IN THE SUPREME COURT OF FLORIDA

MAC RAY WRIGHT, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 71,534

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Nineteenth Judicial Circuit of Florida, In and For St. Lucie County [Criminal Division].

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TABLE OF CONTENTS

AUTHORITIES CITED

CASES — PAGE

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES

FLORIDA STATUTES (1985)

FLORIDA RULES OF CRIMINAL PROCEDURE

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal

"SR" Supplemental Record

STATEMENT OF THE CASE

Appellant, Mac Ray Wright, was charged with one count of premeditated murder and one count of burglary (R1896-1897). The two offenses were alleged to have occurred on June 10, 1986 (R1896-1897). Appellant was also charged with two counts of battery on a law enforcement officer which were alleged to have occurred on June 16, 1986 (R1897-1898). Appellant moved to sever the June 16 charges from the June 10 charges (R133-135,2034-2035). The trial court denied the motion to sever (R143).

Jury selection began on August 27, 1987. During voir dire Appellant objected to the prosecutor using peremptory challenges in a racially discriminatory manner (R594). After any inquiry into the prosecutor's reasons for exercising the challenges, the objection was overruled. Also, Appellant was prohibited from inquiring during voir dire as to the jurors' bias toward believing that police officers could never be mistaken in their testimony (R406-407). During trial Appellant objected to the prosecutor introducing a lease agreement on the grounds that there had been a discovery violation (R747-749). The lease was introduced into evidence as Exhibit 1 (R759).

At the close of the state's case, and at the close of all the evidence, Appellant moved for judgment of acquittal (R1136-1142,1312-1319). Appellant's motions were denied (R1142,1319). The jury found Appellant guilty as charged of all offenses (R2042-2045). Appellant was adjudicated guilty of the offenses (R2047-2048). The jury voted for life imprisonment as to the murder charge (R2046). The trial court overrode the jury's decision and

sentenced Appellant to death for the killing (R2049,2069-2074). The trial court found the following non-statutory mitigating circumstances: expression of remorse for the killing; recent history of being a good worker; history of mental illness in Appellant's family; Appellant provided for the deceased and their family; Appellant's brother died during a shooting incident; Appellant's father left home when Appellant was ten years old leaving his mother and seven children, and Appellant had a history of alcohol and other substance abuse (R2074). The trial court found four statutory aggravating circumstances: the murder occurred during the commission of a felony; it was heinous, atrocious, or cruel; it was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; and the defendant had been previously convicted of a felony involving the use or threat of violence (R2070-2072). The trial court sentenced Appellant to life in prison for armed burglary (R2050) and to five (5) years in prison for the batteries (R2051-2052).

STATEMENT OF THE FACTS

A. The Burglary and Murder Charge

The state's evidence relevant to the burglary and murder charge was as follows.

The state's first witness was Bessie Webster, the mother of Sandra Ashe (R732). Webster testified that Appellant and Sandra Ashe were the parents of Latonya Ashe, age 12; Nadieal Ashe, age 8, Mac Ray Wright, age 5 (R733). Sandra Ashe lived at 1911 Avenue Q, a single family dwelling owned by Webster (R734). Ashe applied for low rental housing which leased the house from Webster to Ashe (R735). Appellant lived there off and on (R735). On Monday, June 9, 1986, Webster went to Sandra Ashe's home and saw her lying in bed (R741-742). Her nose and mouth were swollen (R742). Ashe stated that Appellant had broken her nose and that he was not supposed to be in the house (R742). Ashe stated that she had called the police and changed the lock on the door (R743). Webster did not know whether the lock on the back door was locked (R766). Appellant called, but Ashe would not speak to him (R744). A lease agreement was introduced into evidence (R759). The lease bears Sandra Ashe's signature (R759). Ashe told Webster that Appellant was living in the residence (R762). Webster never moved to evict Appellant from the residence (R763). Webster was tired of hearing about Appellant and Ashe having domestic problems (R765).

Officer Glen Park of the Ft. Pierce Police Department testified that at 3:52 p.m. on June 9, 1986, Sandra Ashe and her mother came to the police station (R850). Park filled out an offense report for battery, and Ashe named Appellant as the person

who hit her (R851). There was no complaint taken out for trespassing or any such related offense (R852-855).

Dorothy Walker, who lived across the street from 911 Avenue Q, testified that she knew Appellant and Sandra Ashe all their lives (R855-856). On the evening that Ashe was killed, Ashe came over and sat at the carport with Walker (R857). Ashe had a swollen lip and showed Walker her side, and said that "He had beat her and stomped her in her side" (R857). Ashe said that she had changed the locks on her door (R857). She changed the lock because she wanted him out (R857). On that night, Walker heard two shots, and ran out of the front door and saw Appellant enter his car and leave (R858).

Marion Matthews lives next door to Dorothy Walker, her aunt (R869). On the evening of June 10, 1986, Appellant was at her home after work in the afternoon (R875-876). Appellant drank beer at Matthews' house (R888). Matthews thought Appellant drank about 3, 4, maybe a whole six pack (R888). Matthews testified that Appellant complained about his head hurting on a regular basis (R886). Matthews thought it was due to his drinking (R886). Appellant told Matthews that he was going to the bar and then left (R876). In the late evening hours of that night Matthews heard some shots, but did not do anything because it was normal to hear shots from that area (R870). Matthews saw Appellant's car back out of the yard and take off (R870-871).

Latonya Ashe testified that Sandra Ashe was her mother. Latonya referred to Appellant as her "daddy" (R800). Latonya Ashe is thirteen years old (R776). Two days prior to the killing, her

mother had driven to the house of Dee Dee Morgan (R779,802). Appellant's car was at the house (R780). Sandra Ashe cried because Appellant had earlier told her that he wasn't "messing" with Dee Dee anymore (R780). Sandra Ashe waited for Appellant to exit, and then proceeded to chase him all through town (R803). Later that night, at around 11:30, Latonya was asleep, and heard Appellant "fussing with my mother" (R781). Latonya heard a slap, and saw her mother come out of the kitchen wiping blood from her face (R782). Appellant made Ashe put his clothes in the trunk of the car (R782). Appellant cleaned the blood off the walls with a rag (R783). Latonya asked Ashe if she wanted her to call the police, but she did not say anything (R783). Appellant asked Ashe if she wanted to call the police (R783). Appellant slammed the telephone against the wall (R784). As Appellant departed, Ashe asked for the key to the house saying that if he did not give the key she was going to go to the police (R784). He replied that he would kill her if she went to the police (R784). He did not give the key back (R784-785). Ashe's nose was broken and her lips were swelling up (R785). Ashe went to the hospital and Latonya went along (R785). Latonya called her grandmother, but she refused to come because she was "sick and tired of running out there to see what happened to Sandra" (R785).

Latonya testified that she went to school the next morning and when she returned she saw Gary changing the locks (R786-787). Ashe said she did not want the children talking to Appellant or letting him in (R786-787). The next day, Tuesday, Latonya again went to school, and that night she, her mother, and her brother and sister

were watching television (R788). Around 11:00 or 11:30, Latonya heard Appellant trying to put his key into the door, but it would not fit (R792). Appellant went to Ashe's room and told her to open the door, but no one answered (R792). Appellant went to a window and pushed a screen out and asked for the door to be opened, but no one was in the room (R792). He went around the windows again and to the back door, and knocked the kitchen door down (R792-793). Appellant fired two shots (R793). Ashe and Latonya urged Appellant not to shoot and he replied that he had told her (Ashe) to open the door (R793). Appellant fired one more time from the kitchen entrance (R793). Latonya heard one more shot in front of the loveseat (R793). Ashe was trying to get out of the front door and tripped and fell on her face between the front door and the garage (R794). Appellant went outside and turned her over with his feet (R794). He then came inside, picked something up, and left in his car (R795,797).

Nadieal Ashe testified that she just got out of the second grade (R824). Nadieal was asleep in the living room on the night of the shooting (R827). She heard shots and woke up (R827). She heard Appellant say, "Yea, motherfucker, didn't I tell you to open that door" (R829). Appellant then fired some more (R829). Nadieal saw Appellant fire five (5) times (R828). She saw her mother fall out the door and Appellant followed (R828). He smiled and turned her over (R828). Appellant entered the house and picked up the brass off the floor and left (R828). The brass was something that came off the bullet (R831).

Officer Duke Burger testified that he arrived at the scene at 11:30 p.m. (R911). The woman was lying face down on the concrete with a small brown rug over her (R911). The woman had a faint pulse (R917).

Officer Peggy Gahn arrived at 11:38 p.m. (R920). Rescue was working on Ashe (R920). The inside of the house was very neat (R921). The door from the utility room into the kitchen was completely out of the doorjam (R921). It was hanging and looked as if it were going to fall (R921-922). Gahn testified that Appellant had a legal right to be on the property on June 9, 1986 (R964). There were no legal documents prohibiting Appellant from being on the property (R959). Although their relationship was volatile, Sandra Ashe never sought a restraining order against Appellant, and did not file a trespassing warrant (R958-959). Appellant and Ashe would break up and make up (R964).

Dr. Leonard Walker, the pathologist, testified that he performed the autopsy (R1020-1022). There were four (4) bullet wounds (R1024). One bullet went through the neck (R1024). Another went through the left arm, and chest and lung, and impacted into the liver (R1024). Another entered the back and went into the lung (R1024). The last bullet went into the left buttock (R1024). There was no evidence of contact wounds (R1039). Three of the bullet wounds were potentially fatal (R1041). Death was the result of bleeding from the bullet wounds (R1040). Alcohol was found in the body (R1050). There was not a broken nose or anything to that effect (R1052).

B. Battery on a Law Enforcement Officer

The state presented the following evidence relevant to the two charges of battery on a law enforcement officer.

Officer Peggy Gahn testified that on June 16, 1986, she was notified by the booking officer that Appellant was at the county jail (R935-936). Gahn and a jailer went to the interview room (R936). Appellant asked what he was charged with, and Gahn replied murder and armed burglary (R936). Appellant picked up the table and struck Gahn and the jailer (R936). Gahn ran out of the room, and saw Appellant picking up a chair and saying, "I'm gonna kill you" (R939). Gahn testified that she later learned that Appellant was "drunk and spaced out" when he turned himself in (R981). Appellant was stumbling and wobbly, and had been lunging forward, and for his own safety he had to be escorted to keep form falling on his face (R981-982).

Correctional Officer Marie Ryan McNamara testified that she was working at the Sheriff's Office on June 16, 1986, when Appellant and two females and one male arrived (R1084-1085). Appellant's sister said that Appellant was "messed up" (R1085). Appellant appeared to be strung out (R1085). Ryan thought Appellant needed help because he was being held up by his family and because he looked like he had been "doing something" (R1087). McNamara got Officer Morris (R1085). Morris looked at Appellant and went and got some more officers to escort Appellant (R1085). When the officers arrived, Appellant's brother started screaming and told the officers not to harass Appellant and that Appellant came in to turn himself in (R1085-1086). When Appellant began walking he did not stumble or stagger (R1087).

Deputy Lee Morris testified that on June 16, 1986, he was working at the booking area of the jail when Marie Ryan called him to the front desk (R1097). When Morris got there Appellant's eyes were bloodshot and his face was "a little bit droopy" (R1097-1098). Appellant said he had a .38 in his pocket and pointed his fingers to Morris' head and said he was going to "blow your fucking head off you cracker," and then said he did not have a gun (R1098). Morris thought nothing about Appellant's remark (R1098). Morris thought it was consistent with his observation that Appellant was drunk and spaced out (R1104). Appellant was searched and placed in a cell (R1098). Appellant did not stumble or stagger (R1098). Detective Gahn, along with Corporal Farless, came into talk with Appellant (R1099-1100). Morris heard a big crash and saw Gahn running out of the interview room with blood coming down her arm (R1100. Morris went into the room and saw Appellant hit Farless with a closed fist (R1100). Appellant started running out toward the front door and was swinging his arms, so Morris tried to grab him from behind, and they fell, and Farless and Officer Reddick struggled with Appellant to put handcuffs on him, and Morris was kicked in the ribs (R1101). Appellant was acting like an "absolute wild man," an "ape" (R1106-1107).

Deputy Gary Farless testified that he was outside the interview room while Appellant was interviewed (R1110). Gahn started to tell Appellant what he was charged with (R1110-1111). Appellant, who was leaning back with his feet up on the table, stood up and picked up the table and said, "Get the fuck off me," and threw the table at Gahn and Reddick (R1111). Farless saw that

Gahn was cut (R1111). As Appellant started coming out the door, he hit Farless with a closed fist (R1111). Farless told Appellant he needed to settle down (R1111). Appellant hit Farless again (R1111). Farless grabbed Appellant, and Appellant said, "Now, I'm gonna hurt you" (R1111). Farless and the other officers subdued Appellant and placed him in a holding cell (R1111). Farless testified that Appellant was not staggering, stumbling, or falling down at any time (R1113). About a week later, Appellant told Farless that he was sorry and he was probably drinking and should not have acted like that (R1115). Farless testified that Appellant appeared to have been drinking, but did not appear drunk (R1115-1116). At an earlier deposition Farless had said that Appellant appeared to be intoxicated when he came in (R1116-1117).

C. Defense Testimony

The following witnesses were called on behalf of Appellant. Sam Ubank testified that he owns a car business and sold Appellant his 1982 Ford Thunderbird (R1147). Appellant traded in a 1975 Volkswagen owned by Sandra Ashe (R1147). The car registration has 1911 Avenue Q as Appellant's address (R1151). So did the credit application (R1151). So did Appellant's proof of insurance through General Finances Corporation (R1152).

Judy Johnson is the department manager and assistant cashier at Sun Bank (R1157-1158). Appellant's credit card dated May 20, 1986 listed 1911 Avenue Q as Appellant's address (R1159). When Appellant first opened the account he lived at 1604 Avenue K (R1168).

Odessa Ingram testified she knew Appellant since January 9, 1977, and that she knew Sandra Ashe since January 9, 1979 (R1178). Ashe was her friend (R1178). On the night of Ashe's death, Ingram saw Appellant between 8:30 and 9:00 (R1179). Appellant was sitting in his car drinking (R1180). Ingram told him to go home, but he did not respond (R1180). Appellant's eyes were real red like he was sleeping and his speech was slurred (R1180). Ingram told him to go home because he was drunk (R1181). While Ingram was talking to Appellant, Dee Dee Morgan drove up and said a few words to Appellant (R1183). The earlier Monday, Ingram visited Ashe and noticed that she had a bandage on her face (R1184). Ashe said that she and Appellant got into it and that he had taken some of his clothes (R1185). Ashe did not say that Appellant had taken all of his clothes (R1188).

Rose Wright Ray, the sister of Appellant, testified that Appellant lived with Sandra Ashe and the children at 1911 Avenue Q (R1200). On June 16, 1986, Ray received a phone call from Appellant (R1201). Appellant agreed to turn himself in (R1201). Appellant told Ray to meet him a few blocks from the jail (R1204). Ray could tell that Appellant was drinking (R1202). Ray called her brother and Dee Dee and they met Appellant (R1205-1206). He was drinking a can of beer and had two more cans besides (R1205-1206). They let him finish his beer and then went into the jail with him, with Ray and George holding onto him (R1207). Once inside, Ray told Marie McNamara that they had come to turn Appellant in (R1208). McNamara said that they did not know of Appellant, but after a while they came up with the paperwork

(R1208). Ray also testified that sometimes Sandra Ashe would put Appellant out of the house and then she would come back and get him (R1213). Ashe changed the locks on the doors on plenty of occasions, but Ashe would later get Appellant and bring him home (R1215).

Susan Ryan, formerly of General Finance, testified that Appellant bought a car financed by General Finance (R1229). The records show that Appellant's address was 1911 Q Avenue (R1230-1231).

Tammy Edge testified that her father employed Appellant at Morris Edge Masonry (R1234). Appellant was a friend of the family (R1236). Appellant was staying at 1911 Avenue Q (R1236). Appellant drank a lot and would sometimes come to their house intoxicated (R1240).

D. Penalty Phase

The state's first witness was Rupert Koblegard who testified that in 1973 he prosecuted a case in which Appellant was charged with shooting two women (R1483-1484). Koblegard testified that Appellant came to the home of Daisy Hickman, became angry, and shot Hickman with a pistol (R1485-1486). Renee McCoy came to the house and she was also shot (R1485-1486). Appellant surrendered himself to the police (R1486-1487). A jury found Appellant guilty of two counts of aggravated assault (R1488).

Robert Sandifer testified that on June 10, 1978, he saw Appellant being arrested and a struggle ensued (R1502). It took three police officers to place Appellant in handcuffs (R1502). Appellant was arrested (R1502).

Steve McCain testified that after conducting "a State Attorney's hearing" he filed charges regarding the June 10, 1978 incident (R1509). Appellant pleaded no contest to one count of battery of a police officer and to two counts of simple assault (R1511). Appellant was sentenced to two years in jail (R1511).

Larry Newberry of the Fort Pierce Police Department testified that on June 10, 1986, he saw Sandra Ashe lying near the front door of the residence (R1547). She closed her eyes and opened them and closed them again (R1548). She had a slight pulse (R1549).

Dr. Leonard Walker opined that Sandra Ashe would have remained conscious for some period of time after she had been shot (R1552). Walker opined that the bullets which struck the bone would be more painful than the other two (R1553). Walker opined that the pain would be severe (R1554). Ashe would have heard the shots if she was conscious (R1555). Ashe was not conscious when she arrived at the hospital (R1559-1560).

Rose Ray testified that Appellant and Sandra Ashe would have their big arguments and disagreements, and she would put him out, but each time they would get back together (R1582). It was constantly like that all the time (R1582). Appellant provided for Ashe and his children (R1582). Appellant would help take care of Rose who has terminal cancer (R1582-1583). Appellant was in a slow learning class at school (R1583).

Marie Wright, the mother of Appellant, testified that another son of her was shot in 1979 (R1597). Appellant is the sixth child in the family (R1597). Appellant's mother and father separated "at an early age," and Wright basically wound up raising Appellant and

the other seven children alone (R1598). As a small child, Appellant always complained of headaches and said he felt like water or something would be running in his ears (R1598). Wright noted that Appellant was a very nervous child (R1598). There was mental illness in Appellant's father's family: he had one aunt die in a state institution and he has a second aunt in such an institution now (R1598). Wright would take Appellant to the mental health clinic; Appellant would say that his head would bother him (R1599). Appellant's sisters, Sara and Rose, would always talk to him and try to calm him down when he had nervous attacks (R1599). Appellant would start shaking from his nerves and they would always talk with him (R1599-1600). Wright testified that Sandra Ashe said that Appellant was a good provider (R1600).

Richard Ketchum is a general contractor specializing in masonry who used to employ Appellant (R1604). Appellant was punctual and a good worker who did not give any problems and took orders and commands well (R1605). Ketchum testified that, if it were not for the criminal proceedings, he would still employ Appellant (R1605-1606).

Odessa Ingram is the mother of one of Appellant's children (R1610). Ingram testified that Appellant has been a good father to the child (R1611).

Appellant testified that he was born on September 13, 1955 (R1637). Appellant had trouble in school and was in a special class for his last two years of school (R1639). His parents separated when he was nine or ten (R1639). Appellant held himself out to be married to Sandra Ashe (R1639). They started living

together in November 1977 (R1639). They had three children together (R1640). Appellant was a block mason (R1642). On June 10, 1986, Appellant got off work and went to Foremost Liquor Store, then to Dedelia's house drinking (R1642-1643). He took some valium and percodan or just percodan (R1644). He went to the house and talked with Ashe about money for beers and got into an argument (R1645). Appellant's key did not fit the front door, and he went around and opened the back door (R1645). Ashe came to the back door and they started arguing (R1645). Appellant can't remember step by step what happened, all he remembers is "this big explosion or this quick snap what had happened" (R1646). Appellant is sorry it happened (R1646). He realizes that what he did was wrong (R1646). Appellant did not go to the residence with the purpose of bringing about the death of Sandra Ashe (R1648). He loved Sandra Ashe and still does (R1647). He feels bad about what happened and he loves his children regardless of their testifying against him (R1647). Appellant has not seen his children since he was in jail, but he had sent them birthday cards and receives some pictures from Latonya by way of his niece (R1647).

Psychiatrist Carmine Ebalo testified that on June 21, 1987, he was asked to see Appellant in the jail because he was having some disturbance (R1673). Appellant was in distress, had not been eating and was having trouble sleeping (R1675). Appellant was kind of distant from Dr. Ebalo so he could not see if he was shaking (R1676). Dr. Ebalo prescribed some anti anxiety medicine, Zanax and an anti depressant (R1676). On April 16, 1987, Dr. Ebalo saw Appellant to determine whether he was sane at the time of the

offense and whether he was competent to stand trial (R1682). Appellant referred to Sandra Ashe as the mother of his children (R1685). He said they were living together (R1685). He said that his relationship with Sandra Ashe had been stormy and that his mother had tried to counsel them (R1686). He said he was a good provider and he used to work two jobs until he found her in bed with another man a few years ago (R1686). They stayed together for the sake of the children (R1686). Every two or three months they would have a big fight and would stay away from each other, and then would go back and the same thing would happen again (R1686).

Dr. Ebalo further testified that Appellant could not remember much about the incident, saying that he remembered they were having a fight prior to the incident and the next thing he could remember was walking the street and was told that there was a warrant on him (R1687). Appellant couldn't believe it and just kept walking around (R1687). For three or four days he continued to drink (R1687). Before the argument he was drinking gin and had taken eight tablets of percodan (R1687). Appellant admitted to using alcohol for a long time: he leveled off for a while, but then he started to drink daily again and was using percodan in the last six years (R1689). He admitted that he had done speed, marijuana, and valium, saying that he does drugs two or three times a week, admitting to smoking two joints of marijuana per day (R1689). He keeps half a gallon of gin and would consume this within 24 hours, drinking after work and using drugs to calm himself down (R1689). There is a family history of explosive temper and alcoholism (R1689).

The day after the second time he saw Appellant, Dr. Ebalo called Appellant's mother, and spoke with her on the telephone the following day (R1690). She confirmed the stormy relationship and that Appellant had with Sandra (R1690). Appellant's mother alluded to his going to mental health center (R1690). Dr. Ebalo did not notice any acute signs and symptoms of any psychosis in Appellant (R1691). In Dr. Ebalo's opinion, Appellant had substance use disorder mix, explosive intermediate disorder, and adjustment disorder with depressed mood (R1691). At the time of the incident, Appellant was acting under the influence of extreme mental and emotional disturbance, because of the argument (R1697). On June 10, 1986, at the time of the alleged incident, Appellant was under the influence of alcohol and drugs; his functioning had been diminished by those chemicals (R1699). On July 2, 1987, Dr. Ebalo was asked to see Appellant again (R1677). Dr. Ebalo talked to Appellant and determined that he could not remember any of the details about the shooting (R1681).

SUMMARY OF THE ARGUMENT

GUILT PHASE

1. The prosecutor used five (5) peremptory challenges on black jurors. Appellant objected that the challenges were based on race. The trial court found that Appellant had met his burden under State v. Neil, 457 So.2d 481 (Fla. 1984) and required the prosecutor to explain the reason for the challenges. The prosecutor failed to give legitimate racially neutral reasons for at least three (3) of the excluded jurors. For example, one black juror was excused because he could identify with Appellant in that he was a black male. This is hardly a racially neutral reason. Also, another black juror was excused because she did not have an advanced education and didn't understand various defenses. However, the record does not show that she did not have such an education and did not understand the defenses. In fact, she was never asked questions about these subjects. The prosecutor's reason was not legitimate, but was merely a pretext. The same applies for at least the third black juror. The trial court overruled Appellant's objection and permitted the challenges. This was error under the circumstances of this case.

2. The prosecutor committed a discovery violation by failing to disclose a lease agreement it was introducing into evidence at trial. Despite the fact that the lease was in the prosecutor's constructive possession long before trial, and in his actual possession on the morning of trial before the opening statements of defense counsel, the prosecutor did not disclose the lease until he introduced it into evidence. Despite Appellant's objection to

the discovery violation, the trial court failed to conduct an adequate inquiry into the circumstances of the violation and its effect. This failure was reversible error.

3. Appellant moved to sever Counts I and II, the burglary and murder charges which occurred on June 10, 1986, from Counts III and IV, the batteries on law enforcement officers which occurred on June 16, 1986. The June 10 incident was separate from the June 16 incident and involved different victims, different days, and different crimes. The incidents were not episodically related. It was error to deny Appellants motion to sever. The error was not harmless.

4. Hearsay statements were admitted over Appellant's objection. This was error. The error was not harmless.

5. The trial court limited Appellant's voir dire by refusing to permit him to question prospective jurors about whether they believed that police officers could ever be mistaken in their testimony. Such questioning was relevant to whether there was an unyielding jury bias in favor of police, thus such questioning was necessary to ensure a fair and impartial jury. Restricting voir dire as to bias or prejudice of prospective jurors was reversible error.

6. There was not clear evidence that Appellant had fled to avoid prosecution. Thus, it was error to give a flight instruction over Appellant's objection.

7. Submission of this cause to the jury on alternative theories of first degree murder was error. First, the general verdict deprived Appellant of the right to a unanimous verdict.

Second, it subjects Appellant to the possibility that he was found guilty on an invalid theory. Third, it violates the Notice Clauses.

8. Since Appellant was a cotenant in the premises he was alleged to have burglarized, and there was no eviction process as required by law to terminate the tenancy, the evidence was insufficient to prove burglary. Thus, it was error to deny Appellant's motion for judgment of acquittal.

9. The trial court directed a finding on an essential element of battery on a law enforcement officer. Such a finding was a matter for the trier-of-fact to determine, and not for the trial court to instruct on as a matter of law. It was reversible error to direct a finding on an essential element, thus, in essence, directing a verdict.

10. At a pre-trial hearing, in the absence of Appellant, the prosecutor made allegations as to Appellant's violent character. Without hearing evidence, the trial court made up its mind that Appellant was a menace. Appellant was denied due process and a fair trial where the judge became biased prior to trial.

PENALTY ISSUES

11. The jury recommended a sentence of life imprisonment. The trial court found numerous non-statutory mitigating circumstances. In light of this, and the fact that the jury may have had a different view of the existence of statutory mitigating and aggravating circumstances, the facts were not so clear and convincing that no reasonable person could differ as to whether a

death sentence was appropriate. Thus, it was error to override the jury and to impose a sentence of death.

12. It was error to consider non-statutory aggravating circumstances in imposing the death penalty. The harmless error rule does not apply because there was mitigating evidence.

13. During the judge phase of the sentencing proceeding, the prosecutor made a variety of factual assertions, none of which were supported by testimony. Without such testimony, Appellant was denied his rights to cross-examination and confrontation which are necessary to ensure the reliability of the capital sentencing.

14. The trial court erred by conducting a portion of the proceedings in the absence of Appellant.

15. Appellant's noncapital sentences violate the sentencing guidelines.

16. Florida's death penalty statute operates in an unconstitutional manner. It does not meet the constitutional requirements of evenhanded, nonarbitrary application. The standard jury instructions are constitutionally infirm, the books are full of cases recording the derelictions of counsel in capital cases, trial judges commit reversible error with astonishing regularity, the statute has not been strictly or consistently construed, and the use of technical bars to review has turned capital litigation into a maze of traps for the unwary.

17. The aggravating circumstances used at bar are unconstitutionally vague, have not been strictly construed, do not conform to their legislative purposes, and are subject to such inconsistent application as to make them unconstitutional.

ARGUMENT

GUILT PHASE

POINT I

THE TRIAL COURT ERRED BY PERMITTING THE STATE TO USE PEREMPTORY CHALLENGES TO EXCLUDE BLACKS FROM THE JURY.

The prosecutor used five peremptory challenges to exclude blacks from the jury. They were Gary Salter (juror 124), Alma McFolley (juror 117), Eddie Hays (juror 122), Thomas Washington (juror 42), and Willie Wortham (juror 43, the first alternate).

Appellant objected that the prosecutor was exercising his peremptory challenges in a racially discriminatory manner (R594). Appellant specifically noted the exclusion of jurors Salter, McFolley, and Hays (R594). It was agreed by the trial court and the prosecutor that the excluded jurors were black and that Appellant was black (R595). Upon Appellant's request, the trial court asked the state to give reasons for challenging the black jurors (R595-596).[1]

The prosecutor gave the following reasons for excluding Mr. Salter:

> As far as Gary Salter, who was a married man with three children and works every day, I believe Mr. Salter, Number 1, would be able to identify himself more with the Defendant, since they are both black males of essentially the same age; and, Number 2, and I don't know if the court noted this, but investigator Richard McIlwain had written it down before I even got back to my table, that Mr. Salter and I had no eye contact whatsoever. I could not

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[1] The trial court specifically found that the first prong of State v. Neil, 457 So.2d 481 (Fla. 1984) had been met, thus requiring the state to give reasons for exclusion of the black jurors (R606).

> get Mr. Salter to look me in the eye during the entire time that we had conversations, he never once looked me in the eye. And I felt uncomfortable about that and that's why I struck Mr. Salter.

(R597). The prosecutor subsequently elaborated by saying that he was allowed to consider race, so long as he did not systematically exclude jurors due to that consideration (R601).

As to Mr. Hays and Ms. McFolley, the prosecutor asserted that they "indicated difficulty in understanding what we were talking about" when questioned about voluntary intoxication and the insanity defense, that they did not have the benefit of advanced education, and that he did not feel that he had any communication with the two (R596-597). The prosecutor pointed out that he had left one black on the jury (R596).[2] The trial court permitted the exclusion of the black jurors. This was error.

In State v. Slappy, 522 So.2d 18 (Fla) cert. denied ___ U.S. ___, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988) this Court explained that any doubt as to whether the complaining party, objecting to the use of peremptory challenges based on race, has met its initial burden should be resolved in that party's favor. Once the object-

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[2] It was later that the prosecutor would exclude black jurors Mr. Washington and Mr. Wortham. The prosecutor said that he excluded Mr. Washington and Mr. Wortham because they knew the defendant and the family (R689). The prosecutor had examined Mr. Washington about his acquaintance with Appellant, the decedent, and their families (R625-629). Mr. Washington said that he could set aside what he knew about these persons, and could judge the case on what came from the witness stand (R629). Curiously, the prosecutor peremptorily dismissed Mr. Washington without the defense having a chance to question him (R629-630). The questioning of Mr. Wortham was directed mainly to Mr. Wortham's considering Appellant a personal friend (R655-660). Mr. Wortham stated that, if Appellant were proven guilty beyond a reasonable doubt, he would return a verdict of guilty (R660).

ing party has met the initial burden, the striking party must give a clear and reasonably specific racially neutral explanation of legitimate reasons for the use of the peremptory challenge. Roundtree v. State, 546 So.2d 1042, 1044 (Fla. 1989); State v. Slappy, 522 So.2d 18, 22 (Fla. 1988). More importantly, the reasons given must be evaluated so as to assure that they are not pretextual. Id.

In Slappy, supra, five (5) factors were listed which would weigh against the reason being a race neutral explanation. This Court held that the presence of one or more of the following non-exclusive list of factors would show that the reason was an impermissible pretext:

> We agree that the presence of one or more of these factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext: (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged.

522 So.2d at 22 (emphasis added). Although it was noted that one black juror was on the jury, the question is whether "any juror" has been excluded due to race. Slappy, supra, at 21. In the present case the state failed to give racially neutral legitimate reasons for exclusion of three black jurors.

As explained in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) the defendant's challenge is not

rebutted by the assumption that the juror might identify with, and therefore be sympathetic with, the defendant based on commonalities such as race:

> But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption -- or his intuitive judgement -- that they would be partial to the defendant because of their shared race.

106 S.Ct. at 1723; see also Slappy, supra at 522. Thus, the prosecutor's exclusion of Mr. Salter because of the assumption that he could identify with Appellant due to both being "black males" of essentially the same age fortifies, rather than rebuts, the claim that the exclusion was racially neutral.[3] The prosecutor's second reason, the allegation that Mr. Salter made him feel uncomfortable because he could not look him in the eye, without any support in the record, can only be regarded as a pretext. Reasons given must be supported by the record.[4] Tillman v. State, 522

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[3] In Thompson v. State, 548 So.2d 198 (Fla. 1989) this Court noted that if the reason relates to race the reason is not permissible:

> While in some circumstances the state might validly challenge a person based on prior incarceration, the phrasing of the answer by the prosecutor here indicates that the state was as much concerned with Juror Tyler's race as with prior incarceration.

548 So.2d at 202.

[4] The reason record support is required, especially where the prosecutor "feels uncomfortable" with a juror, is that a prosecutor's own conscious or unconscious racism may lead him to misperceive his own instincts and evaluations:

> Nor is outright prevarication ... the only danger here. "[I]t is even possible

So.2d 14, 17 (Fla. 1988) (footnote 1 notes that striking of a juror because of juror glaring at, or using hostile voice with, prosecutor may be valid if trial judge makes findings of support in the record); Hill v. State, 547 So.2d 175 (Fla. 4th DCA 1989) (prosecutor's reason, that juror was yawning and disinterested, not acknowledged by the judge nor trial counsel, not supported by the record); Foster v. State, 557 So.2d 634 (Fla. 3d DCA 1990) (fact that prosecutor was not comfortable, i.e. not having a "good feeling" about juror, was not satisfactory neutral reason). This reason was not supported by the record. It was error to permit the challenge on Mr. Salter.

The prosecutor's exclusion of Alma McFolley because she did not understand the involuntary intoxication or insanity defense and

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> that an attorney may lie to himself in an effort to convince himself that his motives are legal." ... A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may led him to accept such an explanation as well supported.... [P]rosecutors' peremptories are based on their "seat-of-the-pants instincts." ... Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate required them to confront and overcome their own racism on all levels....
>
> *Batson*, 476 U.S. at 106, 106 S.Ct. at 1728 (Marshall, J., concurring) (citations omitted).

Slappy, supra, at 22-23 (quoting from Batson, supra).

did not have the benefit of an advanced education is purely a pretext. Ms. McFolley was not asked a single question about the defenses mentioned above.[5] Nor was there a single question asked regarding her educational level. Thus, there was a failure to examine Ms. McFolley regarding the alleged bias and the reason is a pretext. Slappy, supra at 22 (the second of the five listed factors). In addition, there was not a scintilla of proof that showed Ms. McFolley had the characteristics complained of by the prosecutor thus the reason was a pretext. Id. (the first of the five listed factors). Also, it was not determined if the other jurors possessed advanced educational backgrounds. Thus, a third factor listed in Slappy indicates a pretext. See Slappy, Id. (the fifth factor -- a challenge based on reasons equally applicable to juror(s) who were not challenged). Finally, a fourth factor listed in Slappy was present. There was absolutely no showing on how an advanced education would relate to the case. See Tillman v. State, 522 So.2d 14, 17 (Fla. 1988) (reason given by state -- jurors "lacked educational background" was not valid as "there is no requirement that jurors have college degrees to serve on a panel").

Mr. Hays was excluded for basically the same reasons as Ms. McFolley. Again, the fact that the prosecutor didn't "feel comfortable" with Mr. Hays is not a satisfactory reason. Foster v. State, 557 So.2d 634 (Fla. 3d DCA 1990). Also, Mr. Hays was never asked a single question about voluntary intoxication or

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[5] The prosecutor asked Ms. McFolley only one question which pertained to how she would exercise her duty -- whether she would find Appellant guilty if he were proven guilty beyond a reasonable doubt (she replied in the affirmative) (R490).

insanity. Thus, the reason offered, his lack of understanding of these defenses, is not a satisfactory reason for exclusion. See Slappy, supra at 22 (the fifth factor). As for the lack of an advanced education, other jurors were not asked questions about their education, and a lack of an advanced education was not shown to be related to the facts of this case. See Slappy, supra; Tillman, supra.

For the foregoing reasons, it was error to permit the exclusion of the black jurors. A new trial should be ordered.

POINT II

THE TRIAL COURT REVERSIBLY ERRED IN ADMITTING THE LEASE AGREEMENT INTO EVIDENCE WITHOUT CONDUCTING AN ADEQUATE RICHARDSON INQUIRY FOLLOWING THE STATE'S DISCOVERY VIOLATION.

During the direct examination of Bessie Webster, the prosecutor sought to introduce into evidence Exhibit N, a lease agreement. Defense counsel promptly objected that the lease agreement had not been listed in discovery (R747-749). The prosecutor responded that defense counsel had been allowed to inspect everything in the prosecutor's possession (R747). The prosecutor stated that the lease had not been in his possession prior to trial (R751,754-756).[6] The trial court ruled that there was no violation of the discovery rule because the prosecutor had the duty only to disclose material within the state's possession or control (R751,757). The lease agreement was then admitted into evidence as Exhibit 1 (R759).

Rule 3.220(a)(1), Florida Rules of Criminal Procedure, provides in pertinent part:

> After the filing of the indictment for information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the state's possession or control:
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> (xi) Any tangible papers or objects which the prosecuting attorney intends to use in the hearing or trial and which were not obtained from or belonged to the accused.

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[6] The prosecutor also implied that by listing Bessie Webster in his answer to discovery he had in essence disclosed his intent to use the lease agreement as evidence (R750-751).

Rule 3.220(f) imposes on the prosecutor a continuing duty to disclose any material which he intends to use at trial.

Clearly, there was a discovery violation in the present case. The record shows that the prosecutor complied with neither the spirit nor the letter of Rule 3.220. The prosecutor admitted that he had for some time prior to trial intended to introduce the lease into evidence.[7] However, the prosecutor claimed that since he did not personally possess the lease prior to trial there was no need to disclose to the defense that he intended to introduce the lease at trial. In other words, the prosecutor tried to legitimize trial by ambush -- the very situation the rules of discovery were designed to prevent. Clearly, the discovery rules were violated. The lease was in possession of a state subpoenaed witness, thus the

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[7] The prosecutor implied that in the answer to demand for discovery on June 3, 1987, he disclosed the fact that he intended to use the lease by listing Bessie Webster as a witness (R750-751). Ms. Webster testified that at a pre-trial conference the prosecutor asker her if she had anything to show who was renting the house (R755). Thus, the prosecutor intended to utilize the lease well before trial. As to the implication that listing Bessie Webster as a witness is equivalent to disclosing the lease, such a claim is incredible. Such a listing in no way discloses the existence of a lease. Nor does the possibility that the listing of Webster could have identified an alternative source for discovery of the lease (i.e. Webster) relieve the state from disclosing the lease. Kirkpatrick v. State, 376 So.2d 386 (Fla. 1979) (conviction reversed for failure to conduct an adequate inquiry where codefendant's name, even though known to the defense, was not disclosed as a witness through discovery); Blatch v. State, 495 So.2d 1203 (Fla. 4th DCA 1986) (defense has no obligation to depose witness to ascertain inculpatory statement which the state was aware of at time of discovery).

lease was within the control of the state.[8] The failure to disclose was a discovery violation.

More importantly, even if it were assumed that the prosecutor did not have the duty to disclose due to constructive possession, it is clear that the prosecutor obtained the document on the morning of trial, before defense counsel's opening statement to the jury. Thus, even once he had actual possession of the document the prosecutor delayed disclosing his intent to introduce it in evidence. This is a clear discovery violation.

Despite the existence of the discovery violation in the present case, the trial court failed to conduct an adequate inquiry as required by Richardson v. State, 246 So.2d 771 (Fla. 1971). The law regarding alleged discovery violations by the state is quite clear: the trial judge must conduct a full inquiry into the circumstances surrounding the alleged violation and determine whether the violation was willful or inadvertent; trivial or substantial, or if the defendant's ability to prepare for trial was prejudiced. Cumbie v. State, 345 So.2d 1061 (Fla. 1977); Richardson v. State, 246 So.2d 771 (Fla. 1971); Brey v. State, 382 So.2d 395 (Fla. 4th DCA 1980). In this case the trial court made absolutely no inquiry into whether the violation impacted Appel-

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[8] Evidence need not be in the actual possession of the prosecutor to be discoverable. State v. Coney, 294 So.2d 82 (Fla. 1973); Hutchinson v. State, 397 So.2d 1001 (Fla. 1st DCA 1981). Evidence to be used at trial should be disclosed even if it is merely in the state's constructive possession or control. Id.

lant's ability to prepare for trial.[9] Nor was there an adequate inquiry into whether the violation was willful or inadvertent, or whether it was trivial or substantial.

Failure to adequately inquire into the circumstances surrounding the discovery violation is per se reversible error and Appellant's convictions and sentences must be reversed and this cause remanded for a new trial. Smith v. State, 500 So.2d 125 (Fla. 1986); Cumbie v. State, 345 So.2d 1061 (Fla. 1977).

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[9] Such an inquiry may have determined, for example, that Appellant would have prepared for trial differently and given a different opening statement than the one which claimed that the couple were legally cotenants. The inquiry may have disclosed the possible tactical disadvantages Appellant would encounter due to the violation. Also, if there is a proper inquiry and the court determines that noncompliance has not prejudiced the ability of the defendant to properly prepare for trial, it is essential that the circumstances establishing nonprejudice to the defendant affirmatively appear in the record. Richardson, 246 So.2d at 775. The record does not affirmatively show the absence of procedural prejudice. Again, this is due to the lack of a proper inquiry.

POINT III

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR SEVERANCE.

Counts I and II of the indictment charged Appellant with the June 10, 1986, murder of Sandra Ashe and the burglary of her home on the same day (R1897). Counts III and IV of the indictment charged Appellant with striking police officers at the St. Lucie County Jail on June 16, 1986 (R1897). Appellant moved pretrial for severance of Counts I and II from the remaining counts (R133-135,2034-35). The trial court denied the motion to sever (R143). This was error.

Rule 3.152(a)(1), Florida Rules of Criminal Procedure, provides that where two or more offenses are improperly charged in a single indictment, the defendant shall have a right to a severance of the charges upon a timely motion. A severance upon such a pretrial motion is mandatory. McMullen v. State, 405 So.2d 479 (Fla. 3d DCA 1981); Macklin v. State, 395 So.2d 1219 (Fla. 3d DCA 1981).

The joinder of offenses occurring at different times is improper unless the offenses are episodically related. Paul v. State, 385 So.2d 1371 (Fla. 1980), adopting the dissent in Paul v. State, 365 So.2d 1063, 1065 (Fla. 1st DCA 1979). Offenses are episodically related when they occur immediately after one an-

other,[10] or are a few hours apart,[11] or where the offenses are part of an ongoing series of transactions.[12]

In the instant case the shooting incident on June 10 and the incident at the jail on June 16 were separate incidents involved different victims on different days and were not a series of transactions. The separate incidents were not episodically related. See Williams v. State, 439 So.2d 1014 (Fla. 1st DCA 1983) (offenses occurring on different days involving different victims were not related episodically); Puhl v. State, 426 So.2d 1226 (Fla. 4th DCA 1983) (error to deny severance where kidnapping charged was consolidated with robbery of different victim that occurred some two and one-half (2½) hours later).

Appellant's violent reaction to being told he was charged with murder was not probative of whether he was guilty of premeditated or felony murder or burglary. The evidence of the June 16 episode served only to create in the jury's mind that Appellant was a dangerous and violent person.[13] The episode demonstrated bad character and propensities. It was not relevant to the June 10 charges. Hence, the trial court erred in denying the motion for severance.

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[10] Green v. State, 408 So.2d 1086 (Fla. 4th DCA 1982), and King v. State, 390 So.2d 315 (Fla. 1980).

[11] Johnson v. State, 438 So.2d 774 (Fla. 1983).

[12] Williams v. State, 409 So.2d 253 (Fla. 4th DCA 1982) (narcotics sales six days apart to same undercover police officers properly joined).

[13] The officers described Appellant as acting like "an absolute wild man" and detailed the actions and threats, such as he was going to blow their heads off, that resulted when he became angry on June 16 (R1098,1106-1107).

The conviction must be reversed where it cannot be proven beyond a reasonable doubt that the error could not have influenced the jury. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). The focus must be on the possible effect of the improper evidence. Id.; State v. Lee, 531 So.2d 133, 137 (Fla. 1986). In the instant case it certainly cannot be said beyond a reasonable doubt that that improper evidence could not have influenced the jury. There was substantial evidence from which the trier of fact could have decided that Appellant lacked the required premeditated design and was at most guilty of second degree murder.[14] In fact, the jury took many hours of deliberation and asked a number of questions before reaching any decisions. Some of these questions included requests for reinstruction and clarification on premeditation (SR274). In the jury's mind, there may have been a close question as to whether the evidence showed a first degree murder or second degree murder. The evidence of Appellant's violent propensities on June 16 may have influenced one or more of the jurors -- and thus tipped the scales from a second degree murder to first degree murder verdict. See Puhl, supra 426 So.2d at 1228 (failure to sever charges from separate incidents which simply prove bad character or propensities results in deprivation of a fair trial). The trial court's error in denying the severance can't be said to be harmless beyond a reasonable doubt. Thus, a new trial should be ordered on counts I and II of the indictment.

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[14] The evidence could support a theory that Appellant acted in a fit of anger upon not being able to enter the house, and thus acted with a depraved mind rather than with a premeditated design.

POINT IV

THE TRIAL COURT REVERSIBLY ERRED IN OVERRULING APPELLANT'S HEARSAY OBJECTION.

During trial, Appellant objected to the prosecutor questioning Bessie Webster about some out-of-court statements that she had heard (R740). The prosecutor claimed that the next series of questions were not hearsay (R740). The trial court overruled the objection indicating that the statements were not hearsay, "But rather to prove whether something was said" (R740,741). Webster then testified that Sandra Ashe told her that Appellant had broken her nose, and more specifically that "he was not supposed to be in the house" (R742). It was error to overrule Appellant's hearsay objection and admit this evidence.

Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. Section 90.801, Fla. Stat. (1985). The out-of-court statements at bar were clearly offered to prove the truth of the matter asserted. For example, the statement that "he was not supposed to be in the house" proves only one thing -- that Appellant was not supposed to be in the house. As noted in Beatty v. State, 486 So.2d 59 (Fla. 4th DCA 1986) admitting the statements to show that they were spoken is an overworked excuse which does not apply unless there is a significant reason to show the fact that the words were spoken:

> The trial court admitted this hearsay testimony based upon the much overworked exception to the hearsay rule which allows such hearsay when the inquiry is directed not to the truth of the words spoken, but rather to whether the words were in fact spoken. *Breedlove v. State*, 413 So.2d 1 (Fla. 1982). No reasonable interpretation of the testimony presented by the State in this case would allow us to

> conclude that the State introduced this testimony for any other purpose than for the truth of the words spoken in order to identify appellant as the perpetrator of the crime.

486 So.2d at 60. In the instant case the statements were not offered to show that Sandra Ashe could speak, rather they were offered to prove that she no longer wanted Appellant in their residence. Thus, the statements were hearsay. Where Appellant was on trial for burglary, and a key issue was whether he was authorized to be inside the residence, the error cannot be deemed harmless. Appellant's convictions and sentence for murder[15] and burglary must be reversed and this cause remanded for a new trial.

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[15] One of the alternatives presented to the jury for finding murder was a felony murder theory in which burglary constituted the underlying felony. Thus, it cannot be shown beyond a reasonable doubt that the instant error did not influence the jury in analyzing felony-murder. Thus, the error cannot be deemed harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT V

THE TRIAL COURT ERRED IN REFUSING TO PERMIT APPELLANT TO QUESTION PROSPECTIVE JURORS ABOUT WHETHER THEY BELIEVED THAT POLICE OFFICERS COULD EVER BE MISTAKEN IN THEIR TESTIMONY.

During voir dire Appellant's counsel attempted to ask the prospective jurors the following:

> Do[es] anyone think what a law enforcement officer tells you, period, that he sometimes can't be mistaken in what he tells you?

(R406). The prosecutor objected and the trial court sustained the objection (R406-407). The restriction of voir dire was reversible error.

As explained in Judge Pearson's dissent in Lavado v. State, 469 So.2d 917, 919 (Fla. 3d DCA 1985), adopted as the majority opinion by this Court in Lavado v. State, 492 So.2d 1322 (Fla. 1986), a meaningful voir dire is necessary to a fair and impartial jury:

> It is apodictic that a meaningful voir dire is critical to effectuating an accused's constitutionally guaranteed right to a fair and impartial trial. See Rosales-Lopez v. United States, 451 U.S. 182, 101 S.Ct. 1629, 88 L.Ed.2d 22 (1981).
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> > "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instruction and evaluate the evidence cannot be fulfilled. See Connors v. United States, 158 U.S. 408, 413, 39 L.Ed.2d 1033, 15 S.Ct. 941 [953] (1895). Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts." Rosales-Lopez v. United States, 451 U.S. at 188, 101 S.Ct at 1634, 88 L.Ed.2d at 28 (footnote omitted).

> What is meaningful voir dire which will satisfy the constitutional imperative of a fair and impartial jury depends on the issues in the case to be tried. The scope of voir dire therefore "should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial seem to require...."

469 So.2d at 919. Voir dire has not only the purpose to ensure legal challenges for cause, but also assures that good judgment can be used in exercising peremptory challenges. Mitchell v. State, 458 So.2d 819 (Fla. 1st DCA 1984). Restricting voir dire as to the bias or prejudice of prospective jurors is reversible error. Lavado, supra.

As further explained in Moses v. State, 535 So.2d 350, 351 (Fla. 4th DCA 1988) a defendant must be permitted to conduct a "meaningful" voir dire and what constitutes a meaningful voir dire varies with each case. In the present case Appellant's question as to whether it is possible that police could be mistaken in their testimony related to whether there was a jury bias in favor of police. The question was offered to clarify whether the jury has a bias of believing that police always tell the truth. Such a clarification was necessary; especially in light of the fact that when earlier asked if they would give extra weight to a police officer's testimony some of the jurors did not respond in the negative (R379). Certainly, such a bias would be relevant to the instant case. Police officers testified in reference to all of the criminal charges against Appellant. Of course, if a juror has an unyielding bias to believe that police always tell the truth that juror would not be impartial in a case where the prosecution presents police officers as witnesses. It was imperative that

Appellant know whether the jury had a bias so as to automatically accept the testimony of police officers. See Lavado, supra; Moses, supra. Moreover, the restriction of voir dire limited Appellant's ability to use good judgment in the exercise of peremptory challenges. See Mitchell v. State, 458 So.2d 819 (Fla. 1st DCA 1984). The restriction of voir dire was reversible error.

POINT VI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE FLIGHT INSTRUCTION WHERE THERE WAS NOT SUFFICIENT EVIDENCE THAT APPELLANT FLED TO AVOID PROSECUTION.

The trial court indicated that he would give a flight instruction (R1292). Appellant objected on the ground that there was insufficient evidence of flight (R1293). The trial court overruled Appellant's objection, and read the jury a flight instruction (R1293,1431).[16] It was error to overrule Appellant's objection and to give the flight instruction where there was no evidence that Appellant fled the scene to avoid prosecution.

Flight evidence is admissible and relevant to the defendant's consciousness of guilt, where there is sufficient evidence that the defendant fled to avoid prosecution. Merritt v. State, 523 So.2d 573 (Fla. 1988). Conversely, if the evidence does not show that the defendant fled to avoid prosecution, it is reversible error to give such an instruction. Payne v. State, 541 So.2d 699 (Fla. 1st DCA 1989). Evidence of flight must be clearly established. Shively v. State, 474 So.2d 352 (Fla. 5th DCA 1985).

In the present case the prosecutor claimed that Appellant left the scene to avoid arrest. However, there was no evidence of

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[16] The instruction was as follows:

> If you find from the evidence that the Defendant is any manner attempted to escape or evade a threatened prosecution by flight or concealment you may consider such facts, along with all other evidence in this case of a consciousness of guilt on the part of the Defendant.

(R1431).

flight to avoid prosecution. There was only evidence that Appellant left the scene. It was reversible error to give the flight instruction.

POINT VII

FIRST DEGREE MURDER WAS IMPROPERLY SUBMITTED TO JURY ON ALTERNATIVE THEORIES OF PREMEDITATION AND FELONY MURDER.

Under this Court's decision in Knight v. State, 338 So.2d 201 (Fla. 1976), the indictment in the instant case charging premeditated murder (R1847) was sufficient to charge not only premeditated murder but also felony murder. The jury here was in fact instructed on the two theories as alternatives (R1422-1425) and the prosecution argued them both (R1368-1369,1380), but the jury's verdict did not specify on which theory their finding of guilt was based (R2042). As a result, it cannot be known whether there was a unanimous verdict on one theory or another or whether some jurors voted to convict on one theory and some on the other. The verdict is therefore not a unanimous one. Moreover, if this Court should accept Mr. Wright's argument that the evidence of felony murder was insufficient (Point VIII, infra), then the general verdict leaves open the possibility that the jury improperly found Mr. Wright guilty on an invalid and unsupported theory. Finally, the indictment provided no notice of the felony murder theory.

1. Non-Unanimous Verdict

The general verdict deprived Mr. Wright of a unanimous verdict, since it may have been that some of the jurors voted for guilt on felony murder and some on premeditated murder, in which case neither finding would have been unanimous. There are "size and unanimity limits that cannot be transgressed if the essence of the jury trial is to be maintained." Brown v. Louisiana, 447 U.S. 323, 331, 100 S.Ct. 2214, 2221, 65 L.Ed.2d 159 (1980). This

includes the requirement that jurors concur on the specific acts the defendant has committed as well as ont he ultimate question of guilt or innocence. United States v. Gipson, 553 F.2d 453 (5th Cir. 1977). The unanimity requirement has also been imposed where, as in this case, a defendant is charged with first degree murder under theories which incorporate varying degrees of intent. See Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982).[17]

In Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988), this Court rejected a similar unanimity challenge in a post-conviction proceeding, alternatively finding it waived and that the instruction was correct anyway. This Court said, "A careful reading of the transcript reveals that the jury was instructed that its verdict must be unanimous." Id. at 1070. The defendant there raised the issue post-conviction, and did not have an insufficiently underlying felony, so it may be distinguished here on those grounds. If not, this Court should recede from Gorham. A requirement of jury unanimity on the "verdict" is insufficient where, as here, the jury is instructed on two theories and its verdict is a general one. In such cases, the jury has not been required to find the defendant guilty of a single, cognizable incident or "conceptual grouping." See United States v. Acosta, 748 F.2d 577, 581 (11th Cir. 1984); United States v. Gipson, supra; and Scarborough

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[17] See also United States v. Payseno, 782 F.2d 832 (9th Cir. 1986); United States v. Frazin, 780 F.2d 1461 (9th Cir. 1986); State v. James, 698 P.2d 161 (Alaska 1985); People v. Wesley, 177 Cal.App.3d 397, 223 Cal.Rptr. 9 (1986); State v. Benite, 6 Conn.App. 667, 507 A.2d 478 (1986); Hawkins v. United States, 434 A.2d 446 (D.C.App. 1981); and State v. Handyside, 42 Wash.App. 412, 711 P.2d 379 (1985).

v. United States, 522 A.2d 869 (D.C.App. 1987) (en banc). The general verdict where there were alternative theories of guilt denied Mr. Wright his rights under Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

2. General Verdict Including Invalid Theory

As argued above, there was insufficient evidence of felony murder. The first degree murder conviction cannot be upheld because the general verdict leaves open the possibility that the jury, or at least some of the jurors, found Mr. Wright guilty on the invalid theory. A jury verdict must be set aside if it could be supported on one ground but not another, and the reviewing court is uncertain which of the two grounds was relied upon by the jury. Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1806, 1860, 100 L.Ed.2d 384 (1988).

The United States Supreme Court has consistently held as a matter of constitutional law that if a defendant is convicted upon a general verdict after a jury has been instructed on several theories of guilt, one of which is held to be invalid, a new trial is required.[18] In capital cases, the court has required an even

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[18] Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed.2d (1931); Williams v. North Carolina, 317 U.S. 287, 291-292, 63 S.Ct. 207, 209-210, 87 L.Ed.2d 279 (1942); Thomas v. Collins, 323 U.S. 516, 528-529, 65 S.Ct. 315, 321-322, 89 L.Ed. 430 (1945); Cramer v. United States, 325 U.S. 1, 5, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949); Yates v. United States, 354 U.S. 298, 311-312, 77 S.Ct. 1064, 1072-1073, 1 L.Ed.2d 1356 (1957); Street v. New York, 394 U.S. 576, 585-588, 89 S.Ct. 1354, 1362-1363, 22 L.Ed.2d 572 (1969); Bachellar v. Maryland, 397 U.S. 564, 570-571, 90 S.Ct. 1312, 1315-1316, 25 L.Ed.2d 570 (1970); Zant v. Stephens, 462 U.S. 862, 882, 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235 (1983). See also Crawford v. State, 254 Ga. 435, 330 S.E.2d 568 (1985), applying this principle to the felony murder/premeditation situation.

greater degree of certainty that the verdict rest on proper grounds, even where the error occurs at the guilt phase of the proceeding. Beck v. Alabama, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). See also Andres v. United States, 333 U.S. 740, 752, 68 S.Ct. 880, 92 L.Ed.2d 1055 (1948) (where jury might have concluded from instructions that unanimity was required to grant mercy, as well as find guilt, in pre-Furman unified trial, proceeding unconstitutional).

3. Lack of Notice of Felony Murder

The indictment in the instant case charged only premeditated murder and made no mention of felony murder (R1897). Because of this lack of notice of felony murder, the trial court unlawfully allowed this theory to be submitted to the jury.

An indictment or information is required to state the elements of the offense charged with sufficient clarity to apprise the defendant what he must be prepared to defend against. Russell v. United States, 369 U.S. 749, 763-769, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); Government of Virgin Islands v. Pemberton, 813 F.2d 626 (3d Cir. 1987); Givens v. Wainwright, 786 F.2d 1378, 1380-1381 (9th Cir. 1986).

In Givens, the Ninth Circuit held that it was a sixth amendment violation to allow a jury instruction and prosecutorial argument on murder by torture (under Nevada law analogous to Florida's felony murder) where the information charged willful murder (analogous to Florida's premeditated murder).

Mr. Wright is aware that this Court has rejected a related claim in Knight v. State, 338 So.2d 201, 204 (Fla. 1976). However,

Knight was well before Givens, supra, which holds the reasoning of Knight to be contrary to the sixth amendment. This Court should overrule Knight. Its application here was a violation of Mr. Wrights's rights under the Florida and United States Constitutions.

POINT VIII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE BURGLARY CHARGE.

The evidence shows that Bessie Webster was the owner of the premises in question. Appellant and the decedent, Ms. Webster's daughter, lived together at the house and paid rent to Ms. Webster (R738). Appellant and the decedent would periodically get into violent arguments, after which Appellant would leave, but then would return a few days later. A document admitted into evidence as State's Exhibit 1, a lease agreement for the purposes of federal housing benefits did not list Appellant as a resident because of a federal regulation.[19]

On the night of June 8, Latonya Ashe, the decedent's daughter, heard an argument between Appellant and her mother (R781-782). Appellant had the decedent put his clothes in the trunk of his car, but, when she asked for the key to the house, he said that he would not give it to her (R784). Appellant left (R786). The decedent had the front door lock changed on June 9. On the night of June 10, Appellant attempted to enter the house using his key, but it would not fit (R792). Appellant eventually entered the house and the shooting subsequently occurred.

Appellant unsuccessfully moved for judgment of acquittal on the burglary charge on the ground that he had a possessory right in the dwelling, and hence could not be guilty of burglary (R1136-1144).

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[19] Appellant challenges the admissibility of the lease at Point II of this brief.

Section 810.02, Florida Statutes, provides that one is not guilty of burglary if one is "licensed or invited to enter or remain" on the premises. Appellant submits that, as a tenant of the premises, he was licensed to enter and remain on the property.

For the purposes of a burglary prosecution, a tenant of a dwelling is the owner. E.g. Anderson v. State, 356 So.2d 382 (Fla. 3d DCA 1978). Under Florida law, a residential tenancy is terminated by written notice and a legal action for eviction under sections 83.56 and 83.59, Florida Statutes, or by actual abandonment of the premises under section 83.59(2)(c), Florida Statutes.

The record shows no eviction proceeding against Appellant, nor any restraining order obtained to keep him from the premises. Further, although he left the premises, his refusal to give the keys to the decedent, the course of his relationship with her, and his subsequent return to the premises indicate no intent to surrender possession. The fact that the locks were changed does not terminate his tenancy. See United States v. Brannan, 898 F.2d 107, 108 (9th Cir. 1990) (despite fact that spouse had moved out and changed locks, spouse had common authority, which rests upon mutual use of the property, to permit inspection of the property). Hence, Appellant remained a tenant of the dwelling, and was not a burglar. The trial court erred by denying the motion for judgment of acquittal as to the burglary charge, and by submitting the case to the jury on a felony murder theory on the basis of the burglary as the underlying felony. Hence, this Court should reverse the burglary conviction and remand with instructions to the trial court to enter a judgment of acquittal on that count. Further, since the

evidence as to premeditation was scarcely overwhelming, this Court should reverse the first degree murder conviction with instructions that Appellant receive a new trial solely on the theory of premeditated murder.

POINT IX

THE TRIAL COURT ERRED IN DIRECTING A VERDICT BY INSTRUCTING THE JURY THAT PEGGY GAHN AND GARY FARLESS ARE LAW ENFORCEMENT OFFICERS.

Appellant was convicted of battery on a law enforcement officer pursuant to § 784.07 of the Florida Statutes. THe jury was instructed on the elements of said offense as follows:

> Before you can find the Defendant, Mac Ray Wright, guilty of battery on a law enforcement officer, the State must prove the following four elements beyond a reasonable doubt. One, Mac Ray Wright intentionally touched or struck Officer Peggy Gahn against her will or caused bodily harm to Officer Peggy Gahn. Second, Officer Peggy Gahn was a law enforcement officer. Third, Mac Ray Wright knew Officer Peggy Gahn was a law enforcement officer. Fourth, Officer Peggy Gahn was engage din the lawful performance of her duties when the battery was committed against her.

(R1432) (emphasis added). The trial court instructed the jury similarly as to the alleged battery on Gary Farless (R1433). After reading the jury the elements above, the trial court directed a finding as to the second element by instructing the jury:

> The Court now instructs you that Officer Peggy Gahn is a law enforcement officer.

(R1433-1434).[20] The instruction was erroneous because it directs a verdict for the state on the issue of the second element -- whether Peggy Gahn is a law enforcement officer.[21]

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[20] The same instruction was given as to Gary Farless (R1434).

[21] The standard jury instruction indicates that the trial court may instruct the jury that an official position is that of a law enforcement officer. This indirectly invades the province of the jury. The instant instruction did not even follow the standard instruction; instead it directed the jury that Gahn and Farless were law enforcement officers.

The impact of the instruction directing a finding on the element is clear from the following question which came from the jury during its deliberation:

> The Court stated that Farless and Gahn are law enforcement officers. Would we not be following court instructions to charge him with battery only.

(R280). This question was never answered by the trial court. Instead of finding Appellant guilty of simple battery as the jury apparently wanted to do, the directed verdict of battery on a law enforcement officer resulted.

Instructing a finding on the element deprived the jury of the right to pass on the issue thus directing a verdict. Smith v. State, 399 So.2d 70 (Fla. 5th DCA 1981) (trial court directed verdict on resisting arrest without violence by instructing that the officer was executing a lawful duty). This is a clear, fundamental error which invades the jury's fact finding process in violation of the right to a jury trial under the Sixth Amendment to the United States Constitution and Article I, Section 16 of the Florida Constitution. In United States v. Mentz, 840 F.2d 315, 323 (6th Cir. 1988) the court found that certain constitutional rights are basic protections which ensure that a criminal trial is fundamentally fair. In reversing a conviction due to an instruction invading the jury's province on finding an element,[22] the court noted the long-standing prohibition against directed ver-

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[22] In Mentz, the defendant was charged with robbing a bank insured by F.D.I.C., an element of the crime. The trial court erred by instructing the jury that the bank robbed was a bank insured by F.D.I.C.

dicts, citing Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 3106 (1986), wherein the Supreme Court stated:

> We have stated that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict ... regardless of how overwhelming the evidence may point in that direction." The rule stems form the Sixth Amendment's clear command to afford jury trials in serous criminal cases. Where that right is altogether denied, the state cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

U.S. v. Mentz, at 324. Likewise, in the instant case, the wrong entity judged Appellant guilty thereby rendering the trial on the charges of battery on a law enforcement officer fundamentally unfair. Accordingly, Appellant's convictions and sentences for battery on a law enforcement officer must be reversed.

POINT X

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL WHERE THE TRIAL JUDGE PRESIDING OVER HIS CAPITAL TRIAL BECAME BIASED DUE TO PRE-TRIAL INFLAMMATORY ACCUSATIONS AGAINST APPELLANT.

On March 26, 1987, without Appellant or his attorney present,[23] the prosecutor informed the trial judge that he had no objection to Appellant's absence because of the allegation that Appellant

> ... is a very violent individual who's given problems to the -- the jailers in the past and I would just ask that to be reflected on the record because I can see this being a problem when we try this individual.

(R26). After this hearing, the trial court announced that it would have Appellant "transported at this time because I think we have a very potentially problem situation with him in the holding room with other prisoners" (R27).

Both due process of law and the appearance of justice require that an unbiased judge preside over critical court proceedings. Santobello v. New York, 404 U.S. 257 (1971). Once a trial judge makes up his mind on a matter, the judge should no longer preside over the case. See Mawson v. United States, 463 F.2d 29, 31 (1st Cir. 1972) (new judge required for resentencing for both the judge's sake and the appearance of justice once it appears he has made up his mind). It has been recognized that "a judge is not a computer." Green v. State, 351 So.2d 941, 942 (Fla. 1977). A judge is human and simply cannot ignore a bias once it exists.

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[23] Linnes Finney, apparently an associate of Lorenzo Williams, Appellant's court-appointed attorney, was present at the March 26 hearing. However, Mr. Finney would not be on the case until July 14, 1987 -- more than three months after the hearing.

Thus, the "precepts of justice" and the recognition that certain influences made a judge "less sensitive to due process considerations" requires that a judge not preside over certain proceedings. Land v. State, 293 So.2d 704, 708 (Fla. 1974) (where voluntariness of confession in issue, new trial rather than new hearing an issue, required because judge would likely be influenced by ceratin biases, such as belief in guilt and prior rulings, in deciding issue); see also Smith v. State, 372 So.2d 86 (Fla. 1979) (impossible for trial judge to determine question of prejudice in a post-trial Richardson hearing without possibly being subconsciously affected by a jury's [let alone his own] prior judgment of guilt). In the instant case the trial court's pre-trial remarks reveal that it had made up its mind -- based on unsubstantiated allegations by the prosecutor in Appellant's absence -- that Appellant was a menace to other prisoners.

The state must provide a trial before an impartial judge, and the harmless error rule does not apply to a trial before a biased judge. Rose v. Clark, 478 U.S. 570, 577-578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (citing Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)).

The judge's remarks at bar show a bias against Appellant. At the March 26 hearing, which even Appellant's attorney did not attend, the trial court revealed that it was biased against Appellant, stating -- with no basis on the record -- that he was a menace to other inmates in the holding cell. Since Appellant was not present at the time of these remarks, and since the record does not show that he was ever made aware of them, he could not object

to the trial judge's bias against him. Appellant's trial on a capital offense by a biased judge violated the fifth, sixth, eighth and fourteenth amendments of the federal constitution, and article I, sections 9, 16 and 17 of the state constitution. This Court should order a new trial before an unbiased judge.

PENALTY ISSUES

POINT XI

THE TRIAL COURT ERRED BY OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

The trial court overrode the jury's recommendation of life imprisonment. Under the circumstances this was error.

A jury recommendation of life imprisonment "is entitled to great weight, reflecting as it does the conscience of the community." Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988). A jury recommendation of life imprisonment is to be overridden only when the facts suggesting sentence of death are so clear and convincing that virtually no reasonable person could differ. Hallman v. State, 15 F.L.W. S207, 208 (Fla. April 12, 1990); Tedder v. State, 322 So.2d 908 (Fla. 1975); Holsworth, supra. In Carter v. State, 15 F.L.W. S255 (Fla. April 26, 1990) this Court noted that the Tedder standard:

> has been consistently interpreted by this Court to mean that when there is a reasonable basis in the record to support a jury's recommendation of life, an override is improper.
>
> (Emphasis added). We must look to the mitigating evidence before this jury to determine if it provided a reasonable basis for the life recommendation.

15 F.L.W. at S256-S257. In the instant case there was mitigating evidence which could provide a reasonable basis for the jury's recommendation.

The trial court found seven (7) non-statutory mitigating circumstances (R2074). One, Appellant has expressed remorse for the killing. Smalley v. State, 546 So.2d 720 (Fla. 1989); Morris

v. State, 557 So.2d 27 (Fla. 1990). Two, Appellant has a recent history of being a good worker (his employer testified that if it were not for the criminal proceeding he would still employ Appellant (R1605-1606)). Smalley v. State, 546 So.2d 720 (Fla. 1989) ("willing worker and good employee"); Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988). Three, history of mental illness in Appellant's family; two aunts confined in mental institutions. Thompson v. State, 456 So.2d 444, 448 (Fla. 1984) ("father suffered from mental illness and died in mental institution"). Four, Appellant has provided for Sandra Ashe and for her three children (two of which are also his). Thompson v. State, 456 So.2d 444, 448 (Fla. 1984) ("father who attempted to provide for welfare of his family"); Smalley v. State, 546 So.2d 720 (Fla. 1989) (normally not abusive to his children is mitigating factor). Five, Appellant's older brother died in a shooting accident. See Perry v. State, 522 So.2d 817, 821 (Fla. 1988) (painful personal life experiences are mitigating circumstances). Six, Appellant's father left home when Appellant was ten years old leaving him with mother and seven children. See Remeta v. State, 522 So.2d 825 (Fla. 1988); Spivey v. State, 529 So.2d 1088 (Fla. 1988) (facing difficult one-parent childhood may be mitigating). Seven, Appellant has a history of alcohol and other substance abuse. See e.g., Buckrem v. State, 355 So.2d 111, 113 (Fla. 1978); Norris v. State, 429 So.2d 688, 690 (Fla. 1983).

In addition, other non-statutory mitigating circumstances were present in this case. As a child Appellant was subject to abuse from other children because he was in special educational classes

(R1595). See Freeman v. State, 547 So.2d 125 (Fla. 1989) (childhood problems mitigate). As a small child Appellant complained of headaches and nervous attacks and was taken to a mental health clinic (R1598-99). A history of mental problems can be a mitigating circumstance. See Cochran v. State, 547 So.2d 928 (Fla. 1989). (history of emotional and mental problems). Moreover, the very nature of the incident, where Appellant's relationship with Sandra Ashe and his children was terminated thus causing a "depressed mood,"[24] is a mitigating circumstance. Cochran v. State, 547 So.2d 928 (Fla. 1989) (defendant's depression due to mother of his child breaking off relationship and preventing him from seeing child was mitigating circumstance).

Any of these non-statutory mitigating circumstances might provide a reasonable basis for the jury's recommendation, certainly the cumulative effect of the mitigating circumstances would serve as a basis for a reasonable person to differ on the propriety of a death for Appellant.

The jury's recommendation of a life sentence also is not unreasonable, and proportionally warranted, when one considers that the instant case involved a highly emotional domestic dispute between Appellant and Sandra Ashe which resulted in death. Death is not an appropriate penalty for such domestic cases. Garron v. State, 528 So.2d 353 (Fla. 1988) (this Court noted that "[I]n Wilson v. State, 493 So.2d 1019 (Fla. 1986) this Court stated that when the murder is a result of a heated domestic confrontation, the

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[24] The trial court even recognized that Appellant was found to have an "explosive intermittent disorder" and an "adjustment disorder with depressed mood" (R2073).

penalty of death is not proportionally warranted. See Ross v. State, 474 So.2d 1170 (Fla. 1985); Blair v. State, 406 So.2d 1103 (Fla. 1981).").

In addition, although the trial court found no statutory mitigating circumstances, there is evidence from which the jury could have found at least two statutory mitigating circumstances. The trial court found that the statutory mitigating circumstance of the capital felony occurring while Appellant was under the influence of extreme mental or emotional disturbance did not apply. This finding was based on Dr. Ebalo's finding that Appellant had an "explosive intermittent disorder" and an "adjudgment disorder with a depressed mood." However, the trial court overlooked Dr. Ebalo's further findings that at the time of the incident Appellant was acting under the influence of an extreme mental and emotional disturbance (R1697). Thus, there is evidence from which a reasonable person could find this statutory mitigating circumstance.

The trial court also found that there was no evidence from which to conclude that there was a material or substantial impairment of Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law (R2073). This was based on the trial court finding that there was "no indication in the evidence that defendant lost touch with reality during this incident" (R2073). However, Appellant's testimony indicated that at the time of the incident he was impaired and that there was "this big explosion or quick snap" and he never recalled the shooting (R1646). This mitigating circumstance is also supported by Dr. Ebalo who believed that Appel-

lant was under the influence of alcohol and drugs and his functioning was diminished by those chemicals (R1699). Again, there was evidence from which a reasonable person could find this mitigating circumstance. It should also be noted that the trial court's order shows that he may have dismissed this circumstance because "there is no evidence that defendant did not know right from wrong" (R2073). Of course, this fact does not preclude this circumstance from being used in mitigation. State v. Dixon, 283 So.2d 1 (Fla. 1973); Mines v. State, 390 So.2d 332, 337 (Fla. 1980); Campbell v. State, 15 F.L.W. S342 (Fla. June 14, 1990).

As shown above, there exists mitigating evidence to support the jury's decision. Further, the jury may have decided that not all the aggravating factors found by the trial court were proven, or that some were entitled to little weight. See Hallman v. State, 15 F.L.W. S207 (Fla. April 12, 1990). For example, the jury could have reasonably rejected the cold, calculated and premeditated aggravating circumstance. This circumstance involves a "heightened premeditation." Rogers v. State, 511 So.2d 526 (Fla. 1987). It must be proven that "a careful plan or prearranged design to kill" was implemented. Id. at 533. "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987); Bates v. State, 465 So.2d 490 (Fla. 1985); Garron v. State, 528 So.2d 353 (Fla. 1988). In the present case the evidence showed that Appellant became angry with his spouse because she would not unlock the door to the house. The shooting then occurred. It would not be unreasonable for the jury to conclude that Appellant

was acting in anger, due to an intra-family quarrel, rather than performing a prearranged execution murder. In fact, during the guilt phase of the trial the jury apparently was having difficulty in finding premeditation as demonstrated by their request for clarification and reinstruction on premeditation (SR274). Thus, it really can't be said that they did not reject the heightened premeditation involved in this circumstance. See Garron v. State, 528 So.2d 353, 361 (Fla. 1988) (heightened premeditation factor rejected where case involved "intra-family quarrel, not organized crime or underworld killing"); Thompson v. State, 15 F.L.W. S347 (Fla. June 14, 1990) (killing done while defendant emotional therefore no heightened premeditation). Moreover, the shooting in this case was over one period of physical attack and this factor is not applicable. Campbell v. State, 15 F.L.W. S342 (Fla. June 14, 1990) (offense not cold, calculated or premeditated where "actions took place over one continuous period of physical attack").

The jury could have reasonably found that the killing was not extremely heinous, atrocious, or cruel. This circumstance is reserved for the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Brown v. State, 526 So.2d 903, 906 (Fla. 1988) (quoting from State v. Dixon, 283 So.2d 1 (Fla. 1973)). See also Cook v. State, 542 So.2d 964, 970 (Fla. 1989) ("This aggravating factor generally is appropriate when the victim is tortured, either physically or emotionally, by the killer"). The crime must be "committed so as to cause the victim unnecessary and prolonged suffering." Brown at 907. Of course,

the prolonged suffering cannot merely be fortuitous,[25] it must be "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering." Smalley v. State, 546 So.2d 720, 722 (Fla. 1989); Lloyd v. State, 524 So.2d 396, 403 (Fla. 1988). Recently in Porter v. State, 15 F.L.W. S353 (Fla. June 14, 1990) this Court explained that for this aggravating circumstance to apply the crime must be meant to be deliberately and extraordinarily painful and that a murder involving the firing of three shots at close range would not apply:

> We agree that the murder of Williams did not stand apart from the norm of capital felonies, nor did it evince extraordinary cruelty. We see little distinction between this case and *Amoros v. State*, 531 So.2d 1256, 1261 (Fla. 1988), wherein the Court struck the trial court's finding of especially heinous, atrocious, or cruel on a finding that the murderer fired three shots into the victim at close range. Moreover, this record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was *meant* to be deliberately and extraordinarily painful. The state has not met its burden of proving this factor beyond a reasonable doubt, and the trial court erred in finding to the contrary.

Porter, 15 F.L.W. at S354.

Clearly, in the instant case the jury could find that the shooting was not designed to inflict a high degree of pain. See Amoros v. State, 531 So.2d 1256 (Fla. 1988) (victim shot three times while futilely trying to escape not especially heinous, atrocious, or cruel); Lewis v. State, 377 So.2d 640 (Fla. 1979)

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[25] See Mills v. State, 476 So.2d 172, 178 (Fla. 1985) ("whether death is immediate or whether the victim lingers and suffers is pure fortuity").

(victim shot several times while fleeing). The jury could reasonably either totally reject, or give little weight to, this reason.

In light of the different view the jury may have had of the mitigating evidence, i.e. -- the statutory and non-statutory mitigating circumstances, and the aggravating evidence, it cannot be said that the facts are so clear and convincing that no reasonable person could differ as to whether a death sentence is appropriate. The trial court erred by overriding the jury recommendation of life imprisonment and imposing a sentence of death.

POINT XII

THE TRIAL COURT ERRED IN CONSIDERING NON-STATUTORY AGGRAVATING CIRCUMSTANCES IN IMPOSING THE DEATH PENALTY.

The prosecutor successfully urged the trial court to consider nonstatutory aggravating circumstances in deciding how to sentence Mr. Wright.

The state first urged the judge to override the life verdict because Mr. Wright had been convicted in 1971 of the non-violent felony of conspiracy of larceny of an automobile.[26] Second, it urged the judge to consider the facts concerning the 1973 aggravated assault convictions.[27] The prosecutor gave his opinion that the prosecution in that case was insufficiently vigorous, asserting that "this was clearly attempted first degree murder" (R1816-17).[28] Similarly, the prosecutor asserted that Mr. Wright should have been prosecuted in that case for the offense of possession of a firearm by a convicted felon[29] (R1817). The prosecutor then urged an override because Mr. Wright had an escape conviction,

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[26] Obviously, conviction of a non-violent felony is not a statutory aggravating circumstance. Since Mr. Wright waived the statutory mitigating circumstance of lack of significant prior criminal activity (R1474), the conviction was not relevant to any lawful sentencing consideration. Nevertheless, the trial court specifically considered this conviction in reaching its sentencing decision (R2054).

[27] The prosecutor presented evidence detailing this incident to the jury, so that it could not form the basis of an override.

[28] Just about any such shooting can be characterized by a zealous prosecutor as an attempted murder. Nevertheless, given that Mr. Wright was neither charged with or convicted of attempted first degree murder, the prosecutor's argument was improper.

[29] Needless to say, the notion that a zealous prosecutor could have obtained a conviction for a nonviolent felony does not constitute a proper sentencing consideration.

arguing that the trial court could consider this conviction even though the jury could not: "another felony that the jury was unable to consider because it was not a felony involving violence, but it is a conviction that the Court can consider in determining what should occur to the Defendant, Mac Ray Wright" (R1817). The prosecutor then urged the judge to override the life verdict arguing, without any testimony or other basis in the record, that Mr. Wright "served every single day of his time [for the 1973 convictions] for those five years, plus another half year for the escape conviction. He served all his time because there are fifty-two documented disciplinary reports of this individual" (R1818).[30] The prosecutor then urged the judge to consider the opinions of various probation officers and one Robert Moore, apparently a psychologist, that Mr. Wright "is an escape risk if, in fact, incarcerated for the next twenty-five calendar years" (R1818). The prosecutor frankly urged the judge to consider nonstatutory aggravation:

> Your Honor, I would submit that instead of the jury being able to consider all five felony convictions the jury was only allowed to consider three felony convictions. I would submit that the additional two felony convictions specifically related to escaping from a penal institution and the fact that this individual because of his horrible juvenile record was already considered an adult for punishment at the age of fifteen, is something that this Court can consider in determining whether the Defendant should be sentenced to the minimum sentence or the maximum sentence apprised under the eyes of the law.

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[30] The prosecutor conceded that his assertion was contrary to the documents supplied by the Department of Corrections (R1818). The "fifty-two documented disciplinary reports" are simply not documented on this record.

> I think a review of those documents reflects the necessity coupled with the facts and circumstances as presented that the Court has already heard for the ultimate penalty here. And I would ask the Court to sentence the Defendant to death and override the jury recommendation.

(R1818-1819).[31] Defense counsel objected to all of the foregoing as going to nonstatutory aggravation (R1819-1821). Nevertheless the trial court stated that it could and would review the matters raised by the prosecutor (R1821-1822). When the prosecutor urged the Court to consider these matters which were "unavailable or non-evidentiary for the jury," defense counsel objected that the documents did not constitute proof beyond a reasonable doubt, and the trial court replied: "Okay. Well, these are things the Court can consider in sentence in any case" (R1825).

The consideration of Mr. Wright's juvenile record is contrary to the principle, necessary to uphold the constitutionality of juvenile proceedings, that a juvenile adjudication is not a conviction and serves the purpose of guidance and rehabilitation rather than punishment so that the due process and sixth amendment procedural requirements necessary before a criminal conviction can be obtained to not apply with such force in juvenile proceedings. See, e.g., Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16

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[31] The prosecutor was adamant in his argument that the trial court could consider sentencing factors that the jury could not consider: "Your Honor, I would submit that the jury is extremely limited on what must be presented to them. The sentencing Court has an opportunity to review the entire background of the Defendant. That's why they made the sentencing Court and they made the jury recommendation just that, a recommendation. The sentencing Court is allowed to consider any additional facts and circumstances" (R1822-1823).

L.Ed.2d 84 (1966) and McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971). To consider juvenile record as aggravation, not only is the improper consideration of a non-statutory aggravating circumstance, but also is contrary to the Due Process and Unusual Punishment Clauses.

The state went on to urge an override of the life verdict on the ground that one Dr. Frank Trovato, who did not testify, had concluded that following about Mr. Wright:

> Dr. Trovato's conclusion was the Defendant was -- had an anti-social personality disorder. That he had the characteristics necessary for the formal diagnosis because there's a history to corroborate the Defendant has been physically cruel to other people. That he has deliberately engaged in fire setting. That he has deliberately destroyed other's property without fire setting. That he has stolen without confrontation of victim on more than one occasion. And he's initiated physical fights. It goes on for another page. The core self-worth of Mr. Wright is very poor. Human life means very little. It is such individuals who are most extremely dangerous. They often retaliate with tremendous ferocity feeling justified because the distorted beliefs unfortunately originated from their own unacceptable self, projected out and -- and seen as coming from someone else. I would submit this material was unavailable to the jury, Your Honor. I would submit that this Court is allowed to consider material that I was not allowed to present to the jury. And I would submit that this coupled with the aggravating circumstances and the fact in this case necessitate and make very appropriate the ultimate penalty in this case. I'd ask the Court to consider my arguments.

(R1837-1838).

The prosecutor offered no excuse for its failure to call Dr. Trovato and expose him to confrontation and cross-examination by

Mr. Wright,[32] and gave no reason for its odd argument that the trial court could consider matters that the jury could not. Defense counsel again argued against consideration of such non-statutory aggravating matters (R1845).

In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that the harmless error rule does not apply to consideration of evidence of nonstatutory aggravating circumstances unless there are no mitigating circumstances. This Court reversed for resentencing because of the presentation of nonstatutory aggravating evidence.

At bar, the prosecution presented and argued improper aggravating circumstances, so that error occurred under Elledge. Since the trial court considered and found mitigating circumstances, Elledge dictates that resentencing is required. Even if the harmless error rule did apply, a new sentencing hearing is required since the judge specifically stated in the sentencing order that he considered the matters discussed here. Cf. Trawick v. State, 473 So.2d 1235, 1240-41 (Fla. 1985) ("because the jury heard evidence and argument that did not properly relate to any statutory aggravating circumstance the jury recommendation is tainted"), Spaziano v. State, 393 So.2d 1119 (Fla. 1981) (improper to consider offenses of which defendant not convicted and to consider convictions of nonviolent felonies). The prosecution's actions render doubtful the quality of the fact-finding in the sentencing phase

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[32] Defense counsel pointed out, and the prosecutor did not dispute, that at deposition Dr. Trovato backed down from many of the statements in the report relied on by the prosecutor (R1844). Presumably this is the reason that Dr. Trovato was not called by the prosecution to testify.

contrary to the eighth amendment's mandate that the sentencing authority's discretion be guided and channeled so as to eliminate arbitrary and capricious application of the death penalty. Hence Mr. Wright's death sentence is illegal under article 1, sections 9, 16, 17, and 22 of the state constitution and the fifth, sixth, eighth, and fourteenth amendments to the federal constitution.

POINT XIII

DURING SENTENCING APPELLANT WAS DENIED HIS RIGHTS TO CROSS-EXAMINATION AND CONFRONTATION WHICH ARE NECESSARY TO ENSURE THE RELIABILITY OF THE CAPITAL SENTENCING.

Procedures that tend to undermine the reliability of capital sentencing determinations are unconstitutional. Beck v. Alabama, 447 U.S. 625, 638 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (citing cases). See also Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982) ("The focus of the Court's current capital sentencing decisions has been toward minimizing the risk of arbitrary decisionmaking.... Reliability in the factfinding aspect of sentencing has been a cornerstone of these decisions.").

Professor Wigmore has described the fundamental importance of cross-examination in our system of justice:

> **§ 1367. Cross-examination as a distinctive and vital feature of our law.** For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.
>
> Not even the abuses, the mishandlings and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the medieval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth.....

5 Wigmore, Evidence § 1367 (Chadbourn rev. 1974). There is a strong presumption against the waiver of the fundamental rights of

cross-examination and confrontation. See Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (conviction vacated where record did not establish that defendant, who emphasized in open court that he was not pleading guilty, had knowingly and intelligently waived right to confront and cross-examine witnesses, although he and his attorney agreed to "prima facie trial" in which defendant did not have right to confrontation and cross-examination). The rights of cross-examination and confrontation apply to capital sentencing proceedings. Rhodes v. State, 547 So.2d 1201 (Fla. 1989). Cf. Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) (enhanced sentencing proceeding).

At bar, sentencing proceedings before the judge after the penalty verdict violated Appellant's constitutional rights. The prosecutor came into the hearing with a variety of factual assertions, some supported by documents, none supported by testimony. Appellant was afforded no right to confront and cross-examine the sources of these claims. The trial court overruled the defense objections to this "evidence," opining that it could consider the documents and claims if the defense attorneys were presented an opportunity to review them. Obviously, the review of the documents and claims is not the same as confronting the people who make them. Appellant's right to cross examine and confrontation was totally non-existent at this crucial phase of the case.

Admittedly, defense counsel did not make a specific hearsay or confrontation clause objection to the prosecutor's use of these materials. He argues, however, that under the teachings of Brookhart the record does not establish a knowing and intelligent

waiver of his rights of confrontation and cross-examination. Appellant certainly was not agreeing that the trial court should impose the death penalty or even that the prosecutor's assertions formed a basis for imposition of the death penalty. There was no inquiry as to whether Appellant was waiving his rights to confront and cross-examine his accusers.

Since the judge phase of the sentencing proceeding was conducted without cross-examination and confrontation, it lacked the most fundamental requirements of due process. It lacked the one element -- cross-examination -- that our law considers most important to ensure the reliability of factual determinations. This Court should reverse Mr. Wright's sentence in this case.

POINT XIV

APPELLANT WAS DENIED HIS RIGHT TO BE PRESENT AT CRITICAL PROCEEDINGS AT WHICH NONSTATUTORY AGGRAVATING EVIDENCE WAS PRESENTED TO THE TRIAL COURT AND AT WHICH HIS RIGHT TO BE SILENT WAS WAIVED BY HIS TRIAL ATTORNEY.

The sixth amendment guarantees the defendant's rights to be present at all stages of the trial court proceedings where his absence might frustrate the fairness of the proceedings and to confront his accusers. Faretta v. California, 422 U.S. 806, 819, n.15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Rule 3.180(a)(3), Florida Rules of Criminal Procedure, provides that a defendant shall be present at any pre-trial conference "unless waived by Defendant in writing." Where there has been a violation of this rule, "the burden is on the state to show beyond a reasonable doubt that the error (absence) was not prejudicial." Garcia v. State, 492 So.2d 360, 364 (Fla. 1986). Counsel's waiver of the defendant's presence is invalid without "acquiescence or ratification" by the defendant. Id. 363.

Waiver of an important constitutional right must not be done in a vacuum. The choice must be an informed one, with the defendant fully aware of the consequences. Courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in their loss. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

Since the judge is the sentencer under Florida law, it is improper for a defense attorney to make remarks to the judge adverse to the defendant's interests which might affect the sentencing decision. The presentation of nonstatutory aggravating

sentencing factors requires resentencing where mitigating circumstances are found. Elledge v. State, 346 So.2d 998 (Fla. 1977). The state must provide a trial before an impartial judge, and the harmless error rule does not apply to a trial before a biased judge. Rose v. Clark, 478 U.S. 570, 577-578, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (citing Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)).

On March 26, 1987, this cause came before the trial court on motions for psychiatric examination and for appointment of an investigator. Defense counsel, Lorenzo Williams, was not present. Appellant refused to participate in this hearing at which his attorney was not present.[33] No effort was made to determine why

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[33] At the start of the hearing, the following occurred:

> THE COURT: State of Florida versus Mac Ray Wright. We're rolling. You be ready when the bell rings.
>
> MR. FINNEY: We have three pending motions before the Court.
>
> THE COURT [sic (obviously, this is a continuation of Mr. Finney's remarks, and the attribution to the court is erroneous)]: Okay. I'm appearing here on behalf of Lorenzo Williams from our office. Mr. Williams is presently trying a civil case before Judge --
>
> MR. WRIGHT: I don't even want to be bothered with people there no more. (indiscernible).

(R26). Appellant then left the courtroom. The trial court asked if there was an objection to Mr. Wright's absence, and the prosecutor replied:

> No objection, Your Honor, I would ask to put something on the record. This is an individual charged with first degree murder. The State is seeking the death penalty. This is a very violent individual who's given problems

Appellant left the courtroom, and there was no colloquy that day or any other to determine the cause of his absence or whether he agreed to a hearing, conducted in his absence, in which an interloping lawyer purported[34] to represent him. In Appellant's absence, and without Appellant's true attorney being present, the prosecutor proceeded to vilify him, asserting that he was "a very violent individual" who had caused problems for the jailers, and that he anticipated that Mr. Wright would cause problems at trial (R26). Mr. Finney did not object to the prosecutor's taking advantage of the situation by attacking Appellant's character before the judge who would preside over the trial and who would decide Mr. Wright's fate. Nor did he object when the trial court determined -- with no basis apparent on the record -- that Mr. Wright was a danger to other prisoners (R27). Thus, nonstatutory aggravating sentencing factors were presented in Appellant's absence and resentencing is required. Elledge, supra.

> to the -- the jailers in the past and I would just ask that to be reflected on the record because I can see this being a problem when we try this individual.

(R26). The judge announced that he was "going to have him transported at this time because I think we have a very potentially problem situation with him in the holding room with other prisoners" (R27). Mr. Finney, the attorney purporting to represent Appellant's attorney, voiced no waiver of Appellant's appearance, but on the other hand voiced no objection to going forward without him. It should be noted that Mr. Finney was apparently an associate of Lorenzo Williams, Appellant's court-appointed attorney. Mr. Finney was appointed as co-counsel on July 14, 1987 (R52). As of March 26, however, he was not on the case.

[34] Actually, Mr. Finney purported only to represent Appellant's real attorney (R28). ("Yes sir, Your Honor, Linnes Finney here on behalf of Lorenzo Williams, who represents Mac Ray Wright.").

The next hearing was a pre-trial conference on April 23, 1987.[35] Mr. Williams himself intervened to prevent Appellant's appearance at the pretrial conference. Record page 32 shows an unidentified voice (apparently that of a jailer) saying: "Judge, I was instructed by Mr. Williams not to bring him over. That he would put in a written Order that I didn't have to bring him." Mr. Williams gave as a reason for barring his own client from the hearing that there was "a potential security risk of my client," and that he was waiving Appellant's presence "in deference to the Court and spectators" (R33). Whatever Mr. Williams meant by these remarks,[36] they did nothing to advance the cause of Appellant. The

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[35] Appellant was not present, and defense counsel announced that he was waiving Appellant's presence. The trial court replied that the waiver had to be made by the defendant in writing, and the court-appointed defense attorney replied:

> I think you're correct, Your Honor, but my office was notified I guess about thirty minutes before the Court proceedings this afternoon of a potential security risk of my client. And with -- in deference to the Court and spectators I respectfully waived it, but I told the person from the jail office that I would have filed it because they indicated they have enough men to -- personnel to bring him over today so --

(R33). Defense counsel agreed to sign a waiver of Mr. Wright's presence (R33-34), and then moved for a continuance of the trial date, which was granted (R34-36).

[36] It may be that Mr. Williams meant that someone meant to do Appellant harm if he came to court. If so, it was scarcely the role of defense counsel to acquiesce to proceedings in a coercive atmosphere, and the trial court erred by failing to delay the hearing until proper security was available. On the other hand, it may be that he considered his client a menace. It such were the case, the trial court judge erred by not removing Mr. Williams from the case immediately. An attorney who contrives to bar his client from the courtroom while he badmouths the client is no attorney at all.

record shows no clear reason for Appellant's absence, and shows no acquiescence by Appellant in the attorney's actions.

The case next came up for a pre-trial conference status hearing on June 8, 1987.[37] Again, with Appellant not present, defense counsel stated his intention to file a notice of insanity. He then went on to complain about Appellant being "a difficult

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[37] The record shows that Appellant was not brought to court for that hearing (R39). After a discussion of scheduling the trial date, defense counsel announced his intention to file a notice of insanity, and stated that he thought that the prosecutor was "entitled to additional expert opinion regarding this" (R42). After a discussion of whether the scheduling of the case would interfere with the judge's vacation, the following occurred (again outside of Mr. Wright's presence):

> MR. WILLIAMS [defense counsel]: I need some time, Your Honor, this is a -- this is a difficult client to manage, Your Honor. I mean this is a problem. I'm a Court Appointed --
>
> THE COURT: I think that goes without saying.
>
> MR. WILLIAMS: I'm a Court Appointed counsel in this case. He's gone through a host of other attorneys. And I'm trying -- for lack of a better expression, hold this client's hand without getting my nosed [sic] punched, Your Honor. And it's difficult, he's a difficult client to manage. I've been wrestling with -- with not -- wrestling with the idea of filing a Motion to Withdraw off the case because quite frankly he's difficult to manage, Your Honor. I've been -- I know the situation with other counsel, so I've been trying just to hey, just hold the client's hand and try to move the case along, but quite frankly, Your Honor, I think if I -- I think we're probably have to spoil the Court's vacation. And I really don't know what to say, Your Honor, to be honest with you.

(R42-43).

client to manage"[38] and to assert that he had some concern about "holding this client's hand without getting my nosed [sic] punched," and to claim that he was considering moving to withdraw from the case.

Appellant suffered substantial prejudice from his absence at this hearing. In the first place, defense counsel was waiving Appellant's right to be silent by agreeing that the prosecution could have a psychiatrist examine Appellant. The eventual result of this waiver was the prosecution's use of Dr. Trovato's report as a ground for overriding the life verdict and arguing, successfully, for imposition of the death sentence. In the second place, defense counsel's characterization of Appellant, which Appellant could not rebut both because he was absent and because it was his own attorney who was thus vilifying him, was unethical and presented the trial court with a damaging evaluation of him by the person the trial judge regarded so highly as to entrust with the representation of a defendant in a capital case.

The foregoing proceedings in the absence of Appellant resulted in the presentation of improper and incompetent evidence concerning his character and in the waiver of his right to be silent resulting in the development of evidence used by the state at sentencing to support an override death sentence. At one pre-trial proceeding,

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[38] For the purpose of advancing his claim that Appellant was a difficult client, Mr. Williams asserted that Appellant had "gone through a host of attorneys." What the record actually shows is that the Public Defender withdrew because of a conflict of interest, S 6, and that Philip Yacucci, Jr. (who was since elected the Public Defender for the same circuit) was then appointed (R1907), and that Mr. Yacucci withdrew a month later for reasons not reflected on the record (R1909), after which Mr. Williams was appointed.

which even his attorney did not attend, the trial court revealed that it had made up its mind about Appellant, stating that he was a menace to other inmates in the holding cell. The fact that the trial court made up its mind prior to trial that Appellant was a violent individual would require a new judge for sentencing. See Mawson v. United States, 463 F.2d 29, 30 (1st Cir. 1972) (new jude required for resentencing once it appears he has made up his mind). Only being human, the judge could not ignore the pre-trial bias that had been created. See Green v. State, 351 So.2d 941, 942 (Fla. 1977) ("a judge is not a computer"); Land v. State, 293 So.2d 704, 708 (Fla. 1974). This bias may have subconsciously caused the judge to weigh the sentencing issues differently than the jury, thus causing him to override the jury recommendation. Appellant's absence at these hearings violated his rights under the fifth, sixth, eighth, and fourteenth amendments of the federal constitution, and article 1, sections 9, 16, and 17 of the state constitution. Accordingly, this Court should order a new trial, before a new trial judge unbiased by the prior unsubstantiated representations, with Appellant present at all proceedings at which his rights are waived or nonstatutory aggravating evidence is presented.

POINT XV

APPELLANT'S BURGLARY SENTENCE IS ILLEGAL.

The trial court sentenced Appellant to life imprisonment without parole to be served consecutively to the death sentence. The trial court did not use a sentencing guidelines scoresheet and did not enter written reasons for departure in sentencing Appellant.

The trial court's failure to use a guidelines scoresheet and the written reasons for departure, and the trial court's imposing the burglary sentence consecutively to the murder sentence render the sentence illegal. See Schneider v. State, 512 So.2d 308 (Fla. 2d DCA 1987).

This Court should reverse Appellant's sentence for burglary with instructions to sentence Appellant within the recommended guidelines range to a term concurrent with the first degree murder sentence. See Pope v. State, 15 F.L.W. S243 (Fla. April 26, 1990) (remand for resentencing within recommended guidelines range where there are no written reasons for departure); Shull v. Dugger, 515 So.2d 748 (Fla. 1987).

POINT XVI

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

A capital sentencing scheme is constitutional only to the extent that it is structured to avoid freakish or arbitrary application of the death penalty. See Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Mr. Wright argues that, since Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 912 (1976), the operation of section 921.141, Florida Statutes, has promoted freakish and arbitrary application of the death penalty. In Proffitt, the court held that the statute, as written, could be consistent with the eighth amendment. The Court did not contemplate the regression toward arbitrary application that has since occurred.

Rather than being reserved for the most conscienceless and pitiless criminals, the Florida death penalty is reserved for those with lawyers unfamiliar with the law, and for those tried by improperly instructed juries. It is seldom meted out correctly, much less even-handedly in the trial courts, and Florida's appellate review system simply fails to comply with the dictates of Proffitt. That statutory aggravating circumstances are poorly defined, are arbitrarily applied, and exclude the consideration of mitigating evidence.

1. The jury

a. Standard jury instructions

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury

instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

i. Heinous, atrocious, or cruel

Pope v. State, 441 So.2d 1073 (Fla. 1983) bars jury instructions limiting and defining the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application of in violation of the dictates of Maynard v. Cartwright, 108 S.Ct. 1853 (1988). Since, as shown below, this Court has been unable to apply this circumstance consistently, there is every likelihood that juries, given no direction in its use, apply it arbitrarily and freakishly.

ii. Cold, calculated, and premeditated

The same applies to the "cold, calculated, and premeditated" circumstance. The standard instruction simply tracks the statute.[39] Since the statutory language is subject to a variety of constructions, the absence of any clear standard instruction ensures arbitrary application. Mr. Wright is aware that this Court has written that Maynard does not apply to this aggravating circumstance. In Daugherty v. State, 533 So.2d 287 (Fla. 1988), this Court wrote at page 288:

> We find Maynard inapplicable because [the heinousness] aggravating factor was not found in this case, and therefore need not address its applicability in other circumstances.

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[39] The instruction is: "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." This instruction and the others discussed in this section are taken from West's Florida Criminal Laws and Rules 1990, at 859.

In Jones v. State, 533 So.2d 290 (Fla. 1988), this Court wrote at page 292 that it rejected various arguments raised by the appellant, including:

> 5. An argument grounded on Maynard v. Cartwright, ____ U.S. ____, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), that the jury instruction with respect to whether the murder was committed in a cold, calculated, and premeditated manner was overbroad. Maynard dealt with the validity of a jury instruction involving the definition of heinous, atrocious, and cruel. Because Jones' killing was not found to be heinous, atrocious, and cruel, Maynard is inapplicable to this case.

In Brown v. State, 15 F.L.W. S165, S166 (Fla. Mar. 22, 1990), this Court wrote:

> Based on Maynard v. Cartwright, 108 S.Ct. 1853 (1988), Brown also argues that the standard instruction on the cold, calculated, and premeditated aggravating circumstance is unconstitutional. In Maynard the court held the Oklahoma instruction on heinous, atrocious, and cruel unconstitutionally vague because it did not adequately define that aggravating factor for the sentencer (in Oklahoma, the jury). We have previously found Maynard inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor. Smalley v. State, 546 So.2d 720 (Fla. 1989). We find Brown's attempt to transfer Maynard to this state and to a different aggravating factor misplaced. See Jones v. Dugger, 533 So.2d 290 (Fla. 1988); Daugherty v. State, 533 So.2d 287 (Fla. 1988). We therefore find no error regarding the penalty instructions.

This issue merits more analysis than it has received. In Smalley, this Court did not write that Maynard does not apply to Florida. It rejected a jury instruction claim on the ground that the issue was not preserved in the trial court, and wrote that Florida's heinousness aggravator was not facially unconstitutional under Maynard because this Court had given it a narrowing construc-

tion. Smalley does not hold that the judge need not instruct the jury correctly on the law in a capital sentencing proceeding. Even though the jury is not the ultimate sentencer, its penalty verdict is of great importance. The Cruel and Unusual Punishment Clauses of the state and federal constitutions require accurate jury instructions during the sentencing phase of a capital case. See Hitchcock v. Dugger, 107 S.Ct. 1821, 1824 (1987) (sentence improper where "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances").

Since the Constitution requires accurate instructions, the question becomes whether the Florida standard jury instruction on this circumstance satisfies the stringent requirements of the Cruel and Unusual Punishment Clauses. The standard instruction tracks the statute. This very Court has been misled by the vague statutory language into applying this circumstance too broadly. See Rogers v. State, 511 So.2d 526 (Fla. 1987) (condemning prior construction as too broad). Jurors are prone to like errors. The standard instruction invites arbitrary and uneven application. Its use (and its approval by this Court) necessarily results in improper application in case after case.

iii. Felony murder

The standard jury instruction on felony murder does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least aggravated form of first degree murder. In this regard, the following discussion of the premeditation aggravating circumstance in Porter v. State, 15

F.L.W. S353, S354 (Fla. June 14, 1990) (footnote omitted) is especially pertinent:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder.

The same logic applies to the felony murder aggravating circumstance. It violates the teachings of Zant v. Stephens by turning the offense of felony murder, without more, into an aggravating circumstance. It applies an aggravating circumstance to every first degree felony murder. Further, the instruction turns the mitigating circumstance of lack of intent to kill[40] into an aggravating circumstance. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process clauses of the state and federal constitutions.

b. Majority verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates due process and the Cruel and Unusual Punishment Clauses.

Accepting for the purpose of argument that there is no federal constitutional right to a jury in capital sentencing, Mr. Wright

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[40] See Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (death penalty statute unconstitutional where it did not provide for full consideration of, inter alia, mitigating factor of lack of intent to cause death).

argues that the Florida right to a jury[41] must be administered in a way that does not violate due process. Cf. Anders v. California, 386 U.S. 736, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) (although there is no constitutional right to appeal, state law right to appeal must be administered in compliance with due process).

A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate due process. See Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 1523 (1972), and Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979). It stands to reason that the same principle applies to capital sentencing so that our statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote.

Mr. Wright concedes that in Alvord v. State, 322 So.2d 533 (Fla. 1975), this Court rejected the contention that a penalty verdict for death must be unanimous. See also James v. State, 453 So.2d 786 (Fla. 1984) and Fleming v. State, 374 So.2d 954 (Fla. 1979) (both following Alvord without analysis). In Alvord, this Court did not specifically decide the separate issue of whether a bare majority verdict was constitutional. The subsequent authority of Burch shows that a verdict by less than a substantial majority violates due process.

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states

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[41] The right to a jury in capital sentencing predates the 1968 constitution and is therefore incorporated into article I, section 22, Florida Constitution. Cf. Carter v. State Road Dept., 189 So.2d 793 (Fla. 1966).

in determining whether the statute was constitutional, indicating that an anomalous practice violates of due process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. See, e.g., Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), Thompson v. Oklahoma, 108 S.Ct. 2687 (1988), and Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). Among the states employing juries in capital sentencing, only Florida allows a death penalty verdict by a bare majority.

c. Advisory role

The standard instructions do not inform the jury of the great importance of its penalty verdict. In violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) the jury is told that its verdict is just "advisory."

2. Counsel

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the defendant has no say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through to the present. See, e.g., Elledge v. State, 346 So.2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance), Grossman v. State, 525 So.2d 833 (Fla. 1988) (no objection to victim impact information forbidden by eighth amendment), Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984) (counsel

acted under actual conflict of interest in 1977 appeal, to appellant's detriment), Rutherford v. State, 545 So.2d 853 (Fla. 1989) (failure to object to improper evidence used to support aggravating factor), Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988) (failure to develop and present mitigating evidence), Spaziano v. State, 545 So.2d 843 (Fla. 1989) (failure to assert grounds in first motion for post-conviction relief), Alvord v. Dugger, 541 So.2d 598 (Fla. 1989) (failure to argue and present nonstatutory mitigating evidence in 1974 trial), Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989) (presuming that appellate counsel will purposely fail to present arguable issues). Of course a complete list would fill a volume. The quality of counsel is so sadly strained that this Court has excoriated appellate capital attorneys as a class for failing to serve their clients by filing briefs containing "weaker arguments." Cave v. State, 476 So.2d 180, 183, n.1 (Fla. 1985) ("neither the interests of the clients nor the judicial system are served by this trend").[42]

Failure of the courts to supply adequate counsel in capital cases, and use of judge-created inadequacy of counsel as a procedural bar to review on the merits of capital claims, cause freakish and uneven application of the death penalty.

Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases. The failure to provide

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[42] See also Rose v. Dugger, 508 So.2d 321, 325 (Fla. 1987) (appellate counsel "has either not clearly read the record or has not accurately presented its contents to this Court").

adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. The trial judge

a. The role of the judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975). On the other, it is considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored under, e.g., Smalley v. State, 546 So.2d 720 (Fla. 1989). This ambiguity and like problems prevent evenhanded application of the death penalty.

As an initial matter, trial court judges do not seem to be up to the demands of capital litigation. For instance, the first quarter of the fourteenth volume of Florida Law Week reports seven direct appeals from death sentences. In six of those seven cases, this Court was compelled to reverse by trial court errors, notwithstanding the strong appellate presumptions against reversal. And it is small wonder that our conscientious trial judges are in trouble. Our capital punishment statute is couched in such vague terms as to constitute a maze of traps for the unwary, and the courts are ill served by attorneys of doubtful competence or professionalism.

Since the trial judge is largely bound by the jury's recommendation, the great likelihood of error built into the penalty verdict procedure (improper standard instructions and the lack of

competent attorneys to challenge them) becomes a great likelihood of error by the judge bound by the jury's verdict.[43]

That our law forbids special verdicts as to theories of homicide and as to aggravating and mitigating circumstances makes problematic the judge's role in deciding whether to override the penalty verdict. The judge has no clue of which factors the jury considered or how it applied them, and has no way of knowing whether the jury acquitted the defendant of premeditated murder (so that a sentencing order finding of cold, calculated and premeditated murder would be improper), or whether it acquitted him of felony murder (so that a finding of killing during the course of a felony would be inappropriate).[44] Similarly, if the jury found the defendant guilty of felony murder, and not of premeditated murder, application of the felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons as required by the eighth amendment under, e.g., Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

b. The Florida judicial system

Like other Southern states, Florida has an unfortunate history of racial discrimination in the judiciary resulting in racially

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[43] For example, if the trial court gives the vague standard instructions on "heinous, atrocious or cruel" and "cold, calculated, and premeditated," and defense counsel (as is typical) fails to object, there is a substantial likelihood of jury error in the application of these standards to situations to which they should not apply. Yet the trial judge is pretty much bound by a resulting improper death verdict.

[44] See Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (double jeopardy precluded use of felony murder aggravating circumstance where it appeared that defendant was acquitted of felony murder at first trial).

discriminatory application of the law.[45] Florida's system of at-large judicial elections in large judicial circuits perpetuates this history in violation of the Equal Protection and Due Process Clauses of the state and federal constitutions. The U.S. Department of Justice has ruled that the Georgia judicial system violates the Constitution in the same way. Georgia's Way of Electing Judges Is Overturned by U.S. as Biased, N.Y. Times, Apr. 27, 1990, at 1, col. 1.

Additionally, imposition of the death penalty by elected judges beholden to special interest groups (such as police benevolent associations) who help them get elected violates the Constitution. See Spaziano v. State, 468 U.S. 447, 475, n.14, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (Stevens, J., concurring in part and dissenting in part).

4. Appellate review

a. Proffitt

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review:

> The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. § 921.141(4) (Supp. 1976-1977). The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge

[45] A telling example is set out in Justice Buford's concurring opinion in Watson v. Stone, 148 Fla. 516, 4 So.2d 700, 703 (1941) in which he remarked that the concealed firearm statute "was never intended to be applied to the white population and in practice has never been so applied."

> must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible and the Supreme Court of Florida like its Georgia counterpart considers its function to be to "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." State v. Dixon, 283 So.2d 1, 10 (1973).

428 U.S. at 250-251.

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So.2d 481, 484 (1975).

Id. 252-53.

> Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.
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> Nonetheless the petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency.

Id. 258-59.

Mr. Wright submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (eighth amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious, or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death eligible persons, or channel discretion as required by Lowenfield v. Phelps, 108 S.Ct. 546, 554-55 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is

unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Herring).

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts).[46]

Similarly, the "great risk of death to many persons" factor has been inconsistently applied and construed. Compare King v. State, 390 So.2d 315, 320 (Fla. 1980) (aggravator found where defendant set house on fire; defendant could have "reasonably foreseen" that the fire would pose a great risk) with King v. State, 514 So.2d 354 (Fla. 1987) (rejecting aggravator on same facts) with White v. State, 403 So.2d 331, 337 (Fla. 1981) (factor could not be applied "for what might have occurred," but must rest on "what in fact occurred").

The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict construction in favor of the accused would be that the circumstance should apply only where the prior felony conviction (or at least the prior felony) occurred before the killing. The cases have instead

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[46] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L. Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases WIthout Making it Smaller, 13 Stetson L. Rev. 523 (1984).

adopted a construction favorable to the state, ruling that the factor applies even to contemporaneous violent felonies. See Lucas v. State, 376 So.2d 1149 (Fla. 1979).

In Campbell v. State, 15 F.L.W. S342, S343 (Fla. June 14, 1990), this Court went yet further and wrote that juvenile adjudications of delinquency can satisfy this aggravating circumstance:

> The court correctly found that Campbell was previously convicted of a felony involving the use or threat of violence. He cites no authority in support of his assertion that prior juvenile convictions cannot be considered in aggravation.

This remarkable construction of the statutory requirement that the defendant must have been previously "convicted" of a violent felony simply turns the due process rule on its head. It is contrary to the usual construction of "conviction" as not including juvenile adjudications. See, e.g., § 90.610(1)(b), Fla. Stat. (witness may not be impeached with juvenile adjudication of guilt) and Powell v. Levit, 640 F.2d 239 (9th Cir. 1981) (construing similar federal statute). It is contrary to the rule that juvenile adjudications do not count as prior convictions for habitual felony statutes. It is contrary to the principle, necessary to uphold the constitutionality of juvenile proceedings, that a juvenile adjudication is not a conviction and serves the purpose of guidance and rehabilitation rather than punishment so that due process and sixth amendment procedural requirements necessary before a criminal conviction can be obtained do not apply with such force in juvenile proceedings. See, e.g., Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966) and McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971). The mode of

analysis used in Campbell is directly contrary to the rule of lenity by imposing on the defendant the duty of showing why the statute should not be broadly construed. The silence of the statute was used against the defense rather than against the state. This manner of statutory constructions is contrary to the Due Process and Cruel and Unusual Punishment Clauses. The use of such a mode of analysis renders the Florida death penalty statute unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting) (death penalty statute unconstitutional where court liberally construed premeditation aggravating circumstances in favor of state).

The "under sentence of imprisonment" factor has similarly been construed in violation of the rule of lenity. It has been applied to persons who had been released from prison on parole. See Aldridge v. State, 351 So.2d 942 (Fla. 1977). It has been indicated that it applies to persons in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). See Peek v. State, 395 So.2d 492, 499 (Fla. 1981).

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So.2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[47] it has been broadly

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[47] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 926 (1989).

interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. Appellate reweighing

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So.2d 1200 (Fla. 1986).

d. Procedural technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[48] See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of eighth amendment); and Smalley v. State, 546 So.2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated eighth amendment). Use of retroactivity principles works similar mischief.

e. Tedder

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[48] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Mr. Henry contends that a retreat from the special scope of review violates the eighth amendment under Proffitt.

The failure of the Florida appellate review process is highlighted by the Tedder[49] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

5. Other problems with the statute

a. Lack of special verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found because the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the eighth amendment.

Our law in effect makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates article I, sections 9, 16, and 17 of the

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[49] Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

state constitution and the fifth, sixth, eighth, and fourteenth amendments to the federal constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting a similar sixth amendment argument.

b. No power to mitigate

Unlike someone serving a sentence for anything ranging from a life felony to a misdemeanor, a condemned inmate cannot ask the trial judge to mitigate his sentence because Florida Criminal Rule 3.800(b) forbids mitigation of a death sentence. Whatever the reason for this bizarre provision, it violates the constitutional presumption against capital punishment and disfavors mitigation in violation of article I, sections 9, 16, 17, and 22 of our constitution and the fifth, sixth, eighth and fourteenth amendments to the federal constitution.

c. Presumption of death

Florida law creates a presumption of death where but a single aggravating factor appears. This creates a presumption of death in every felony murder case and in almost every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case).[50] If there is anything left over, it is covered by that omnium gatherum, "heinous, atrocious or cruel." Under Florida law, once one of these factors is present, there is a presumption of death to be overcome only by mitigating evidence so strong as to be reasonably convinc-

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[50] See Justice Ehrlich's dissent in Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984).

ing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[51] This presumption of death does not square with the eighth amendment requirement that capital punishment by applied only to the worst offenders under e.g. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). See Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988) and Adamson v. Ricketts, 865 F.2d 1011, 1043 (9th Cir. 1988). But see Blystone v. Pennsylvania, 110 S.Ct. 1078 (1990) (rejecting a similar argument).

[51] That there is a presumption of death is proven by the fact that death is called for when the aggravating and mitigating circumstances are in equipoise: section 921.141(2)(b) and (3)(b) require that the mitigating circumstances outweigh the aggravating.

POINT XVII

THE AGGRAVATING CIRCUMSTANCES USED AT BAR ARE UNCONSTITUTIONAL.

1. Felony murder

As already argued (pages 86-87), this circumstance does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least aggravated form of first degree murder. Further, it turns the mitigating circumstance of lack of intent to kill into an aggravating circumstance. Hence it violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions.

2. Especially wicked, evil, atrocious, or cruel

This factor does not serve the channelling and limiting function required by the Constitution and has not been consistently strictly construed.

To be constitutional, this aggravating circumstance must, at a minimum, be limited to conscienceless or pitiless crimes which are unnecessarily torturous to the victim. Bertolotti v. Dugger, 883 F.2d 1503, 1526-27 (11th Cir. 1989). History shows that it has been consistently applied to murders that are not "unnecessarily torturous."[52],[53]

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[52] Mr. Wright argues that even this standard violates the Cruel and Unusual Punishment Clause and the constitutional and statutory rule of lenity. Almost any first-degree murder is conscienceless or pitiless. What a "necessarily torturous" murder is, or why it is not as bad as an "unnecessarily torturous" one, are mysteries. A more nearly constitutional standard is that employed in Lloyd v. State, 524 So.2d 396, 403 (Fla. 1988) ("designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering"). (Of course the Lloyd standard is contrary to Pope v. State, 441 So.2d 1073, 1077 (Fla. 1983)).

In making this argument, Mr. Wright is aware that in Smalley v. State, 546 So.2d 720 (Fla. 1989), this Court wrote:

> His first claim involves the aggravating circumstance that the killing was especially heinous, atrocious, or cruel. His argument is predicated on the United States Supreme Court's recent decision in Maynard v. Cartwright, ___U.S.__, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). In that case, the Court relied upon its early [sic] decision in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), to hold that Oklahoma's aggravating factor of "especially heinous, atrocious, or cruel" was unconstitutionally vague. Smalley argues that because Florida uses the same words (section 921.141(5)(h), Florida Statutes (1987)), Florida's aggravating factor also is unconstitutionally vague under the eighth amendment.
>
> Initially, we note that Smalley did not object to the standard jury instruction given on this subject which explained that in order for this circumstance to be applicable, it was necessary for the crime to have been especially wicked, evil, atrocious, or cruel. Therefore, to the extent that Smalley now complains of the jury instruction, the point has been waived. Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S.911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976). However, Smalley's claim has broader implications because he contends that the aggravating circumstance of heinous, atrocious, or cruel is unconstitutionally vague under the eighth and fourteenth amendments. In order to set the issue at rest, we will discuss the merits of Smalley's argument.

Failure to limit this aggravating circumstance to the strict Lloyd standard violates the Due Process and Cruel and Unusual Punishment Clauses.

[53] For example, it has been applied to almost any situation where death was not instantaneous. See, e.g., Mason v. State, 438 So.2d 473 (Fla. 1983) (victim probably lived from one to ten minutes after being stabbed). Compare Mason with Teffeteller v. State, 439 So.2d 840 (Fla. 1983) (victim "lived for a couple of hours in undoubted pain and knew he was facing imminent death"; HELD, killing not heinous, atrocious, or cruel).

It is true that both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel.

This Court has narrowly construed the phrase "especially heinous, atrocious, or cruel" so that it has a more precise meaning than the same phrase has in Oklahoma. In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974), we said:

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

It was because of this narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious, or cruel against a specific eighth amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. E.g., Garron v. State, 528 So.2d 353 (Fla. 1988); Jackson v. State, 502 So.2d 409 (Fla. 1986), cert denied, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); Jackson v. State, 498 So.2d 906 (Fla. 1986); Teffeteller v. State, 439 So.2d 840

> (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). That Proffitt continues to be good law today is evident from Maynard v. Cartwright, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. See Maynard v. Cartwright, 108 S.Ct. at 1859.

Id. 722.

The role of the Florida trial judge is not so clear as Smalley asserts. Under our law, the trial judge conducts a sort of appellate review of the penalty verdict. Flaws in the jury instructions leading to flaws in the verdict necessarily lead to flawed sentencing. The Constitution requires accurate jury instructions in Florida sentencing proceedings. See Proffitt v. Florida, 428 U.S. 242, 256, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion) (State v. Dixon definition "provides [adequate] guidance to those charged with the duty of recommending or imposing sentences in capital cases" (e.s.)) and Hitchcock v. Dugger, 107 S.Ct. 1821, 1824 (1987) ("We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport" with eighth amendment (e.s.)).

The fact that the trial judge must articulate the facts supporting a finding of the aggravating factor is of little consequence. Identical or virtually identical facts produce contrary results, as shown above.[54]

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[54] See also Mello, Florida's "Heinous, Atrocious or cruel" Aggravating Circumstance: Narrowing the class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L. Rev. 523 (1984).

The fact that this Court has frequently reiterated the Dixon definition is also of no consequence. The rules for application of the factor have altered radically and erratically since Proffitt.

Early on, it was held that "execution-style" murders are not covered by this factor. See, e.g., Cooper v. State, 336 So.2d 1133 (Fla. 1976). But in Vaught v. State, 410 So.2d 147 (Fla. 1982), this Court wrote at page 151:

> Appellant contends that the trial court erred in finding that the killing was especially heinous, atrocious, and cruel. He argues that since the shooting was spontaneous and caused nearly instantaneous death, it cannot come within the meaning of this aggravating circumstance, which, under the interpretations given by this Court, focuses on the inflicting of physical pain or mental anguish. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); White v. State, 403 So.2d 331 (Fla. 1981). In response the state correctly points out that the factor heinous, atrocious, or cruel has also been approved based on the fact that a killing was inflicted in a "cold and calculating" or "execution-style" fashion. See, e.g., Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981); Alvord v. State, 322 3234, 49 L.Ed.2d 1226 (1976); Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

(The disapproval of State v. Dixon in Vaught shows that State v.Dixon has not been uniformly followed, the assertion in Smalley notwithstanding.)

Similarly, early cases held that torturous intent was of paramount concern. State v. Dixon contemplates a torturous design ("designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering" of the victim), and the

1975 jury instructions speak of "utter indifference to, or enjoyment of, the suffering of others; pitiless." But Pope v. State,[55] 441 So.2d 1073, 1078 (Fla. 1983) changed everything: "the defendant's mindset [is never] at issue." This revolution was short-lived. In Miller v. State, 476 So.2d 172 (Fla. 1985), we read at page 178 (e.s.): "The intent and method employed by the wrongdoers is what needs to be examined."

Cases involving lingering death show similar swings. In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this factor was improperly found where the defendant allowed "his victim to languish without assistance or the ability to obtain assistance." See also Stone v. State, 378 So.2d 765, 772 (Fla. 1979) (distinguishing Swan v. State[56], where aggravating factor did not apply because brutally beaten victim lingered for a week before dying). But a radical shift had occurred by the time of Mason v. State, 438 So.2d 374 (Fla. 1983). There a finding of heinous, atrocious, or cruel was upheld where the decedent lingered for several minutes choking on her own blood and was "probably aware of her impending death." Id. 378-79. The law changed again in Mills v. State, 476 So.2d 172 (Fla. 1985), when this Court wrote at page 178: "whether

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[55] In Pope this Court admitted that the State v. Dixon definition had not been correctly applied in the past, stating that the State v. Dixon definition improperly made lack of remorse into a consideration for application of this aggravating circumstance. Id. 1077. This disapproval of the State v. Dixon definition was forgotten in Smalley.

[56] 322 So.2d 485 (Fla. 1975).

death is immediate or whether the victim lingers and suffers is pure fortuity."[57]

The heinous, atrocious or cruel aggravating circumstance violates the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. It does not rationally narrow the class of persons eligible for death, cannot be consistently applied, and is unconstitutionally vague.

3. Cold, calculated and premeditated

This circumstance was adopted in 1979 "to include execution-type killings as one of the enumerated aggravating circumstances." Senate Staff Analysis and Economic Impact Statement, SB 523 (May 9, 1979, revised). See also Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 936-37 (1989).

The due process rule of lenity, which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). It requires that a statute be strictly construed in favor of the defendant.

The constitutional principles of substantive due process and equal protection require that a provision of law be rationally related to its purpose. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). See also Moore v. City of East Cleveland,

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[57] As Justice Boyd's concurring opinion in Mills points out, the Mills holding on this aggravating circumstance cannot be squared with prior case law.

431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). This principle applies to criminal enactments. See State v. Walker, 461 So.2d 108 (Fla. 1984). Thus a criminal statute "must bear a reasonable relationship to the legislative objective and must not be arbitrary." Potts v. State, 526 So.2d 104 (Fla. 4th DCA 1987), aff'd., State v. Potts, 526 So.2d 63 (Fla. 1988).

An aggravating circumstance violates the eighth amendment where it does not channel and limit the sentencer's discretion in imposing the death penalty. See, e.g., Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988).

The instant circumstance violates these constitutional principles. It has not been strictly construed to conform to its legislative purpose. The standard construction is that it "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." E.g. McCray v. State, 416 So.2d 804, 807 (Fla. 1982). The qualifier "ordinarily" saps the circumstance of power to narrow the class of death eligible persons, and permits application to situations far removed from the intent of the Legislature. It has been applied in ways which make it virtually synonymous with simple premeditation. See Herring v. State, 446 So.2d 1049 (Fla. 1984). It has not been strictly construed. It fails to genuinely narrow the class of persons eligible for the death penalty. It is not rationally related to its purpose. Hence, it is unconstitutional.

4. Prior violent felony

As already noted, this circumstance has been broadly construed in violation of the rule of lenity. Further, construction has permitted juvenile adjudications of delinquency to satisfy this aggravating circumstance contrary to the usual construction of "conviction" as not including juvenile adjudications. See Campbell v. State, 15 F.L.W. S342, S343 (Fla. June 14, 1990). Due to such a construction, the silence of the statute is used against the defense rather than the state. This manner of statutory construction is contrary to the Due Process and Cruel and Unusual Punishment Clauses.

CONCLUSION

Based on the foregoing arguments, this Court should vacate Appellant's convictions, and vacate or reduce his sentences, and remand this cause for a new trial or grant other relief as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to GISELLE D. LYLEN, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2d Avneue, Suite N921, Miami, Florida 33128 by U.S. Mail this 23 day of July, 1990.

Jeffrey E. Anderson
of counsel