IN THE SUPREME COURT OF FLORIDA

ANTONIO M. CARTER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. **71,714**

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

ANTONIO M. CARTER, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 71,714

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On May 14, 1986, the Spring Term Grand Jury in and for Volusia County, Florida, returned a two count indictment charging that ANTONIO MICHAEL CARTER, the Appellant, committed murder in the first degree resulting in the death of Rohit Patel and Frederick G. Haberle. (R285-286)

During Carter's first appearance on May 14, 1986, Carter profanely refused the court's offer of a lawyer and announced that he intended to represent himself. (R289-286)

On June 11, the Office of the Public Defender, Seventh Judicial Circuit, filed a motion to withdraw citing an irreconcilable conflict of interest. Defense counsel requested that a special assistant public defender be appointed to represent Carter. (R287) On June 25, 1986, defense counsel filed a separate motion to appoint a special public defender pursuant to Section 27.53(3), Florida Statutes (1985). (R288) On July 14,

1986, defense counsel moved for a continuance pending a ruling on the motion to withdraw. (R297) Defense counsel also waived Carter's right to a speedy trial. (R297) Following hearing on the motion to withdraw, the trial court denied the motion and urged defense counsel to renew his efforts to communicate with Carter. The trial court suggested that if those efforts failed, defense counsel could refile his motion to withdraw. (R299,384-395)

On July 14, 1986, defense counsel filed a demand for disclosure. (R298)

On July 21, 1986, the state filed an answer to Carter's demand for discovery and also demanded notice **of** Carter's intention to claim an alibi. (R300)

On October 29, 1986, Carter moved for a continu nce pending receipt of a report following Carter's psychological examination. The trial court granted the motion. (R301) On June 3, 1987, the trial court heard testimony and argument on the issue of Carter's competency to stand trial. (R404-514) On June 8, 1987, the trial court rendered an order finding Carter competent to stand trial. (R302) The trial court denied Appellant's request for further observation as to this issue. (R509-510)

On August 28, 1987, the trial court rendered an order granting Carter ten days in which to file a Notice of Intent to Rely on the Defense of Insanity pursuant to Rule 3.126 of the Florida Rules of Criminal Procedure. (R304)

On November 9, 1987, the case proceeded to a jury trial before the Honorable S. James Foxman, Seventh Judicial Circuit,

in and for Volusia County, Florida. A jury was selected on November 9 and 10, 1987. (R516-761)

During the testimony of Dr. Botting, the trial court overruled defense counsel's objection grounded on the contention that the state was leading the witness. (R87-88) The trial court also overruled defense counsel's objection to a question propounded to Indu Patel. (R117)

Following the presentation of the state's case, defense counsel moved for a judgment of acquittal arguing that the state presented insufficient evidence that Carter was engaged in the act of robbery. Specifically, defense counsel contended that the state offered no evidence that Carter was the individual holding the gun during the confrontation, and that the state presented no evidence concerning the amount of money contained in the register at the time of the shootings. (R195-196) After hearing argument, the trial court denied the motion. (R196-199) Carter presented no evidence at the guilt phase, but did renew his motion for judgment of acquittal, which the trial court denied. (R210-211)

The trial court granted Carter's special jury instruction concerning circumstantial evidence. (R202)

Following deliberations, the jury returned with verdicts of guilty as charged of murder in the first degree, specifically premeditated murder and felony murder of Rohit Patel. The jury found Carter guilty as charged of the first-degree felony murder of Frederick G. Haberle. (R237-242,351-352) The trial court adjudicated Carter guilty of both offenses. (R242-243)

The trial court conducted a penalty phase in this cause on November 16, 1987. (R245) The state presented one additional witness at the penalty phase. (R251-253) The defense presented the testimony of Carter's first cousin. (R254-256)

During the charge conference at the penalty phase, defense counsel objected to the trial court's instruction that parole status supported a finding that Carter was under sentence of imprisonment at the time of the offense. (R259-260,272-273)

At the charge conference, the state revealed that it had rejected Carter's offer to plead guilty in exchange for a non-binding recommendation from the state that the trial court sentence Carter to two consecutive life terms with the applicable 25 year mandatory minimum sentence. The state rejected Carter's offer after conferring with Mrs. Patel and Mrs. Haberle. (R262-264)

Following deliberation, the jury returned with a recommendation that Carter be sentenced to life imprisonment for the murder of Haberle. The jury recommended that Carter be put to death for the murder of Patel. (R273-274,356-357) The trial court followed both recommendations and sentenced Carter to life imprisonment with a 25 year mandatory minimum as to Count 11. The trial court sentenced Antonio Carter to be executed as to Count I. (R280-282,358-364) The trial court entered written findings of fact in support of the death penalty. (R358-360) The trial court found that three aggravating circumstances applied to the case. The court found that:

(1) the crime was committed by a person under sentence of imprisonment; (2) that Carter was previously convicted of another

capital felony and a felony involving the use or threat of violence; and (3) the crime was committed during the commission of a robbery. In mitigation, the trial court found that Antonio Carter suffered from a deprived childhood. (R358-359)

On December 23, 1987, the trial court denied Carter's motion for new trial which was filed on December 23, 1987. (R365-366) On that same date, Appellant filed a notice of appeal. (R367) Carter filed an amended notice of appeal on January 13, 1988. (R377) The Fifth District Court of Appeal rendered an order transferring this cause to this Court on January 13, 1988. (R376) This brief follows.

STATEMENT OF THE FACTS

Incompetency

In determining Carter's competency to stand trial, the trial court considered the reports and testimony of four mental health experts. (R404-514,799-820) Doctors Mhatre, Davis and Barnard concluded that Antonio Carter was competent to stand trial and that he did not meet the criteria for involuntary hospitalization. Doctor Krop was of the opinion that Antonio Carter was incompetent to stand trial and concluded that he did meet the criteria for involuntary hospitalization. (R428) When asked, all of the expert witnesses (Doctor Davis was not asked) agreed that the amount of data gathered was somewhat lacking. The three doctors agreed that a short period of hospitalization would be extremely helpful in determining whether or not Antonio Carter was attempting to act mentally ill or whether he was in fact mentally ill.

Doctor Harry Krop examined Antonio Carter on two occasions. On one occasion, Carter's defense counsel was present. Krop's examination included psychological testing. (R425) Krop determined that Carter exhibited significant thought disorders manifested by extreme hostility, uncooperativeness, and irrationality. (R428) Carter's hostility, suspicion and irrationality increased when his defense attorney arrived. (R428-429) Krop concluded that Carter had a I.Q. of 73 placing him in the lowest 2½ percent of the general population. (R429) Krop classified Carter as borderline mentally retarded. Krop concluded that Carter was not malingering based, in part, on his test

scores. (R430-431) Krop had difficulty diagnosing Carter due to his uncooperative nature and his denial of symptoms such as hallucinations and delusions. (R432-433) Krop concluded that Carter was incompetent to stand trial primarily due to his difficulty in cooperating with his defense attorney. (R463-470) Krop concluded that Carter did meet the criteria for involuntary hospitalization. (R471-472,800-803)

Doctor Barnard also had difficulty examining Carter due to his uncooperative nature. Barnard concluded that Carter was competent to stand trial and assist in his defense. (R486-491) Barnard admitted that his opinion as to Carter's ability to relate to his attorney was based upon Carter's interaction with Doctor Barnard during the examination. (R491) Doctor Barnard never observed Carter interact with his attorney. Barnard concluded that Carter suffered from a personality disorder, although Barnard remained uncertain about this opinion as it was based on insufficient information. (R492-493) Although there was a possibility Carter suffered from a mental disorder, Barnard saw no conclusive evidence of it during the examination. Barnard also concluded that Carter was retarded. (R495)

Carter did report auditory and visual hallucinations to Doctor Barnard. (R493) Carter told Barnard that he grabbed a pistol on the morning of the offense because he was "possessed." (R817) Carter admitted to being under the influence of a voice which told him what he was going to do that day. (R817) Carter told Barnard that he shot the clerk during the robbery when the man froze. (R817) "Something told me to fire the pistol.

Something had control of me. I ain't gonna just walk in there and fire a gun.'' (R818)

Doctor Mhatre also concluded that Carter was competent to stand trial and further opined that Carter was malingering in terms of his sanity. Mhatre admitted that he could not conclusively determine Carter's sanity due to his uncooperative behavior. (R410) Mhatre agreed that Carter was mentally retarded. (R412) Mhatre did concede that Carter's retardation probably would affect his capacity to challenge state witnesses. (R415) Doctor Mhatre agreed with Doctor Barnard that the best way to rule out Carter's malingering would be through a relatively short period of hospitalization. (R418-419)

Doctor Davis concluded that Carter suffered from a personality disorder of the soci pathic type. Davis onclud d that Carter was competent to stand trial and did not meet the criteria for involuntary hospitalization. (R474-480,485) Davis concluded that Carter was simply refusing to cooperate with the examination for his own reasons. Davis did not believe that Carter was malingering, but rather thought that Carter simply chose to obstruct the state's attempts to bring him to trial. (R480-485)

After hearing testimony and argument on the issue and after considering the psychiatric reports, the trial court found Antonio Carter competent to stand trial. (R510) The trial court denied defense counsel's request to hospitalize Carter in order to obtain sufficient data to conclusively determine whether Carter was mentally ill or was simply malingering. (R508-510)

Guilt Phase

On April 15, 1986, Peter Hadburg, a route salesman for Central Florida Distributing Company stopped at Nil's Grocery on Madison Avenue in Daytona Beach, Florida. Hadburg finished conducting business with Roy Patel, the manager of the grocery store. Hadburg headed back to his beer truck and encountered Fred Haberle in front of the store. Hadburg knew Haberle, a wine salesman, since they frequently covered the same territory in plying their respective trades. Hadburg and Haberle engaged in brief conversation outside the store. The pair usually shared a social soft drink at the store every Tuesday, but on this particular date, Hadburg was running ahead of schedule and wanted to finish his route early. The two discussed meeting later at a different locale. (R109-113) As they talked, a black male walked between them and, in the process, gave the pair "a real bitter glare and stared us down and looked at us weird, strange." (R112) Hadburg was unable to identify the black male or to give a more detailed description. (R112) Hadberg got into his beer truck and pulled out of the store's parking lot as Haberle walked into the store. As Hadburg drove up the street he heard what sounded like three or four shots being fired. (R113)

Leland Perry, a trash collector for the City of Daytona Beach, parked at Nil's Grocery about noon. Perry and his driver stopped at the store every day to get a soda to drink with lunch. (R122,127-128) Perry noticed the regular wine salesman entering the store as they parked. (R122-124) Perry got out of the garbage truck and heard what sounded like a shot. (R123) He

looked underneath the truck thinking that they might have rolled over a bottle, but saw nothing. (R123) When Perry got to the front door of the store, he saw the wine salesman lying on the floor. (R123) Perry looked at the man and wondered why he fell. (R124) Perry then raised his head and looked into the store where, approximately five feet from him, he saw a man with a blue steel revolver in his right hand. At trial, Perry identified Antonio Carter, the Appellant, as that man. (R124-125) The assailant ordered Perry to, "Back up Pop." Perry stared into the barrel of the gun as he complied. (R124-126) Once outside Perry got into the garbage truck and told the driver, "Let's go!" (R126) As they drove away, Perry noticed a police car driving toward the grocery store. (R126) Police tracked Perry down two days later and showed him a photographic line-up. (R133-135) He selected Carter's photograph as being the man who ordered him out of the store two days earlier. (R126-127,135-138,322-323)

Indu Patel, Rohit "Roy" Patel's wife, was upstairs in the kitchen above the store. About noon, she heard a loud noise downstairs. She looked out of the window overlooking the road in front of the store but saw nothing amiss. (R114-116) The noise continued so she went downstairs to investigate. (R116) Through a screen door she saw a man pointing a gun at her husband. They both stood behind the store's counter. Patel saw her husband open the register where she had placed approximately $80 the previous night. (R116-118) She returned upstairs and proceeded to call the police. (R117) At the trial, Indu Patel was unable to identify her husband's assailant. (R119-120)

Daytona Beach Policeman Michael G. Lester was the first officer to enter the store following the crime. Lester arrived shortly after 11:00 a.m. (R17) Someone in the crowd outside the store shouted to Lester, "They're inside!'' (R17) Lester entered the store cautiously but observed no movement inside. (R17-18) He found a white male lying on his left side directly in front of the store's counter. (R18) Lester noticed a gunshot wound to the right cheek of the victim. (R18) Lester checked but detected no vital signs. (R18) Lester later found Patel's body lying face up across a stool behind the counter. (R18) Lester determined that Patel was also dead. (R19) The open cash drawer in the register contained only change and food stamps. (R38)

An autopsy revealed that the cause of death for Haberle was a solitary gunshot wound to the head. (R58-62) Haberle also sustained a gunshot wound to the left side of his abdomen. (R62-63) Roy Patel died as a result of multiple gunshot wounds to the chest and head. (R78-83) The medical examiner estimated the survival time of both men to be extremely short after the infliction of the wounds. The doctor opined that their time of consciousness may have been even shorter than the time of survival. (R71-72,88-89,96-97,100-106)

Subsequent investigation revealed a spent projectile in a cardboard box found in a shopping cart parked in the first aisle of the store. The cart was located at the other end of the store away from the counter and the bodies. (R160-161)

Officer Steven R. Thomas of the Daytona Beach Police participated in the investigation on April 15, 1986. (R142)

Thomas found a firearm that appeared to have been thrown behind a spanish bayonet bush growing directly along the wall of the Pinehaven Project Apartments. Thomas found the gun next to the row of apartments containing units 951 through 956. (R142-143) The spot where Thomas found the gun was approximately three to five blocks (one-half to a mile) from Nil's grocery store. Thomas secured the Colt .38 revolver, serial number A52590. (R145-146)

On April 17, 1986, Jenny Ahern, a crime analyst at the Orlando Regional Crime lab, examined the gun for latent fingerprints. (R168-171) Using a superglue method, Ahern eventually found a single latent fingerprint on the cylinder of the gun. This print matched the print of Carter's left middle finger. (R172-177) Ahern was unable to determine how long the print had been present on the gun. (R177)

Charles Myers, a forensic ballistics expert, also examined the gun found in the bush. (R180-183) The revolver contained three live rounds and three fired cartridge cases. (R187) Myers also examined five projectiles recovered from the bodies of Patel and Haberle during the autopsies. (R184-185) Myers compared these bullets with ones that he test-fired from the Colt .38. All five of the projectiles displayed rifling characteristics similar to those found in bullets fired by the Colt .38 found in the bush. (R189) Three of the bullets displayed insufficient individual characteristics to determine if they had been fired from that particular weapon. (R189) Myers

opined that the other two bullets had been fired from the gun found by Officer Thomas. (R189)

Penalty Phase

At the penalty phase, the state presented only one witness, Ed Seltzer, a parole and probation officer with the Florida Department of Corrections. (R251-253) Seltzer testified that, on the day of the offense, Carter was on parole for robbery and use of a firearm in the commission of a robbery. (R251-253,326-327)

Carter presented the testimony of Deborah Cox, his first cousin. Deborah and Antonio grew up together. As a result of Carter's mother's placements in various mental institutions, Antonio bounced around from one family member to the next during his childhood. Antonio resided in various foster homes as well as detention centers between stints with the occasional willing relative. Deborah's mother was a sister of Carter's mother and therefore kept him frequently. Even when Antonio did not live with Deborah, they saw each other anyway. (R254)

Antonio Carter grew up without the benefit of even a reasonable amount of nurturing and affection from his parents. (R254-255) He lived in at least two different foster homes during his childhood. He was removed from one in Deland after approximately one year due to some unspoken problems. (R255)

Antonio Carter was a good-hearted youngster. (R256) It was after he was paroled that Deborah Cox noticed a change in Antonio. (R256) Cox testified that Antonio had an excellent

relationship with her own children. He played with them and had a close bond with them. (R256) Cox testified that Antonio Carter's life was worth saving. She opined that he had led a hard life. She also opined that Antonio was not in his right mind at the time of the offense. (R256)

SUMMARY OF ARGUMENTS

POINT I: Appellant contends that the trial court allowed the state to try Antonio Carter without a sufficient inquiry into Carter's competence to stand trial. Although three psychiatrists felt that Carter was competent, one psychologist opined that he was incompetent. The psychologist's examination was the only one to include observation of Carter interacting with his attorney. The psychiatrists who concluded that Carter was competent had insufficient data to reach that conclusion. At the very least, the trial court should have granted Appellant's request that Carter be hospitalized in order to rule out the psychiatrists' belief that Carter was malingering.

POINT 11: The trial court completely ignored substantial and competent evidence that Carter suffered from a mental defect at the time of the offense. In addition to testimony presented at the penalty phase that Carter was not in his "right mind" at the time of the offense, the trial court completely ignored the evidence and testimony presented at the competency hearing. All of the mental health professionals agreed that Carter suffered at the very least from a personality disorder. Most agreed that he was retarded. In ignoring this evidence, the trial court failed to follow the standards set forth by this Court in Rogers v. State, 511 So.2d 526 (Fla. 1987).

POINT 111: In light of the testimony presented at the guilt phase that Carter acted strangely at the scene of the crime and

testimony at the penalty phase that Carter was not in his "right mind" at the time of the offense, the trial court should have instructed the jury on the two statutory mitigating circumstances dealing with the defendant's mental state at the time of the offense. By omitting these critical instructions, the trial court committed fundamental error in failing to instruct the jury on the applicable law of the case. Floyd v. State, 497 So.2d 1211 (Fla. 1986).

POINT IV: Appellant contends that the facts of this offense do not constitute grounds to impose a death sentence. The imposition of the death penalty in this case is disproportionate when compared to other cases reviewed by this Court. The crime was the result of a robbery "gone bad." This fact coupled with Carter's mental problems support the imposition of a life sentence.

POINT V: Appellant contends that the prosecutor's primary consideration in seeking the death penalty in this case arose as a result of the wishes of the victims' families. In this respect, Carter's death sentence is based, at least in part, on improper consideration of victim impact recently condemned by the United States Supreme Court in Booth v. Maryland, 482 U.S. __, 107 S.Ct. __, 96 L.Ed.2d 440 (1987).

POINT VI: Appellant takes issue with the trial court's instruction at the penalty phase that parole status constitutes being under sentence of imprisonment. Appellant contends that this

results in a directed verdict as to this particular aggravating circumstance or, at the very least, to a judicial comment on the evidence. Appellant makes a similar attack on the instruction stating that first-degree murder is a capital felony and that robbery is a felony involving the use or threat of violence to another person. Appellant recognizes that a similar attack on this latter instruction was rejected by this Court in Johnson v. State, 442 So.2d 193 (Fla. 1983).

POINT VII: Recognizing the recent trend in this Court's opinions regarding absence of a defendant during portions of the trial, Appellant nevertheless urges this Court to grant a new trial where defense counsel waived Carter's presence. This waiver occurred in Carter's presence. Carter was subsequently absent when the trial judge admonished the venire about media exposure before sending them home for the day. Appellant maintains that a defendant cannot voluntarily waive his presence at any stage of a capital trial, unless that waiver is personal, voluntary, intelligent, and of record.

POINT VIII: Recognizing that this Court has ruled unfavorably on this issue in Combs v. State, 13 FLW 142 (Fla. Feb. 18, 1988), Appellant nevertheless urges that the Florida Standard Jury Instructions at the penalty phase denigrates the importance of the jury recommendation contrary to Caldwell v. Mississippi, 472 U.S. 320 (1985).

POINT IX: Appellant contends that the trial court obviously gave undue weight to the jury's recommendation of death. This resulted in an unconstitutional skewing of the sentencing process.

POINT X: Although this Court has previously rejected numerous attacks to the constitutionality of the death penalty in Florida Appellant urges reconsideration particularly in light of the evolving body of case law which in some cases has served to invalidate the very basic cases on which the death penalty was upheld in the state of Florida.

POINT I

APPELLANT'S DUE PROCESS RIGHT NOT TO BE TRIED WHILE INCOMPETENT WAS VIOLATED BY THE TRIAL COURT'S RULING FINDING ANTONIO CARTER TO BE COMPETENT AND DENYING DEFENSE COUNSEL'S REQUEST TO ALLOW THE GATHERING OF MORE DATA ON CARTER'S MENTAL STATUS.

Rule 3.210(a), Florida Rules of Criminal Procedure, provides:

> A person accused of a crime who is mentally incompetent to stand trial shall not be proceeded against while he is incompetent.

Rule 3.211(a)(1) sets forth some considerations in determining the issue of competence to stand trial. These include, inter alia, a defendant's capacity to disclose to his attorney pertinent facts surrounding the offense; his ability to relate to his attorney; and his ability to assist his attorney in planning his defense. The constitutionally mandated standard for determining an individual's competency, is whether the accused has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402 (1960); Drope v. Missouri, 420 U.S. 162 (1975); and, Reese v. Wainwright, 600 F.2d 1085 (5th Cir. 1979).

Florida courts have taken the view that in a competency determination, the trial judge is the finder of fact. A trial court's decision on this issue will not be reversed on appeal unless an abuse of the exercise of his discretion appears.

Fowler v. State, 255 So.2d 513 (Fla. 1971) and King v. State, 387 So.2d 463 (Fla. 1st DCA 1980).

Appellant concedes that a mere numerical tabulation of the mental health experts who testified during the competency hearing tends to lead one to the conclusion that Antonio Carter was competent to stand trial. (R404-510,799-820) However, the ultimate determination of competence is within the discretion of the trial judge. This Court has stressed that psychiatric reports are "merely advisory to the court, which itself retains the responsibility of decision." Block v. State, 69 So.2d 344, 346 (Fla. 1954)(quoting 23 C.J.S. Criminal Law, §940, at 239). That determination, of course, is subject to review by this Court upon the entire record.

> . . . the question of whether or not [a]ppellant suffered from a clinically recognized disorder or psychosis is a question of fact, reviewed by the usual clearly erroneous standard. If we decide that the evidence requires a finding of that mental disorder, then the further decision as to competency or incompetency is a matter upon which the appellate court assumes a greater decisional role and takes a "hard look" at the record. (citation omitted)

Lokos v. Capps, 625 F.2d 1258, 1267 (5th Cir. 1980).

The tendency of judges to defer to the conclusions of psychiatrists regarding competency, as well as other issues, is well-documented. See, e.g., H. Steadman, Beating a Rap? Defendants Found Incompetent to Stand Trial, 56 (1979). A trial court's deference to "expert" opinion is troublesome, in view of a variety of factors making psychiatric judgments much less reliable and less valid than is commonly thought. See J. Ziskin,

Coping With Psychiatric and Psycholoqical Testimony, (3d ed. 1981); Ennis & Litwack, Psychiatry and the Presumption of Expertise; Flipping Coins in the Courtroom, 62 Calif. L.Rev. 693 (1974).

In the case at bar, the trial court considered the reports and testimony of four mental health experts. (R404-514,799-820) Doctors Mhatre, Davis and Barnard concluded that Antonio Carter was competent to stand trial and that he did not meet the criteria for involuntary hospitalization. Doctor Krop stood alone in his opinion that Antonio Carter was incompetent to stand trial and concluded that he did meet the criteria for involuntary hospitalization. (R428) Without comment, the trial court summarily found Antonio Carter to be competent to stand trial. (R302,510) An analysis of the quality and bases of the expert's opinions in the instant case necessarily results in a conclusion that the trial court abused its discretion in declaring Carter competent to stand trial. At the very least, the trial court should have granted defense counsel's request for further observation in order to gather the additional data that most of the experts agreed was necessary. Appellant contends that the trial court's inquiry was insufficiently comprehensive to guarantee his due process right to a fair trial, and that the trial court abrogated its affirmative duty to further inquire into the competence question raised by Appellant's motion and the psychiatric reports.

The first psychiatric report in the record on appeal is that of Doctor Harry Krop, a clinical psychologist accepted as an

expert in the field of forensic psychology. (R423-425,800-803) Doctor Krop examined Carter on August 12, 1986. This three and one-half hour examination included psychological testing. (R425) Krop reviewed the reports of Doctors Davis and Mhatre and also talked to Doctor Barnard about his examination. (R425-426) It was at this point that Doctor Krop requested to see Carter again, as Krop found the reports of the other doctors to be very inconsistent. (R426) For this reason as well as the fact that Carter's defense counsel kept insisting that he was still having extreme difficulty relating to Carter finding him to be resistant, uncooperative and hostile. (R426) These reasons compelled a second meeting with Carter on April 13, 1987 for a period of three hours. (R426-427)

During both examinations, Krop found that Carter exhibited significant thought disorders manifested by extreme hostility, uncooperativeness, and irrationality. (R428) Carter was incoherent on a number of occasions. During the second meeting, Krop found Carter to be slightly less hostile until his defense counsel arrived. It was then that Krop noted that Carter's hostility, suspicion and irrationality increased. (R428-429) Krop administered the Wexler Adult Intelligence Scale. This was done to rule out malingering and to get an I.Q. estimate. Krop found that Carter had an I.Q. of 73 placing him in the lowest 2½ percent of the general population. (R429)

Krop opined that Carter was not malingering. This was based in part on the fact that Carter was able to respond fairly

well in certain structured situations. (R429) Additionally, Carter's scores on the tests were consistent. Generally, a malingerer has sporadic scores or consistently, extremely low scores. (R430) Krop found no indication that Carter was trying to give false information. (R431) Krop was aware of the reports of the other doctors indicating their opinion that Carter was malingering. These conclusions were based on the observation that Carter talked freely of other matters but resisted any attempts to discuss his case. (R431) It was Doctor Krop's experience that malingerers are very consistent in their attempt to "look bad." (R431) In contrast, although his legal plight might be enhanced by a finding of incompetence, Antonio Carter remained adamant in not wanting to be examined by mental health professionals. He became extremely angry with his attorney for even considering an insanity defense. Carter also expressed his opposition to any transfer to a psychiatric facility. (R431-432)

It was Krop's opinion that Carter suffered from a mental illness. This illness was difficult to diagnose in light of Carter's uncooperative nature and his denial of symptoms such as hallucinations and delusions. (R432-433) Doctor Krop was certain that Carter suffered from some type of thought disorder. Krop also concluded that Carter suffered from borderline mental retardation. Krop's most accurate diagnosis based upon the available information was that Carter suffered from an atypical paranoid disorder. Krop's secondary diagnosis called for ruling

out malingering. This could be done by placing Carter in a setting for prolonged observation. (R433)

In dealing specifically with Carter's incomp tency to stand trial, Krop's major concerns were: 1) Carter's inability to relate to his attorney; (2) his ability to make rational choices regarding plea negotiations; (3) his capacity to challenge prosecution witnesses; and, (4) his ability to manifest appropriate courtroom behavior. (R434) Krop concluded that Carter appreciated the charges against him as well as the possible penalty. Carter understood the adversary nature of the legal process although he did harbor some suspicion and expressed lack of trust in his attorney. (R463)

Krop believed that Carter would have extreme difficulty disclosi g pertinent facts surrounding the alleged offense to his attorney. Carter's trial attorney supported Krop's opinion in that the attorney reported Carter to be belligerent and uncooperative. (R463-464) Carter probably had the intellectual capacity to explain his involvement in the robbery, but his suspicion of his defense counsel made that difficult. (R464-465) Krop concluded that Carter's ability to relate to his attorney was significantly impaired. Krop did not believe that Carter had the ability to assist his attorney in the preparation of his defense. (R465-468) Krop concluded that Carter's motivation to help himself in the legal process was lacking. As evidence of this, Krop pointed out that Carter did not cooperate with him, a defense psychologist. (R469-470) Krop concluded that Carter's mental illness fell within the parameters of both a psychosis and a behavioral

disorder. Krop thought that Carter might be psychotic. He certainly had no doubt that Carter met the criteria for involuntary hospitalization and that he was mentally ill and posed a threat to himself or others. (R471-472, 800-803)

Doctor Robert Davis, a psychiatrist, also examined Carter twice. Davis diagnosed Carter as suffering from a personality disorder of the sociopathic type. This disorder is characterized as a genetic disorder highlighted by a lack of conscience; difficulty in feeling guilt; an inability to learn from punishment or experience; pleasure-oriented behavior; and a very short temper. (R474-480) Davis concluded that Carter was competent to stand trial and did not meet the criteria for involuntary hospitalization. (R477-479,485)

Davis concluded that Carter was simply refusing to cooperate with the evaluation for reasons of his own. Davis did not think that Carter was malingering, rather Davis was of the opinion that Carter simply did not choose to discuss certain topics. Davis did not know Carter's reasons for such behavior. However, Davis chose to hazard a guess that Carter's non-response arose from Carter's belief that it was not to his advantage to stand trial. (R480-485)

Appellant invites this Court to read both written reports submitted by Doctor Davis and to read his testimony at the competency hearing. Appellant is of the opinion that it is abundantly clear that Doctor Davis simply does not like Antonio Carter. The tone of Doctor Davis' reports is unlike the reports of any of the other doctors. Appellant submits that Doctor Davis

is quick to label Carter's behavior as reprehensible rather than attributable to any type of mental illness. As only one example of Doctor Davis' tone:

> His judgment, I feel, is that of a sociopathic personality. I feel he has no guilt. I feel he deliberately lies, and that he has no intention of submitting to any type of examination. I feel that he is well aware of the consequences if he goes to trial, and he is doing everything in his power to avoid it. **(R815)**

In light of Doctor Davis' unprofessional and personal feelings about Antonio Carter as well as the lack of depth in his examinations, Appellant submits that Davis' opinion in entitled to little if any weight. Appellant submits that Doctor Davis' bias removes him from his position as one of several "neutral experts working for the Court," Parkin v. State, **238** So.2d **817**, **821** (Fla. **1970)**, and casts doubt on his conclusions.

George W. Barnard, a psychiatrist, attempted to examine Antonio Carter on October **29**, **1986**, pursuant to a court order. That attempt was unsuccessful since Carter refused to participate. **(R486-489)** On May **29**, **1987**, Doctor Barnard succeeded in evaluating Carter and concluded that he was competent to stand trial at that time. Barnard concluded that Carter appreciated the nature of the charges, the possible penalty, and the adversary nature of the legal process. **(R490)** Barnard concluded that Carter had the capacity to disclose pertinent facts to his attorney in the course of his defense. **(R490-491)** However, Barnard waffled somewhat on Carter's ability to relate to his attorney. Barnard concluded that Carter probably had that ability, but this

conclusion was based solely on how Carter related to Barnard. (R491) Barnard also concluded that Carter probably had the ability to exhibit appropriate courtroom behavior if Carter's behavior during the evaluation carried over to trial. (R491-492) Barnard was also concerned about Carter's capacity to cope with the stress of pre-trial incarceration. Carter had a history of considerable difficulty coping in jail. (R492)

Barnard concluded that Carter suffered from a personality disorder, although Barnard remained uncertain about this opinion based upon insufficient information. (R492-493) Although there was a possibility Carter suffered from a mental disorder, Barnard saw no conclusive evidence 'of it during the examination. Carter reported to Barnard that he hallucinated in the past (both auditory and visual). (R493) Barnard concluded that Carter was in the dull-normal range of intelligence. (R495)

Doctor Mhatre, also a psychiatrist examined Carter pursuant to a court order in March of 1987. (R407-410) Mhatre concluded that Carter was competent to stand trial and further opined that Carter was malingering in terms of his sanity. However, Mhatre admitted that he could not conclusively determine Carter's sanity due to Carter's uncooperative behavior. (R410) Mhatre testified that Carter had an I.Q. of 73. Mhatre thought that Carter probably would be classified as suffering from borderline mental retardation. (R412) Mhatre did not believe that Carter was sick enough to require hospitalization. (R410) Mhatre thought that Carter's retardation probably would affect his capacity to challenge state witnesses. (R415)

The main thrust of Mhatre's testimony was that he was of the opinion that Carter was malingering. Mhatre based this on the fact that Carter gave different responses to similar questions on Mhatre's second examination. **(R419-420)** Mhatre considered this evidence of deception on Carter's part. Mhatre concluded that Carter was attempting to defend himself through obstruction and passive-aggressive behavior. **(R417)** Mhatre admitted that the best way to determine if Carter was actually malingering was to hospitalize him where he could be observed on a continuing basis. Mhatre pointed out that people have difficulty "acting" mentally ill over a long period of time. Mhatre concluded that the question of Carter's malingering could be resolved during a hospitalization lasting a couple of weeks. Due to Carter's low intelligence, any possible deception on Carter's part would be discernible within a relatively short period of time. **(R418-419)**

Making its decision, the trial court was faced with three conclusions that Carter was competent to stand trial counterbalanced by Doctor's Krop's opinion that Carter was incompetent. Doctor Davis was the only witness who remained absolutely adament about his degree of certainty on this issue. However, even Doctor Davis diagnosed Carter as suffering from a personality disorder. **(R479-480)** Appellant has already set forth his argument that Doctor Davis' opinion is not entitled to any weight. Although Doctor Mhatre concluded that Carter was competent to stand trial, Mhatre, like Davis, encountered great difficulty in obtaining Carter's cooperation during the examination. Doctor Mhatre disagreed with Doctor Davis' assessment of

Carter's intelligence. Mhatre agreed with the other experts that Carter had an I.Q. of 73 resulting in a diagnosis of borderline mental retardation. (R412-415) Mhatre thought that Carter had the ability to communicate with his attorney, but might not choose to do so on a voluntary basis. (R411) Mhatre agreed that Carter's retardation would probably affect his capacity to challenge prosecution witnesses. (R415) Perhaps most importantly, Doctor Mhatre agreed that the best method of determining if Carter was actually malingering or, instead, suffered from a mental illness, was to hospitalize him for a two-week period where he could be observed on a continuing basis. (R418-419) Mhatre concluded that an answer to this question could be obtained within a couple of weeks.

Doctor Bernard, who also concluded that Carter was competent to stand trial, was also not certain that Carter could relate to his attorney. (R491) His conclusion that Carter could adequately relate was based on Carter's interaction with him during the examination.

It is on this issue that Doctor Krop's opinion becomes critical. Doctor Krop was the only doctor who saw Antonio Carter in a setting where Carter's attorney was present. During Krop's second examination, Carter was somewhat less hostile than during the initial encounter. (R428-429) This remained the case until Carter's defense counsel arrived, at which point Carter's hostility, suspicion and irrationality increased. (R428-429) Appellant submits that a defendant's ability and willingness to cooperate with his defense counsel is the crux of this issue. In

that Krop was the only witness who observed this critical interaction, Appellant submits that his opinion should be given great weight.

Doctor Barnard reached his conclusion as to competence in spite of the admitted shortage of available data. Doctor Barnard's testimony and written reports contain conflicting information. Doctor Barnard concluded that Carter exhibited no signs that he was suffering from hallucinations during the short period of the examination. However, Doctor Barnard included in his report information obtained from Carter that, at the time of the offense, Carter was "possessed" and under the influence of a voice telling him what to do. (R817) Carter told Barnard that "something told me to fire the pistol . . ." during the robbery. (R818) Barnard also agreed with Krop and Mhatre that Carter was retarded. (R828) Barnard also heard information from Carter that he suffered a severe blow to the head with a pipe while he was incarcerated in 1983. (R819) Carter also reported this injury to other examining experts.

In addition to the expert opinions and testimony considered by the court, there were incidents during this proceeding where Carter exhibited bizzare behavior. During Carter's first appearance hearing on May 14, 1986, he announced his intention to represent himself. Carter told the count judge at that hearing, "They told me Ray Cass was my Public Defender. And damn if he ain't come down here and told me he don't know me." (R294) When the county judge persisted in his attempt to ascertain whether Carter wanted a lawyer, Carter replied, "Hell, no.

I'm going to represent my mother-fucking self. . . I'll represent my mother-fucking self." (R294)

Prior to the commencement of the competency hearing, a news reporter took a photograph of Carter. Carter demanded identification from the man and angrily asked about the photographer's right to photograph him. (R452) Carter threatened to file a civil suit against the man as well as the state attorney, the court system, and his defense counsel. (R452) Carter's suit against his defense counsel would seek damages for placing Carter in a situation where he was forced to be examined by psychiatrists. (R452)

All of the experts who were asked, agreed that insufficient data existed to completely rule out malingering. The general consensus appeared to be that a brief hospitalization could conclusively resolve this issue. Defense counsel requested such a hospitalization and the trial court responded by summarily denying Appellant's motion to declare him incompetent to stand trial. Appellant submits that this constituted an abuse of discretion. The trial court had insufficient competent evidence to conclude that Antonio Carter was competent to stand trial. The trial court certainly abused its discretion in denying .defense counsel's request for the gathering of additional data on this issue. As a result, Antonio Carter's constitutional rights to due process of law, equal protection and a fair trial were violated. The resulting death sentence is constitutionally infirm. Amend. V, VI, VIII, and XIV, U.S. Const.

POINT II

ANTONIO CARTER'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM WHERE THE TRIAL COURT COMPLETELY FAILED TO CONSIDER SUBSTANTIAL, COMPETENT EVIDENCE THAT CARTER SUFFERED FROM A MENTAL DEFECT AT THE TIME OF THE OFFENSE.

At the competency hearing, the trial court heard the testimony of four experts qualified in the mental health field. The trial court also considered the written reports of these experts. All four witnesses agreed in their testimony and in their reports that Antonio Carter suffered from some form of mental deficiency. The experts differed only as to the degree of Carter's deficiency. (R404-506,800-820) Additionally, Carter's first cousin testified at the penalty phase that Carter was not in his "right mind" at the time of the offense. (R256) Furthermore, the trial court evidently forgot about the testimony of Peter Hadberg who saw Carter immediately before he committed the offense. Hadberg stated that a black male (obviously Carter) walked between the conversing Haberle and Hadberg and, in the process, gave the pair "a real bitter glare and stared us down and looked at us weird, strange." (R112) In spite of this overwhelming and unrefuted evidence that Antonio Carter suffered a mental deficiency, the trial court mysteriously ignored any mention of Carter's mental problems in the written findings of fact supporting the death penalty. (R358-360)

After finding three aggravating circumstances to be applicable, the trial court wrote of his consideration of the mitigating factors:

> As three aggravating circumstances were found to exist, the Court analyzed the evidence for possible mitigating circumstance[s]. In doing so the Court was well aware of the Florida Supreme Court's advice set forth in Rodgers (sic) vs. State, 511 So.2d 526 (FL. 1987) (specifically see Pages 534 and 534 (sic) in cited case). This Court found the following mitigating circumstance did exist:
>
> 1. The non-statutory factor of any other aspect of the Defendant's character or record, and any circumstance of the offense.
>
> Specifically the Court finds the Defendant suffered from a deprived childhood. This conclusion was based upon the testimony of the Defendant's first cousin, Deborah Cox. This testimony was considered and accepted by this Court. (R359)

The trial court concluded that the three aggravating circumstances completely outweighed the sole mitigating circumstance and imposed the death penalty. (R359-360)

It is clear from the trial court's written findings of fact that he completely overlooked the substantial and competent evidence in the record indicating that Antonio Carter had serious mental problems at the time of the offense that continued after his arrest. Despite the trial court's indication that his consideration of the mitigating evidence was done in compliance with this Court's decision in Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), the trial court simply ignored the evidence as to these valid mitigating circumstances. In reality, the trial court did not follow the dictates set forth in Rogers, supra. We simply cannot tell what consideration the trial court gave to the evidence of Carter's mental problems. Did the trial court forget about that portion of Deborah Cox's testimony? Did the trial

court find that portion of her testimony to be unbelieveable or was the trial court of the opinion that it had little if any weight? What about Peter Hadburg's testimony that Carter acted strangely immediately before the murders? **(R112)** The same questions can be asked of the trial court's consideration of the vast quantity of evidence presented at the competency hearing. Did the trial court think that it could ignore substantial, competent evidence of a valid mitigating circumstance, simply because that evidence was adduced at a pre-trial hearing rather than at the penalty phase? Appellant submits that a trial court's refusal to consider such overwhelming evidence simply because the jury did not hear that evidence can be deemed error of constitutional and fundamental magnitude.

Appellant wishes to emphasize that the situation in the case at bar is not similar to the one presented in e.g. Porter v. State, **429** So.2d **293** (Fla. **1983).** Porter argued that, although the trial judge considered mitigating evidence, the judge did not accord it the weight that Porter believed it deserved. See also Floyd v. State, **497** So.2d **1211** (Fla. **1986).** In the instant case, there is absolutely no indication that the trial court even considered the mitigating evidence that established Antonio Carter's mental problems. In light of this critical error of omission by the trial court, Antonio Carter's death sentence was unconstitutionally imposed. Amend. VIII and XIV, U.S. Const.

POINT III

CARTER'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM IN THAT THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE APPLICABLE LAW RELATING TO THE TWO MITIGATING CIRCUMSTANCES INVOLVING CARTER'S MENTAL STATUS AT THE TIME OF THE OFFENSE.

At the penalty phase, Deborah Cox, Antonio Carter's first cousin, testified about Carter's difficult childhood. (R253-256) The last portion of her testimony related to Carter's mental state at the time of the offense:

> Q. Is his life worth saving?
>
> A. I feel that it is because he had a hard life and the things that they say he done, I don't know whether he done them or not. I feel that he wasn't in his right mind. (R256) (emphasis added)

The state failed to refute Cox's testimony in any way, shape or form. (R256) Additionally, the state presented evidence at the guilt phase indicating that Antonio Carter acted oddly immediately prior to the offense. Peter Hadburg testified that Carter walked directly between two men conversing and gave the pair "a real bitter glare and stared us down and looked at us weird, strange." (R112)

The trial court informed the jury only of the "catch-all" mitigating circumstance:

> Any aspect of the defendant's character or record or any other circumstance of the offense. (R268)

Appellant concedes that defense counsel did not request any instruction as to Antonio Carter's mental state at the time of

the offense. However, Appellant contends that the trial court committed fundamental error in failing to adequately instruct the jury as to applicable mitigating circumstances, evidence of which the state presented at the guilt phase and the defense presented at the penalty phase.

Rule 3.390(a), Florida Rules of Criminal Procedure, states:

> The presiding judge shall charge the jury only upon the 1 w of the cas at the conclusion of argument of counsel . . .

The two mitigating circumstances applicable in the instant case were: (1) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, §921.141(6)(b); and, (2) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to requirements of law was substantially impaired, §921.141(6)(f). Due Process requires that the jury be instructed on all mitigating circumstances. Limiting instruction to those mitigating factors which the trial judge deems appropriate distorts the death penalty sentencing scheme:

> If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976). Evidence, however slight, did exist that warranted the instructions on the two mental mitigating circumstances. The record contains Deborah

Cox's unrefuted testimony that Antonio Carter was not in his "right mind" at the time of the offense. The State did not object to or attempt to dispute this testimony. During the guilt phase, the State presented testimony that Carter acted in a strange manner just prior to the shootings. (R112) It is clear that lay testimony is admissible on the issue of a person's mental condition. Hall v. State, 78 Fla. 420, 83 So.513 (1919) and Hixon v. State, 165 So.2d 436 (Fla. 2d DCA 1964).

Before the mitigating circumstances introductions in the Standard Jury Instructions, the following note appears:

> Give only those mitigating circumstances for which evidence has been presented.

Fla.Std.Jur.Inst. at 80. However, the trial court failed to properly follow these directions. Just as a defendant has the right to a theory of defense instruction which is supported by any evidence, e.g., Bryant v. State, 412 So.2d 347 (Fla. 1982), he is also entitled to an instruction on mitigating circumstances supported by any evidence. The trial judge cannot substitute his opinion for that of the jury and deprive the defendant of the jury's consideration of the issue by denying jury instructions.

Although the jury was not aware of the plethora of evidence adduced at the competency hearing regarding Carter's mental problems, the trial judge was aware of this evidence. In light of his own knowledge, the trial court certainly should not have so quickly disregarded Deborah Cox's testimony as well as Peter Hadburg's testimony that Carter was not in his "right mind" during the commission of the offense.

This Court faced an identical situation in Floyd v. State, 497 So.2d 1211 (Fla. 1986). Floyd did not specifically request any instructions as to mitigating evidence, in spite of the fact that certain non-statutory mitigating evidence was presented at the penalty phase. The defense attorney also failed to articulate an objection to the trial court's omission of pertinent instructions. Nevertheless, this Court held that the trial judge's failure to adequately instruct the jury on mitigating circumstances required a new penalty phase. Floyd, supra at 1215. This Court pointed out:

> Under our capital sentencing statute, a defendant has the right to an advisory opinion from a jury. (citations omitted) In determining an advisory sentence, the jury must consider and weigh all aggravating and mitigating circumstances.
>
> * * *
>
> The instructions to the jury in this case were incomplete.
>
> * * *
>
> In view of the inadequate and confusing jury instructions we believe Floyd was denied his right to an advisory opinion. We cannot sanction a practice which gives no guidance to the jury for considering circumstances which might mitigate against death. (citation omitted).

Floyd v. State, 497 So.2d at 1215-1216. Appellant submits that the jury instructions given in the instant case were fundamentally and constitutionally infirm. Failure to properly instruct the jury on the applicable law usurped their function of considering and weighing mitigating circumstances and, as a result, Antonio

Carter's death sentence was unconstitutionally imposed. Amends. V, VI, VIII, XIV, U.S. Const.; Eddings v. Oklahama, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 856 (1978); Songer v. State, 365 So.2d 696 (Fla. 1978); Cooper v. State, 366 So.2d 1133 (Fla. 1976).

POINT IV

THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE THUS VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This case can perhaps best be described as a simple robbery "gone bad". It is a textbook felony murder. Three aggravating circumstances exist. They are not particularly compelling. The murder occurred during the commission of a robbery, but an obvious lack of premeditation exists. Carter has one prior armed robbery conviction and an additional conviction for first-degree murder arising out of this same felony murder incident. Additionally, the trial court found one mitigating circumstance, i.e. Antonio Carter suffered from a deprived childhood. (R358-359) Furthermore, Appellant argues in Point 11, supra, that the trial court should have found Carter's mental problems in mitigation as well. On the spectrum of murder cases that this Court has reviewed, this case simply does not qualify as one warranting imposition of the death penalty.

In Fitzpatrick v. State, 13 FLW 411 (Fla. June 30, 1988), this Court has again recognized its duty to review the circumstances of every Florida capital case. Reiterating the dictates of State v. Dixon, 283 So.2d 1 (Fla. 1973) and Furman v. Georgia, 408 U.S. 238 (1972) this Court stated:

> It is with this background that we must examine the proportionality and appropriateness of each sentence of death issued in this State. A high degree of certainty in procedural

> fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered even handedly.

13 FLW 412. Fitzpatrick also involved a defendant with evidence of substantially impaired mental capacity, extreme emotional disturbance, and low emotional age. In light of this Court's reduction of Fitzpatrick's sentence, a similar disposition of Carter's case is mandated.

This Court has recognized the mitigating quality of crimes committed impulsively while the perpetrator suffered from a mental disorder rendering him temporarily out of control. E.g. Holsworth v. State, 522 So.2d 348 (Fla. 1988); Amazon v. State, 487 So.2d 8 (Fla. 1986); Miller v. State, 373 So.2d 882 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976). In Holsworth, the defendant, like Carter, had a personality disorder. While committing a residential burglary, Holsworth attacked a mother and her daughter with a knife. The mother broke Holsworth's knife, but he obtained another from the kitchen and continued his attack. Both victims received multiple stab wounds. The daughter died. Although the jury recommended life, the trial judge found no mitigating circumstances and imposed death. However, this Court reduced the sentence to life citing Holsworth's drug use, his mental impairment, his abuse as a child and his potential for productivity in prison.

Amazon was nineteen years old with the emotional development of a thirteen-year-old. He was raised in a negative family setting and had a history of drug abuse. There was

inconclusive evidence that Amazon had ingested drugs on the night of the murder. During a burglary, robbery and sexual battery, Amazon lost control and, in a frenzied attack, administered multiple stab wounds to his robbery and sexual battery victim and her eleven-year-old daughter, who was telephoning for help. The trial court found no mitigating circumstances. Reversing the death sentence, this Court said, "In light of these mitigating circumstances, one may see how the aggravating circumstances carry less weight and could be outweighed by the mitigating factors.'' 487 So.2d at 13.

Antonio Carter is likewise deserving of a life sentence. His crime was a product of his mental impairment. He had a personality disorder and suffered from borderline retardation. There was some evidence that he had a significant thought disorder, i.e. an atypical paranoid disorder. He had an I.Q. of only 73. He also had a deprived childhood arising from the fact that his mother had mental problems as well. There was evidence that he was not in his right mind at the time of the offense. He told a psychiatrist that he shot the store owner when the man froze during the robbery. (R817-818) He was under the influence of an auditory hallucination which commanded him during the offense. Eyewitness testimony established that Carter acted strangely at the scene of the crime. (R112)

There were positive aspects to Antonio Carter as well. He had a loving relationship with his niece and nephew. He was a good-hearted person prior to suffering a severe head injury in prison. Carter's offense was apparently a simple robbery "gone bad."

Impulsive killings during the course of other felonies, even where the defendant was not suffering from an impaired mental capacity, have also been found unworthy of a death sentence. See Proffitt v. State, 510 So.2d 896 (Fla. 1987) (defendant stabbed victim as he awoke during a burglary of his residence); Caruthers v. State, 465 So.2d 496 (Fla. 1985)(defendant shot a convenience clerk three times during an armed robbery); Rembert v. State, 445 So.2d 337 (Fla. 1984)(defendant bludgeoned store owner during a robbery); Richardson v. State, 437 So.2d 1091 (Fla. 1983)(defendant beat victim to death during a residential burglary in order to avoid arrest). Certainly, with the added mitigation of mental impairment contributing to the crime, Carter's life must be spared. Antonio Carter's death sentence is disproportionate to his crime. This Court must reverse the death sentence with directions to the trial court to impose life.

POINT V

ANTONIO CARTER'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM WHERE THE STATE'S DECISION TO SEEK THE ULTIMATE SANCTION WAS BASED IN LARGE PART ON IMPROPER CONSIDERATIONS CONTRARY TO THE DICTATES OF BOOTH V. MARYLAND, 482 U.S. ___, 107 S.Ct. ___, 96 L.Ed.2d 440 (1987).

During the charge conference for the penalty phase, defense counsel placed on the record the discussion regarding plea negotiations. Defense counsel stated that, following the conclusion of the discovery process, the defense approached the state regarding any plea offers. The prosecutor told defense counsel that there would not be any plea offer forthcoming but, should the defense decide to tender an offer, the state would consider it carefully. (R262-263) The next day, defense counsel communicated to the prosecutor that Antonio Carter was willing to plead to each of the two counts as charged in return for a promise by the state that they would have no objection to two consecutive life sentences with the applicable minimum mandatory term. This recommendation by the state would not be binding on the trial court. (R262-263) In placing the state's consideration of this offer on the record, the prosecutor stated in chambers:

> I told Mr. Cass I would consider the offer and as part of the State's evaluation of the offer, I called the widows of both of the victims on the telephone that night and I spoke with Mrs. Haberly (sic) and I spoke with Mrs. Patel as well as members of Mrs. Patel's family who participated in the conference call that evening.
>
> I know that Mrs. Haberly (sic) and Mrs. Patel spoke to one another on the

> telephone after I spoke with them and we again spoke concerning the case and after consideration of the feelings of the families of the victims and after considering all of the facts and circumstances surrounding the case pursuant to Article 5, Section 17 of the Florida Constitution, the State Attorney exercised his discretionary judgment and agreed to elect the death penalty just by --
>
> MR. CASS: That's my understanding. (R263-264)

The trial court was not a participant in any of those plea negotiations. (R264)

Appellant recognizes that all jurisdictions permit a substantial range of prosecutorial discretion in deciding whether or not to prosecute. See e.g., Cleveland v. State, 417 So.2d 653 (Fla. 1982); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973); and United States v. Cox 342 F.2d 167 (5th Cir. 1965). However, prosecutorial discretion is not completely unbridled. See e.g. Yick Wo v. Hopkins, 118 U.S. 356 (1886). Many jurisdictions have placed some controls on a prosecutor's discretion after initial steps toward prosecution have been taken. See Note, 103 U.Pa.L.Rev. 1064-1067 (1955). Selective enforcement of the law by a prosecutor can result in a violation of a defendant's constitutional right to equal protection under the law. See United States v. Robinson, 311 F.Supp. 1063 (W.B.Mo.1969). Some restraint on prosecutorial discretion has also been imposed in relation to the severity of the criminal sanction sought by the prosecuting agent. See e.g. People v. McCollough, 8 Ill. App. 3d 963, 291 N.E.2d 505 (1972); Olsen v.

Delmore, 48 Wash.2d 545, 295 P.2d 324 (1956); and, Comment, 42 U.Colo.L.Rev. 455 (1971).

Appellant submits on appeal that his dea h sentence constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution. This conclusion necessarily results when one considers that the prosecutor's decision to seek the ultimate sanction in prosecuting Antonio Carter was based, in large part, on the inappropriate consideration of the feelings of and sympathy for the surviving members of the victims' families. The prosecutor's consideration of such matters is clearly reflected by the record on appeal through the prosecutor's own words. (R263-264) Appellant submits that this improper consideration of inappropriate matters results in an arbitrary and capricious application of the death penalty recently condemned in Booth v. Maryland, 482 U.S. __, 107 S.Ct. __, 96 L.Ed.2d 440 (1987).

Booth prohibits the jury from considering a "victim impact statement" (VIS) during the sentencing phase of a capital murder trial. Maryland law allowed such a statement to be read to the jury during the sentencing phase, or for the family members to be called to testify as to the information. Statements detailed economic loss suffered by the victim, psychological damage to the victim's family as a result of the offense, as well as any other information related to the impact of the offense upon the victim or the victim's family. The United States Supreme Court held that the Eighth Amendment absolutely prohibits a capital sentencing jury from considering

victim impact evidence. To hold otherwise, "would create the risk that a death sentence will be based on constitutional considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.' See Zant v. Stephens,"452 U.S. 862, 885 (1983). Booth, supra at 448. The Court pointed out that allowing the jury to rely on such information could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill. Booth, supra at 450.

Such a rationale should be equally applicable to reliance on the same type of information in the State's decision to kill. The Court found, "that because of the nature of the information contained in a VIS, it creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." Id. The Court also expressed concern for the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice cannot tolerate such distinctions. Furman v. Georgia, 408 U.S. 238 (1972)(Douglas, J., concurring). The United States Supreme Court's concern regarding relative victim's community worth could be applied in the instant case. If neither Patel nor Haberle had any family members, the prosecutor probably would have accepted Carter's offer to plead to a minimum fifty year term. The prosecutor stated that he called the victims' families that night. One wonders what would have happened if the families happened to be poor and could not afford a telephone. Appellant

submits that if that were the case, Antonio Carter would probably not be living on death row. A similar result probably would have been reached if the victims had been disliked by their surviving family members. It is easy to understand the United States Supreme Court's concern in this regard as set forth in Booth.

There have long been advocates of "victims' rights." The Florida Legislature has even enacted specific statutes similar to the one condemned in Booth v. Maryland, supra. See S921.143, Fla. Stat. (1987). However, Booth specifically limited its holding to capital cases noting that their decision was guided by the fact that death is a "punishment different from all other sanctions." See Woodson v. North Carolina, 428 U.S. 280, 303-304, 305 (1976)(plurality opinion of Stewart, Powell and Stevens, JJ.). The Court expressed no opinion as to the use of these type of statements in non-capital cases.

In the instant case, the prosecutor abdicated his own responsibility and allowed the surviving family members to control the decision as to the quest for death. This illustrates the Booth Court's statement regarding the impermissible risk that the capital sentencing decision will be made in an arbitrary manner. Appellant concedes that the prosecutor mentioned that he considered all of the facts and circumstances surrounding the case before he "exercised his discretionary judgment and agreed to elect the death penalty. . . ". (R264)(emphasis added) However, it should be noted that the primary item mentioned by the prosecutor was his discussion with the victims' family members. The prosecutor's use of the word "agreed" is also

revealing in that it suggests that he "agreed" with the families' decision to seek the death penalty for Antonio Carter. The prosecuting attorney's recitation to Article 5, Section 17 of the Florida Constitution (dealing with qualifications and duties of elected state attorneys) has no apparent applicability.

Any decision to impose the death sentence must "be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). The presence or absence of emotional distress of the victim's family is not a proper sentencing consideration in a capital case. Booth v. Maryland, supra at 451. Our system of jurisprudence requires "reasoned decision making" in capital cases. Booth, supra at 452.

The principle of prosecutorial discretion is based upon the belief that the prosecuting arm of the State is imbued with certain legal knowledge. The act of ceding that authority to the family of a murder victim constitutes the ultimate shirking of the prosecutor's professional duty. Such action could even be termed prosecutorial misconduct, especially in a capital case. If a rape victim told a prosecutor that she wanted the culprit to be killed, the prosecutor would instantly recognize his inability to comply with her emotional pleas. A prosecutor is aware that death is not an appropriate sanction for such a crime, much as he knows that he could not seek a fifty-year prison term in a trespassing case. Likewise, a prosecutor should be aware of the type of cases that warrant a sentence of death. The entire capital process is geared to appropriately narrow the class of

death penalty cases. See State v. Dixon, 283 So.2d 1 (Fla. 1973). Feelings of the victim's surviving family members should play no part in the state's decision to seek the death penalty. Absent such a restriction, the death penalty is imposed in an arbitrary and capricious manner as a result of whim and sympathy rather than a reasoned determination by an impartial agency. The fact that it played a part in the instant case results in a questioning of the entire process. The death penalty was unconstitutionally imposed in the instant case. Booth v. Maryland, supra; Eighth and Fourteenth Amendments U.S. Const. This Court should at the very least remand this cause for a hearing to determine exactly what part the victims' families' wishes played in the prosecutor's decision to seek the death penalty.

POINT VI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION AND IN IMPROPERLY INSTRUCTING THE JURY AT THE PENALTY PHASE RESULTING IN A DEPRIVATION OF CARTER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL.

During the charge conference at the penalty phase, the trial court announced its intention to instruct the jury that Carter was legally under sentence of imprisonment if the state proved that Carter was on parole at the time of the offense. (R259) Defense counsel objected to that particular instruction contending that it, in essence, directed a verdict as to that particular aggravating circumstance. (R259) The trial court overruled the objection stating:

> My reason for putting it in there -- I don't interfere with their fact finding role. I'm telling them that if they do -- if they find him on parole, that is the same as the sentence of imprisonment. I'll leave it up to them if he was under sentence of parole. That's my reason for that. (R259)

The trial court instructed the jury, inter alia:

> The aggravating circumstance[s] that you may consider are limited to any of the following that are established by the evidence.
>
> The crimes for which the defendant is to be sentenced were committed while he was under sentence of imprisonment.
>
> If you find that the defendant was on parole at the time of the crimes, then the defendant was legally under sentence of imprisonment at the time of the crimes. (R267)

The jury recommended the ultimate sanction as to count I and recommended life imprisonment as to count 11. (R356-357) In

sentencing Antonio Carter to death as to count I, the trial court found that the capital felony was committed by a person under sentence of imprisonment, i.e., that he was on parole at the time of the offense [1]. (R358)

The trial court also instructed the jury, inter alia:

> The defendant has been previously convicted of another capital offense or a felony involving the use or the threat of violence to some person.
> The crime of first-degree murder is a capital felony. The crime of robbery is a felony involving the use or threat of violence to another person. (R267)

Defense counsel did not object to this particular instruction concerning Section 921.141(5)(b), Florida Statutes (1985).

Appellant contends on appeal that both of these jury instructions, one objected to by defense counsel while the other was not, had the effect of directing a verdict at to the aggravating factors named in Sections 921.141(5)(a) and (b), Florida Statutes (1985). These instructions, in essence, invaded the province of the jury in determining if the state had proved these aggravating circumstances beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973).

Appellant recognizes this Court's approval of the instruction as to the nature of the robbery by the inclusion of the instruction in the standard jury instructions for criminal cases. Fla.Std.Jur.Instr.Crim.P. p.78 (1981). Appellant also recognizes that this Court expressly approved this instruction in

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1/ Section 921.141(5)(a), Florida Statutes (1985).

Johnson v. State, 442 So.2d 193 (Fla. 1983) cert. denied 104 S.Ct. 2181. Appellant contends, however, that to permit the trial court to reach the conclusion required of these instructions and announce it to the jury, allows an impermissible comment on the evidence by the trial judge. See Raulerson v. State, 102 So.2d 281 (Fla. 1988); Parise v. State, 320 So.2d 444 (Fla. 3d DCA 1975). Cf. 590.106, Fla.Stat. (1985). Appellant urges this Court to reconsider its holding in Johnson v. State, supra. The trial court's giving of this particular instruction resulted in a deprivation of Antonio Carter's constitutional rights to due process of law and to a fair trial guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution as well as his corresponding rights under the Florida Constitution, Article I, sections 9 and 16.

This Court has recognized that under the Florida capital sentencing scheme, a defendant is entitled to an advisory penalty recommendation from a jury. Floyd v. State, 497 So.2d 1211 (Fla. 1986). In Floyd, the trial judge erred by, in effect, instructing the jury that no mitigating circumstances were established by the evidence. In Carter's case, the converse error is present because the jury was, in effect, instructed that the evidence established that two aggravating circumstances were present.

Jury instructions which have the effect of relieving the state of its burden of proof of an element of a crime violate the Fourteenth Amendment to the United States Constitution. Sandstrom v. Montana, 442 U.S. 510 (1979). The appropriate

inquiry for determing whether a constitutional violation has occurred is whether a reasonable juror could have interpreted the instruction in an unconstitutional manner. Id. at 514.

In the instant case, the jury should have been required to determine on its own and from the evidence presented to them, whether Antonio Carter was in fact under sentence at the time of the offense. The jury should also have been allowed to make its own determination as to the nature of Carter's prior robbery conviction and contemporaneous murder conviction. Appellant contends that the jury instructions given, failed to adequately channel the jury's discretion by "'clear and objective standards' that provide 'specific and detailed guidance'", Godfrey v. Georgia, 446 U.S. 420, 428 (1980), thereby rendering Carter's penalty phase constitutionally deficient. Cf. Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982).

The instructions given by the trial court are no different than instructing a jury in a robbery case that the defendant is guilty of robbery if the proof shows that he committed the acts charged. The trial court effectively directed the jury to find the aggravating circumstances in question. Since the objectionable instructions relate to two out of the three aggravating circumstances relied upon by the trial court, it is not inconceivable that these two aggravating circumstances were the only ones found by the jury in support of its death recommendation. By giving the instruction, the trial court denied Carter's rights to due process and to a fair sentencing hearing before an impartial jury.

POINT VII

IN CONTRAVENTION OF FLA.R.CRIM.P. 3.180 AND IN CONTRAVENTION OF CARTER'S SIXTH AMENDMENT RIGHT TO BE PRESENT AT ALL STAGES OF THE TRIAL, THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN COMMUNICATING WITH THE JURY WHILE ANTONIO CARTER AND BOTH ATTORNEYS WERE ABSENT.

During jury selection, the trial court conducted individual voir dire of the jurors regarding publicity and death qualifications. Both attorneys and Antonio Carter were present during these proceedings. Each side would then exercise peremptory challenges in chambers. At the conclusion of the proceedings on November 9, 1987, the state exercised one of its remaining challenges to excuse venireman Thomas Locke. (R664) The following then occurred in chambers:

> THE COURT: What I would like to do is release Locke and send the rest of the jurors home and tell them that they're to come back in the morning at nine and take their seats and we'll proceed with jury selection.
>
> I probably want to reinstruct them again.
>
> MR. CASS (defense counsel): If you would.
>
> THE COURT: Do you want to be in there for that or --
>
> MR. DOYLE (prosecutor): The State does not, Your Honor.
>
> THE COURT: Do you want to be in for that?
>
> MR. CASS: No, Your Honor. I would request that Your Honor give the admonition on the record. THE COURT: Well, if I do it on the record, does the Defense have to be present?

MR. CASS: No, sir.

THE COURT: Do you waive your presence and the Defendant's presence?

MR. CASS: Yes. (R664-665)

The trial judge then conducted proceedings in the courtroom with the venire present. The trial court excused Mr. Locke and instructed the rest of the venire to return at nine o'clock the next morning. The trial judge warned the venire to avoid any media accounts regarding the case. (R665-667)

Rule 3.180, Florida Rules of Criminal Procedure, states that a defendant shall be present at, inter alia, "all proceedings before the court when the jury is present." Appellant submits that a defendant in a capital case has a per se right to be present at all stages, critical or not. Appellant submits that every stage is critical to a capital defendant. This arises from his right to participate, at least on a limited basis in his defense. See Faretta v. California, 422 U.S. 806 (1975). This Court has held in the past that any communication with the jury outside the presence of the prosecutor, defendant and defense counsel is so fraught with potential prejudice that it cannot be considered harmless. Ivory v. State, 351 So.2d 26 (Fla. 1977).

A criminal defendant has the constitutional right to be present at stages of his trial where fundamental fairness might be thwarted by his absence. Snyder v. Massachussettes, 391 U.S. 97 (1934); Francis v. State, 413 So.2d 1175 (Fla. 1982). This Court held in Francis, supra, that a defendant was entitled to a new trial where he was involuntarily absent during a portion of jury selection (specifically during the exercise of peremptory

challenges). It made no difference that his counsel waived his presence since Frances did not personally acquiesce in or radify this waiver.

Appellant concedes that there is apparent acquiescence by Antonio Carter on the record. Carter was obviously present when his counsel waived his presence and did not verbalize any objection. These facts and this Court's past opinions on this issue preclude Appellant from arguing this point with extreme vehemence. Meek v. State, 487 So.2d 1058 (Fla. 1986) held that the failure of Meek to timely object ratified his trial counsel's waiver of his presence. Herzog v. State, 439 So.2d 1372 (Fla. 1983) held that the defendant's voluntary absence during a hearing on the motion to suppress where counsel waived Herzog's presence was not error. This Court held that the absence was voluntary and was not during a crucial stage of the trial. This Court has also ruled that counsel can waive a defendant's presence during critical stages of a capital trial if the defendant acquiesces in the waiver after actual or constructive notice. Peede v. State, 474 So.2d 808 (Fla. 1985). Counsel may make the waiver on behalf of the client, provided that the client, subsequent to the waiver ratifies the waiver either by examination by the trial judge, or by actual or constructive knowledge of the waiver. See State v. Melendez, 244 So.2d 137 (Fla. 1971). Cf. Amazon v. State, 487 So.2d 8 (Fla. 1986). Very recently, this Court has gone even further on this issue. Turner v. State, 13 FLW 426 (Fla. July 7, 1988) held that the involuntary absence of

a defendant during a voir dire conference could be harmless error.

In spite of the above, Appellant urges this Court to reconsider its stance on this particular issue. Appellant maintains that a defendant convicted of a capital crime cannot voluntarily waive his presence at any stage of his capital trial. Rather, it is respectfully submitted that a defendant cannot constitutionally do *so.* Hopt v. Utah, 110 U.S. 574 (1884). The violation of Fla.R.Crim.P. 3.180(a)(5) in this case constitutes a denial of due process guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. The record on appeal fails to demonstrate an adequate waiver by the defendant of his constitutional right to be present and participate during a portion of his capital trial.

POINT VIII

THE TRIAL COURT ERRED IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTIONS WHICH DIMINISH THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS CONTRARY TO CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985).

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> [An] uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 472 U.S. at 333. Although a Florida jury's role is to recommend a sentence, not impose one, the reasoning of Caldwell is applicable. See, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted; Dugger v. Adams, __U.S.__ (case no. 87-121 March 7, 1988). A recommendation of life affords the capital defendant greater protections than one of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the jury's decision is critical, and any diminution of its importance violates Caldwell. Adams; Mann v. Dugger, 817 F.2d 1472, 1489-1490 (11th Cir.), on rehearing, 844 F.2d 1446 (11th Cir. 1988).

The trial court read the standard penalty phase instructions to the jury. In part, those instructions stated:

> As you now have been told, the final decision as to what punishment should be imposed is the responsibility of the judge.
> However, it is you[r] duty to follow the law . . . and render to the court an advisory sentence. . . (R266).

The instruction is incomplete, misleading and misstates Florida law. Contrary to the court's assertion, the sentence is not solely his responsibility. The jury recommendation carries great weight and a life recommendation is of particular significance. Tedder, supra. The instruction failed to advise the jury of the importance of its recommendation. The instruction failed to mention the requirement that the sentencing judge must give the recommendation great weight. Finally, the instruction failed to mention the special significance of a life recommendation under Tedder. The instruction violates Caldwell. Carter realizes that this Court has ruled unfavorably to this position. E.g., Combs v. State, 13 FLW 142 (Fla. Feb. 18, 1988); Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987). However, he asks this Court to reconsider this ruling and reverse his death sentence. Eighth and Fourteenth Amend., U.S. Const.

POINT IX

THE TRIAL COURT ERRED IN GIVING UNDUE WEIGHT TO THE JURY'S RECOMMENDATION OF DEATH, THEREBY SKEWING THE SENTENCING WEIGHING PROCESS IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury recommended life imprisonment for the murder of Haberle. (R357) By an eleven to one vote, the jury recommended death for Antonio Carter for the killing of Patel. (R356) In sentencing Antonio Carter to death, the trial court found three aggravating circumstances and one mitigating circumstance. (R358-360) In following the jury recommendations as to each of the murders, the trial court stated:

> There are three aggravating circumstances. They are strong circumstances that must be given great weight. . . . The aggravating factors are dominant and fully support the jury's recommendation of a death sentence.
>
> The jury recommended a life sentence be imposed upon the Defendant for Count 11. This Court disagrees with that recommendation. The Court finds the same factors in Count I would also support a death sentence in Count 11. However, given the totality of the circumstances this Court is not inclined to overrule the jury's recommendation as to Count II. It will impose a life sentence with no parole for 25 years. (R359-360)

While a jury's recommendation of death should be given due consideration, it can, indeed be overstressed. Ross v. State, 384 So.2d 1269 (Fla. 1980). A recommendation of life is to be given great weight and not overruled absent compelling reasons, Tedder v. State, 322 So.2d 908 (Fla. 1975), but the same is not true for a recommendation of death. Ross, supra at

1274-1275). With a recommendation of death, the trial judge is bound to exercise his independent judgment in imposing sentence. Ibid.

Based upon the sentencing court's statement, it is apparent that the court gave too much deference to the jury's recommendation and failed to use his independent judgment in imposing sentence. Antonio Carter's death sentence has been imposed in violation of the Eighth and Fourteenth Amendments and must be reversed.

POINT X

IN CONTRAVENTION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or implicitly rejected each of these challenges to the constitutionality of the Florida statute and that detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

Appellant initially contends that his constitutional right guaranteed by the First, Sixth and Fourteenth Amendments to the United States Constitution were violated by the failure of the trial court in securing from Carter a personal, knowing, voluntary, intentional and intelligent waiver of his constitutional right to testify at trial. "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, (citation omitted), and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or a privilege.' Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed.2d 1461, 1666, 58 S.Ct. 1019; 146 ALR 357." Brookhart v. Janis, 384 U.S. 1, 4 (1966). See also Wright

v. Estelle, 572 F.2d 1071 (5th Cir.), cert. denied 439 U.S. 1004 (1978)(Godbolt, J., dissenting). Appellant recognizes that this issue has been decided contrary to his position in Remeta v. State, 522 So.2d 825 (Fla. 1988), however, Appellant urges reconsideration. Appellant points out that the record does not establish such a waiver by the defendant in either the guilt or the penalty phase of the trial.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (Fla. 1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980)(England, J. concurring). Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984)(Ehrlich, J. concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139

(Fla. 1974) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349 (1977); Argersinger v. Hamlin, 407 U.S. 25 (1972); Amend. VI and XIV, U.S. Const.; Art. 1, §§9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledge Rule [Elledge v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the

Eighth and Fourteenth Amendments to the United States Constitution.

Section 921.141(5)(d), Florid Statutes (1985)(the capital murder was committed during the commission of a felony), renders the statute unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because it results in arbitrary application of this circumstance and in death being automatic in felony murders unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

Additionally, a disturbing trend has become apparent in this Court's decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895 (1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra at 258. Secondly, this Court must review and reweigh the evidence of aggravating and

mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 934 (Fla. 1978) cert. denied 414 U.S. 956 (1979)(emphasis added).

In two recent decisions, this Court has recognized previous decisions were improperly decided. In Proffitt v. State, 510 So.2d 896 (Fla. 1987) this Court reduced a death sentence to life despite having previously affirmed it on three prior occasions in Proffitt v. State, 315 So.2d 461 (Fla. 1975) affirmed 428 U.S. 242 (1976); Proffitt v. State, 360 So.2d 771 (Fla. 1978); and Proffitt v. State, 372 So.2d 1111 (Fla. 1979). The basis of the holding was this Court's duty to conduct proportionality review. Similarly in King v. State, 514 So.2d 354 (Fla. 1987) this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having approved it in King's direct appeal in King v. State, 390 So.2d 315 (Fla. 1980). In so doing, this Court acknowledged that the factor had not been proven beyond a reasonable doubt. What these two cases clearly demonstrate is that the death penalty as applied in Florida leads to inconsistent and capricious results.

In view of the arbitrary and capricious application of the death penalty at every level of the criminal justice system,

the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based upon the foregoing authorities, argument and policies, Appellant respectfully requests that this Honorable Court grant the following relief:

As to Points I and VII, reverse the convictions and sentences and remand for a new trial;

As to Points II and IX, vacate the death sentence and remand for imposition of a life sentence or, at least for reconsideration of the sentence;

As to Points 111, V, VI and VIII, vacate the death sentence and remand for imposition of a life sentence, or in the alternative, for a new penalty phase:

As to Point IV, vacate the death sentence and remand for imposition of a life sentence or, in the alternative, for a hearing on this issue;

As to Point X, declare Florida's death penalty statute unconstitutional or remand for the imposition of a life sentence.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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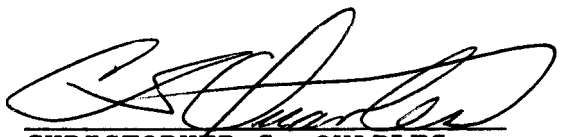
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th floor, Daytona Beach, Fla. 32014 in his basket at the Fifth District Court of Appeal and mailed to Mr. Antonio Carter, #068601, P.O. Box 747, Starke, Fla. 32091 on this 15th day of July 1988.



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