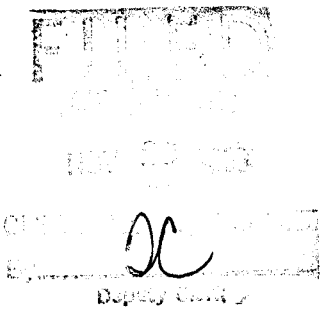
IN THE SUPREME COURT OF FLORIDA



LEONARD LEE SMALLEY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 72,785

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SUMTER COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

The state indicted Leonard Lee Smalley, Jr., for first-degree murder (R1) 1/. The matter proceeded to a jury trial in the Circuit Court for Sumter County, the Honorable John W. Booth presiding. Prior to trial the state, at the direction of the court, disclosed that only two aggravating circumstances would be relied on in seeking the death penalty, to wit: 1. An especially heinous, atrocious, or cruel murder, and; 2. A homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification) (R117). Smalley testified in his own behalf and contended that he did not intentionally harm the victim (R766-805). The jury found Smalley guilty of first-degree murder without specifying the basis for the verdict (R160, 924-925).

1/ (R) refers to the record on appeal in the instant case.

Smalley was adjudicated guilty of first-degree murder (R161-162,925). Defense counsel then sought to have the jury polled as to whether their verdict had been based on a theory of premeditated or felony murder. The court denied that request, ruling that the state had waived as an aggravating circumstance the contention that the murder occurred during the commission of an enumerated felony by failing to specify that statutory aggravating circumstance prior to trial when responding to the previous court order requiring the State to list the applicable aggravating factors:

> The Court: . . . If the state had indicated that it might be going on grounds for, aggravated circumstances or as set forth in the instruction book, then that might be additional reasons which states that, the crime for which the defendant is to be sentenced was committed while he was engaged or an accomplice . . . then it goes and lists the certain offenses, but this is not . . . the state has indicated that is not, and it is the court's ruling in denying your motion [to poll the jury] that the state would be prohibited from going on four, but they have indicated that they are not going to. So that is an additional reason for denying the polling, because if they were going to attempt to come in under four, I think you would have a legitimate reason.

(R930-931).

The penalty phase occurred the following day. The state presented no additional evidence and relied on the evidence and testimony presented during the guilt phase (R934). The defense presented the testimony of several psychologists, psychiatrists, relatives of Mr. Smalley, and a previous co-worker

(R935-1037). The jury, by a majority of ten-two, recommended that a sentence of death be imposed (R164,1065).

Sentencing occurred the following week. Judge Booth found an especially heinous, atrocious or cruel murder to have been proved beyond a reasonable doubt. Judge Booth also found; Smalley had no significant history of prior criminal activity; Smalley committed the crime while under the influence of extreme mental or emotional disturbance; Smalley acted under extreme duress or under the substantial domination of another person; Smalley's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; Smalley was himself an abused child; Smalley has expressed substantial and genuine remorse at the time of the offense and constantly thereafter; and, Smalley was a good employee and co-workers thought very highly of him (R165-170, see Appendix A). Judge Booth found that the one aggravating factor outweighed all the mitigating circumstances and imposed a sentence of death in accordance with the jury recommendation (R172,1072). A notice of appeal was filed (R187,194) and the Office of the Public Defender was appointed to represent Mr. Smalley for the purpose of his appeal (R175,197-198). This brief follows.

STATEMENT OF THE FACTS

There is a high corollary between child abuse and people who were themselves abused children (R955). Leonard Smalley (hereafter Smalley, "Lee" or "Buddy") was born January 15, 1960 (R2). His father, who left when Smalley was two years old, was described by Smalley's mother as an irresponsible person suffering from battle fatigue resulting from being in the Navy during World War II (R1019-20). Smalley's first step-father physically and mentally abused Smalley (R1020-21). "For instance if something happened, he would beat Buddy and beat the others with a cutting board, one of these one inch ones with a handle on it. He beat me. He beat us with belts. He beat us with a hose. He beat us with ropes." (R1021). Smalley's second step-father was an alcoholic, and his relationship with Buddy vacillated between being very kind and loving to being abusive; if the step-father needed a drink, he would become abusive (R1028). The abuse ranged from kicking to name calling (R1028). Smalley often took the blame for his younger sister so that she would escape such punishment (R1011-13).

Smalley joined the Navy to get away from home but received a bad conduct discharge due to marijuana usage and being AWOL (R956-57). He thereafter moved in with Cecelia Cook, a twenty-four year old woman with three children; Kimberly (7), Chris (4), and Julie (2) (R577-78). Cecelia was at that time separated from her husband and, prior to October 23, 1987, had known Smalley for approximately six months (R579). Smalley's

mother described the relationship between Cecelia and Smalley as follows:

> First off, let me say, I don't hate Cecelia, because she has got problems, and I know it too. But she was very dominating, very domineering, and it was constantly "Buddy come do this" . . . or "Lee", I believe she called him . . . "change that baby's diaper". "Lee, wash his face", - talking about Chris. It was just constantly on him. Buddy would call me, begging me to babysit with Julie, because the day care would not take care of her because she was sick. He would call me and beg me to take care of her, and I could hear, when I would tell him "I've got my own job to do", -- and in all honesty, I thought that if he got tired of the situation enough, he would just get out of it. But I would hear her screaming and cursing in the background, and saying "they don't want to take care of my -- blankety blank kids, just hang up the phone". And he would say "Mom, please, I'm about to lose my job." And I really felt like that if I didn't, then he would get tired of the situation and he would leave. I know he loved those children, and Buddy was always trying to fix up a family atmosphere. He always wanted everything, since he was a little kid, he wanted everything beautiful.

(R1029-30). Smalley's mother stated that Smalley worshipped Cecelia and acted like a robot, acting on command doing whatever she wanted (R1030). Smalley worked as a lab technician with Vision Express for a little over two months (R1035), and was described as a good employee; a friendly, non-violent, very mild mannered and friendly person (R1037). His employer stated that Cecelia ocassionally during that two month period would come into the store, "and I would be out in the front waiting on a patient,

and she would get to yelling at him and get so loud that it would even disturb my patients and they would ask me what was going on, and one time I did even have to go back and pull the door to a little." (R1036). The employer testified that Smalley never talked back or raised his voice to Cecelia but just sat there and took it (R1036). Smalley lost that job because he continually called in sick to stay home and care for the children (R1035-36).

On Monday, October 19, 1987, Smalley stayed home from work and took two year old Julie to the doctor's office; they were there all day.

> Cecelia Cook: He kept her on Monday, -- well no, he had her Monday, but they spent the day at the doctor's office. It was crowded, and they had to wait, and from what he told me, they just barely -- I got off work at six o'clock, they were late picking me up from work. The pediatrician diagnosed Julie as having some kind of flu or upper respiratory type of thing, and prescribed medication.

(R580) [2/] When Smalley called in that Monday to explain to his employer that he would be absent "his boss was very upset with him, and told him that he no longer had a job[.]" (R587). On Tuesday, Cecelia was off work and she cared for Julie (R588). Thereafter, Smalley cared for the children on Wednesday, Thursday and Friday (R588).

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[2]When performing the autopsy, the medical examiner found that the flu-like symptoms were caused by food particles aspirated into her lungs (R644).

At approximately 8:30 a.m. on Friday, October 23, 1987, Smalley drove the family to a chiropractor's office and dropped Cecelia off for her "adjustment" while he took Kim and Chris to school (R579-581). He then returned with Julie to pick Cecelia up at the chiropractor's; they had breakfast at Hardees (R581). After leaving Hardees, they still had some time before Cecelia had to report to work at Shoe World so they stopped on the side of a secluded road and made love (R582). When asked about Julie, Cecelia stated, "she had fallen asleep, but she didn't sleep good at night because of the cough that she had. It was constantly, what, you know, waking her up. She seemed fine, otherwise." (R582). Smalley dropped Cecelia off at work by 11:00 (R582).

Around 1:00, Smalley called Cecelia to tell her that he had a job interview with a construction company.

> Cecelia: He told me that he had a job interview with Rix Construction, and he was happy about that, because it was driving a dump truck, something that he had did previously in Lakeland, and I asked him, I said "well, you said you were going to bring me something to eat before you went home", and he said "well, I got busy and had to make phone calls", and so on and so forth, and I said "well, I have a banana, that will last me for a little while, but you need to get me something to eat when you come up for your job interview". He said "o.k.". He said "I love you" and I said "I love you", and that was basically the end of the conversation.

(R583). Shoe World is located in a shopping plaza containing such businesses as Wal Mart, Dan's City Ice Cream Parlor, and Cedar River Restaurant (R606). Shoe World is approximately 35 miles from Smalley's home (R602).

Smalley came by Shoe World just before 3 o'clock on his way to the job interview; Julie was with him at that time and appeared to be fine. She sat up in the front seat and waved to Cecelia (R586). Cecelia asked Smalley why he hadn't brought her anything to eat and he replied, "I didn't have time". (R586).

Smalley called Cecelia around 4:30 o'clock p.m. to get the telephone number for ITT Financial Services (R588). A loan payment was due, and Cecelia had written some bad checks making it impossible for them to make the payment. Smalley wanted to call the loan officer (Mr. Locke) and explain to him why the payment was going to be late. Cecelia testified:

> He called to ask me if I had the number to . . . someone that we had a loan with, works for ITT Financial Service, and at that time, I was beginning to feel weak, and I had even called my mother previous to that and told her that Lee had not brought me anything to eat, and that if he wasn't there by 5 o'clock, could she bring me something to eat, and she was about six miles away from where I worked. She was willing to bring me something to eat if he didn't show up, and he finally came. The conversation was -- "Lee, why haven't you brought me anything to eat?" -- "You know I can't be without it".[3] "Well, I'm sorry, I've just been busy and" -- da-da-da-da . . . and I said "well, I feel like I'm going to pass out here at work and you know I can't be without it", and he said "well, I will be there as soon as I can", and I said "O.k." and we hung up and that was the end of the conversation.

(R588-589).

3/ Cecelia claims to be a hypoglycymic (R581).

Smalley returned to Shoe World at approximately 5:00; Julie was not with him (R589). Smalley told Cecelia that Julie had been asleep and he had left her at their house with a neighbor supervising (R589). Cecelia and Smalley went to Playland and picked up Kimberly and Chris, went and got something for Cecelia to eat, dropped Cecelia off at Shoe World at approximately 5:40, and then Smalley returned home with the two children (R589-591). Cecelia received a call around 7 o'clock telling her that something had happened to Julie, and by the time she arrived at the hospital at 7:30 she was told that Julie had passed away (R592).

SMALLEY'S STATEMENTS AND TRIAL TESTIMONY:

Smalley's statements and trial testimony establish that he struck Julie after dropping Cecelia off at the chiropractor's on the morning of October 23 when she began crying and whining for her mother. "And, I left from there and went back to the chiropractor's office. But, while I was gone and while I was going back to the chiropractor's office, Julie was whining for her mommy and I hit her a few times to make her hush." (R736,768). After dropping Cecelia off at Shoe World, Smalley took Julie over to Wal Mart and put her on the riding horses when he tried to call Mr. Locke, the loan officer with ITT Financial Services, and Julie continued crying (R736-737):

> I was supposed to call Buck Locke, because Cecelia had wrote a bunch of bad checks, and I knew that we weren't going to have the money to pay for the loan that we had through ITT Financial Services, so she left it up to me to call Buck Locke and make up another excuse for not being able to pay the

> bill. So, I went and tried to call, and he wasn't in, and while I was sitting, I was going to wait and try again later, and while I was sitting there, Julie was still crying, and I think I smacked her again on the arm, or the back, or something. So then she would hush. Then I tried calling again, and he still wasn't there, so I decided that I would try later. So, I left from there, and I went right on up to the Cedar River Seafood Place, which is in the same plaza, and bought a paper so I could look through the paper, and I took that paper home with me. Me and Julie went home.

(R770-771). Smalley indicated that when they got in the car, he struck Julie when she would not be quiet and again when they got home because she again started whining; he kept saying, "Julie, just hush", but she would not stop crying; he struck her (R737). When she would not stop crying he took her outside and dipped her in a blue barrel previously emptied and cleaned in order to wash dirty bed linen and dirty clothes soiled by Julie's diarrhea and vomit (R773):

> I can't remember. I think I hit her on the arm a couple of times. I may have smacked her in the face and she wouldn't hush. Well, the house was a wreck, it had been in a wreck for sometime, and I just wanted some peace and quiet. I turned the stereo on but it seemed like Julie was trying to outcry the stereo. So we had this blue barrel out beside the little shed, out there by the house, and it had old dirty water in it and I drained all the dirty water in it and there was some broken glass and stuff in the bottom of it, and I poured all of that out, and I rinsed it out and I set it out behind the house and filled it up with water and when I filled it up with water, I came back inside and Julie was still whining, so I grabbed her by her feet and took her out back and I kept

> dunking her down in the blue barrel and I would pull her back up and tell her to hush and she would be crying and gasping and I would stick her back down in the water again, and I don't know how many times I did it, but one time when I pulled her up she was, acted like she was about unconscious and I thought she was going to drown so I stopped. I didn't want to hurt her. I just wanted her to hush, and I took her back in the house and I took the diaper off of her cause it was soaked and I threw it in the garbage and she was coughing up water and she was crying and I kept telling her to hush, and she wouldn't, so I started socking her in the stomach and everytime I would hit her, water would come out.

(R737-38). When asked how many times he struck her, Smalley replied, "I don't know, I, two or three times, I don't know and she wouldn't stop whining, and I just wanted her to stop, all I wanted her to do was be quiet so I could think about myself and my, my problems for a while[.]" (R738).

Smalley then called the construction company and arranged for an interview that afternoon. The whole time he was on the phone, however, Julie kept crying (R738). The phone calls were made from a neighbor's residence because Buddy and Cecelia had no phone. When he returned home from the neighbors', he began cleaning up the house:

> And, then I went back to the house, and the place was a wreck. I was so tired of seeing it dirty with food and clothes and everything scattered everywhere and I was going to start in the kitchen. So I went and put dishwater in the kitchen sink and I was putting dishes in it and Julie started her whining again, and I said "Julie, shut up, please just shut up" and she wouldn't stop and she kept on and she kept on, and I had my dishwater in

> the sink so I went in there and I got her and I stuck her head down in the dishwater and I pulled her up and I said "shut up" and she was still crying and I did it again and I did that three or four times until she just, was coughing up water and she wasn't crying at all. And, after I had done that I laid her in the living room floor on top of a blanket because she had sucked in so much water and stuff that she was pooping liquid and water was coming out of her nose and everything else, and she was just laying on that blanket. Oh God, everything just seems so foggy.

(R739). This occurred around 2:30 p.m. (R739). Smalley changed Julie's diaper and took her with him to Rix Construction to fill out the application and be interviewed, a process that took about 5 minutes (R 575). On the way home Julie whined again and, when Smalley smacked her in the back of the head, she fell forward in the seat and just layed there and hushed and went to sleep (R730). They arrived home around 4:30 (R493). When walking back to the house, Julie fell face first in the dirt. Smalley picked her up, asked her if she was o.k., and wiped the dirt from her face and mouth (R740). He asked to use the neighbor's telephone to call Mr. Locke at ITT Financial Services, and after getting that straightened out called Cecelia; Julie urinated in her pants while in the neighbor's house and was taken outside by the neighbor (R740-41).

> [A]nd then I called, I started talking to Cecelia, cause I was dialing the number and she was jumping all over me and telling me I should have been there and that you know, she was hungry and she didn't even seem to care that I might have had a job --- I, well, I wasn't mad at her, I just resented her.

> It just seemed like everything was good for her, but nothing I wanted to do or what I tried to do seemed any good and I resented it and it was always "no, my things were more important", you know . . . "you stay home and watch the kids", and "you do this", or "you change their diaper", or her diaper, so, I went back over to the house, and Julie started crying again, and that's when I stuck her in the tub, and I held her under the water under the faucet, and I, I didn't run any water in the tub, I just held her head under the faucet and I would hold her there until she acted like she was gasping for breath, and then I would pull her out and say "hush", and she wouldn't, and then I would stick her back under there again and finially she just started spewing up the water again and I went to take out of the tub, and when I took her out of the tub, I held her by her feet and I hit her head on the carpet two or three times.

(R741-42,775). Just prior to this Smalley smoked some marajuana, "just to ease my mind, because I felt like I was going crazy." (R775). After being dropped on the carpeted floor, Julie started shaking and moaning. Smalley realized he might have seriously hurt her and became scared (R742,777). Hoping she would recover, he wrapped her in a blanket and placed her on the bed, covering her with the bedsheet so she would not be seen, and took Cecelia the food she kept demanding (R742,777). When he returned and Julie would not wake up, he administered CPR (R509, 742-43,777-78). When he got no response he screamed for help until the neighbors came (R743-44,779-80). Julie died from blunt trauma which caused internal bleeding in the skull and swelling of the brain which ultimately cut off the vital functions (R642-43). Smalley was adamant that he never intended to hurt Julie; he only wanted her to hush, to be quiet (R736,737,745,748,756,770,774,776,780).

SUMMARY OF ARGUMENT

POINT I: The trial judge ordered the state to disclose prior to trial which statutory aggravating circumstances would be relied on in seeking the death penalty. The state disclosed two; the trial court found one to have been adequately proved (an especially heinous, atrocious or cruel murder). In Maynard v. Cartwright, 486 U.S. __, 108 S.Ct. __, 100 L.Ed.2d 372 (1988), the United States Supreme Court held that an identical statutory aggravating factor was unconstitutionally vague because such bare wording is too subjective to provide sufficient guidance to the sentencer. Because Florida's aggravating circumstance is identical to Oklahoma's, the same reasoning renders Florida's statutory aggravating circumstance unconstitutionally vague. This defect is not cured by an appellate court placing a "limiting construction" on the use of this aggravating factor because the unconstitutionally vague version was used by the jury to recommend the death penalty and by the trial judge to impose the death sentence. Because the only statutory aggravating circumstance found to exist by the trial judge in this case is unconstitutionally vague, the death sentence must be reversed and the matter remanded for imposition of a sentence of life imprisonment with no parole for twenty-five years.

POINT II: Assuming that the sole aggravating circumstance found to exist by the trial court is viable, the death penalty is none-the-less grossly excessive where that one aggravating circumstance is offset by at least seven independent mitigating circumstances consistently recognized as compelling reasons to impose a sentence of life imprisonment rather than a death sentence. Several of the statutory mitigating circumstances found to exist explain and offset the existence of this particular aggravating circumstance. Other mitigating factors show that this tragic crime was an isolated instance committed by an individual with a great potential for rehabilitation. The death penalty has expressly been reserved for "the most aggravated and unmitigated of serious crimes". This crime is not the most aggravated of serious crimes, but instead the most mitigated. Never has this Court affirmed imposition of the death penalty where these particular mitigating circumstances have been found to exist by the trial judge. Precedent from this Court affirmatively shows that the death penalty under these objective factors is disproportionate. Accordingly, the death sentence must be reversed and the case remanded with directions that a sentence of life imprisonment with no parole for twenty five years be imposed.

POINT I

THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS UNCONSTITUTIONALLY VAGUE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The sole aggravating circumstance found to exist in this case was that the murder was especially heinous, atrocious, or cruel (R165). In Maynard v. Cartwright, 486 U.S. __, 108 S.Ct. __, 100 L.Ed.2d 372 (1988) the United States Supreme Court affirmed the decision of the Tenth Circuit Court of Appeal holding that Oklahoma's identical statutory aggravating circumstance was unconstitutionally vague under the Eighth Amendment to the United States Constitution because it failed to adequately channel the sentencer's discretion in imposing the death penalty. The Tenth Circuit compared Oklahoma's death penalty scheme to that in Florida and Georgia:

> Under the Georgia statute reviewed in [Zant v. Stephens, 462 U.S. 862 (1983)], first degree murder is not necessarily a capital offense. The death penalty can be imposed for first degree murder only if at least one statutory aggravating circumstance is established. A statutory aggravating circumstance is used simply to cross the threshhold dividing first degree murders that are not eligible for the death penalty and first degree murders that are eligible for the death penalty. It does not matter how many statutory aggravating circumstances are present - only one is needed to cross the threshhold. Therefore, as long as one valid aggravating circumstance remains, the murder is a capital offense even if other aggravating circumstances are subsequently found invalid.

> Moreover, an aggravating circumstance under the Georgia statute is used only to determine which first degree murders are capital offenses. An aggravating circumstance does not play the additional role of guiding the sentencer in the exercise of its statutory discretion in deciding whether to sentence a particular murderer to life imprisonment or to death. No particular aggravating circumstance is afforded special weight. There is no requirement that aggravating circumstances be balanced against mitigating circumstances. See Zant, 462 U.S. at 873-74, 103 S.Ct. at 2740-41.

Cartwright v. Maynard, 822 F.2d 1477, 1479 (10th Cir. 1987). In Florida, the statutory aggravating circumstances serve both functions. As in Georgia, the aggravating factors establish which first degree murders are capital offenses in that, in the absence of any statutory aggravating circumstances, a sentence of life imprisonment is mandated. See Section 921.141(3)(a). The aggravating circumstances under the Florida scheme also serve to channel the sentencer's discretion in imposing the death penalty, in that they are weighed by both the jury and the judge against the mitigating circumstances in determining whether a death penalty is appropriate. See Section 921.141(2)(3), Fla. Stat. (1987).

> Florida, like Oklahoma, uses an aggravating circumstance to guide the discretion of the sentencer rather than to define which first degree murders are capital offenses. In this respect the Oklahoma statute is similar to the Florida Statute reviewed by the Supreme Court in [Barclay v. Florida, 463 U.S. 939 (1983)] and [Wainwright v. Goode, 464 U.S. 78 (1984)]. Nevertheless, this case differs from Barclay and Goode in two important respects. First, the Oklahoma courts do not reweigh the

> aggravating and mitigating circumstances after an aggravating circumstance has been found invalid. Second, this case involves an allegation that an aggravating circumstance is invalid under the Federal Constitution rather than state law.

Cartwright, 822 F.2d at 1480.

In Florida the use of an aggravating circumstance to guide the discretion of the sentencer has three facets. First, the jury issues a recommendation to the sentencer based upon the jury's assessment of the weight of mitigating and statutory aggravating circumstances considered by the jury to have been adequately proved. Next, that recommendation is afforded great weight when the trial judge independently weighs the mitigating and statutory aggravating circumstances which he feels have been adequately established. Finally, this Court independently reviews the propriety of the death sentence based upon its comparison of the mitigating and aggravating circumstances to those in other cases where a death sentence has been approved or rejected.

A "limiting construction" by the appellate courts as to what constitutes an "especially heinous, atrocious or cruel" murder fails to cure the defect that obtains when the jury is instructed solely in bare statutory language and recommends a death sentence as occurred here. This jury was instructed;

> The Court: Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings. The aggravating circumstances that you may consider are

> limited to any of the following that are established by the evidence: the crime for which the defendant is to be sentence was especially heinous, atrocious, or cruel. If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R1059). Thus, the sole statutory aggravating circumstance found to exist in this case was thus defined in terms found to be unconstitutionally vague and violative of the Eighth Amendment in Cartwright. When an aggravating factor is improper because it violates the Eighth Amendment to the United States Constitution, as opposed to some state constraint, the death sentence must be vacated. "A death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments." Cartwright, 822 F.2d at 1483. Similarly, a death sentence that is recommended pursuant to a balancing test that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth Amendment. See Riley v. Wainwright, 517 So.2d 656, 659 (Fla. 1987). For the trial court and/or for this Court to independently impose a death sentence in the absence of a valid recommendation by the jury defeats the procedure mandated by the Florida Statutes and otherwise violates the Sixth, Eighth, and Fourteenth Amendments.

No objection by trial counsel is necessary to preserve this Eighth Amendment error. See Woods v. State, 531 So.2d 79, 13 ~~FLW 439~~, ~~440~~ (Fla. July 14, 1988); Copeland v. Wright, 505 So.2d 425 (Fla. 1987). The only statutory aggravating circumstance that exists in this case is unconstitutionally vague under the Eighth Amendment. A "limiting construction" of this aggravating factor by appellate courts and, indeed, even by a trial judge, divests meaningful jury participation, since any jury recommendation would have been made after reliance on and consideration of an unconstitutionally vague factor. For these reasons, the sole aggravating factor in this case must be discarded. In the absence of a valid statutory aggravating circumstance and in the face of the compelling mitigating factors that irrefutably exist, pursuant to Banda v. State, 13 FLW 451 (Fla. July 14, 1988) the death sentence must be reversed and the matter remanded with directions that a sentence of life imprisonment with no possibility of parole for twenty five years be imposed.

POINT II

SMALLEY'S DEATH SENTENCE IS EXCESSIVE UNDER FLORIDA LAW AND CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Coker v. Georgia, 433 U.S. 584, 592 (1977), the United States Supreme Court cautioned that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of the individual Justices; judgment should be informed by objective factors to the maximum possible extent." Coker, 433 U.S. at 592. The Legislature has chosen to reserve application of the death penalty "only to the most aggravated and unmitigated of most serious crimes." Fitzpatrick v. State, 527 So.2d 807, 811 (Fla. 1988), and in that vein has expressly set forth by statute objective factors to restrict the subjectivity of imposition of the death penalty in Florida.

Review by this Court of those objective considerations leads to no other reasonable conclusion but that this is NOT the most aggravated of serious crimes, and therefore the death penalty is in this case excessive punishment. This Court has never affirmed a death sentence where these particularly compelling mitigating factors were found by the trial court; such cases are patently not "the most aggravated and unmitigated of serious crimes." Fitzpatrick, supra. The trial court found but one statutory aggravating circumstance to have been sufficiently proved, to wit; the murder was especially heinous, atrocious, and cruel (R 165, See Appendix A). Assuming, arguendo, that this lone

aggravating factor is viable (See Point I), before the death penalty is authorized that sole aggravating factor must outweigh seven independent, compelling mitigating circumstances recognized and found to exist by the trial court.

1. Smalley has no significant history of prior criminal activity.

2. The crime was committed while Smalley was under the influence of extreme mental and emotional disturbance.

3. Smalley acted under extreme duress or under the substantial domination of another person.

4. Smalley's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

5. Smalley was himself an abused child.

6. Smalley is genuinely remorseful.

7. Smalley was a good employee thought highly of by fellow employees.

(R 165-170, Appendix A). Comparison of this case to other cases establishes that a death sentence is clearly excessive here. Rather than being the most aggravated of serious crimes, this is one of the most mitigated. Never has this Court approved the death penalty where a single aggravating factor is offset by these particular mitigating circumstances. These objective factors address the crime and the defendant's character based on mitigating considerations existing before, during, and after the crime.

Specifically, Smalley was himself an abused child, and the testimony established that there is a high corollary between people who abuse children and people who were themselves abused. Smalley's natural father, described as "irresponsible", suffered

from "battle-fatigue" and abandoned the family when Smalley was two years old (R1019-1020). Two step-fathers tormented Smalley both physically and mentally. "For instance, if something happened, he would beat Buddy and beat the others with a cutting board, one of these one inch ones with a handle on it. He beat me. He beat us with belts. He beat us with a hose. He beat us with ropes." (R 1021). Smalley would often take the blame for his smaller sister in order that she escape such mistreatment (R1011).

In short, Smalley was raised in a home of inappropriate adult behavior, and that undoubtedly affected his responses when he was thrust into a situation of having to exercise parental supervision and discipline. This particular mitigating factor has frequently been given great weight by this Court when vacating death sentences and remanding for imposition of life sentences. See Livingston v. State, 13 FLW 187. 188 (Fla. March 10, 1988); Amazon v. State, 487 So.2d 1, 13 (Fla. 1986). The documented interplay between abused children who later themselves become abusive adds significantly more meaning to this mitigating consideration under these facts, because this flaw in Smalley's character was latent, beyond his control, and ingrained by others when his character was first being formed.

The trial court also found that Leonard Smalley has no significant history of prior criminal activity. That finding is uncontroverted by the record. This statutory mitigating factor is a compelling indicator of the defendant's character and potential for rehabilitation. See Proffitt v. State, 510 So.2d

896 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Menendez v. State, 419 So.2d 312 (Fla. 1982). In each of these cases the trial court imposed a death sentence in accordance with a jury recommendation. In each case this Court reversed the death sentence as excessive and remanded for imposition of life sentences. Significantly, lack of a prior criminal history was the only mitigating factor expressly found in any of these cases.

Menendez concerned a felony murder; this case concerns a felony murder. (The jury was not provided a verdict form to specify the basis for their verdict, but the evidence is wholly inconsistent with a premeditated killing.) The evidence is simply overwhelming that Smalley loved Julie dearly (R24,1029-30). Smalley's fifteen year old neighbor testified, "They loved each other a lot." (R511); "I don't know about Mrs. Cook, or what, I know he had a good relationship with the kids. If you ask me, they were a good family."(R 507). When Smalley returned from taking Cecelia her food and found that Julie had stopped breathing, he attempted to revive her. Failing in this, he screamed for the neighbors to call an ambulance and to come help (R509,515,743-49,779-80). Julie's heart was then in a condition of "articulus ventilation", meaning the heart was quivering but there was no blood output (R551). Even Cecelia admitted that Smalley loved the children and that they loved him (R 607). "He would get up at night, he said he couldn't sleep, knowing that she was sick, and he would get up and stroke her head [.]" (R606). These actions are totally at odds with any premeditation to kill the child.

Smalley's distress at the death of the child was genuine and not feigned. The mental health experts all concluded that there was no intent to kill Julie (R940,977,982).

> Dr. Krop: Well, I think the situation that occurred would almost be looked at like a vicious cycle. I think that as the day progressed, the frustrations got greater, the pressures in his mind got greater, and he was feeling torn and frustrated in terms of knowing how to make the right decisions and so forth, in terms of satisfying everybody's needs. Again, one has to look at the fact that he is already a fragile and fairly unstable individual and wasn't able to deal with the demands of raising a child like most of us would be able to do, so I think as things went on during the day, he initially got frustrated, started abusing the child physically, on an impulse in terms of not knowing how to deal with the child's crying and as he began getting involved in that situation in terms of not knowing how to satisfy the chld, using some physical abuse and then feeling guilty about the abuse, yet at the same time feeling like not wanting to let his girlfriend know what was going on, and I think it is just really built in him almost just like, just building up inside of him and he would respond until he got to the point where he just reacted in an explosive, very inappropriate, irrational kind of way, using extremely poor judgment to the point where the child died as a result of the physical beating that he put on her.

(R 949). The very fact that this is a felony murder, as opposed to a premeditated murder, is itself mitigating. See Spivey v. State, 526 So.2d 762 (Fla. 1988); Ross v. State, 474 So.2d 1170 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Norris v. State, 429 So.2d 688 (Fla. 1983).

In Huckaby v. State, 343 So.2d 29 (Fla. 1977), this Court reduced a jury-recommended/court-imposed death sentence to life imprisonment and commented on the interplay between especially heinous, atrocious and cruel conduct and the statutory mitigating factors that pertain to the mental condition of the defendant when the crime was committed:

> Our review of the record shows that the capital felony was committed while Huckaby was under the influence of extreme mental or emotional disturbance, and that while he may have comprehended the difference between right and wrong his capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired.... It is our view, moreover, that these mitigating circumstances outweigh the aggravating circumstances in this case although the circumstances on each side are equal in number. * * * Our decision here is based on the causal relationship between the mitigating and aggravating circumstances. The heinous and atrocious manner in which this crime was perpetrated, and the harm to which the members of Huckaby's family were exposed, were the direct consequence of his mental illness, so far as the record reveals.

Huckaby, 343 So.2d at 33-34, (emphasis added). See also, Amazon v. State, 487 So.2d 1, 13 (Fla. 1986)("In light of these mitigating circumstances, one may see how the aggravating circumstances carry less weight and could be outweighed by the mitigating factors. The heinous, atrocious and cruel murders were committed in an irrational frenzy.") .

Similarly, the abuse inflicted in this case was a direct consequence of Smalley's mental condition, as shown by the testimony and expressly found by the trial court.

> THE COURT: "Drs. Poetter, Kropp and Fisher testified that although the Defendant met the criteria for competence at the time of the offense, his mental ability to appreciate the result of his conduct was substantially impaired. All testified that they believed the Defendant had no intent to kill the child, but the drug abuse, emotional distress, and depression combined to impair the Defendant's mental processes at the time of the offense."

(R169).

The harm was not intended as torture or abuse, as in Roman v. State, 475 So.2d 1228 (Fla. 1985)(two year old female child sexually abused and buried alive) or Dobbert v. State, 328 So.2d 433 (Fla. 1976)(father systematically tortured his five children for days, after which two died); this isolated instance of abuse occurred as a tragic, inappropriate reaction to Julie's crying. This occurred after a week of constant attention and care for the child by Smalley without any appreciation from Cecelia and at the cost of another job. On Monday Smalley spent the entire day in a doctor's office waiting to have Julie cared for (R580). Smalley was in a prolonged state of despair and frustration over the house being a mess which he had to clean up (R737-739). Cecelia was getting them deeper into financial trouble by writing bad checks, leaving it to him to explain to those who had extended them loans why the payments were not timely being made (R770-771). It was shortly after his talk with the loan officer and a conversation with Cecelia where she yelled at him for not having brought her something to eat that he lost control and fatally injured Julie when she continued to cry. In

that respect, his actions must be gauged by his motivation and mental condition at that time. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed2d 1 (1982). Sleep deprivation caused by Smalley's care for Julie at night also played a part (R582).

Aggravated child abuse was just recently added as a specifically enumerated felony whereby first degree felony murder is committed when a child dies from such abuse. See Sections 782.04(1)(a)(2)(h) Fla.Stat. (1985); 827.03 Fla.Stat. (1987). By its very nature, whenever a felony murder occurs with an underlying felony of aggravated child abuse, the aggravating factor of an especially heinous, atrocious or cruel murder will be present. This is so whether the conduct of the defendant is intentional or a product of emotional strain. If the mitigation present in the instant case is insufficient to outweigh that sole aggravating circumstance, then it is doubtful whether there ever will be sufficient mitigation to do so, and the death penalty will therefore become automatic whenever such a conviction obtains. See Woodson v. North Carolina, 428 U.S. 280 (1976).

In addition to the fact that Smalley has no significant history of prior criminal activity, the trial court found two additional mitigating fators that are also indicative of a good chance for rehabilitation of the defendant, those being that Smalley is genuinely remorseful and he was a good employee thought highly of by his co-workers (R 170). "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: any sentencing authority must predict a convicted

person's probable future conduct when it engages in the process of determining what punishment to impose.'" Skipper v. South Carolina, 476 U.S. 1, 5 (1986)(citation omitted). Along these lines, Dr. Krop testified:

> I think that one of the things that people look at and one of the reasons, of course, why the death penalty was instituted, was because there was the feeling that an individual would not have rehabilitation potential. I think that -- and I would concur that most of the individuals that are sentenced to death, probably don't have rehabilitation potentials. I think that based on the remorse that he is experiencing, his own self-inflicted depression, the fact that he has been acknowledging to me what he did, which is unusual, even for the individuals who are already on death row, I think those are all rehabilitation, positive rehabilitation signs. I also think what is important is that, again based on information available to me, he would not appear to be a management problem and would be able to get along fairly well in an open prison population.

(R953). "Any convincing evidence of remorse may properly be considered in mitigation of the sentence[.]" Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983); See State v. Sachs, 526 So.2d 48, 51 (Fla. 1988)("[W]e conclude that clear and convincing evidence of actual remorse also may constitute a valid reason for [downward] departure."). The significance of genuine remorse is that self-inflicted punishment is oft-times more harsh than any imposed by society. Smalley's remorse is so great that one psychologist was hesitant to find Smalley competent to stand trial because it was doubtful that Smalley would actively assist his attorney or try to defend himself (R973-975).

THE JURY RECOMMENDATION IS UNRELIABLE

As set forth in Point I, the jury was not provided sufficient guidance to apply the statutory aggravating factor of an especially heinous, atrocious, or cruel murder. Accordingly, the jury recommendation is tainted and entitled to little weight. See Riley v. Wainwright, 517 So.2d 656, 659 (Fla. 1987)("If the jury's, recommendation upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by the procedure."). The standard jury instructions also violate the Eighth and Fourteenth Amendments to the United State Constitution by informing the jury that the mitigating circumstances must "outweigh" the aggravating circumstances. Mitigating circumstances need not weigh more than the aggravating circumstances. The mitigation must only be such as to make imposition of the death penalty unwarranted. By informing the jury that the mitigating circumstances must "outweigh" the aggravating circumstances, the weighing process is distorted under the Eighth Amendment and the burden of persuasion is unconstitutionally placed on the defendant in violation of the Sixth and Fourteenth Amendments. The standard jury instructions are susceptible to being misunderstood by a reasonable juror, which is an independent reason that the jury recommendation is unreliable and invalid under the Eighth Amendment.

Further, the Due Process clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to

constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). "The safeguards fo due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty." The standard jury instructions in Florida create a rebuttable presumption once an aggravating circumstance is established that death is the appropriate penalty unless and until a defendant establishes that "there are mitigating circumstances sufficient to outweigh the aggravating circumstances." Fla. Std. Jury Instructions in Criminal Cases, p.77. Taken literally, the standard instructions require that, for a life sentence to be recommended by the jury or imposed by the trial judge, the mitigating evidence must weigh more than ("outweigh") the aggravating circumstances. This is a burden of persuasion rather than a burden of production, and it results in the state bearing the burden of persuasion only so long as no mitigating evidence is introduced. This follows because the jury is instructed that the state only has to prove beyond a reasonable doubt that the death penalty is appropriate before any mitigation is shown. When mitigation is shown, the jury is instructed that the mitigation must "outweigh" the aggravating circumstances. A reasonable construction of the standard instruction is that the mitigation must weigh more than the aggravating factors. This violates the Due Process clause of the Fourteenth Amendment, and renders the death penalty process unreliable under the Eighth Amendment.

> In this circuit, then, the state of the law is well settled. Capital sentencing instructions which do not clearly guide a jury in its understanding of mitigating circumstances and their purpose, and the option to recommend a life sentence although aggravating circumstances are found, violate the Eighth and Fourteenth Amendments.

Goodwin v. Balkcom, 684 F.2d 794, 801 (11th Cir. 1982). A presumption which, although not conclusive, has the effect of shifting the burden of persuasion to the defendant, is constitutionally deficient. The threshold inquiry is to determine the nature of the presumption the jury instruction describes. "That determination of words requires careful attention to the words actually spoken to the jury (citations omitted), for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom v. Montana, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed2d 39 (1979).

The defective nature of the standard instructions was addressed in Arango v. State, 411 So.2d 172 (Fla. 1982), where this Court held that the instructions, when considered as a whole, do not effectively shift the burden of persuasion to the defendant. This Court recognized, however, that the death penalty can only be imposed where the state shows the aggravating circumstances outweigh the mitigating circumstances. Arango, 411 So.2d at 174. It is respectfully but expressly submitted that the standard instructions given in this case, even when considered in their entirety, do not fairly apprise the jury of their function and thus they do not comport with constitutional requirements.

The jury recommendation was further unconstitutionally tainted by improper prosecutorial argument and tactics occurring during both the guilt and penalty phases of trial. It is expressly submitted that, though such error may be deemed harmless as it pertains to affecting the jury determination of guilt during the first phase of the trial, that same error cannot reasonably be said not to have influenced the jury recommendation for the death penalty. A death sentence recommended by a jury whose passions and emotions have been unfairly inflamed by the prosecutor violates the Eighth Amendment to the United States Constitution and is unreliable. Booth v. Maryland, 486 U.S. __, 107 S.Ct. 2529 (1987).

Specifically, the prosecutor argued, "You know, this is Mr. Smalley's day in court. Well, let me tell you, it is also somebody elses day in court. It's Julie Ann Cook's day in court. Because she, as a victim, she has certain rights, even though she is no longer here." (R861). "Well, let me tell you something. There has been absolutely no evidence of any diminishment of mental capacity at all, so that is not even there. Don't even get in there and say 'must have been crazy to do that'. That doesn't excuse him from the criminality of what he did. No evidence to show that he has any diminished capacity. He is just as sane as you and I, legally, and is responsible for everything that he does, just like you are, just like I am." (R881).

> The law sets out six rules, rules that you can follow in using, and it says did the witness that is testifying seem to have an opportunity to know the things about which the witness testified.

> Well, you know, Leonard Lee Smalley had an opportunity. I don't think he told you the whole truth, and I tell you why, because he ain't told the whole truth yet. He told you part of the truth. The next one, did the witness seem to have an accurate memory? Well, no question about the memory of most of these people, except one, the defendant. Notice how he conveniently forgot some things, but remembered other things, very explicit detail. That reminds me. When I said that I think he has told part of the truth, when I was reviewing for this case, I went through those statements -- you can take them back -- I tell you one thing that I honestly believe he told the truth about. All the way through, he imitates the sounds that she made. The (ugg-ugg), the (gurgling), and the (sputtering) and talks about everything horrible that she did. I think that is the truth. I think he witnessed that. I think all the way through, everything he said her little head flopped around, and she started shivering, and all that, I think all that happened. And I think in the end, the third version of the story that he told was true to the extent of how many times he dunked her, how many times he hit her. He may have minimized his -- and like Lieutenant Farmer, I think that there is one part of the story that isn't true, and that is the intent part. Why, as Lieutenant Farmer said, -- 'do you believe that?" -- "It doesn't take common sense, that anybody didn't show that they were going to hurt somebody and kill them doing that to them".

(R881-882)(emphasis added).

> Yours is not going to be an easy decision. It is something that you should not take lightly. I think the acts of Mr. Smalley on October 23, 1987 will have rippled effect throughout all the county. It certainly affects the Hords, because young Michael at age 15, has to know what it is to deal with death. Cindy, his mother, has to know what it is to deal with a frustration of

> a young child dying. Certainly, the Cook family has to know what it is to deal with the loss of a child under the most tragic -- the most senseless circumstances in the world. Julie is gone, but she is not forgotten. Julie will never have the opportunity to watch the sun shine, the sky blue, or the rain fall, and she will never hear birds sing. She will never have the excitement of the first day in kindergarden, the exuberance of first love, the joy of giving birth, but just as surely as we sit here today, Julie's presence is here today, and what she is here for is her day in court. You know, Matthew, Chapter 19, verse 14, says "suffer not the little children, but bring them on to me, for theirs is the kingdom of heaven" and, surely, her soul sits up there right now. But there is some unfinished business down here now. And that unfinished business is, the person who put her up there has to face the highest authority in this land. And that is the law. Your verdict here today, as I said, will ripple out, you will issue a message to Sumter County. You don't do this to a child, you don't do it and then hide behind the fact that -- I didn't mean to do it. In Sumter County, if you are an adult, then you face the consequences of what you do like a man. And Julie will never, never rest until justice is done. Justice, which is first degree murder, not lesser included justice, but what he is charged with and he is charged with first degree murder, and that is what the proof is. And, I think when you go in there, and you think about it, you pray over it, or talk about it, there is no question what it is. It is first degree murder as charged. Thank you very much.

(R888-889).

In State v. Murray, 443 So.2d 955 (Fla. 1983), this Court held that prosecutorial error alone does not warrant automatic reversal of a conviction:

> This Court considers this sort of prosecutorial misconduct, in the face of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings. It ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office. Nor may we encourage them to believe that so long as their conduct can be characterized as "harmless error", it will be without repercussion. However, it is appropriate that individual professional misconduct not be punished at the citizens expense, by reversal and mistrial, but at the attorneys expense, by professional sanction.

Murray, 443 So.2d at 956. This Court recently vacated a death sentence and remanded for a new penalty phase based on prosecutorial comment that was much more innocuous than that present in the instant case. See Garron v. State, 13 FLW 325 (Fla. May 19, 1988). The prosecutor in this case employed arguments that have squarely and unequivocally been held to be improper. Such reckless disregard from the state attorney in using this type argument is an affront to the ethical requirements of his elected office and his duty to set an appropriate example to those he oversees.

Repeated statements of what the attorney thought the evidence proved is patently unacceptable. Grant v. State, 171 So.2d 361, 365 (Fla. 1965)("It is unnecessary to enlarge upon the sound rule of practice that the prosecution will not in argument express belief in the guilt of the defendant[.] Competent counsel avoids such breaches of legal propriety and the courts will scrutinize such offensive conduct with great care."). It is

widely recognized that proper argument by counsel can in no way contain the personal opinions of the attorney as to what has or what has not been established by the evidence. In Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984), Judge Hurley stated, "The 'send'em a message' argument may have some cachet in the political arena, but it is grossly improper in a court of law. (citations omitted). It diverts the jury's attention from the task at hand and worse, prompts the jury to consider matters extraneous to the evidence. This type of argument is calculated to inflame the passions or prejudices of the jury and, thus, is prohibited by ABA Standards For Criminal Justice, 3-5.8 (c)."

In Bertolotti v. State, 476 So.2d 130 (Fla. 1985), this Court stated, "In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty phase trial." Bertolotti at 133 (emphasis added). The recommendation of this jury, "which is advisory only" Bertolotti at 133, is demonstrably infected with constitutionally-improper considerations deliberately interjected by the prosecutor, with standard jury instructions that improperly shifted the burden of persuasion to Smalley to show that the mitigating circumstances outweighed the aggravating circumstances, and with an unconstitutionally vague statutory aggravating circumstance, the bare wording of which has squarely been held by the United States Supreme Court to fail to provide adequate guidance. Therefore, when this Court performs the proportionality analysis of the objective factors present in this

case and compares them to the objective factors present in other death penalty cases, little if any significance should be given to the recommendation of this jury. In light of the particular objective mitigating circumstances found to exist by the trial judge, precedent shows unequivocally that the death penalty is disproportionate under these facts, even assuming a valid statutory aggravating circumstance and even assuming a valid jury recommendation for the death penalty. Accordingly, the death sentence must be reversed and the matter remanded for imposition of a life sentence.

CONCLUSION

The death sentence must be reversed and the matter remanded for imposition of a life sentence with no parole for twenty-five years because the sole aggravating circumstance found by the trial judge to exist in this case is unconstitutional and because, even assuming a valid aggravating circumstance, the mitigating factors specifically found to exist by the trial judge affirmatively establishes that a death sentence has been disproportionately imposed under the Eighth Amendment and prior decisions of this Court.

JAMES B. GIBSON
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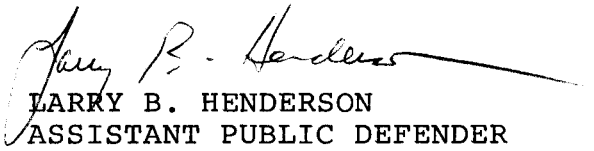
SEVENTH JUDICIAL CIRCUIT



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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. Leonard Lee Smalley, #112115, P.O. Box 747, Starke, Fla. 32091 on this 23d day of November 1988.

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