IN THE SUPREME COURT OF FLORIDA

ANTHONY J. PONTICELLI,)
)
Defendant/Appellant,)
vs.)
)
STATE OF FLORIDA,)
)
Plaintiff/Appellee.)
)
)

CASE NO, 73,064

FILED
SID J. WHITE
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APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The symbol (R) will refer to the record on appeal in the instant case; (SR) will refer to the supplemental record on appeal.

IN THE SUPREME COURT OF FLORIDA

ANTHONY J. PONTICELLI, Defendant/Appellant, vs. STATE OF FLORIDA, Plaintiff/Appellee.	)	CASE NO. 73,064

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On January 4, 1988, the grand jury in and for Marion County returned an indictment charging Appellant, ANTHONY JOHN PONTICELLI, with two counts of first degree murder in violation of Section 782.04(1)(a)1, Florida Statutes (1987) and one count of robbery with a deadly weapon in violation of Sections 812.13(1) and (2)(a), Florida Statutes (1987). (R1375-2376) Defense counsel filed a Motion for Psychiatric Examination for the purposes of determining Appellant's competence to stand trial and his sanity at the time of the offense. (R1413-1415) The motion was granted and Doctors Rodney Poetter, Harry Krop and Robin Mills were appointed to examine Appellant. (R1426-1427) Following a hearing on August 2, 1988, Judge McNeal determined Appellant was competent to stand trial. (R1217)

On July 25, 1988, Appellant filed a Notice of Intent to Rely on an Insanity Defense at trial. (R1424-1425) The nature

of the insanity sought to be proved was acute cocaine usage. **(R1424)** Appellant filed two motions to suppress his statements made to Dennis Freeman **(R1448-1551)** and to Investigator Munster. **(R1469-1477)** Both motions were denied following an evidentiary hearing. **(R1292,1232-1233)** Prior to trial, Judge McNeal ruled that defense counsel could not question the jury venire concerning their reactions to **a** recent celebrated murder trial which resulted in a not guilty by reason of insanity verdict. **(R1236,7-8)**

Appellant proceeded to jury trial on the charges on August **9-12, 1988** with the Honorable Raymond T. McNeal, Circuit Judge presiding. **(R1-1156)** The state, over defense objection, introduced Appellant's taped statements into evidence. **(R789-790)** However, after the first tape was begun, Judge McNeal reversed his ruling and suppressed the first taped statement. (R804) Appellant unsuccessfully moved for a mistrial. **(R804-805)** The three subsequent taped statements were then entered into evidence over defense objection. **(R804,815,831,839)** At the close of the state's case-in-chief, Judge McNeal granted a judgment of acquittal **as** to the robbery charge but permitted the two murder charges to stand. **(R941)**

After the state rested, the defense sought to present the testimony of Dr. Mark Branch to explain the affect of cocaine psychosis. **(R971-993)** However, Judge McNeal sustained the state's objection and refused to allow Dr. Branch to testify. (R993) Fallowing deliberations, the jury returned verdicts finding Appellant guilty as charged of two counts of first degree murder. (R1151-1152,1512-1515)

On August 18, 1988, the jury reconvened for the penalty phase. (R1309-1374) Following deliberations, the jury recommended by votes of 9-3 that Appellant be sentenced to death for both murders. (R1373,1741,1742)

On August 22, 1988, Appellant filed a Motion for New Trial. (R1743-1818) Judge McNeal denied this motion. (R1158) On September 6, 1988, Appellant again appeared before Judge McNeal for sentencing. (R1159-1173) Judge McNeal adjudicated Appellant guilty of both murders and imposed the death penalty for each. (R1172-1173,1847-1851) Judge McNeal filed written findings of fact in support of the imposition of the death penalty. (R1833-1837)

Appellant filed a timely notice of appeal on September 6, 1988. (R1860) Appellant was adjudged in solvent and the Office of the Public Defender was appointed to represent him on appeal. (R1865,1881-1882)

STATEMENT OF THE FACTS

Keith Dotson lived in Silver Springs Shores in Marion County with his mother. (R510) During Thanksgiving 1988, Dotson's cousins, Ed and Warren Brown, and their friend Brian Burgess came to visit Dotson. (R465,510,534,556) On the afternoon of November 27, 1987, the day after Thanksgiving, Dotson and his friends were at the Kwik King store where Dotson first met Appellant. (R512) Since Appellant seemed nice, Dotson invited him to come by his house that evening where Dotson and his friends planned to watch video cassettes which they had rented. (R512) At approximately 6:30 - 7:00 p.m. that evening Appellant arrived at Dotson's house. (R512,536,556,469) Appellant stayed for approximately thirty - forty-five minutes during which time the group sat around and talked about the movie which they were watching. (R513,470,536,558) Later Appellant returned to Dotson's house in a car. (R514,558) Appellant went in the house and told Ed Brown and Brian Burgess that there were two people in the car who he was planning to kill. (R474,537) Appellant showed the boys a gun which he had and told them that he planned to kill the people for money and cocaine. (R474,537) Appellant also told them that he would need a ride back to his house, which Ed Brown agreed to give him. (R474,537) Appellant asked Brown for the phone number so he could call them and then he left. (R475,539) The boys did not really believe that Appellant was serious about what he had said. (R475,539) Nevertheless Brown asked Dotson if he had a gun and Keith replied yes. (R476,516,539) Ed told Keith to load it and to bring it to him just in case

Appellant returned. **(R476,516,539)** Brown got the shot-gun and kept it by the couch. **(R476)** Although the phone rang several times the boys did not answer the phone on purpose. **(R476,517,539)** At approximately 11:30 p.m. Appellant returned to Dotson's house in a taxi cab. **(R540,560)** When he arrived Appellant told the boys that he had killed the two people for cocaine and $2,000. **(R517,542,477)** Appellant asked if he could wash his clothes because there was blood on them. **(R478)** Dotson agreed to wash the clothes and lent Appellant some sweat pants and a shirt. **(R479,517,561)** Appellant asked Ed Brown if he thought that after shooting someone in the head whether that person would live. **(R479)** Brown told him that he thought chances were slim and told Appellant that he did not think he had any worries about it. **(R479)** Appellant however was quite worried because he said he had heard moaning. **(R479,563,541)** While waiting for his clothes to be washed, Appellant called his mother and told her he was with some friends and would be home in approximately thirty minutes. **(R480,540,562)** After his clothes were finished, Appellant asked Brown for a ride home which he gave him. **(R544,564)** The boys never called the police. **(R482,521,565)** On the next day Ed, Warren, and Brian went home to West Virginia. **(R482,521,565)** While packing the car, Ed Brown found a pair of shoes with blood on them behind the back seat of the car. **(R483)** On the way to West Virginia, Brown threw the shoes out on the side of a county road. **(R484)**

On the following day Appellant returned to Keith's house after his cousins had left. (R522) Appellant arrived in a

red Camaro accompanied by John Turner. (R522) Appellant said he was going to use the money he had gotten from the people he had killed to fix the car up and to use it as a getaway. (R523) Appellant asked Keith if he had told anyone and Keith said no. (R523) Appellant stayed approximately thirty minutes and then left. (R523) A short while later Appellant again arrived at Keith's house. (R524) This time Appellant was in a blue car but again was accompanied by John Turner. (R524) Appellant again asked Keith if he had told anyone and Keith again told Appellant no. (R524) Because Keith wanted Appellant to leave, he told him that he had to go to Orlando and pick his mother up at the airport. (R524)

Timothy Keesee lived with Ralph and Nick Grandinetti. (R411) Keesee also knew Appellant who used to come by their trailer to purchase cocaine. (R415) The Grandinettis allowed Appellant to purchase cocaine on credit. (R415) Keesee spent Thanksgiving 1987 in Tallahassee and returned home the day after with his younger brother who was in the Navy. (R415-416) Keesee got home about 7:30 p.m. and when he arrived Appellant was at the house with both Ralph and Nick. (R416) The three were discussing the money that Appellant owed the Grandinettis for cocaine they had given him. (R416) The Grandinettis were wondering how Appellant was going to pay them and Appellant told them he would sell whatever cocaine they had. (R417) Ralph had about five grams of cocaine packaged individually. (R418) There was also a wad of money on the table although Keesee does not know how much it contained. (R418) Since it was in front of Ralph, Keesee

assumed the money was his. **(R418)** Appellant told the Grandinettis that he could make a couple of phone calls and if they could take him to sell what they had Appellant would settle **up** with them. **(R418)** The discussion involved mainly Appellant and Ralph Grandinetti. **(R419)** Appellant made two phone calls but got no answer to either one. (R419) Ralph seemed a bit anxious to get his money or to take Appellant home. (R419) Keesee had invited the Grandinettis to go with him and hi5 brother to a bar. (R419) Ralph said that they would take Appellant home. (R419) However Appellant requested that he be allowed to finish his phone calls so that they could settle **up** that night. (R419) Keesee and his brother went to a couple of bars and returned home about 10:00 p.m. (R421) The Grandinettis were not at home which surprised Keesee since Nick usually stayed at home. (R421) Keesee thought that perhaps they had gone looking for him and his brother so he waited expecting the Grandinettis to call. **(R421)** The Grandinettis' sister came by that evening. (R422) However Nick and Ralph never came home that night. (R422) On Saturday morning Keesee got up about 7:00 a.m. and took his brother to the airport in Orlando. (R422) Keesee returned from Orlando around noon. **(R422)** About an hour later Detective Munster came by and asked Keesee if he had seen Nick and Ralph. (R422) Keesee told the Detective that although they lived there he had not seen them since the night before. (R423) Detective Munster asked Keesee who the Grandinettis had been with the night before and Keesee told him about Appellant and where Appellant lived. **(R423)** Detective Munster then showed Keesee pictures of Ralph and Nick

and told him that they were dead. (R424) Keesee was aware that Ralph was a cocaine dealer. (R426) In the four weeks that Keesee lived with the Grandinettis, Appellant came by at least fifteen to twenty times and bought large amounts of cocaine from Ralph. (R426) Sometimes Appellant would come by two or three times a day to purchase cocaine. (R427)

On Saturday November 28, 1987 Ellzey Harrington found a car behind his house in Silver Springs. (R304) Harrington first saw the car around 8:00 a.m. (R306) It appeared as if the driver had had a flat tire since the tire was off the front. (R306) Later after Barrington thought that someone should have been there to get the car, he went down to look at it. (R306) Harrington and his neighbor approached the car and Harrington observed a foot in the passenger window. (R309) As he approached closer Harrington saw blood all over and saw a person head down on the floor on the car. (R309) The man appeared to be badly hurt. (R310) In the back seat appeared to be a dead man. (R310) Harrington could hear the man in the front seat gasping for air and observed him kicking his foot. (R310) The back of the man's head was matted with blood and blood was spattered all over the car. (R310) Harrington observed a pair of glasses and a driver's license on the seat of the car. (R310) Harrington opened the door so that the man in the front seat could get his feet down and perhaps breath a little more normally. (R312) The man said nothing but just groaned. (R313) About ten to fifteen minutes later an ambulance arrived. (R313) When the paramedics arrived they stabilized the person who was in the front seat and

took him to the hospital. (R336-337,346-347) The person in the back seat was already dead. (R344)

On November **29, 1987** Doctor Tamera Sanderson performed an autopsy on Ralph Grandinetti. (R363) The victim had multiple abrasions on his face over his forehead which were superficial. (R367) There were marks under his chin which were consistent with fingernail gouges. (R367) There was **a** bullet wound to the left side of the head just above the left ear which extended through the skull line and through the brain. (R368) The wound was a close contact wound which indicated that the gun was placed very close to the head. (R369) The bullet entered through the scalp producing a large amount of hemorrhaging underneath the scalp on top of the bone. **(R369)** The bullet went through the skull and **brain** through the inner portion of the skull on the right side of the head. **(R369)** The bullet exited to the outer portion of the skull but stopped just beneath the skin, there was no exit wound. **(R369)** The cause of death was massive trauma, lacerations and bleeding and shattering of the brain substance caused by a gunshot wound to the head, **(R374)** Doctor Sanderson opined that death occurred within one to two minutes. **(R374)**

Nick Grandinetti survived until December 12, 1987. **(R385)** On that date Doctor Nicholas Maruniak performed an autopsy. (R385) Nick Grandinetti suffered two gunshot wounds to the back of his head. (R386) There were bruises around the back of his head and on the side of his head. (R386) The skin on the right ear was peeling and red and covered with a creamy substance. This **was** consistent with hot pressure placed on the

ear for an extended period of time. (R388) Doctor Maruniak discovered two small bullet holes in the back of the head which he determined to be entrance wounds. **(R390)** There wasruising on the back of the head which indicated that the victim had bled internally. (R390) Doctor Maruniak discovered bruising which was consistent with blunt trauma to the head. **(R392)** There had been a bolt inserted in the victim's head to drain the pressure. **(R393)** The victim was not in pain because he had been in a coma. (R394) The bullets had entered the back of the head on either side of the midline, coursed through the posterior lobe to the brain with one ending up in the front of the brain and the other in the lower frontal part of the brain, **(R394)** There were no exit wounds. (R394) The cause of death was cardiac arrest which was secondary to the gunshot wounds. **(R398)** Either bullet would have caused death. (R399) Although the victim probably experienced pain until he became comatose, Doctor Maruniak could not say within a medical certainty that he had suffered pain. **(R399-400)**

Joseph Leonard was one of Appellant's best friends. (R606) In November of **1987,** Leonard gave Appellant a gun in return for a tattoo that Appellant had purchased for Leonard. **(R608)** On Friday November 27, **1987** Appellant called Leonard and asked if he would be able to give him a ride around 8:30 p.m. that night. (R610) Appellant said he was with Nick Grandinetti whom Leonard also knew. (R611) Leonard had agreed to give Appellant a ride. **(R611)** At around **9:30** p.m. Appellant came to Leonard's house and returned the gun to him. **(R611)** At that

time Appellant told Leonard that he "did Nick" which Leonard understood to mean that he had shot and killed Nick Grandinetti. (R612) Joey Leonard's roommate, Bobby Mead, was present when Appellant told Joey about killing Nick. (R574-575) Appellant also wanted to know what he should do with the bodies, although neither Mead nor Leonard ever saw any bodies. (R577) Appellant gave the gun to Leonard and left. (R614) Leonard put the gun in a stereo cabinet. (R614) Early the following day Appellant walked over to Leonard's house. (R615) Appellant and Leonard took a walk on a golf course during which Appellant told Leonard the details of what had happened. (R616) Appellant told Leonard that the Grandinettis had been harassing him about money that he owed them and were not going to let him leave their house until they got the money from him. (R617) They had all left in a car and Appellant directed them around the back roads trying to sell the cocaine. (R618) Appellant said he shot them both in the head. (R619) After doing this Appellant had stopped at Leonard's house and gave him the gun. (R619-620) After leaving Leonard's house Appellant had a flat tire so he took the bodies and left them. (R620-621) Appellant then said he took a taxi cab home. (R621)

William Tressam works as a driver for Ocala Taxi Company. (R450) On the evening of November 27, 1987 he was dispatched at 11:15 p.m. to the Cloister Court Motel in Silver Springs. (R451) When he arrived a male walked from the shadows into his cab and got in the back seat. (R452) The person asked to go to Silver Springs Shore and Tressam told him it would cost

$12.00. (R453) The person gave Tressam $15.00 and asked if it would cover it. (R453) The man said he had been to the ABC lounge with some friends and was trying to hitchhike back to the Shores when he decided that he wouldn't get a ride so he called a cab. (R455 He said he wanted to leave the lounge but his friends did not so he left by himself. (R455) When Tressam asked the man for an address where he wanted to go the man could not give him an address but said he would show him where to go. (R455) Tressam dropped off the man at a residence. (R456) Later when Tressam was contacted by Detective Munster, Tressam was able to take him out to the place where he had dropped off the man but found that it was a vacant house. (R457) Tressam cannot say that his fare was Appellant. (R458)

Ronald Balsey is an acquaintance of John Turner (R639) On the Sunday after Thanksgiving John Turner came to his house with another individual. (R641) This other individual was Appellant. (R640) John came into the house and asked Halsey if they could burn some trash out behind the house and Halsey agreed. (R641) Both Appellant and Turner came in the house sat down and talked about a football game. (R642) Appellant appeared nervous and after the conversation Turner said they were going to burn the trash. (R642) When Halsey went back to check on the fire he saw a dark coat on top of the fire. (R643) Halsey was surprised that they were burning clothes and asked about it. (R644) Appellant broke down and told Halsey that he had shot two men. (R644) Appellant told Halsey that he had owed one of the men money for cocaine. (R645) Appellant said that the two men

roughed him up threw him in the back of the car and started driving. (R645) When they came to a stop Appellant shot each of the men in the back of the head. (R645) After Appellant shot them he took the driver out and put him in the back seat. **(R646)** The passenger was still moving so Appellant said he hit him a couple of times in the face with the butt of the gun. (R646) Appellant had intended on driving out of the state but got a flat tire so Appellant parked the car took several grams of cocaine and **$900.00** from the men. (R646) Appellant said that he and Turner had smoked all of the cocaine and Appellant had spent the money on crack cocaine. **(R647-648)** Halsey advised Appellant not to leave the state. (R648) It appeared that Appellant burned a pair of blue jeans. (R648) Appellant said that they would never find the shoes because they were heading to West Virginia. (R648) Appellant and Turner stayed twenty minutes and then left after which Halsey never saw Appellant again. **(R649-650)** Halsey next saw John Turner approximately three weeks later when he came to the house with Detective Munster. **(R650)** The evidence technician came and collected the evidence which consisted of the partially-burned clothing. (R651)

Dennis Freeman, an inmate in the Marion County jail for the previous twenty months testified that in December of 1987 he met Appellant who was housed in the same cell. **(R713,716)** A few days after Appellant came into the cell, he began to speak with Freeman about his case. (R719-720) Freeman advised Appellant not to talk about his case but this advice went unheeded. (R720) Appellant said that he was arrested because he gave inconsistent

statements to Detective Munster. (R720) Later Appellant admitted that the statements he had given to Munster were false. (R721) Although Freeman originally told Appellant not to talk about his case, he later encouraged Appellant to talk to his parents or his priest or Detective Munster. (R721) Appellant stated that he would not talk to Munster, he was afraid his parents could not handle it and would disown him and he could not talk to his priest for fear that the priest would tell his parents. (R722) Appellant told Freeman that the victims had sought him out because he owed them money. (R722) Eventually Freeman contacted the Sheriff's Department who in turn put him in contact with Munster. (R723) Munster spoke with Freeman by phone and visited him four or five times at the jail. (R723) Freeman never asked Munster for anything and never was told to do anything specifically by Munster. (R724) Freeman eventually told Appellant that he had talked to Munster but Appellant still continued to talk about his case to Freeman. (R725) Appellant drew maps of where he had disposed of some evidence and told Freeman that he was afraid that John Turner would find the evidence and turn it over to Munster. (R726) Appellant asked Freeman if he could help him dispose of the evidence to which Freeman replied that he would although he did not mean this. (R726) Appellant drew a map and gave it to Freeman which Freeman turned over to Detective Munster. (R726) The map had Keith Dotson's phone number and name on it. (R727) Appellant told Freeman that he had made a few phone calls from the victims' house to get them to believe that he was trying to sell cocaine for them. (R740) Appellant

thought about killing the victims at their house but there were other people there. **(R741)** After the other people left Appellant asked the victims to take him to Keith Dotson's house to sell the cocaine. **(R741)** After they **left** Keith's house, they drove to a place where Appellant killed them. **(R742)** Although Appellant drew a map eventually Freeman destroyed this. **(R742)** Appellant told Freeman that they were sitting in the car when he pulled the gun and shot them. (R744) Appellant stated that he shot the driver first with two shots to the head and afterwards shot the **passenger** with one shot to the head. **(R745)** Appellant stated that one of the men was still alive. **(R745)** After Appellant shot the men he got in the front and drove to Joey Leonard's house. **(R746)** When he **got** there he started freaking out and told Leonard and Mead what he had done. **(R746)** Appellant gave Joey the gun with which he had shot the victims and discussed with Joey disposing of the bodies and the car. **(R747)** After Appellant left the house he had a flat tire so he abandoned the car. **(R747)** Appellant took money **from** the victims and walked to Silver Springs Boulevard where he made a phone call. (R748) He took a taxi cab to Dotson's house where he told Keith what he had done and washed his clothes. **(R749)** The following day Appellant said that he contacted John Turner and the two of them took the clothes to a friend of John's where they burned them. (R750) Appellant said that he had burned a shirt and a **pair** of pants. **(R752)** Appellant and Turner smoked the cocaine that he had taken. **(R752)** Appellant told Freeman that he did this because he wanted to rob the victim **of** cocaine and money. **(R753)**

Freeman was previously convicted of 26 felonies. **(R739)** This was not the first time that he provided information to law enforcement officers, **(R754)** In fact Freeman had been doing so for ten years. **(R755)** Freeman received nothing from the information that he gave to Munster and sought nothing, **(R755)** Rather Freeman did this because he felt it was "the morally right thing to do". **(R755)** Freeman in the past has gotten paid for information that he has provided. **(R757)** Freeman even approached law enforcement officers at some point and offered to set up cocaine deals. **(R760)** During a **reverse** sting operation that he was involved in, Freeman received **$1800** which he did not return to law enforcement officers. **(R763)**

Bruce Munster of the Marion County Sheriff's Department was the lead investigator in the Grandinetti murders. **(R777-778)** Munster first contacted Tim Keesee, the Grandinettis roommate. **(R780)** From Keesee Munster first learned of Appellant's involvement. **(R782)** Keesee said that he last saw the victims alive in the company of Appellant. **(R782)** Munster went to Appellant's home and talked to Appellant's mother because Appellant was not home. **(R782)** Munster left his card with a request for Appellant to call him. **(R782)** Appellant was not a suspect in the murders at this point. **(R783)** Appellant called Munster and told him that he had not heard about the murders. **(R783)** Appellant said he had been with the victims earlier when they picked him **up** and transported him back to their house where they stayed for a while. **(R783)** The victims then took Appellant to the Kwik King store in Silver Springs Shores where they left him between 9 and

9:30. (R783) Appellant and John Turner then went to Gainesville where they intended to pick up some girls. (R783-784) Munster contacted John Turner who corroborated Appellant's story. (R784)

On December 3, 1987, Munster and Lieutenant Jerald traveled to John Turner's house where they encountered Turner and Appellant. (R784-785) While Lieutenant Jerald went inside to interview Turner, Munster went over and interviewed Appellant. (R785) Munster had investigative subpoenas for both Turner and Appellant from the State Attorney's office. (R785) One of the subpoenas was served on Turner but Appellant was never served. (R785) However, Munster explained to Appellant about the subpoena and asked him if he would give him the statement about what he planned to tell the state attorney. (R785) Munster read Appellant his *Miranda* rights and at some point Appellant requested an attorney and then asked Munster to turn off the tape recording. (R808-809) Munster turned off the tape recorder and briefly talked to Appellant about his rights and whether he wanted to talk to him without an attorney. (R810) Although Munster does not recall exactly what he discussed with Appellant he did not question Appellant any further. (R810) Munster asked Appellant to get out of the car after which he, Jerald and Turner left to go to the State Attorney's office where Turner gave his statement. (R810) Munster then drove Turner back to his home and found Appellant still there. (R811) Appellant approached the car and asked what was going on. (R811) Munster told Appellant that he was driving to his house to interview his parents. (R811) Appellant asked Munster not to do it but to allow Appellant to

talk to his parents alone first. (R811) Munster agreed to do that and drove to Appellant's house where he waited about one and a half blocks away until Appellant arrived. (R812) After Appellant arrived and entered his home, Munster waited ten minutes after which he and Lieutenant Jerald went to the house. (R812) When they got to the door Appellant opened it and invited them to enter. (R812) Munster spoke to Appellant's parents and told them that he had taken a statement from Appellant and wanted to get some facts but that at this point they did not know if Appellant was involved in these murders. (R813) Appellant's father urged Appellant to tell Munster the truth and not be afraid and just give them a truthful statement. (R814) At that point Appellant said that he was afraid that the people who had committed the murders were dangerous and he feared for his family's lives. (R814) Appellant wanted to know what the sheriff's department could do to protect his family. (R814) Munster said that he would be glad to protect them but did not know who or what he was protecting them from. (R814) Appellant agreed to talk with Munster. (R814)

After Appellant finished talking with Munster he got into the police car although he was not under arrest. (R815) Appellant offered to show them where and how the murders occurred. (R816) Appellant told them that a man named Charlie was walking down the road when they picked him up. (R817) Although Appellant was unable to show Munster where this occurred he was able to direct them to a spot where there were gouges in the road from the tire rim after they had received a flat tire. (R817) By

following these marks Appellant was able to direct Munster to an area where he said the murders occurred. (R824-825) At that point Appellant said that he had left the car to urinate near a tree during which time he heard shots fired. (R825) Appellant started to run but this man named Charlie caught him and brought him back to the car. (R825) Appellant then directed Munster to an area down the road adjacent to where the bodies were found. (R825) Charlie had ordered Appellant to drive here and directed him to make several other turns which he did. (R826) After parking the car Appellant elbowed Charlie who took the keys and ran. (R826) Appellant pointed to an area where he fell over a fence became disoriented and came back to where the bodies were. (R826) Appellant turned around and ran again this time ending up at the Cloister Motel where he called a cab to pick him up. (R826)

On December 4, 1987 Appellant met with a Mr. Tressam who works for the Ocala Cab Company. (R828) Tressam was able to retrace the route that he had taken a fare from Silver Springs to a place in the Shores. (R828) They stopped in an unoccupied house which was next door to Keith Dotson. (R829)

Appellant's father called Munster and told him that there was a family illness and he and the family were going to New York. (R830) On December 8, 1987 Appellant called Munster and gave a statement. (R830-831)

On December 11, 1987 Munster went to Joey Leonard's house to serve a state attorney subpoena on Leonard and Bobby Mead. (R832) Joey told Munster that he had a .22 caliber Ruger

pistol which he had given to Appellant but which Leonard claimed Appellant never returned to him. (R832) Later Leonard called Munster and told them that he had something for him. (R834) When Munster arrived at Leonard's house Leonard took him to the garage and pointed to a barrel in which Munster located a .22 Ruger semi-automatic firearm. (R834) Leonard told Appellant that this was for Munster. (R834) On the following day Nick Grandinetti died. (R836) Based on the firearm and the statements of Leonard and Mead, Munster prepared a warrant for Appellant's arrest which he served on Appellant when he returned from New York. (R836) Appellant was arrested and taken to the Silver Springs Shores substation where he was advised of his Miranda rights and gave a taped statement. (R837)

After the tape was turned off Appellant told Munster that he was not going to get into trouble or take the rap for anyone. (R840) Appellant told Munster that Steve Foley had actually committed the murders. (R840-41) Appellant stated that he and the victims stopped at the Cloister Court Motel so that Appellant could make a phone call. (R841) While he was on the phone Appellant was approached by Steve Foley who was someone he knew from New York. (R841) According to Appellant Foley had a vendetta against him because Appellant had "ratted" on him in New York. (R841) Foley had threatened to kill Appellant and his family and also told Appellant that he was wanted by the police. (R841) However Foley said that if Appellant would help him to get away he would forget about what Appellant did to him. (R841) Foley and Appellant got in the car and drove away with the

victims. **(R841)** Foley asked for cocaine which the victims were going to give him. **(R841)** At this point Foley pulled out a gun and shot both of the victims. **(R842)**

Munster received a phone call from Dennis Freeman who was a cellmate of Appellant at the Marion County jail. **(R846)** When Munster met with Freeman at the jail, Freeman gave him details of the crime and provided him with a map. **(R847)** From this map Munster was able to make contact with Dotson. **(R848)** Munster contacted **Dotson** who had knowledge of the murders and also informed Munster of his cousins and friend in West Virginia who also had information about the murders. **(R849-50)**

Munster was unable to verify where Tim Keesee was on the night of the murder. **(R876)** Keesee also told Munster that the victims were going to Silver Springs Shores to find Appellant. **(R876)** Munster was told by two different people that **a** Charlie Lightborne was involved in the murders. **(R877)** One of these people was Carl Allen who was associated with the place where Nick Grandinetti worked. **(R877)** Additionally Appellant gave a description of someone which description matched that of Charlie Lightborne. (R880) When Munster met with Lightborne he was told that he was in Alabama on the night of the murder. (R881) Munster verified that Lightborne had left for Alabama around noon on the day of the murders. **(R882)**

Several people testified that Appellant was a non-violent trustworthy and friendly person. **(R968,962-63,948)** However in September of **1987** Appellant and his family returned to New York for a period of one month. **(R1039)** Appellant remained in New

York until the third week in October. (1040) After Appellant's return from New York he was a changed person. (R1040,948,964,970) Appellant's mood changed, he became short-tempered and very argumentative with his parents, was extremely nervous and lost a great deal of weight. (R1040) John Turner testified that after Appellant's return from New York he hung out with Turner every day getting high on cocaine. (R948) In the three to four weeks immediately preceding the Grandinettis' deaths, Appellant and Turner smoked cocaine every day. (R949) They would buy crack cocaine on street corners and buy cocaine from Nick Grandinetti. (R951) Appellant always purchased the cocaine. (R951) Although Turner and Appellant would discuss how much drugs they were consuming they still continued to do it. (R952) The drug consumption occurred every day from approximately 8:00 in the morning until 3:00 to 4:00 a.m. the following morning. (R953) Before Appellant had gone to New York Turner had never known him to use cocaine. (R953) Although they talked about stopping their drug usage they still continued to do it. (R954) At some point Turner would just take Appellant home and Appellant recognizing his problem, would thank Turner for doing this. (R954) Turner knows that he was addicted to cocaine and thinks that Appellant was too. (R958) Turner believes that he and Appellant may have used cocaine on the morning of the murders but knows that they did not use it in the evening or in the afternoon of the murders. (R961)

Penalty Phase

Doctor H. Robin Mills, a psychiatrist, testified on behalf of Appellant at the penalty phase. (R1317) Doctor Mills testified as an expert on the effect of ingesting cocaine and the repeated use of cocaine on Appellant. (R1319) Doctor Mills testified that the symptoms of extreme emotional disturbance due to drug ingestion include a personality change, a person becoming reclusive after being outgoing, a person becoming short-tempered, becoming unreliable, becoming hostile, argumentative and disrespectful towards hi5 parents, developing an obsession for cocaine, and becoming irresponsible. (R1321) Doctor Mills' opinion was that Appellant was suffering from drug-induced extreme mental or emotional disorder at the time that he committed the murders. (R1325) Additionally Doctor Mills believed that Appellant's capacity to appreciate the criminality of his act was substantially impaired and that his ability to conform his conduct to the requirements of law was also substantially impaired. (R1325) Doctor Mills stated that Appellant had the ability to know and differentiate between right and wrong, and that there was some evidence that Appellant knew the consequences of his acts. (R1327-28) Doctor Mills stated that even if Appellant did not use cocaine on the day of the murder his opinion would not change. (R1330) This is so because the effect of the drug persists and probably was no less extreme than if Appellant ingested cocaine that very night. (R1330) Doctor Mills does not believe that Appellant's behavior was due to the fact that he was planning on killing the victims. (R1331)

Additionally Doctor Mills believes that Appellant's behavior after the murders does not appear to be that of a cold-blooded killer but instead conforms to acute brain syndrome that one gets from drug usage. (R1332)

SUMMARY OF ARGUMENTS

POINT I: It is error to force an accused to stand trial unless he is competent to do so. Competency includes a defendant's ability to assist his attorney in his defense. Appellant contends that the trial court erred in finding him competent to stand trial where one psychiatrist found him incompetent to do so. Although two psychologists found him competent even these mental health officials agreed that Appellant was suffering from denial and religious preoccupation to the point that his judgment was clouded. One of these officials agreed that with treatment and counselling Appellant would improve. Thus it was error to find Appellant competent to stand trial.

POINT 11: Once an accused invokes his right to an attorney all interrogation must cease. The police are prohibited from continuing any interrogation unless it is shown that the accused reinitiated the contact with the officers. In the instant case Appellant clearly invoked his right to counsel. Despite this clear invocation, Investigator Munster reinitiated contact with Appellant and took a statement from him. The statements should be suppressed.

Additionally, where a statement is taken from an accused after a law enforcement officer has induced such statement with promises of immunity the statement is a5 a matter of law involuntary and must be suppressed. Where it is shown that subsequent statements are tainted by the involuntary statement these statements also must be suppressed. In the instant case Judge McNeal

determined that Investigator Munster had induced the original statement from Appellant under an implied promise of immunity. The three subsequent statements given to Investigator Munster were tainted in that references to the first statement which the court ruled involuntary were included in such statement. Therefore the three subsequent statements should have been suppressed.

POINT 111: An accused has an absolute right to present witnesses to establish a valid defense. In the instant case Appellant filed a notice of intent to rely upon insanity as a defense. The precise nature of the insanity was due to his cocaine addiction. In this regard Appellant sought to present the testimony of Dr. Mark Branch, a recognized expert in the field of behavioral psychology who was prepared to testify to the effects of repeated exposure to cocaine on one's behavior. The trial court refused to allow Dr. Branch to testify thus preventing Appellant from presenting his defense. This exclusion deprived Appellant of a fair trial.

POINT IV: The purpose of voir dire is to obtain a fair and impartial jury to try the issues in a case. In a criminal case voir dire examination should be as varied and elaborate as the circumstances require in order to obtain a fair and impartial jury whose minds are free of all interests, bias, or prejudice. It is clear that prospective jurors' attitudes towards an insanity defense is a proper subject for examination. In the instant case Appellant presented an insanity defense. To ascertain any

possible bias against this defense, defense counsel should have been allowed to question the jurors in regard to their opinions of a recent celebrated **case** in the same area which resulted in a not guilty by reason of insanity verdict. Failure to allow defense counsel to probe this highly relevant area constituted error,

POINT V: It is error to allow a witness to testify that he is in danger because of his testimony unless there is evidence that the danger to that witness is directly attributable to the defendant. It is the state's burden to link such evidence of the danger posed to the witness to the defendant. In the instant case state witness Dennis Freeman was permitted to testify that he was in danger from retaliation by other inmates because of his testimony against Appellant. Such evidence is clearly irrelevant and served only to raise the specter in the minds of the jury that Appellant was the source of the danger. A new trial is required.

POINT VI: Photographs should be received in evidence with great caution. **Before** such photographs may be admitted they must be relevant to some issue at trial. Even if photographs are relevant courts must still be cautious in admitting. them if the prejudicial effect is so great that the jury becomes inflamed. In the instant case a photograph of one of the victims taken immediately prior to the autopsy was irrelevant in that it offered no evidence with regard to any issue at trial and additionally was cumulative to a previous photograph already in evidence.

The continued exhibition of a group of photographs of the victims, including gruesome autopsy photographs, was error where such continued exhibition resulted in the jurors' preoccupation with the photographs and resulted in the diversion of the jury's attention from the witnesses' testimony.

POINT VII: During the penalty phase a defendant is entitled to present evidence with regard to certain mental mitigating factors. These include whether or not Appellant's capacity to appreciate the criminality of his actions were substantially impaired and whether his ability to conform his conduct to the requirements of law was substantially impaired. It is irrelevant and highly prejudicial for the state, in an attempt to somehow minimize these mitigating factors, to elicit testimony that Appellant met the test for legal sanity. This Court has previously held that the finding of sanity does not eliminate consideration of the statutory mitigating factors. Appellant is entitled to a new penalty phase.

POINT VIII: The murder of Nicholas Grandinetti was not heinous, atrocious and cruel. The evidence shows that the victim was shot twice in the back of the head. Clearly the shots were intended to kill him. No other additional acts are present to set this crime apart from the norm of capital. felonies. The mere fact that Nicholas Grandinetti did not immediately die does not make the crime heinous, atrocious and cruel.

POINT IX: The murders of Nicholas and Ralph Grandinetti were not cold, calculated and premeditated. While the evidence was sufficient to show that Appellant intended to murder the victims, there is no evidence that there was *a* "particularly lengthy, methodic or involved series of atrocious events" as required by caselaw in order to uphold application of this factor.

POINT X: Sections 921.141(5)(h) and (i), Florida Statutes **1987)** are unconstitutionally vague. The circumstances fail to adequately inform juries what they must find in order to impose the death penalty and thus allows for the imposition of the death penalty in an arbitrary and capricious manner.

POINT XI: Appellant's death sentence must be vacated because the evidence shows that the trial court erred in its consideration of valid unrebutted mitigating factors. In so doing the trial court exhibited not only factual inaccuracies but also an ignorance of the applicable law in determining whether certain mitigating factors apply. For example the trial court erroneously used the legal test for sanity to reject the mental mitigating factors. As such the validity of the death penalty in the instant case is questionable. A new sentencing hearing is required.

POINT **XII:** Although this Court has previously rejected numerous attacks to ,he constitutionality of the death penalty in Florida, Appellant urges reconsideration particularly in light of the evolving body of caselaw which in some cases **has** served to

invalidate the very basic cases on which the death penalty was upheld in this state.

POINT 1

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9,16,17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN FINDING APPELLANT TO BE COMPETENT TO STAND TRIAL.

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, 80 S.Ct. 788, 4 L.E.2d 824 (1960); Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (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 Anthony Ponticelli was competent to stand trial. (R1174-1217) 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 Psychological Testimony, (3d ed. 1981); Ennis & Litwack, Psychiatry and the Presumption of Expertise; Flipping Coins in the Courtroom, 52 Cal.L.Rev. 693 **(1974)**

In the case at bar, Judge McNeal considered the testimony of Dr. A. John Mills, M.D., a psychiatrist and two licensed psychologists, Dr. Rodney Poetter and Dr. Harry Krop. (R1177-1217) Dr. Mills offered his opinion that Appellant was incompetent to stand trial because he was censoring information and his feelings. (R1181-1182) Appellant suffered from delusional thought processes causing him to be extremely threatened by an evaluation of his mental capacity. (R1182) Appellant's affect and general demeanor were inappropriate and his association was loose in that his thoughts did not track logically, one upon the other. (R1183) Although he could not evaluate whether Appellant appreciated the nature of the charges he faced, Dr. Mills believed that the fact Appellant would not discuss any of the facts made it highly questionable that he did. (R1184) Appellant's choice not to cooperate with and assist his attorney was based on a psychotic process and **was based** on Appellant not being oriented to reality. (R1185) Appellant felt that God would take care of him. (R1186)

Dr. Poetter examined Appellant and found him to be competent. However, whenever Dr. Poetter tried to discuss the events of the offense or the trial, Appellant replied only that God would take care of him. (R1194-1196) Appellant's decision not to assist his attorney was a competent one made by a

reasonable mind. (R1196) Although Appellant understands the consequences, he manifests denial of the reality of the gravity of his circumstances. (R1197-1198) Denial is an inappropriate way of dealing with the stress Appellant was facing. (R1198) Dr. Poetter stated that if Appellant received treatment and counselling, he could overcome the denial. (R1199) This time would also allow Appellant's religious fervor to subside. (R1199) Dr. Poetter stated that Appellant is mildly impaired in that emotionally it is doubtful he is aware that he could be sentenced to death. (R1202) Appellant's decision not to assist his lawyer is affected by his denial and his religious beliefs. (R1202)

Dr. Krop also found Appellant to be preoccupied with his religious beliefs. (R1211) Because he believed God would take care of him, Appellant believed he should not provide any assistance to his attorney. (R1211) Appellant's beliefs may be a psychological defense but did not constitute a mental illness. (R1212) Although Appellant's denial and religious preoccupation are interfering with his judgment, Dr. Krop believed Appellant was making a cognitive choice. (R1214)

Based on the foregoing testimony, Judge McNeal found Appellant competent to stand trial. (R1217) However, a close review of the evidence, clearly shows that this ruling was error. Although only Dr. Mills actually found Appellant to be incompetent, all three experts agreed that Appellant's judgment was impaired due to his denial and his preoccupation with religion. Dr. Poetter even agreed that Appellant would benefit if he received

treatment and counselling. (R1198-1199) Without a doubt, Appellant was not assisting his attorney in the preparation of his defense. This decision was clearly affected by his inappropriate belief that God would take care of everything for him. In light of the seeming consensus that Appellant could benefit from treatment and counselling, Appellant submits that Judge McNeal's ruling constituted an abuse of discretion. Due process was violated thus entitling Appellant to a new trial.

POINT 11

IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS TO INVESTIGATOR MUNSTER WHERE SUCH STATEMENTS WERE INVOLUNTARY AND TAKEN IN DEROGATION OF APPELLANT'S RIGHTS.

Appellant filed a pre-trial motion to suppress his statements made to Investigator Munster on the basis that the statements were taken after Appellant had requested an attorney and that the statements were involuntary in that they were made in response to assurances by Investigator Munster that they could not be used against him. (R1469-1477) At the hearing on the motion to suppress, Judge McNeal denied the motion on both grounds without requiring any testimony. **(R1227-1233)** At trial the state sought to have the taped statements admitted into evidence over defense objection, **(R789-790)** After the first tape was partially played for the jury, the following occurred:

> **THE COURT:** When I considered your Motion to Suppress the other day, if I had the benefit of this testimony, I probably -- it was probably available but I didn't hear the exact comments that Investigator Munster told Mr. Ponticelli at the time he took the statement.
>
> The way I hear the tape now, it sounds to me like even though the investigative subpoena was not served it's clear that the statement was given in response to the threat of the subpoena and that Investigator Munster told him that the statement wouldn't be used against him. **(R791-792)**

After further argument, Judge McNeal reversed his ruling and suppressed the first statement. **(R804)** He allowed **the** other statements, however, rejecting Appellant's contention that they were made after he had requested a lawyer . Defense counsel also argued that the other statements should be suppressed since they make reference to the first statement and suggest that Appellant had lied. (R804-805) Appellant also moved for a mistrial since a previous state witness, Dennis Freeman, had testified that Appellant had told him he lied in his statements to Investigator Munster. **(R804-805)** This motion was denied. **(R805)** In Appellant's first statement to Munster the following transpired:

> Q. All right. I want to go through it again, but this time I'm gonna read you your rights; you have a right to remain silent, the constitution requires that I so inform you of this right and you need not talk to me if you do not wish to do so; you do not have to answer any of my questions, do you understand that?
>
> A. Yes.
>
> Q. Should you talk to me, anything which you might say in answer to my questions can and will be introduced into evidence in court against you; do you understand that?
>
> **A. Yes.**
>
> Q. If you want an attorney to be present at this time or at any time hereafter, you are entitled to such counsel; if you cannot afford to pay for counsel, we will furnish you with counsel if you so desire, do you understand that?
>
> A. **Yes.**
>
> Q. Do you wish to have an attorney present at this time, would you Like to answer my questions.

> A. Um,
>
> Q. And I want you to understand that you **can** stop answering my questions at any time.
>
> A. I don't, I think I should have ah, man, I just want to talk to my father, man; I wish I could get an attorney, man, I think
>
> Q. You want an attorney
>
> A. I think I should
>
> **Q. Ok.**
>
> A. because, just let me talk to you personally for a second, ok. (inaudible)
>
> Q. What's that
>
> A. Can you turn off that for a second
>
> Q. All right, I'll cut this for a second (SR10-11, emphasis added).

A few hours later, a second statement was taken from Appellant at his home by Investigator Munster. (SR12-24) No mention of Appellant's Miranda rights occurred during this statement.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that where a defendant is undergoing custodial interrogation and he indicates his desire to exercise his right to consult with an attorney, interrogation must cease. The Court prohibited any further elicitation of information without the benefit of counsel:

> If the individual states that he w nts an attorney, the interrogation must cease until an attorney is present . . . If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must

> respect his decision to remain silent. Miranda v. Arizona, 384 U.S. at 474.

Later cases have not abandoned that view. In Michigan v. Mosely, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) the Court noted that Miranda had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel. Id 423 U.S. at 104, n.10. In Fare v. Michael C., 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197, 209 (1979), the Court referred to Miranda's "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." And, in Rhode Island v. Innis, 446 U.S. 291, 298, 100 S.Ct. 1682, 64 L.Ed.2d 297, 306 (1980), a case where a suspect in custody had invoked his Miranda right to counsel, the United States Supreme Court again referred to the "undisputed right under Miranda to remain silent" and to be free of interrogation "until he had consulted with a lawyer." Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) amplifies these views:

> Second, although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, . . . the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel: and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.

> [footnote omitted]. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.

Accord Kight v. State, 512 So.2d 922 (Fla. 1987).

In the instant case, Appellant clearly requested an attorney. (SR11) Investigator Munster concluded the interrogation at that point. (SR11) A few hours later, Investigator Munster reinitiated contact with Appellant and took another statement from him. A clear Edwards violation occurred. The subsequent statement should have been suppressed.

Notwithstanding the Edwards violation, Appellant's statements should have been suppressed for an additional reason. A confession is involuntary if it is induced by any direct or implied promises, however slight, of reward or immunity. Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897); State v. Kettering, 483 So.2d 97 (Fla. 5th DCA 1986), review denied 494 So.2d 1153 (Fla. 1986). In determining the voluntariness of a statement, the court must look at the totality of the circumstances. Reddish v. State, 167 So.2d 858 (Fla. 1964). Promises of immunity, calculated to extract a confession, render such confessions involuntary. G.G.P. v. State, 382 So.2d 128 (Fla. 5th DCA 1980).

In the instant case, Judge McNeal correctly albeit belatedly ruled that the first statement was given in response to Munster's implied promise of immunity. (R791) Therefore as

matter of law that statement is involuntary and cannot be used against Appellant. However, this statement was used against Appellant when the subsequent statements were admitted because numerous references are made to the first statement. (SR12,21,50) Additionally, Dennis Freeman, a state witness, made references to the statements made by Appellant to Munster. (R720) The taint of the involuntary statement carried through to the subsequent statements. Therefore these statements should have been suppressed also. United States v. Bayer, 331 U.S. 532, 67 S.Ct. 1394, 91 L.Ed. 1654 (1947); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

POINT III

IN VIOLATION **OF THE** FIFTH, **SIXTH AND** FOURTEENTH AMENDMENTS TO **THE** UNITED **STATES CONSTITUTION AND ARTICLE I,** SECTION **9, 16 AND 22 OF THE FLORIDA CONSTITUTION,** THE **TRIAL COURT** ERRED **IN PREVENTING** APPELLANT **FROM PRESENTING** THE **TESTIMONY OF DR. MARK BRANCH** WHERE SUCH **TESTIMONY** WAS **CRUCIAL TO HIS DEFENSE.**

Appellant filed a pretrial notice of intent to rely upon the defense of insanity. (R1424-1425) The nature of the insanity sought to be proved was acute cocaine usage. (R1424) During his case-in-chief, Appellant sought to call Dr. Mark Branch, an expert in the field of behavioral psychology who would testify as to the effects of repeated exposure to cocaine on one's behavior. (R971-993) The trial court recognized Dr. Branch's expertise but expressed concern as to whether there were sufficient underlying facts to support Dr. Branch's opinion. (R980) Defense counsel proceeded to proffer a hypothetical based on the facts of the instant case to which Dr. Branch opined that Appellant was obsessed with cocaine to the point that he would engage in its usage to the exclusion of most other important things in his life. (R981) Someone using cocaine to the extent described to Dr. Branch, would probably over-react to any perceived threats. (R983) The trial court refused to allow Dr. Branch to testify. (R993)

The right of an accused to present witnesses to establish a defense is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Indeed, this right is a cornerstone of our adversary

system of criminal justice. Both the accused and the prosecution present a version of facts to the jury so that it may be the final arbiter of truth. Id.; United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Subject only to the rules of discovery, an accused has an absolute right to present evidence relevant to his defense. Roberts v. State, 370 So.2d 800 (Fla. 2d DCA 1979); Campos v. State, 366 So.2d 782 (Fla. 3d DCA 1979).

The Florida Evidence Code provides that all relevant evidence is admissible with relevant evidence defined as evidence tending to prove or disprove a material fact. Sections 90.401 and 90.402, Florida Statutes (1987). Section 90.702, Florida Statutes states:

> If scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

The opinion rendered by such evidence may be based on facts made known to him at trial. Section 90.704, Florida Statutes (1987). The facts may be presented to the expert by way of a hypothetical question so long as the facts are supported by evidence introduced at trial. Autrey v. Carroll, 240 So.2d 474 (Fla. 1970).

This Court in Buchman v. Seaboard Coastline Railroad Company, 381 So.2d 229 (Fla. 1980), has enumerated the only two elements to be considered by the trial judge in evaluating the admissibility of expert testimony: 1) the subject must be beyond

the common understanding of average laypersons, **and** 2) the witness must have such knowledge as will probably aid the trier of fact in its search for truth. Both of those elements are unquestionably met by Dr. Branch.

Perhaps the most important, and most overlooked, aspect of the sufficiency of facts on which an expert opinion is based, is that the expert himself, and not the trial court, is the person who makes the determination. As was held in H.K. Corporation v. Estate of Miller, 405 So.2d 218, 219 (Fla. **3d** DCA **1981),** "the sufficiency **of** the facts required to form an opinion must normally be decided by the expert himself and any deficiency relates to the weight rather than the admissibility of the expert's opinion." Caselaw recognizes the fact that it is the expert himself who is in the best position to determine whether he had enough facts to render an expert opinion. Nat Harrison Associates, Inc. v. Byrd, 256 So.2d 50 **(Fla.** 4th DCA **1971).**

A similar opinion was issued in Quinn v. Millard, 358 **So.2d** 1378, 1382 (Fla. 3d **DCA** 1978), which held that:

> . . . the sufficiency of the facts required to form an opinion must normally be decided by the expert himself because neither trial judges nor appellate judges are usually in a position to determine precisely which facts are dispensable and which are essential to the validity of the opinion reached. Therefore, it is usually up to the opposing side to refute these conclusions, and, unless the omissions are glaring, such deficiencies relate to the weight rather than the admissibility of the expert's testimony.

As previously mentioned, and as the Quinn case illustrates, the weight to be accorded expert testimony is the province

of the jury, and the trial court should not preclude the admissibility of expert testimony unless the expert himself testifies that he has knowledge insufficient on which to base an expert opinion. This is especially true if the cross-examiner is given the opportunity to present other facts to the expert.

Most of the objections set forth by the state in their argument on this issue at trial went to the weight rather than the admissibility of evidence. The objections were properly the subject of cross-examination. Seibels, Bruce and Company v. Giddings, 264 So.2d 103 (Fla. 3d DCA 1972), stated that:

> In propounding a hypothetical question, a party is entitled to use evidence even if it be conflicting viewed in a light most favorable to him.

The court further held that evidence which conflicted with that offered in hypothetical questions to expert witnesses could be used to impeach or impair the credibility of opinions given by the experts. On the authority of this case, clearly the prosecutor's role is not to object to the expert testimony on this basis, but rather to attempt to diminish the credibility of the expert witness through effective cross-examination.

A trial judge does not have discretion to exclude relevant testimony unless it is inadmissible by virtue of some recognized rule of evidence, such as hearsay. Spencer v. Spencer, 242 So.2d 786 (Fla. 4th DCA 1970). Especially in the case such as the one at bar, a rule allowing wide latitude in the presentation of evidence by defendant in a capital trial. should be applied. A trial judge may not frustrate a defendant's legitimate right to present his defense by strict adherence to the state

evidentiary rules. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). No such rule prevails over the fundamental demand of due process of law in the fair administration of criminal justice. United States v. Nixon, 418 U.S. at 713. In the weighing process, the fundamental constitutional right to present witnesses should prevail. The Sixth Amendment right to present evidence is supreme, and any doubts must be resolved in favor of that fundamental right. Caselaw in Florida is clear that it is error for the trial court to exclude evidence which tends in any way, even indirectly, to prove a criminal defendant's innocence, and that all doubt of admissibility of this type of evidence should be resolved in favor of admissibility. Moreno v. State, 418 So.2d 1223 (Fla. 3d DCA 1982).

The testimony of Dr. Branch went to the very heart of Appellant's defense of insanity. The exclusion of the proffered testimony deprived Appellant of a fair trial. Appellant is entitled to a new trial.

POINT IV

IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY JURY WHEN THE TRIAL COURT LIMITED HIS VOIR DIRE EXAMINATION.

Appellant was tried in Ocala for murder in August, 1988. On July 25, 1988, Appellant filed a Notice of Intent to Rely on Insanity Defense. (R1424-1425) In November, 1987, Reed Greinert was tried in Ocala for the triple murders of his wife and her parents resulting in a verdict of not guilty by reason of insanity. Defense counsel wanted to question the venire about their reactions to the Greinert case but the trial court refused to allow this inquiry. (R7-8) As per the ruling of the trial court, the defense counsel submitted numerous newspaper articles concerning the Greinert case including articles recounting the shock and disappointment by many people at the verdict. (R1747-1804) Defense counsel noted his basis for wanting to question the venire in his Motion to Implement Specified Jury Selection Procedure. (R1466-1468)

Voir dire examination of prospective jurors by counsel is assured by Rule 3.300(b), Florida Rules of Criminal Procedure. The purpose of voir dire is to obtain a fair and impartial jury to try the issues in the case. King v. State, 390 So.2d 315 (Fla. 1980). Counsel have the right to elicit from the prospective jurors such information as may be necessary to show impartiality, or lack of it, disqualification or unfitness to serve as a juror and other information necessary so that counsel may

intelligently exercise his peremptory challenges. Johnny Roberts, Inc. v. Owens, 168 So.2d 89 (Fla. 2d DCA 1964) cert. denied, 173 So.2d 147 (Fla. 1965). In a criminal trial, voir dire examination should be as varied and elaborate as the circumstances require in order to obtain a fair and impartial jury whose minds are free of all interest, bias or prejudice. Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967). It is clear that prospective jurors' attitudes toward an insanity defense is a proper subject for examination. Washington v. State, 371 So.2d 1108 (Fla. 4th DCA 1979). Ever since the well-publicized trial of John Hinckley wherein he was found not guilty by reason of insanity of the attempted murder of President Ronald Reagan, the insanity defense has been the subject of much criticism, predominantly negative. When the insanity is based upon voluntary drug usage, the public's antipathy is even greater. See Annot., 73 A.L.R.3d at 112 §2[b] wherein the author notes:

> The entire defense has an air of speculation about it. Few persons have experienced temporary insanity from drugs or alcohol and consequently the ordinary juryman or judge does not really seem to believe that such a thing occurs.

In the instant case, the Greinert case was a cause celebre in the Ocala area. Much of the public sentiment was negative as can be discerned from the newspaper articles included in the record. (R1747-1804) Indeed, the trial judge himself recognized the notoriety of the Greinert case. (R8) While it may well have been proper for the trial court to control the extent to which counsel could question the jurors about the

Greinert case, it was an abuse of discretion to totally prohibit defense counsel from any questioning with regard to the Greinert case. Such questioning was necessary to determine if the Greinert case created any latent bias against insanity defenses in the minds of the jurors. The result is that Appellant was denied due process and a trial by a fair and impartial jury. A new trial is mandated.

POINT V

IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER A STATE WITNESS WAS PERMITTED TO TESTIFY AS TO POTENTIAL DANGER HE FACED AS A RESULT OF HIS TESTIMONY WHERE SUCH DANGER WAS NEVER CONNECTED TO APPELLANT.

Dennis Freeman, a former cellmate of Appellant, testified for the state. His testimony concerned Appellant's admissions to committing the murders, his efforts in disposing of evidence and his activities following the murder. At the beginning of his testimony the following occurred:

> Q. Have you gotten any special treatment, any benefits, anything at all in exchange for what you're going to tell this jury?
>
> A. No, I have not.
>
> Q. Is it, in fact, a dangerous situation for you to be here testifying?
>
> A. Most definitely.
>
> Q. Why is that?
>
> A. Well, because of the area that I'm situated in in the jail, it's open population.
>
> Q. If someone in the jail found out that you were doing this, you could be in danger?
>
> **MR. REICH:** Objection. May we approach the bench?
>
> **THE COURT:** Yes, sir.
>
> (Side bar conference had out of the presence of the jury.)
>
> MR. REICH: Judge, I just object to this

line the questioning. Any danger he may be in may be attributed danger from my client since he's testifying against my client.

It is terribly prejudicial and object and move to strike the response that has already been made about considering himself to be dangerous. As the Court for a curative instruction and move for a mistrial.

THE COURT: Motion for mistrial is denied. Your objection is overruled, but I will require the state to clarify, it's not Mr. Ponticelli.

(Side bar conference concluded.)

Q. Mr. Freeman, you were telling the jury that you felt that you could possibly be in danger as a result of testifying here in court.

A. Yes, ma'am,

Q. Now, you're not currently housed with the defendant?

A. No ma'am. (R714-715)

Rather than "clarifying" the question, the colloquy raised the suggestion that Appellant was "arranging" for other inmates to possibly harm Freeman.

In Jones v. State, 385 So.2d 1042 (Fla. 1st DCA 1980) disapproved on other grounds, Justus v. State, 438 So.2d 358 (Fla. 1983), the court set forth the relevant law:

An attempt by a defendant or third person to induce a witness not to testify or to testify falsely is admissible on the issue of defendant's guilt, provided it is shown that the attempt was made with the actual participation, knowledge, or authorization of the defendant. Duke v. State, 106 Fla. 205, 142 So. 886 (1932). Absent a link to the defendant, the issue of whether a witness is subject to improper influence is irrelevant and collateral to the issue of whether the defendant committed

> the crime for which he is charged and its admission over objection is grounds for the granting of mistrial and the denial thereof would be reversible error. Johnson v. State, 355 So.2d 200 (Fla. 3d DCA 1978). Furthermore, the admission of such evidence could only serve to create undue prejudice in the minds of the jury against the accused. Coleman v. State, 335 So.2d 364 (Fla. 4th DCA 1975).
>
> Since there was no evidence presented to connect appellant to any threats against the witness as insinuated by the prosecution in its examination, Appellant's motion for mistrial should have been granted. Id. at 1043-1044.

Accord Reeves v. State, 423 So.2d 1017 (Fla. 4th DCA 1982).

If Freeman had been in danger because of threats by Appellant, this evidence would, of course, be admissible. Sireci v. State, 399 So.2d 964 (Fla. 1981). However threats made against a witness or evidence of danger to that witness is inadmissible unless it is directly attributable to the defendant. Duke v. State, 106 Fla. 205, 142 So. 886 (1932). It is the state's burden to link evidence of the danger posed to the witness to the defendant. Norris v. State, 158 So.2d 803 (Fla. 1st DCA 1963) cert. discharged 168 So.2d 541 (Fla. 1964); Suarez v. State, 95 Fla. 42, 115 So. 519 (1928).

In the instant case, the evidence concerning the danger posed to Freeman by his testifying against Appellant was elicited by the State. It is clearly irrelevant as even the State admitted. Consequently, the testimony should have been stricken. Freeman was a key state witness. Thus it is impossible to guage the prejudicial effect of such testimony. Appellant is entitled to a new trial.

POINT VI

IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT ADMITTED A PHOTOGRAPH OF THE VICTIM WHICH WAS CUMULATIVE TO OTHER PHOTOGRAPHS ALREADY IN EVIDENCE AND PERMITTED EXTENDED PUBLICATION OF PHOTOGRAPHS TO THE JURY.

During the testimony of Dr. Sanderson, the state was permitted to introduce into evidence a photograph of Ralph Grandinetti taken during the autopsy. (R364) The photograph showed Grandinetti's face. (Volume XI Of Record on Appeal, State's Exhibit #12). Defense counsel objected to the admission of the photograph on the ground that it was cumulative to State's exhibit #9 which showed the body of Ralph Grandinetti, including his face, as it was found in the car. (R364) As the photographs were admitted into evidence, apparently the state posted them on an easel which was in continuous view by the jury. Defense counsel objected to the continued exhibition of the photographs on the grounds that the jurors were being distracted from the trial testimony. Defense counsel's objection noted:

> I'm going to object to the continued exhibition. I know that those photographs have been published to the jury, but I think the continued exhibition of them is prejudicial for two reasons.
>
> Number one, clearly, especially photographs 4, 5 and 6, then I think 9, the ones that actually show the inside of the car and show the blood, and then show Ralph Grandinetti's body both in the car and then lying outside the car, are clearly admissible, admittedly, but I think continued exhibition of them is

> prejudicial and only serves to inflame the jury against Mr. Ponticelli.
>
> Secondly, I have noticed, especially since the photograph of Ralph on the ground has been put up, that several of the jurors, during the time the testimony has been taken, have been glancing up, paying more attention to that than to the testimony, and again, I think it's prejudicial and certainly is distracting to the jury. **(R359-360)**

The trial court simply overruled the objection. **(R360)** The exhibits remained in continuous view, presumably with the additions of the photographs of Nick Grandinetti until the trial court finally had them turned around. (R470)

Photographs should be received in evidence with great caution. Thomas v. State, 59 **So.2d** 517 **(Fla. 1952).** The test for admissibility of photographs is relevancy. Zamora v. State, **361** So.2d 776 **(Fla.** 3d DCA 1978). **A** photograph is admissible if it properly depicts factual conditions relating to the crime and **if** it is relevant in that it aids the court and jury in finding the truth. Booker v. State, **397** So.2d **910 (Fla. 1981). Even if** photographs are relevant, courts must still be cautious in admitting them if the prejudicial effect is so great that the jury becomes inflamed. Alford v. State, **307** So.2d **433** (Fla. **1975),** cert. denied **427 U.S.** 912, **96 S.Ct. 3227, 49** L.Ed.2d 1221 **(1976).** In Adams **v.** State, 412 **So.2d 850** (Fla. **1982),** this Court noted with approval the trial judge's reasoned judgment in prohibiting the introduction of "duplicitous photographs."

Applying the foregoing principles to the instant case, reversible error occurred. State's exhibit **#12** shows the face of Ralph Grandinetti immediately prior to the start of the autopsy.

Ralph Grandinetti died immediately from a single gunshot to the back of the head. Exhibit #12 in no way shows anything at all having to do with commission of the murder oF the cause of death. State's Exhibit #9 shows the body of Ralph Grandinetti including an unobstructed view of his face. State's exhibit #12 offers nothing to aid the trier of fact and thus was indeed cumulative. Where there is no fact or circumstance in issue which necessitates or justifies he introduction of a photograph, its admission is error. Reddish v. State, 167 So.2d 858, 863 (Fla. 1964). While the simple erroneous admission of a single photograph may not require reversal, the problem is exacerbated by the trial court's ruling permitting the continued exhibition of all of the photographs to the jury even after the necessity of referring to them had passed. Defense counsel properly noted that the jury's attention was diverted from the witnesses' testimony by their preoccupation with the photographs. Eventually the trial court had the photographic display turned around. (R470) However, this occurred after five witnesses testified only two of which even referred to the photographs. The prejudicial effect is apparent particularly where several of the photographs are autopsy photographs (State's Exhibits 16, 23 and 25) [1/]. Reddish v. State, 167 So.2d 858 (Fla. 1964). The combination of the erroneous admission of State's Exhibit #12 and

1/ Although no objection was tendered to these autopsy photographs, the relevancy is questionable inasmuch as they do not aid the jury in the determination of any material issue. See generally Rosa v. State, 412 So.2d 891 (Fla. 3d DCA 1982) and cases cited therein.

the prolonged exhibition of the photographs to the jury served only to inflame the passions of the jury, thus violating Appellant's right to due process of law. A new trial is mandated.

POINT VII

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH **AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT IRRELEVANT AND PREJUDICIAL EVIDENCE DURING THE PENALTY PHASE.**

During the penalty phase, Dr. Robin Mills, a psychiatrist testified as an expert on the effects of repeated cocaine usage. (R1319) In Dr. Mills' expert opinion, Appellant was suffering from drug-induced extreme mental and emotional disorder at the time he committed the murders. (R1325) He further opined that Appellant's capacity to appreciate the criminality of his actions as well as his ability to conform his conduct to the requirements of law were substantially impaired. (R1325) Over defense objection, the state was permitted to elicit **Dr.** Mills' opinion that Appellant had the ability to differentiate between right and wrong and that he knew the consequences of his actions. **(R1327-1328)**

Sections 921.141(6), Florida Statutes (1987) provides that mitigating factors may include:

> (b) The capital felony was committed while **the** defendant was under the influence of extreme mental or emotional disturbance.
>
> * * *
>
> (f) **The capacity** of the defendant to appreciate the criminality of his conduct to the requirements of law was substantially impaired.

In Mines v. State, 390 So.2d 332 (Fla. 1980) this Court stated that the finding of sanity **does** not eliminate consideration of the statutory mitigating factors concerning mental condition. Accord Ferguson v. State, 417 So.2d 631 (Fla. 1982). The question propounded to Dr. Mills by the state were clearly irrelevant and should not have been allowed. However, the prejudice cannot be minimized since the questions were clearly designed to persuade the jury that so long as Appellant was legally sane any other evidence of diminished or impaired mental condition was of no consequence. It is equally clear that this was in fact the belief of the trial judge who rejected the mental mitigators because Appellant was legally sane. (R1836) The reliability of the jury recommendation is clearly undermined. Appellant is entitled to a new sentencing hearing before a newly-empaneled jury.

POINT VIII

IN VIOLATION OF THE EIGHTH **AND** FOURTEENTH AMENDMENTS **TO** THE UNITED STATES CONSTITUTION AND ARTICLE I, **SECTION** 17 **OF** THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPOSED THE DEATH PENALTY UPON AN ERRONEOUS **FINDING** THAT THE MURDER WAS HEINOUS, ATROCIOUS AND CRUEL.

With regard to the murder of Nicholas Grandinetti, the trial court found that the murder was especially heinous, atrocious and cruel. **In** support of this finding the court stated:

> 1. The crime was especially heinous, atrocious and cruel. Nicholas Grandinetti was shot in the back of the head with a .22 caliber handgun, but did not die immediately. When he began moaning, defendant repeatedly hammered the victim's head with the handgun because he used all the bullets shooting the victims. Then while Nicholas Grandinetti was still alive, defendant pushed his head down onto the floorboard of the car and drove around looking for a place to dump the bodies. Evidence suggests that Nicholas Grandinetti's ear was burned by heat through the floorboard. The car, abandoned on the evening of November 27, was not discovered until the next afternoon. Nicholas Grandinetti was still alive. After being discovered, he moaned, struggled with paramedics, uttered profanity and lived until December 11. According to medical testimony Nicholas Grandinetti felt pain during this entire ordeal.

Appellant asserts that this finding cannot be sustained.

In State v. Dixon, **283** So.2d 1, 9 (Fla. 1973) this Court held:

> . . . that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the

> suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only applies to crimes especially heinous, atrocious and cruel. In Lewis v. State, 398 So.2d 432 (Fla. 1981) this Court stated the principle that "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious and cruel."

In Kampff v. State, 371 So.2d 1007 (Fla. 1979) this Court reversed a finding of heinous, atrocious and cruel where the defendant had brooded for three years over his divorce from his wife. He then procured a gun and shot his wife three times, the last of which was a point blank shot to her head. In several other cases this Court has reversed a finding of heinous, atrocious and cruel in situations involving worse scenarios than the instant case. **See**, e.g., Menendez v. State, 368 So.2d 1278 (Fla. 1978)[defendant shot victim twice as he stood with his arms raised in a submissive position]; Lewis v. State, 377 So.2d 640 (Fla. 1979)[Defendant shot the victim in the chest and then shot him several more times as he tried to escape]; Simmons v. State, 419 So.2d 316 (Fla. 1982)[defendant attacked the victim in her

home and killed her by two hatchet blows to her head]; Teffeteller v. State, 439 So.2d **840** (Fla. 1983)[victim suffered shotgun blast to the abdomen, lived for several hours in undoubted pain and knew he was facing death]; Rembert v. State, **445** So.2d **337** (Fla. 1984)[victim beaten with a club one to seven times and lived for several hours]; Herzog v. State, 439 So.2d 1372 (Fla. 1983)[female victim induced by defendant to take drugs, after which she **was** gagged, placed on a bed and smothered with a pillow and ultimately dragged into the living room where she was successfully strangled to death with a telephone cord].

An example of the valid finding of this circumstance can be found in Gardner v. State, **313** So.2d 675 (Fla. 1975) where the female victim suffered at least one hundred bruises on her body, numerous cuts and lacerations, and severe injury to her genitals and internal organs due to **a** sexual battery performed with a broom stick, bat or bottle. ~~See also~~ Lucas v. State, 376 So.2d 1149 (Fla. 1979) where the defendant shot the victim, pursued her into the house, struggled with her, hit her, dragged her from the house and finally shot her to death as she begged for her life. This aggravating circumstance should be reserved for murders such as the ones in Gardner and Lucas which were "accompanied by such additional acts as to set the crime apart from the norm." Herzog, supra at 380. It ill serves the continued viability of the death penalty in Florida if the aggravating circumstance can be upheld under the facts of the instant case; the facts simply do not comport with a finding of an especially heinous, atrocious and cruel murder.

The evidence shows that Nicholas Grandinetti was shot twice in the back of the head. There was no advance warning that he was going to be shot. The shots were intended to kill him - his brother Ralph died virtually instantly from a single shot to the head. The fact that Nicholas Grandinetti did not immediately die is of no consequence. See Teffeteller, supra, and Rembert, supra. While Appellant may have hit Nicholas in the head with the gun butt to accomplish his purpose, there is no evidentiary support for the court's conclusion that he "repeatedly hammered the victim's head with the handgun." Certainly there is no accompanying torture or other additional acts necessary to sustain this aggravating factor. While the murder of Nicholas Grandinetti was indeed senseless and horrible, it does not meet the test for being especially heinous atrocious and cruel. This factor must be stricken.

POINT IX

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPOSED THE DEATH PENALTY UPON AN ERRONEOUS FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

In sentencing Appellant to death, Judge McNeal determined that both murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In support of this finding, the trial court stated:

> 2. The crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Before the murders defendant made arrangements for a ride later that evening and commented to witnesses that he was going to kill "those two guys for their money and cocaine." There is also evidence that defendant, using a ficticious (sic) arrangement to sell cocaine, lured the Grandinettis to the murder site with the intention of killing them. Shooting the victims in he back of the head while they sat in the front seat of the automobile was cold, calculated and premeditated. The evidence established that defendant was in the back seat and the victims were facing forward in the front seat of the car at the time of the shootings. These facts suggest the absence of threats or intimidation by the victims and the absence any need for self-defense by the defendant. Clearly there is no pretense of moral or legal justification. (R1834)

At least one commentator has exposed the inconsistency with which this Court has reviewed this aggravating circumstance. Kennedy, Florida's "Cold, Calculated and Premeditated" Aggravating

Circumstance in Death Penalty Cases, 17 Stetson L.Rev. **47** (1987). It does appear, however that the "cold, calculated, and premeditated" aggravating factor "is frequently and appropriately applied in cases of contract murder or execution style killings and 'emphasizes cold calculation before the murder itself.'" Perry v. State, 522 So.2d 817 (Fla. **1988).** See also Garron v. State, 528 So.2d 353 (Fla. 1988)(heightened premeditation aggravating factor was intended to apply to execution or contract-style killings). This Court has recently made it clear that this factor requires proof of **"a** careful plan or prearranged design". Rogers v. State, 511 So.2d 526, 533 (Fla. 1987); Mitchell v. State, 527 So.2d 129 (Fla. 1988). As stated in Preston **v.** State, 444 So.2d 939, **946** (Fla. 1984):

> [The cold, calculated, and premeditated] aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator. See, e.g., Jent v. State, (eyewitness related a particularly lengthy series of events which included beating, transporting, raping and setting victim on fire); Middleton v. State, 426 So.2d 548 (Fla. 1982)(defendant confessed he sat'with a shotgun in his hands for an hour, looking at-the victim as she slept and thinking about killing her); Bolender **v.** State, 422 So.2d **833** (Fla. 1982), cert. denied, U.S.)), 103 S.Ct. **2111, 77 L.Ed.2d** 315 (1983)(defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died).

While it is true that Appellant told Dotson and his friends that he **was** going to kill the victims, this occurred just before the murders. There is certainly no evidence of a

"particularly lengthy, methodic, or involved series of atrocious events" as required by Preston, supra. Important to the consideration of this factor is that Appellant did not search out the victims. Rather the victims sought Appellant and were trying to get the money which Appellant owed them for drugs they had supplied to him, It is entirely consistent with the facts that Appellant killed the victims to extricate himself from his "financial" bind. There is no evidence that the victims had any inkling at all that they were about to be shot. While there was sufficient evidence of premeditation, it wholly fails to prove the "heightened level of premeditation" as required by the statute. This factor must be stricken.

POINT X

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE DEATH PENALTY STATUTE IS UNCONSTITUTIONAL BECAUSE SECTIONS 921.141(5)(h) AND (i), FLORIDA STATUTES (1987) ARE UNCONSTITUTIONALLY VAGUE AND APPLIED IN AN ARBITRARY AND CAPRICIOUS MANNER.

In imposing the death penalty for the murders of Nick and Ralph Grandinetti, Judge McNeal found both murders were committed in a cold, calculated and premeditated manner as provided by Section 921.141(5)(i), Florida Statutes (1987). Additionally, Judge McNeal found the murder of Nick Grandinetti to be especially heinous, atrocious and cruel *as* provided by Section 921.141 (5)(h), Florida Statutes (1987). Appellant contends that these aggravating factors cannot be factually or legally sustained. (See Points VIII and IX, supra). However, Appellant additionally contends that these two factors are unconstitutionally vague and prone to arbitrary and capricious application particularly in light of the vacillating standard of review by this Court, so as to render Florida's death penalty statute unconstitutional.

Initially, Appellant recognizes that these arguments were not presented to the trial court. However this Court may still consider them. These errors are sentencing errors apparent from the face of the record which require no objection to preserve them for appeal. State v. Whitfield, 487 So.2d 1045 (Fla. 1986). Moreoever, in capital cases, this Court always takes a fresh look at the evidence to insure that it supports the trial court's

findings. Harvard v. State, 375 So.2d 833 (Fla. 1977). Because this Court does undertake a de novo review of the sufficiency of the evidence in capital cases, capital defendants on direct appeal may advance de novo objections to the sufficiency of the evidence and to the legal standard that the evidence must satisfy.

ESPECIALLY HEINOUS ATROCIOUS AND CRUEL

Section **921.141 (5)**(h)**,** Florida Statutes (1987) authorizes the jury and the trial court in a capital case to consider as an aggravating circumstance whether the killing was especially heinous, atrocious, or cruel. The difficulty with this circumstance is that "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous. Maynard v. Cartwright, **486** U.S. __**, 108** S.Ct. **1853, 100** L.Ed.2d 372, 382 **(1988).** Because this aggravating circumstance can characterize every **first** degree murder, Section (5)(h) is unconstitutionally vague. It "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-end discretion which was held invalid in Furman v. Georgia, ***408*** **U.S.** 238, **33** L.Ed.2d **346**, 92 S.Ct. 2726 (1972)." Maynard v. Cartwright, 100 L.Ed.2d at **380.**

Since Furman, the Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the **risk** of wholly arbitrary and capricious action." Id; Spaziano v. Florida, **468** U.S. 447, **104** S.Ct.

3154, 82 L.Ed.2d 340 (1984). For example, in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the jury sentenced the defendant to die, and the Georgia Supreme Court affirmed, based solely on a finding that the murder was "outrageously or wantonly vile, horrible and inhuman." The United States Supreme Court, however, reversed, finding that:

> nothing in these few words, standing alone, . . . implie[d] any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of [this aggravating circumstance]. In fact, the jury's interpretation of [this circumstance] can only be the subject of sheer speculation.

446 U.S. at 428-429.

Similarly in Maynard v. Cartwright, supra, the court applied Godfrey to Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance. This language was identical to that used in Florida's section (5)(h). A unanimous Supreme Court found that this language was unconstitutionally vague:

> [T]he language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in Godfrey .... To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that

> means, and an ordinary person could honestly believe that every unjustified intentional taking of human life is "especially heinous."

Maynard v. Cartwright, 100 L.Ed.2d at 382.

In the instant case, in accordance with Section (5)(h), the Court instructed the penalty phase jury:

> The aggravating circumstances that you may consider as to Count I [Nick Grandinetti, victim] are limited to any of the following that are established by the evidence. * * *
>
> Two, the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. (R1367)

As in Godfrey, the court read to the jury no other limiting instruction on the subject. As in Maynard v. Cartwright, the instruction did not limit the jury's or the trial court's discretion in any significant way. In fact, the instruction was virtually the same as the one condemned in Maynard v. Cartwright. Accordingly, allowing Appellant to be sentenced to die under this unconstitutionally vague law is error.

Additionally, this aggravating circumstance is unconstitutional since it is susceptible to arbitrary and capricious application. For example, in Raulerson v. State, 358 So.2d 826 (Fla. 1978) this Court approved the trial court's finding of a murder committed in an especially heinous, atrocious or cruel manner. After resentencing was ordered by the federal court for the Middle District of Florida, Raulerson v. Wainwright, 408 F.Supp. 381 (M.D. Fla. 1980), this Court struck the finding, after reviewing the same facts, stating, "We have held that

killings similar to this one were not heinous, atrocious, and cruel. (citation omitted)." Raulerson v. State, 420 So.2d 567, 571 (Fla. 1982).

Another example of patent inconsistency is found in the subjective view of what additional facts separate a murder from the norm. In Troedel v. State, 462 So.2d 392 (Fla. 1984) and Breedlove v. State, 413 So.2d 1 (Fla. 1982) this Court approved the application of this factor because, "the fact that the victims were killed in their home sets this crime apart from the norm." Troedel, 462 So.2d at 398. However, in Simmons v. State, 419 So.2d 316 (Fla. 1982) this Court disapproved the application of this aggravating factor, stating, ". . . the finding that the victim was murdered in his own home offers no support for the finding."). Simmons, 419 So.2d at 319. The inconsistent, arbitrary and capricious application of this aggravating circumstances underscores the unconstitutionality of the death penalty.

B. COLD CALCULATED AND PREMEDITATED WITH NO PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

This Court's vacillation in its interpretation of Section 921.141(5)(i), Florida Statutes (1987) cannot help but breed confusion to those seeking to consistently apply the aggravating circumstances. For instance, in Caruthers v. State, 465 So.2d 496 (Fla. 1985) this Court disallowed a finding of a cold, calculated and premeditated murder where a robber shot a store clerk three times. This Court stated "the cold, calculated an premeditated factor applies to a manner of killing characterized by heightened premeditation beyond that required to establish

premeditated murder." Caruthers at **498** (emphasis added). Eight pages later, in the next reported decision, this Court approved the same factor, stating "this factor focuses more on the perpetrator's state of mind than on the method of killing. Johnson v. State, 465 So.2d 499, 507 (Fla. 1985)(emphasis added). Then in Provenzano v. State, **497 So.2d 1177** (Fla. **1986),** this Court reverted to the prior standard, stating ". . . as the statute indicates, if the murder was committed in a manner that was cold calculated, the aggravating circumstance of heightened premeditation is applicable." Provenzano at 1183. Recently, in Banda v. State, 536 **So.2d 221** (Fla. **1988),** this Court again returned to the subjective intent of the murderer. How are the trial courts to know which standard applies? Is it the defendant's state of mind or is it the manner in which the crime was committed?

Further, there is patent inconsistency in application of the second prong of the cold calculated or premeditated, without any pretense of moral or legal justification factor. In Banda v. State, 536 **So.2d 221,** 225 **(Fla. 1988)** this Court stated, "We conclude that, under the capital sentencing law of Florida, a "pretense of justification is **any** claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." (emphasis added). In Cannady v. State, **427** So.2d **723 (Fla. 1983),** this Court disapproved the finding of a cold, calculated or premeditated murder because, according to the defendant, the victim rushed at him before he was shot five times. "During his confession appellant explained that he shot

Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own life." Cannady at 730. Yet in Provenzano v. State, 497 So.2d 1177 (Fla. 1986) this Court approved that aggravating factor and rejected as a pretense of moral justification the uncontroverted fact that the victim (a courtroom bailiff) was repeatedly firing a pistol at the defendant when the bailiff was shot. *See also* Turner v. State, 530 So.2d 45 (Fla. 1988)(no pretense of moral justification where defendant believed victims [his wife and another woman] had a lesbian relationship resulting in defendant losing family).

This Court itself has recognized the inconsistency and arbitrariness of its application of this aggravating circumstance. In Herring v. State, 446 So.2d 1049 (Fla. 1984) this Court approved a finding of cold, calculated and premeditated where the evidence showed that the defendant first shot the convenience store clerk in response to what the defendant believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor. As a lone voice of reason, Justice Ehrlich dissented on this point and noted that the court had gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated by (5)(i). The loss of that distinction, Justice Ehrlich warned:

> would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, as applied, of Florida's death penalty statute.

Over three years later, in Rogers v. State, 511 So.2d 526 (Fla. 1987) a unanimous court adopted Justice Ehrlich's view and expressly overruled the application of (5)(i) to the factual circumstances in Herring, supra. Certainly the validity of the death sentences approved in the interim which at least in part relied upon the approval of (5)(i) on the basis of Herring, supra, are highly questionable.

For a further discussion of the unconstitutionality of (5)(i), this Court is directed to the very informative article by Jonathan Kennedy in Stetson Law Review. Kennedy, Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L.Rev. 47 (1987).

Because of the inconsistent, arbitrary and capricious application of (5)(i) by this Court, Justice Ehrlich's ominous warning in Herring, supra has now become a reality. Florida's death penalty statute is unconstitutional.

POINT XI

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION THE TRIAL COURT ERRED IN ITS CONSIDERATION OF VALID UNREBUTTED MITIGATING FACTORS AND IMPOSING A SENTENCE OF DEATH.

In its findings of fact in support of the death penalty the trial court purported to consider in part the following mitigating circumstances:

> 1. Anthony John Ponticelli has no significant history of prior criminal activity. Even accepting the state's argument that defendant violated the law by voluntarily ingesting cocaine every day prior to the offense, there are no arrests or convictions of any kind on defendant's record. However, it should be noted that convictions are not required to negate a mitigating factor of no significant history of prior criminal activity. Quince v. State, 477 So.2d 535 (Fla. 1985).
>
> * * *
>
> 3. Although defense argues that the defendant was under the influence of extreme mental or emotional disturbance at the time of the offense, the only evidence to support this theory is the opinion testimony of Dr. Robin Mills. Dr. Mills' testimony considered in the light of all the testimony and the other mental evaluations, does not support a finding of extreme mental or emotional disturbance at the time of the offense. The only evidence to support Dr. Mills' opinion is the illegal use of cocaine by the defendant and a description of his hyperactivity on the evening of the murders. Because defendant would not discuss his mental processes or any details of the offense with the mental health professionals appointed to examine him, Dr. Mills' testimony must be characterized as mere speculation.

> Defendant's suspicious and hyperactive conduct on the evening of the murders could have resulted from the fact he was planning to murder two people. Voluntary intoxication may negate a specific intent, but there is absolutely no evidence that defendant used any alcohol or drugs on the day of the offense.
>
> 4. Defense also argues that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Once again this argument is based on defendant's possible cocaine addiction and the opinion testimony of Dr. Robin Mills. Dr. Harry Krop and Dr. Rodney Poetter found that defendant's ability to conform his conduct to the requirements of law may have been diminished; but defendant's failure to discuss the offense or his mental processes precluded an effective evaluation of this issue. Although defendant would not discuss some of the examiners' questions, he clearly indicated that he was sane at the time of the offense. All three mental health professionals found that he did not meet the M'Naghten criteria for legal insanity. Further, defendant's actions suggests that his capacity to appreciate the criminality of his conduct was not impaired. Not only did he plan the murders, but afterwards he called a taxi and directed the driver to take him to a house next door to where he really wanted to go, washed his bloody clothing, put his shoes in a car that was leaving for Kentucky and subsequently burned his clothing. (R1835-1836)

Appellant contends that the trial court's findings are factually and legally flawed thereby bringing into question his evaluation of these mitigating factors. Therefore, this is not simply a situation where Appellant is merely disagreeing with the weight accorded these factors by the trial court, thereby distinguishing this case from Quince v. State, 414 So.2d 185, 187 (Fla. 1982).

As to the first mitigating factor, Appellant's lack of significant criminal history, several points must be made. First, it is unclear whether the trial court found this factor as a mitigating factor. Rather, the trial court merely noted that Appellant had no arrests or convictions but that convictions are not necessary to negate this circumstance, citing Quince v. State, 477 So.2d 535 (Fla. 1985). It is simply impossible to determine if the trial court accepted this mitigating factor or rejected it at the suggeston of the state. Second, Quince v. State, 477 So.2d 535 (Fla. 1985) is easily distinguishable from the instant case. In Quince, the defendant had no adult criminal record. However, he had an extensive juvenile record replete with adjudications for serious offenses, Third, utilizing Appellant's drug usage in this manner is both unfair and unwarranted. Appellant's defense was insanity induced by cocaine addiction. To use the very matter offered in defense against Appellant unfairly inhibits Appellant's right to due process by forcing him to choose between presenting a defense to a criminal charge and relying upon a valid mitigating factor to ensure a proper sentence. Additionally, drug addiction should properly be viewed as a disease in much the same manner as alcoholism. In this regard it is important to note Justice Ervin's observation in his dissenting opinion in Gardner v. State, 313 So.2d 675, 679 (Fla. 1975) that the more enlightened perspective on heavy alcohol use is that it is no longer considered simply an emotional weakness, but rather a form of disease which, like other physical and mental ailments, can cause aberrant behavior and require

treatment. Moreover, Appellant's cocaine addiction though substantial was of a fairly short duration (approximately four-five weeks). When viewed against Appellant's 20 years of crime-free activity, it is clear that not only is this factor present, it is entitled to great consideration.

Because they are interrelated, Sections 921.141(6)(b) and (f), Florida Statutes (1987) will be discussed together. These factors are alluded to by the trial court in paragraphs 3 and 4 as set forth above. Initially, it is argued that it is impossible to determine if the trial court accepted or rejected these mitigating factors. While setting forth the evidence he purported to rely on with regard to these factors, the trial court never really reached a conclusion. The trial court's findings are factually and legally flawed. At the penalty phase the state presented no evidence but chose to rely upon the evidence presented during the guilt phase. The defense presented the testimony of Dr. Robin Mills, a psychiatrist accepted by all parties as an expert in the area of the effects of the ingestion of and repeated use of cocaine. (R1319) Defense counsel supplied Dr. Mills with a hypothetical containing details of Appellant's drug usage and his actions leading up to the murders of the Grandinettis. (R1323-1324) It was Dr. Mills' expert opinion that at the time of the murders, Appellant was suffering from drug-induced extreme mental or emotional disorder. (R1325) Dr. Mills also opined that at the time of the murders, Appellant's capacity to appreciate the criminality of his actions as well as his ability to conform his conduct to the requirements of law

were substantially impaired. (R1325) Dr. Mills' opinions did not change even when the was asked to assume that Appellant had ingested no drugs at all on the day of the murders. (R1330) Absolutely no evidence was presented to rebut this testimony. However, the trial court appeared to reject it mainly because Appellant had refused "to discuss his mental processes or any details of the offense with the mental health professionals appointed to examine him." In essence, then, the trial court rejected Ds. Mills' conclusions and opinions because they were uncorroborated. While the testimony may have been uncorroborated it was also unrebutted. **The** inescapable conclusion is that the trial court refused to consider valid unrebutted mitigating evidence, which is in clear violation of Lockett v. Ohio, **438** U.S. 586 (1978) and its progeny. An excellent analysis of this problem can be found in Waters, Uncontroverted Mitigating Evidence in Florida Capital Sentencings, **63** Fla. B.J. 11 (Jan. 1989).

The trial court's rejection of (6)(f) is equally flawed. Dr. Mills' testimony was rejected by the trial court on the basis that Dr. Mills and two clinical psychologists (Poetter and **Krop)** all determined Appellant was legally sane at the time. The trial court even referred to the "M'Naghten criteria for legal insanity". In Ferguson v. State, **417** So.2d 631 **(Fla.** 1982) this Court remanded **for** resentencing because the trial court applied the wrong standard in determining the applicability of the mental mitigating factors. This Court noted:

> The sentencing judge here, just **as** in Mines, misconceived the standard to

> be applied in assessing the existence of mitigating factors (b) and (f). From reading his sentencing order we can draw no other conclusion but that the judge applied the test for insanity. He then referred to the M'Naghten Rule" which is the traditional rule in this state for determination of sanity at the time of the offense. It is clear from Mines that the classic insanity test is not the appropriate standard for judging the applicability of mitigating circumstances under section 921.141(6), Florida Statutes.

Id at 638. Additionally, the only place in the record where the opinions of Doctor Poetter and Krop are set forth are in the transcript of the hearing on Appellant's Motion to Determine Competence to Stand Trial. (R1176-1220) Neither Poetter nor Krop gave opinions with regard to the applicability of the mental mitigating factors. Rather their testimony related solely to the conclusion that Appellant was competent to stand trial.

In summary, the evidence overwhelmingly supports the finding of numerous mitigating factors which far outweigh any aggravating factors which could even arguably be upheld by this Court. To sustain the death penalty in light of the evidence and the trial court's misapplication of the law would violate the Eighth and Fourteenth Amendment to the United States Constitution and Article 1, Sections 9 and 17 of the Florida Constitution.

POINT XII

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 impliedly 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.

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. 1976) 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), Florida 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, 834 (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.

The Florida death penalty statute discriminates against capital defendants who murder whites and against black capital defendants in violation of the Eighth and Fourteenth Amendments to the United States Constitution **and** Article 1, Section 17 of the **Florida** Constitution. McClesky v. Kemp, 481 **U.S.** ___, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)(dissenting opinion of Brennan, Marshall, Blackman and Stevens, JJ.)

In view of this Court's abandonment of its duty to make an independent determination of whether or not a death sentence is warranted, 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 on the foregoing reasons and authorities Appellant respectfully requests this Honorable Court to grant the following relief:

As to Points I through VI, reverse his convictions and remand for a new trial;

As to Point VII, vacate his sentences and remand for resentencing with a new jury;

As to Points VIII, IX, and XI, vacate the sentence and remand for resentencing or reduce the sentences to life.

As to Points X and XII, declare the death penalty unconstitutional and reduce the sentence to life.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Fla. 32014 and to Mr. Anthony Ponticelli, #112967, P.O. Box 747, Starke, Fla. 32091 on this 20th day of March 1989.

Michael S Becker

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