IN THE SUPREME COURT
OF FLORIDA

APPEAL DOCKET NO. 89-3469

JOEY B. THOMPSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Appeal from the Circuit Court
Duval County, Florida

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, Joey Burton Thompson, will be referred to in this brief as **"appellant"** or "Mr. **Thompson."** Appellee, the State of Florida will be referred to as **"appellee," "the** State," or **"the** prosecution." References to the pleadings contained in this Record on Appeal will be designated as **"R,"** followed by the appropriate page number(s), set forth in brackets (Example: [R.1]). References to the transcripts of pre-trial, trial, sentencing and post-trial proceedings in this case will be referred to as **"Tr.,"** followed by the appropriate page number(s), set forth in brackets (Example: [Tr.1]).

STATEMENT OF THE FACTS

Appellant, Joey Burton Thompson, is twenty-nine years old and the father of two young children, for whom he has always provided support. [R.1; Tr.1083] He has no prior arrests and has maintained gainful employment throughout his life. [R.1; Tr.768, 771, 1083] He has been sentenced to death by electrocution for the killing of his girlfriend, Annette Louise Place. [R.304]

On February 11, 1988, appellant's estranged wife, Janice Thompson requested that members of the Jacksonville Sheriff's office accompany her to her husband's home [Tr.950] so that she could retrieve her personal belongings. [Tr.644] Upon arriving at the home, the officers knocked for a period of time before appellant answered the door. [Tr.632] He appeared dazed. [Tr.633] Upon the appellant's opening of the door, Ms. Thompson pushed past appellant, forcing entrance into the home. [Tr.633] Thereupon, appellant indicated to the police that a dead person was in his bedroom. Indeed, upon a search by the officers, the dead body of Ms. Place was found in the room. Appellant confessed to the crime, both orally and in writing, indicating that he intended to kill Ms. Place and then himself. [Tr.638] A suicide note was found in appellant's home.

The State's theory of the case at trial was that on the evening prior to the murder, Mr. Thompson and Ms. Place had an argument because appellant informed Ms. Place that he intended to reunite with his family. He also told her he wanted her to leave

his home. Appellant had met the victim a few weeks prior to the murder at a topless lounge, where the victim worked as a dancer. He became romantically involved with her, causing the break-up of his marriage. Appellant, regretting this result, told her he no longer wanted to see her and asked her to leave his home. Ms. Place refused to leave appellant's home and told him that she would have him killed if he tried to leave her. [Tr. 6471 She also threatened to blow up his house. [Tr. 6471

According to the State, on the morning of February 9, 1988, Mr. Thompson arose at approximately 8 o'clock a.m. in a state of depression. Thereafter, he decided to kill Ms. Place and then commit suicide. [Tr.647] By all accounts, Mr. Thompson had been extremely distraught, to the extent that his wife believed he was suicidal. [Tr.787] Sometime around 8:30 o'clock a.m., he shot Ms. Place once in the head [Tr.648], and stabbed her once in the back. [Tr.748] Thereupon, he engaged in several efforts to kill himself, none of which were successful. [Tr.651] One such effort involved the consumption of a large number of pills, which caused Mr. Thompson to become unconscious for a period of time. He also attempted unsuccessfully to slash his wrists. These efforts were ended when his estranged wife entered the home with the police.

At trial, appellant testified that the murder had in fact been committed by his estranged wife, after she surreptitiously entered appellant's home and killed Ms. Place in a jealous rage. He further testified that he wrote the suicide note after Ms.

Place's death, when he decided it would be best for his family if he killed himself and left a note that he had committed the murder. [Tr.821] He also testified that he had unsuccessfully attempted suicide in several fashions during the eighteen hours prior to police entry into his home. [Tr.795]

An autopsy conducted on the victim established she had been shot once and stabbed once, within a brief period of time.

STATEMENT OF THE CASE

On February 11, 1988, appellant was arrested and charged with the murder of Annette Place. [R.1] Thereafter, he was indicted by a grand jury for first degree murder. [R.122] A pretrial challenge to the composition of the grand jury was rejected by the trial court and a petition for writ of prohibition was denied by this Court on the merits. [Case No. 72,3451. [R.142] No pretrial motions to suppress evidence were filed.

The case proceeded to trial on October 3, 1988. [Tr.311] Prior to the jury selection process, counsel for appellant moved the court to order the State to produce information in its possession relating the criminal backgrounds of the prospective jurors. [Tr.347] This motion was denied by the trial court. [Tr.352]

During voir dire, one of the prospective jurors, Ms. Terri D. Glover, expressed her reservations about the death penalty and indicated that she could never vote to impose it. [Tr.444] Nonetheless, she stated:

> MRS. GLOVER: My beliefs are I feel that I can go in the trial but when that certain day comes to convict him as being guilty or not guilty or having the death penalty or if he is going to prison, I can't make that decision. I mean I can't agree to the death penalty.
>
> MR. CHIPPERFIELD: You could not make a recommendation of death?
>
> MRS. GLOVER: Of the death penalty, but I could go through the trial.

[Tr.443] Ms. Glover was removed for cause over the objection of appellant's counsel. [Tr.483]

As its first witness the State called the victim's father who, despite an admonition by the trial court not to reveal his relationship with the victim to the jury, testified that the victim was his daughter. [Tr.567] A timely motion for mistrial was denied, the trial court concluding that error had occurred, but determining such error to be harmless. [Tr.572] Photographs of the deceased were also introduced over objection. [Tr.582]

The appellant took the stand in his own defense and testified that his estranged wife had in fact committed the murder of Ms. Place during a jealous rage. [Tr.776] He further testified he decided to take the blame for the homicide in a suicide note and commit suicide. He believed his suicide would prevent his family from becoming further traumatized by what had happened. [Tr.797-98]

Thereafter, the State called Janice Thompson to deny her involvement in the crime. Although extensive pretrial efforts to locate and depose Ms. Thompson had been made by defendant's counsel, [Tr.920-24] these efforts were unsuccessful due to Ms. Thompson's deliberate concealment of herself. [Tr.948] She had been advised by the State that she need not make herself available to defense counsel. [Tr.924] Requests to exclude Ms. Thompson's trial testimony were denied by the trial court. [Tr.936]

Upon Mr. Thompson's conviction, the jury recommended, by a vote of 8 to 4, to recommend that appellant be sentenced to death. [R.295] Throughout the trial, jurors were repeatedly told by both the State and the trial court that their role as

sentencers was minimal. The prosecutor stated, "[The trial judge] is the one that is imposing the sentence. You should not feel bad for being here or having to vote" [Tr.110-02] and emphasized, "Don't feel like [determination of the death penalty] is on you, like the burden's on you." [Tr.1093] The trial court's instructions did not cure this misleading role. Instead the trial court compounded the characterization by stating, "Thus, the jury does not impose the punishment if a verdict of guilty is rendered. The imposition of the sentence is the function of the Judge of this Court and it is not the punishment of the jury." [Tr.358-59]

During the sentencing phase, the trial court excluded evidence that appellant had successfully undertaken a polygraph examination, which indicated he did not in fact kill Ms. Place, finding such evidence to be irrelevant to the sentencing recommendation. Thereafter, the jury returned its recommendation of death, by a vote of 8 to 4. [Tr.1047]

In sentencing appellant, the trial court found the existence of five mitigating circumstances, namely that: 1) appellant had no prior criminal record [R.301]; 2) appellant was suffering from emotional stress at the time of the offense [R.303]; 3) appellant had maintained employment while married [R.303]; 4) appellant had been a good son while growing up [R.303]; and 5) appellant had been a good inmate while in custody [R.303]. In aggravation, it found that the murder had been committed in a cold, calculated and premeditated fashion. [R.303] Despite the existence of five

mitigating circumstances and only one aggravating circumstance, which the appellant argued was not applicable to the facts of the crime, the trial court imposed a sentence of death by electrocution upon the appellant. [R.304]

A timely Notice of Appeal was filed. [R.308] This appeal followed.

POINTS ON APPEAL

I.

WHETHER THE FACTS OF THIS CASE WARRANT IMPOSITION OF THE DEATH PENALTY.

II.

WHETHER THE TRIAL COURT ERRED AT THE PENALTY PHASE WHEN IT DETERMINED THAT THE ONE AGGRAVATING CIRCUMSTANCE FOUND OUTWEIGHED THE FIVE MITIGATING CIRCUMSTANCES FOUND IN THIS CASE.

A. Whether the Trial Court Erred in Finding that the Requirements for Imposition of the "Cold, Calculated, and Premeditated" Aggravating Circumstance had been Satisfied.

B. Whether the Trial Court Erred in Finding Several Nonstatutory Aggravating Circumstances.

C. Whether, Based Upon a Weighing of Aggravating and Mitigating Circumstances as Required by Section 912.141(3), Florida Statutes (1987), Imposition of the Death Penalty is Disproportionate in this Case.

III.

WHETHER THE TRIAL COURT ERRED BY MAKING, AND ALLOWING THE PROSECUTION TO MAKE STATEMENTS WHICH MISCHARACTERIZED AND DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY IN ITS SENTENCING RECOMMENDATION, IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENT.

IV.

WHETHER THE PENALTY PHASE JURY INSTRUCTIONS FAILED TO CHANNEL THE JURY'S DISCRETION IN CONSIDERING WHETHER THE CRIME WAS "COLD, CALCULATED AND PREMEDITATED."

V.

WHETHER THE TRIAL COURT ERRED WHEN IT EXCLUDED EXCULPATORY POLYGRAPH RESULTS FROM CONSIDERATION DURING THE SENTENCING PHASE OF THIS CASE.

VI.

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE VICTIM'S FATHER IDENTIFIED THE VICTIM AS HIS DAUGHTER TO THE JURY.

VII.

WHETHER THE TRIAL COURT ERRED IN PERMITTING JANICE THOMPSON TO TESTIFY AT TRIAL AFTER SHE HAD DELIBERATELY CONCEALED HERSELF FROM DEFENSE COUNSEL PRIOR TO TRIAL AT THE STATE'S ACQUIESCENCE.

VIII.

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE HIGHLY PREJUDICIAL PHOTOGRAPHS OF THE DECEASED VICTIM WHICH INFLAMED THE JURY AND PREVENTED A FAIR CONSIDERATION OF THE EVIDENCE.

IX.

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR DISCOVERY OF PROSECUTORIAL INVESTIGATIONS OF PROSPECTIVE JURORS OR FUNDS TO CONDUCT SIMILAR INVESTIGATION.

X.

WHETHER THE TRIAL COURT ERRED WHEN IT REMOVED A QUALIFIED PROSPECTIVE JUROR FOR CAUSE BECAUSE OF HER FEELINGS ABOUT THE DEATH PENALTY.

XI.

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S REQUEST TO RECORD THE PROCEEDINGS OF THE GRAND JURY.

XII.

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO PRECLUDE STATE ATTORNEY VOIR DIRE EXAMINATION OF PROSPECTIVE GRAND JURORS.

XIII.

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO ENJOIN GRAND JURY DELIBERATIONS ON THE GROUND THAT THE GRAND JURY WAS IMPROPERLY CONSTITUTED.

SUMMARY OF THE ARGUMENT

I.

THE FACTS OF THIS CASE DO NOT WARRANT IMPOSITION OF THE DEATH PENALTY.

The facts of this case do not justify the imposition of the extreme sanction of death. Prior to this offense, appellant was a law-abiding individual, who had never been arrested in his life and who had been gainfully employed as a construction supervisor. He was a family man with two young children. At most, the facts establish that appellant was mentally distraught and emotionally upset at the time of the offense. The victim was his girlfriend. In an act of desperation, appellant killed her and then attempted to kill himself. Comparing this case with other first degree murder cases, it is clear that the only appropriate sentence is one of life imprisonment.

II.

THE TRIAL COURT ERRED AT THE PENALTY PHASE WHEN IT DETERMINED THAT THE ONE AGGRAVATING CIRCUMSTANCE FOUND OUTWEIGHED THE FIVE MITIGATING CIRCUMSTANCES FOUND IN THIS CASE.

The trial court erred in the weighing process required to be undertaken prior to imposing a sentence of death. First, it erroneously concluded that the aggravating circumstance that the crime was "cold, calculated and premeditated" had been established. Second, it erroneously utilized non-statutory factors in aggravation of appellant's sentence. Finally, it erroneously concluded that the one valid statutory aggravating

circumstance outweighed the five mitigating circumstances found. In view of the facts of this case, the imposition of the death penalty is disproportionate to the crime committed. Appellant's sentence should be reduced to life imprisonment.

III.

THE TRIAL COURT ERRED BY MAKING, AND ALLOWING THE PROSECUTION TO MAKE STATEMENTS WHICH MISCHARACTERIZED AND DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY IN ITS SENTENCING RECOMMENDATION, IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENT.

The jury in the instant case was repeatedly instructed by the trial court that its sentencing recommendation was not conclusive and was told by the State not to "feel bad" about voting for the death penalty because the judge could override a recommendation of death. The jury's lessened sense of responsibility created a bias in favor of death, thereby rendering its sentencing recommendation invalid.

IV.

THE PENALTY PHASE JURY INSTRUCTIONS FAILED TO CHANNEL THE JURY'S DISCRETION IN CONSIDERING WHETHER THE CRIME WAS "COLD, CALCULATED AND PREMEDITATED."

The jury instructions given failed to inform the jury of the findings necessary to support the aggravating circumstance of "cold, calculated and premeditated." This aggravating circumstance was the only circumstance utilized by the trial court to impose a sentence of death. The failure to sufficiently apprise the jury of the meaning of "cold, calculated and

premediated" left the jury with unchanneled discretion in reaching its recommendation and tainted the entire sentencing procedure. For this reason, appellant's sentence must be reversed.

V.

THE TRIAL COURT ERRED WHEN IT EXCLUDED EXCULPATORY POLYGRAPH RESULTS FROM CONSIDERATION DURING THE SENTENCING PHASE OF THIS CASE.

During the sentencing proceedings, appellant sought to admit into evidence the results of a polygraph examination which indicated appellant had been truthful when he stated he did not kill the victim. The trial court refused to admit such evidence. Although the results of a polygraph examination are not generally admissible in Florida courts, this general rule should not be applicable in this capital case because such results: 1) tended to establish the mitigating factor of residual doubt and 2) rebutted the State's argument that the murder was cold, calculated and premeditated. The failure to admit such evidence violated the Eighth Amendment and the dictates of Lockett v. Ohio, 438 U.S. 586 (1978).

VI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE VICTIM'S FATHER IDENTIFIED THE VICTIM AS HIS DAUGHTER TO THE JURY.

At trial the State was permitted, over objection, to call as its first witness the victim's father for the sole purpose of identifying the victim. Prior to his taking the stand, the father was instructed not to reveal his relationship with the victim. Nonetheless, upon taking the stand, he immediately identified the deceased as his daughter. A motion for mistrial based on this testimony was denied, the trial court concluding that although error had occurred, it was harmless. Introduction of this evidence was clear error and a mistrial should have been declared. The trial court's refusal to do so constituted reversible error.

VII.

THE TRIAL COURT ERRED IN PERMITTING JANICE THOMPSON TO TESTIFY AT TRIAL AFTER SHE HAD DELIBERATELY CONCEALED HERSELF FROM DEFENSE COUNSEL PRIOR TO TRIAL BY THE STATE'S ACQUIESCENCE.

The State withheld the location of a crucial State witness, Mrs. Joey Thompson, so that she could not be interviewed or deposed until after appellant had given his direct testimony at trial. This willful, substantial, and prejudicial violation of the Richardson should have resulted in the exclusion of her testimony at trial. Failure to exclude this testimony was reversible error.

VIII.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE HIGHLY PREJUDICIAL PHOTOGRAPHS OF THE DECEASED VICTIM WHICH INFLAMED THE JURY AND PREVENTED FAIR AND UNIMPASSIONED CONSIDERATION OF THE EVIDENCE.

At trial photographs depicting the deceased were admitted over objection, despite an offer from defense counsel to stipulate to the cause of death. These pictures were unduly gruesome and gory. The State's purpose in introducing these photographs was to inflame and incite the emotions of the jury. Therefore, their admission into evidence was reversible error.

IX.

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR DISCOVERY OF PROSECUTORIAL INVESTIGATIONS OF PROSPECTIVE JURORS OR FUNDS TO CONDUCT SIMILAR INVESTIGATION.

The trial court committed reversible error when it denied appellant's motion to require the State to furnish information it its possession with respect to prospective jurors. As the result of this denial, appellant was placed at an unfair advantage during the jury selection process. The production of such information should be required in capital cases, such as this one. Appellant's case should be remanded for a new trial with instructions that the information sought be provided to appellant's counsel prior to the jury selection process.

X.

THE TRIAL COURT ERRED WHEN IT REMOVED A QUALIFIED JUROR FOR CAUSE IN VIOLATION OF THE APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO AN IMPARTIAL JURY.

During the voir dire process, one of the prospective jurors stated she was opposed to the death penalty and could not vote to impose it. Nonetheless, she stated that she could serve during the guilt phase of trial. Removal of this juror for cause at the request of the State was erroneous.

XI.

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S REQUEST TO RECORD THE PROCEEDINGS OF THE GRAND JURY.

In the present case, a Motion to Record Grand Jury Proceedings was filed by appellant's counsel and was denied by the trial court. Denial of this motion was error since appellant established a viable need for this information.

XII.

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO PRECLUDE STATE ATTORNEY VOIR DIRE EXAMINATION OF PROSPECTIVE GRAND JURORS.

The selection of grand juries is governed by Chapters 40 and 905, Florida Statutes, (1987). Neither chapter authorize voir dire examination of prospective grand jurors. In addition to an absence of statutory authority permitting the practice of a voir dire of prospective grand jurors, no common law authority

supports the practice. The trial court erred in permitting the State to conduct a voir dire examination of prospective grand jurors.

XIII.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO ENJOIN GRAND JURY DELIBERATIONS ON THE GROUND THAT THE GRAND JURY WAS IMPROPERLY CONSTITUTED.

Appellant was indicted by an impermissibly constituted grand jury. By statute, a grand jury can consist of not fewer than 15, nor more than 18 persons. In the present case, the grand jury that indicted appellant consisted of 23 members. This excessive number of grand jurors resulted in a greater likelihood that a true bill would be returned against appellant and thus violated appellant's constitutional rights.

ARGUMENT

I.

THE FACTS OF THIS CASE DO NOT WARRANT IMPOSITION OF THE DEATH PENALTY.

Assuming the facts alleged by the State, and relied upon by the judge at sentencing, the sentence of death by electrocution imposed upon Mr. Thompson is profoundly disproportionate to the crime. The death penalty should be reserved for only the most aggravated and unmitigated crimes. State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). As compared with other capital cases in which the death penalty was imposed, the extreme penalty of death is not warranted on the instant facts. Therefore, appellant's sentence should be reduced to life imprisonment.

In State v. Blair, 406 So.2d 1103 (Fla. 1981), this Court "compar[ed] th[e] case with others" before remanding it with directions to the trial court to impose a life sentence. Id. at 1109. This Court thus concluded that the imposition of a death sentence includes comparison with other first degree murder case facts to determine the applicability of death. Such comparison in the instant case yields the conclusion that death is inappropriate.

The facts of the Blair case, found by this Court not to warrant a death sentence as a matter of law, were significantly more egregious than the instant facts as alleged by the State. In Blair, the defendant was alleged to have ordered his son to dig a hole in the backyard of the marital home and place a piece

of plywood over it. Id. at 1107. The defendant then sent all three of his children on pretextual errands, and while they were gone, killed his wife, the children's mother, by shooting her three times in the head. Id. Before the children returned, he gathered all the evidence of the scene and burned it in his backyard. Id. The defendant told the children that their mother had left town to visit friends. Id. When one of the children attempted to enter her mother's bathroom, the defendant prevented her because the body was in that room. Id. The same child later saw the defendant carry the mother's body outside for burial. Id. After the mother was buried in the backyard hole, the defendant poured a concrete slab over the site. Id.

At trial, the Blair defendant presented a defense of accidental shooting, stating that the weapon discharged during a violent struggle as part of a domestic quarrel. Id. at 1108. This Court theorized that the defense was rejected by the jury as "simply unbelievable," due to medical examiner testimony that the victim weighed no more than 80 pounds when killed, and was in all likelihood incapable of violent struggle with her husband. Id.

Upon a finding a guilt in Blair, the trial court followed the jury's recommended sentence and imposed death. Id. at 1105. This Court, however, rejected the sentence, stating:

> Because of the existence of a mitigating factor, and the improper inclusion of several aggravating factors, we must vacate the death sentence. Furthermore, comparing this case with others, we remand it for imposition of a life sentence. Cf. Halliwell v. State, [323 So.2d 557 (Fla. 1975)]

> We have carefully reviewed the record in this case and find no reason to reverse the judgment of conviction, so the judgment is affirmed. The death sentence is vacated and the cause is remanded to the trial court for the imposition of a life sentence without eligibility for parole for twenty-five years.

Id. at 1109 (emphasis added).

The facts in Halliwell v. State, 323 So.2d 557 (Fla. 1975), are similarly more egregious than those alleged in the instant case. In Halliwell, the defendant was accused of the following acts:

> Appellant grabbed a 19-inch breaker bar and beat the husband's skull with lethal blows and then continued beating, bruising and cutting the husband's body with the metal bar after the first fatal injuries to the brain. That conduct alone justified a finding of premeditated murder, but we see nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court.
>
> . . .
>
> The attainment of a new depth in what one man can do to another, even in death, occurred several hours after the killing when Appellant used a saw, machete and fishing knife to dismember the body of his former friend and placed it in Cypress Creek. It is our opinion that when Arnold Tresch died, the crime of murder was completed and that the mutilation of the body many hours later was not primarily the kind of misconduct contemplated by the Legislature in providing for the consideration of aggravating circumstances.

323 So.2d at 561 (emphasis added).

In the instant case, the facts as alleged by the State were much less aggravated than those found in the Blair or Halliwell

cases. Under the State's theory of the case, presented upon closing argument, the facts were alleged to be:

> The defendant woke up, he had a decision to kill the victim in this case, he thought about for thirty minutes, got the gun, pointed it at the area where it would do damage; that is, the back of the head where it would kill the person. He pulled the trigger, got the knife, stabbed the victim. Where? In the back of the chest where it would do damage. Disposed of the knife. Covered up the body.

[Tr.1000-1001]. The State also highlighted the defendant's actions after the alleged killing, arguing that the defendant disposed of the knife by throwing it in the outside garbage can [Tr.1004], but kept the gun for its sentimental value as a gift from his grandfather. [Tr.1005] The State further postulated a motive for the murder, stating that the defendant wanted to get back with his wife, and so killed the victim because she would not leave. [Tr.1004]

The trial court accepted the State's version of the facts in its imposition of the sentence, stating in its sentencing order:

> The facts surrounding the brutal murder of Annette Louise Place are as follows:
>
> The Defendant and his wife separated. His wife and two children moved out of the marital home. The Defendant and the victim were alone in the Defendant's home.
>
> The Defendant confessed that he and the victim argued on the night of February 9, 1988. The victim wanted to move in with the Defendant. The Defendant wanted to get back together with his wife. The victim threatened to have the Defendant killed or blow up his house if he stopped seeing her.

The Defendant intended to kill the victim and himself. At 8:30 a.m. on February 10, 1988, the Defendant shot the victim in the back of her head from one foot away as she slept. Because she continued to wiggle, and because the Defendant did not want her to feel any pain he stabbed her once in the back. The Defendant put the knife in the garbage and it was taken away that morning.

The Defendant decided he could not kill himself. He did cut his wrists around 7:00 p.m. on the night of February 10, 1988. He wrote a suicide note to his wife around noon on February 10, 1988.

At trial, approximately eight months later, the Defendant testified that it was his wife who murdered Annette Louise Place. The Defendant testified that he was awakened by a noise. His Wife had shot the victim and was standing over the victim after having stabbed her. The Defendant told his wife to leave and he took the weapons.

. . .

Joey Burton killed the victim execution-style as she slept. When she didn't die, he stabbed her thrusting a knife 6 1/2 inches into her back. Joey Burton Thompson remained in his home with the dead body for over eighteen hours before his crime was discovered.

Some eight months after confessing to this brutal murder, Joey Burton Thompson blamed his Wife for the crime.

The acts of this Defendant are cowardly. The victim was defenseless against the Defendant. As the victim slept, she was murdered. The Defendant could not follow through with his own suicide. Thinking his wife who was hiding would not be located, the Defendant decided to blame her--the mother of his children for this crime.

[R.296-297].

These facts are simply not the type which demand the imposition of a death sentence. The facts, assuming all the State's allegations and the inferences therefrom to be true, do not cry out for the imposition of the penalty reserved only for the most heinous and dastardly crimes. Rather, the facts as alleged by the State reflect a minimum of forethought, a concern for the amount of pain inflicted upon and suffered by the victim, and a nullity of future dangerousness on the part of Mr. Thompson.

The trial court found the following factors warranting the imposition of death:

> The Court having considered both statutory and non-statutory mitigating circumstances, finds that the mitigating circumstances in this case, although greater in number than the aggravating factor found in this case do not outweigh the cold, calculated, and premeditated manner in which this Defendant's crime was committed. The Defendant's subsequent defense of blaming his wife, the mother of his two young children coupled with the execution style killing of the defenseless victim justifies the sentence of death.

[R.299-300] (emphasis added). As will be discussed in the following section, the trial court thus relied on two non-statutory aggravating factors, neither of which warrant the imposition of death, in its sentencing order. The death penalty is not appropriate in the instant case. This cause should be remanded with instructions to impose a life sentence without parole for twenty-five years upon the appellant.

II.

THE TRIAL COURT ERRED AT THE PENALTY PHASE WHEN IT DETERMINED THAT THE ONE AGGRAVATING CIRCUMSTANCE FOUND OUTWEIGHED THE FIVE MITIGATING CIRCUMSTANCES FOUND IN THIS CASE.

Assuming only for the limited purpose of this argument, that appellant was properly convicted, the Court's imposition of the death penalty was erroneous. The trial court erred in imposing a penalty of death in three distinct, yet interrelated, ways. First, the court erred in finding that the statutory aggravating circumstance delineated in §921.141(5)(i), Fla. Stat. (1987), specifically that the capital felony "was committed in a cold, calculated, and premeditated manner," was satisfied in the instant case. Relevant case authority demonstrates that the trial court failed to consider the significantly heightened degree of premeditation this Court currently demands for permissible application of this statutory aggravating circumstance. Second, the trial court erred by applying a number of aggravating factors, all of which are both nonstatutory and incapable of being reasonably construed to support a statutory circumstance.

Finally, even assuming that the trial court properly found one aggravating circumstance, it nonetheless erred in concluding that the one aggravating circumstance outweighed the five mitigating circumstances found with respect to the appellant. The proportionately review required by this Court indicates that death is an inappropriate penalty when several statutory and nonstatutory mitigating factors are balanced against, at most,

one statutory aggravating factor. Given that the trial court inappropriately imposed that factor, finally, a proportionately assessment reveals that this Court has never upheld imposition of the death penalty in the absence of any statutory aggravating factors. Indeed, in Gregg v. Georgia, 428 U.S. 153, 196-97 (1976), the United States Supreme Court held that the presence of at least one statutory aggravating circumstance is constitutionally required. ~~See also~~ Hildwin v. Florida, ___ U.S. ___, 1989 WL 55633 (May 30, 1989)(under Section 921.141, Fla. Stat., (1987), "[t]he ultimate decision to impose a sentence of death ... is made by the court after finding at least one aggravating circumstance."). This Court has also consistently applied this rule. Banda v. State, 536 So.2d 221, 225 (Fla. 1988).

A. The Trial Court Erred in Finding that the Requirements for Imposition of the "Cold, Calculated, and Premeditated" Aggravating Circumstance had been Satisfied.

Prior to trial, appellant requested the trial court to declare the two aggravating circumstances sought by the State (that the capital felony was "especially heinous, atrocious, or cruel" and was "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification") unconstitutionally vague, in violation of the Eighth and Fourteenth Amendments. [R.248] At the sentencing phase, appellant again argued that these two aggravating circumstances, codified at §§921.141(5)(h) and (i), Fla. Stat. (1987),

respectively, violated the Eighth and Fourteenth Amendments due to their impermissible vagueness and the consequent likelihood of arbitrary infliction of the death penalty. [R. 1057-58]. Although the trial court ultimately opted not to apply the "especially heinous, atrocious, or cruel" circumstance, it nonetheless found the "cold, calculated, and premeditated" aggravating circumstance to be applicable.

Objecting to the applicability of this circumstance, appellant referred at sentencing to this Court's opinion in Nibert v. State, 508 So.2d 1 (Fla. 1987). [Tr.1058] Under the reasoning of the Nibert decision, and as argued by appellant, the application of this aggravating circumstance requires a "finding of heightened premeditation, i.e., a cold blooded intent to kill that is more contemplative, more methodical, more controlled than necessary to sustain a conviction for first degree murder." Id. at 4. [Tr.1058]

In the instant case, the State alleged that appellant awakened at 8:00 A.M., and at some point within the next one-half hour decided, in an act of desperation, to kill the victim and himself. [Tr.1060] At 8:30 A.M., according to the trial court, he killed the victim. [Tr.1060] No evidence indicates, however, that appellant contemplated the killing for the full thirty minutes prior to the act. Likewise, no evidence indicates that appellant's plan was a pre-arranged one which included preparations for committing the act and avoiding its consequences. [Tr.1060] To the contrary, all relevant evidence indicates that appellant's mental state was highly emotional,

rather than contemplative and reflective. [R.266] For this reason the jury should not have been instructed that it could consider the "cold, calculated and premeditated" circumstance.

Appellant also argued for limitations on the jury instruction relating to this circumstance. He argued that, based on the instructions given, the jury could have concluded that virtually any premeditated murder justifies a finding of this aggravating circumstance. As discussed in Section IV, infra, although the special instruction given by the court did not state that every premeditated murder qualified, the instruction failed to advise the jury that the absence of a prearranged plan precludes a finding of the factor. [Tr.1127] The jury was thus left with little guidance as to the requisite "prearranged plan" element of the circumstance.

Since the "heightened premeditation" aggravating factor was the only aggravating circumstance presented to the jury, the danger that the misleading jury instructions tainted the jury's recommendation is particularly acute. More significantly, the facts do not justify the court's application of this aggravating circumstance. The State must establish the presence of this circumstance beyond a reasonable doubt. Caruthers v. State, 465 So.2d 496, 498-99 (Fla. 1985).

As discussed above, the defendant awakened at 8:00 A.M. and sometime later decided to kill the victim and himself. At 8:30 A.M. he shot the victim in the head, and immediately stabbed her, as she slept. [Tr.1060] The State offered no evidence

indicating either that appellant planned the act even for the full thirty minutes, or that he contemplated a means of avoiding detection. [Tr.1060] Indeed, to the contrary, even under the State's theory of the case, appellant then attempted to take his own life, but was unable to do so. In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court held that the "cold, calculated and premeditated" provision required "heightened premeditation," "which must bear the indicia of 'calculation.'" Id. at 533. Additionally, this Court in Rogers ruled that the "calculation" referred to in the statute "consists of a careful plan or prearranged design." (emphasis added). Id. This new "careful plan or prearranged design" standard was upheld most recently in Eutzy v. State, 541 So.2d 1143, 1147, (Fla. 1989).

Other post-Rogers cases have described the extent to which the standard has been raised, In Amoros v. State, 531 So.2d 1256 (Fla. 1988), for example, although this Court found sufficient evidence of premeditation to uphold a first degree murder conviction, "there was an insufficient showing ... of the necessary heightened premeditation, calculation, or planning required to establish this aggravating circumstance." Id. at 1261. Further, this Court stated:

> In Rogers v. State, we found this aggravating circumstance requires a calculation which includes a careful plan or prearranged design and receded from a broader use of the circumstance ..., particularly where there was no evidence of any prearrangement."

Id. (emphasis supplied). Finally, the Amoros court cited a pre-Rogers case, McCray v. State, 416 So.2d 804, 807 (Fla. 1982),

which held that although not all-inclusive, "executions or contract murders" should be the primary context in which this circumstance is properly applied. Id.

Another recent case illuminates the enhanced factual circumstances required by the new, heightened standard. In Jackson v. State, 530 So.2d 269 (Fla. 1988), this Court recounted the fact that:

> [t]he victim was bound, gagged, and then choked with a belt until he was unconscious. After [the victim] regained consciousness, [defendant] beat him in the face with a cast on his forearm and then straddled his body and repeatedly stabbed him in the chest.

Id. at 270. Faced with facts indicating a protracted incident in which the defendant had a great deal of opportunity to reflect on his actions, this Court might well have applied the aggravating circumstance. Instead, the court concluded, "the evidence does not establish the heightened degree of prior calculation and planning required by our Rogers decision." Id. (emphasis added). The facts in the instant case indicate a short period of time in which the appellant may have had an opportunity for contemplation. Yet, under Jackson, this Court now requires a significantly extended period of reflection before an act can be described as a product of "heightened premeditation." According to Amoros and other precedent, finally, this period is analogous to the extent of reflection involved in "execution or contract murders." The opportunity for reflection indicated in the instant case simply does not satisfy the heightened Rogers standard.

This Court's decision in Harvey v. State, 529 So.2d 1083 (Fla. 1988), is also instructive. In Harvey, this Court noted:

> That [the defendant] planned the robbery in advance and even cut the phone lines before going over the bridge to the [victims'] home would not, standing alone, demonstrate a prearranged plan to kill. However, once the [victims] were under their control, they openly discussed whether to kill [them]. These murders were [thus] undertaken only after the reflection and calculation which is contemplated by this statutory aggravating circumstance.

Id. at 1087. The Harvey Court's imposition of the aggravating circumstance, however, was issued by a bare 4-3 majority. Joined by Justice Overton and Justice Barkett, Justice Ehrlich's opinion concurring only in the penalty rejected the Court's approach to the "cold, calculated, and premeditated" aggravating circumstance issue. In contrast to the majority, these three justices found that the incident to which the majority alluded, namely the discussion between the defendants concerning the necessity of disposing of witnesses during the robbery, did not satisfy Rogers' heightened standard. Id. at 1088 (Ehrlich, J., concurring). Referring to these discussions, the concurrence stated that:

> [t]his apparently is the only plan or design [the defendant] had to kill. This certainly supports the element of premeditation, but, in my view, <u>does not measure up to the planning or prearranging design that the Court was articulating in Rogers ....</u>

Id. (emphasis added).

The narrowly decided opinion in Harvey, in fact, is the sole post-Rogers case in which the Court found that the new standard

has been met. In Mitchell v. State, 527 So.2d 179 (Fla. 1988), for example, the Court found that a homicide committed by multiple stab wounds resulting from a rage did not satisfy Rogers' "careful plan or prearranged design" standard. Id. at 182. Similarly, in Hamblen v. State, 527 So.2d 800 (Fla. 1988), this Court overturned the trial court's decision to apply the "cold, calculated, and premeditated" aggravating circumstance. Holding first that "executions or contract murders" are the primary class of crimes fitting into this category, this Court held:

> [u]nlike those cases in which robbery victims have been transported to other locations and killed some time later, ... [defendant's] conduct was more akin to a spontaneous act taken without reflection. While the evidence unquestionably demonstrates premeditation, we are unable to say that it meets the standard of heightened premeditation and calculation required to support this aggravating circumstance.

Id. at 805. This Court also refused to apply this aggravating circumstance in Lloyd v. State, 524 So.2d 396 (Fla. 1988).

Even prior to Rogers, this Court has closely scrutinized trial courts' findings that homicides were committed in a cold, calculated and premeditated manner. In Hansbrough v. State, 509 So.2d 1081 (Fla. 1987), for instance, this Court rejected an application of the aggravating circumstance and held:

> [t]his aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings. Bates v. State, 465 So.2d 490, 493 (Fla. 1985). Moreover, this circumstance goes to the state of mind, intent, and motivation of the perpetrator.

Id. at 1086. Similarly, this Court in Nibert v. State, 508 So.2d 1 (Fla. 1987) ruled that "we have consistently held that application of this aggravating factor requires a finding of heightened premeditation; i.e., a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first-degree murder." Id. at 4 (emphasis in original).

The Nibert Court then quoted a lengthy passage from this Court's opinion in Preston v. State, 444 So.2d 939, 946-47 (Fla. 1984), which also declined to apply the aggravating circumstance:

> The level of premeditation needed to convict in the guilt phase of a first-degree murder trial does not necessarily rise to the level of premeditation required in Section 921.141(5)(i). This 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 [408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982)] (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) cert. denied, 463 U.S. 1230 (1983); Bolender v. State, 422 So.2d 833 (Fla. 1982), cert. denied, 462 U.S. 939 (1983) (defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died).

Nibert, 508 So.2d at 4, quoting Preston, 444 So.2d at 946-47 (emphasis supplied by Nibert Court). The facts in the instant case do not indicate a "lengthy" series of "atrocious" events.

The victim was shot while she was sleeping, and then stabbed almost immediately. [Tr.648, 748]

Culminating in Rogers, this Court has paid close attention to trial courts' application of the "cold, calculated, and premeditated" statutory aggravating circumstance. A somewhat similar case is Middleton v. State, 426 So.2d 548 (Fla. 1983), cited in the lengthy passage above. [1] In Middleton, this Court upheld the imposition of the aggravating circumstance, where the appellant confessed he contemplated for one hour whether to shoot the victim, who was sleeping, before committing the homicide. Id. at 552-53. The instant case is distinguishable from Middleton, however, on a number of grounds. First, the period of "reflection" was, at its greatest possible duration, just one-half the duration of Middleton, and was probably less. In fact, testimony indicated only that defendant decided to commit the homicide sometime between 8:00 A.M. and 8:30 A.M., which suggests that appellant "reflected" on his actions, if at all,

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[1] The facts of the crime in Middleton, however, stand in stark contrast to the facts of the instant case. In Middleton, the defendant killed the mother of a man he had met in prison, who was allowing him to stay in her house. Because the victim would not allow him to use her car, he shot her in the head as she awoke. He then stole her car and two guns and fled to New York City, where he was apprehended. In upholding the imposition of death, this Court noted, "The shocking thing about this murder is that the only thing the victim ever did to the appellant, so far as the record indicates, was to show him extraordinary kindness and generosity." Id. at 553. In Middleton this Court found four aggravating factors and no factors in mitigation.

for a very short time before he decided to kill his girlfriend and himself. [Tr.1060]

Second, Middleton describes the very lowest factual limits in which the Court has upheld the application of the "cold, calculated, and premeditated" aggravating circumstance. Other than Middleton, this Court has insisted on "executions or contract killings," or analogous factual situations, as the only context in which the aggravating circumstance is properly imposed. As this Court detailed in Garron v. state, 528 So.2d 353 (Fla. 1988) in rejecting the circumstance, for example, "[T]he heightened premeditation aggravating factor was intended to apply to execution or contract-style killings. This case involves a passionate, intra-family quarrel, not an organized crime or underworld killing." Id. at 361 (emphasis added).

Although the trial court did find that the instant homicide was committed **"execution-style,"** [Tr.1096], the "execution or contract killing" standard suggests that this Court is concerned not with the actual form of a homicide, but with the defendant's mental state, i.e. the degree of premeditation. In Hamblen, supra, for example, this Court refused to permit application of the circumstance when the actual form of the killing was "execution style," but was not a product of heightened premeditation. Thus, the two elements of the "execution or contract killing" standard are not intended to be interpreted independently. Instead, this Court has used the standard simply to describe the significantly enhanced degree of premeditation

required before application of the aggravating circumstance will be upheld. Middleton describes the lowest degree of premeditation for which this Court has upheld the aggravating circumstance.

Third, and perhaps most importantly, Middleton is a pre-Rogers case. In Rogers, this Court was quite explicit in its intention to heighten the standard governing application of the aggravating circumstance. Now, only a "careful plan" or "prearranged design" will permit a court to apply the "cold, calculated, and premeditated" circumstance. Thus, Rogers has modified the standard to require a heightened level of premeditation, and consequently the lower contours of the standard, as represented by Middleton, are no long valid. Thus, the trial court impermissibly found the "cold, calculated, and premeditated" aggravating circumstance in the instant case.

B. The Trial Court Erred in Finding Several Nonstatutory Aggravating Circumstances.

In imposing a sentence of death upon appellant, the trial court made several explicit factual findings as required by §921.141(3), Fla. Stat. (1987). In determining, these factual circumstances, however, the trial court also found a number of nonstatutory aggravating circumstances. See Brown v. state, 473 So.2d 1260, 1265 (Fla. 1985) (distinguishing between written findings of nonstatutory aggravating factors and mere verbal findings, which are legally insignificant). For example, the court stated:

> [Appellant] killed [the victim] execution style as she slept. When she didn't die, he stabbed her thrusting a knife 6 1/2 inches into her back. [Appellant] remained in his home with the dead body of [the victim] for over eighteen hours before his crime was discovered.
>
> Some eight months after confessing to this brutal murder, [appellant] blamed his wife for the crime,
>
> The acts of this Defendant are cowardly. The victim was defenseless against the Defendant. As the victim slept, she was murdered. The Defendant could not follow through with his own suicide. Thinking his wife who was in hiding would not be located, the Defendant decided to blame her -- the mother of his children for this crime.
>
> [Appellant] believes in the death Penalty. He believes that if you commit this type of act you deserve the death penalty.

[R.296-297]. In applying the "cold, calculated, and premeditated" aggravating circumstance, furthermore, the court made the following findings of fact:

> [Appellant] shot [the victim] execution style as she slept. When she didn't die, he stabbed her thrusting a knife 6 1/2 inches into her back. [Appellant] disposed of the knife.
>
> [Appellant] wrote a suicide note but did not end his own life.
>
> Approximately seven months after giving a full confession, [appellant] blamed his wife for this brutal murder.

[R.303-304]. The passages excerpted above comprise all of the factual findings made by the trial court at sentencing in support Of its finding that the "cold, calculated, and premeditated" statutory aggravated circumstance had been satisfied.

To reiterate, the trial court found that appellant: killed the victim "execution style as she slept"; remained in house with the dead body for over eighteen hours; blamed his wife for the

murder eight months after an alleged confession; acted "cowardly"; unsuccessfully attempted suicide; and finally, believes in the death penalty. The sole factual finding even colorably related to the "cold, calculated, and premeditated" aggravating circumstance is that the killing was performed in an "execution-style" manner. As the preceding section indicates, however, the reference to "execution-style" killings mentioned in this Court's precedents must be read in pari materia with the term "contract killings" to describe a heightened degree of premeditation.

This Court, as well as the United States Supreme Court, has consistently overturned trial court's reliance on nonstatutory aggravating factors in the context of Florida's explicit statutory scheme. In Barclay v. Florida, 463 U.S. 939 (1983), for example, the Supreme Court held both that 5921.141, Fla. Stat. (1987) "requires the sentences to find at least one valid statutory circumstance before the death penalty may even be considered" and "does not permit nonstatutory aggravating factors to enter into this weighing process." Id. at 954. The Barclay Court recognized further that, when a trial court has considered improper aggravating factors, this Court has insisted on resentencing where mitigating circumstances are also present. Id. at 955, citing, Moody v. State, 418 So.2d 989, 995 (Fla. 1982); Riley v. State, 366 So.2d 19,22 (Fla. 1978); Elledge v. State, 346 So.2d 998, 1002-03 (Fla. 1977). Even when no mitigating circumstances exist, the Supreme Court continued, this

Court has refused to apply the harmless error rule to the consideration of nonstatutory aggravating circumstances. Barclay., citing Lewis v. State, 398 So.2d 432 (Fla. 1981).

More importantly, this Court's consistent rule has been that consideration of nonstatutory aggravating factors by trial courts is impermissible. In the recent case Grossman v. State, 525 So.2d 833, 842 (Fla. 1988), for instance, this Court held that a nonstatutory aggravating circumstance, in that case the impact on the victim's survivors, is not an appropriate foundation on which to base a death sentence. Similarly, in Robinson v. State, 520 So.2d 1 (Fla. 1988), this Court held that "'absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.'" Id. at p. 6, (emphasis added), quoting Pope v. state, 441 So.2d 1073, 1078 (Fla. 1983)(emphasis added). Robinson is relevant to the instant case for two reasons. First, the trial court's reference to appellant's "blaming his wife," [R.303], is merely another example of the "absence of remorse" nonstatutory aggravating factor rejected by Robinson. This Court in Robinson also held that nonstatutory aggravating circumstances are equally impermissible whether they are imposed in their own right, or merely to support a statutory aggravating circumstance. Applying this rule to the instant case, it is manifest that the factual circumstances delineated by the trial court - "blaming" another individual, failing to commit suicide, and belief in the death Penalty - are irrelevant to the "cold, calculated, and

premeditated" circumstance and thus impermissible. Likewise, this Court in Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987) rejected "lack of remorse" and the effect of the victim's death on the victim's children as aggravating factors. In Trawick v. State, 473 So.2d 1235 (Fla. 1985), this Court rejected judge and jury findings of improper aggravating circumstances and held:

> Acts committed independently from the capital felony for which the offender is being sentenced are not relevant to [the] question of whether the capital felony itself was especially heinous, atrocious, or cruel [a statutory aggravating circumstance]."

Id. at 1240. Although concerning a statutory circumstance other than that imposed by the instant trial court, Trawick demonstrates that any circumstances found by a trial court must not be independent from the capital felony. Id. Under this holding, the factual circumstances found by the trial court are unrelated to the capital felony itself, and are invalid on this basis as well.

The Trawick Court also rejected "lack of remorse" as an appropriate aggravating circumstance:

> In general, the trial court's findings are replete with statements that are not specifically linked to any statutory aggravating circumstance. While some of the findings may properly relate to statutory aggravating circumstances, the lack of clarity makes it difficult for us to sort out the relevant and sufficient findings from the irrelevant or insufficient ones. We have noted several infirmities in the trial judge's findings. In effect the trial judge went beyond the proper use of statutory aggravating circumstances in his sentencing

> findings and the sentence of death cannot stand.
> We find further that because the jury heard evidence and argument that did not properly relate to any statutory aggravating circumstances the jury recommendation is tainted.

Id. at 1240-41.

Moreover, case law is replete with application of the rule that "[o]nly statutory aggravating factors may be considered." Drake v. State, 441 So.2d 1079, 1082 (Fla. 1983); McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982)(because "aggravating circumstances must be limited to those provided for by statute, [n]either the failure of the appellant to acknowledge his guilt nor demonstration of remorse is a valid statutory aggravating circumstance."). In Blair v. State, 406 So.2d 1003 (Fla. 1981), this Court overturned the trial court's application of the nonstatutory factors of simple "premeditation" and the means used to dispose of the victim's body. Id. at 1108-09. See also Riley v. State, 366 So.2d 19, 21 (Fla. 1978)(rejecting summarily the imposition of two nonstatutory aggravating circumstances).

In Elledge v. State, 346 So.2d 998 (Fla. 1977), cited in the United States Supreme Court's Barclay decision, supra, this Court predictably rejected imposition of a nonstatutory aggravating factor. Elledge at 1002. Equally relevant, the Elledge Court also refused to apply a harmless error analysis even in the presence of "substantial additional aggravating circumstances." Id. Finally, in Purdy v. State, 343 So.2d 4 (Fla. 1977), this Court held simply that "[t]he specified statutory circumstances

are exclusive; no others may be used for that purpose." Id. at 6.

Thus, this Court has consistently proved unwilling to endorse the application of nonstatutory aggravating circumstances, whether standing on their own or in support of statutory factors not logically related. Further, this Court has also proved unwilling to apply the harmless error rule in the context of imposing nonstatutory aggravating circumstances. Because the trial court expressly found a number of nonstatutory factors wholly irrelevant to the "cold, calculated, and premeditated" circumstance, this Court should order appellant resentenced to life imprisonment.

C. Based Upon a Weighing of Aggravating and Mitigating Circumstances as Required by Section 912.141(3), Florida Statutes (1987), Imposition of the Death Penalty is Disproportionate in this Case.

Closely related to the problem of application of improper nonstatutory aggravating factors is their role in the requisite weighing process between aggravating and mitigating circumstances. In Barclay v. State, 470 So.2d 691 (Fla. 1985), this Court found that, by improperly applying a nonstatutory aggravating factor, the trial court "failed to follow the correct weighing process." Id. at 695, citing Mikenas v. State, 367 So.2d 606 (Fla. 1978). In Miller v. State, 373 So.2d 882 (Fla. 1979), quite similarly, this Court held:

> [t]he use of [a] nonstatutory aggravating factor as a controlling circumstance tipping the balance in favor of the death penalty was

> improper. The aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose.

Id. at 885. In Elledge, this Court held, "We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." 346 So2d at 1003.

In the very recent case of Songer v. State, ___ So.2d ___, 14 FLW 262 (Fla., June 2, 1989), this Court described its traditional proportionality analysis as a function of the weighing of aggravating and mitigating circumstances. In Songer, the defendant argued that it was disproportionate to impose the death penalty given the existence of only one statutory aggravating circumstance, balanced against three statutory mitigating circumstances, and several nonstatutory mitigating circumstances. Id. at 263. This Court agreed and held:

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 942 (1974). To secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure the ultimate punishment is appropriate.
>
> Our customary process of finding similar cases for comparison is not necessary here because of the almost total lack of aggravation and the presence of significant mitigation. We have in the past affirmed death sentences that were supported by only one aggravating factor, [citation omitted], but those cases involved either nothing or very little in mitigation. Indeed, this case may represent the least aggravated and most mitigated case to undergo proportionality analysis.

Id. (emphasis added). Accordingly, this Court ordered the defendant in Songer resentenced to life imprisonment.

Like Songer, the instant case involves a finding by the trial court of only one statutory aggravating circumstance, which itself is subject to challenge, one statutory mitigating circumstance, and four additional nonstatutory mitigating Circumstances. [R.295-304] Thus, under Songer, a sentence of death is disproportionate in the instant case. Accord, Caruthers v. State, 465 So.2d at 499 (this Court holding that death penalty is disproportionate when there is one statutory aggravating circumstance, one statutory mitigating circumstance, and several nonstatutory mitigating circumstances).

In Lloyd v. State, 524 So.2d 396 (Fla. 1988), similarly, this Court applied its traditional proportionality analysis, where the trial court found a single aggravating circumstance and a single statutory mitigating circumstance, with no nonstatutory mitigating circumstances. Id at 403. The Lloyd Court concluded that, compared with this Court's previous cases, to apply the death penalty would be disproportionate. Id. similarly, in Rembert v. State, 445 So.2d 337 (Fla. 1984), this Court overturned a trial court's imposition of the death penalty upon finding one statutory aggravating circumstance and only nonstatutory mitigating circumstances. Id. at 340. In Proffitt v. State, 510 So.2d 896 (Fla. 1987), this Court examined for proportionality a case in which a trial court imposed death after finding two statutory aggravating factors, one statutory

mitigating factor and a number of nonstatutory mitigating factors, and found that the imposition of the death penalty would have been disproportionate. Id at 897-98. In so doing, this Court focused on the following mitigating circumstances:

> Here, not only is there no aggravating factor of prior convictions, but the trial judge expressly found that Proffitt's lack of any significant history of prior criminal activity or violent behavior were mitigating circumstances .... He was employed at the time of the offense and described as a good worker and responsible employee. This testimony was unrefuted. The record also reflects that Proffitt had been drinking, he made no statements on the night of the crime regarding any criminal intentions .... Additionally, following the crime, Proffitt ... immediately fled the apartment, returned home, confessed to his wife, and voluntarily surrendered to authorities.

Id. These mitigating factors are remarkably similar to those found by the trial court in the instant case and likewise compel a finding that death is an inappropriate penalty in this case. Prior to this offense, appellant had been a hardworking, law-abiding family man. His crime was the result of a severe emotional crisis, caused by the break-up of his family.

Under controlling authority of this court then, imposition of the death penalty in the instant case would be disproportionate considering this Court's previous treatment of quite similar comparisons of aggravating and mitigating circumstances. In summary, the trial court erred in: finding that the "cold calculated, and premeditated" aggravated circumstance had been satisfied; applying a host of nonstatutory aggravating factors which could not reasonably be construed to

support the sole statutory aggravating factor found by the trial court; and finally, in striking the balance between aggravating and mitigating circumstances in favor of death. Indeed, because the sole aggravating circumstance found by the trial court is invalid, appellant contends, a sentence of death cannot be upheld. Banda v. State, 536 So.2d at 225. Assuming, in the alternative, that the aggravating circumstance of cold, calculated and premeditated was inappropriately found, imposition of the death penalty is nonetheless disproportionate given the presence of an array of statutory and nonstatutory mitigating circumstances. As a result, appellant is entitled to a reduction of his sentence to life imprisonment.

III.

THE TRIAL COURT ERRED BY MAKING, AND ALLOWING THE PROSECUTION TO MAKE STATEMENTS WHICH MISCHARACTERIZED AND DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY IN ITS SENTENCING RECOMMENDATION, IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

A sentencing jury in a capital case is called upon to make an extremely difficult and uncomfortable decision that has no counterpart in any aspect of ordinary life. The pronouncement of whether another human being lives or dies, made on behalf of the community at large, is a grave and somber duty. Indeed, the United States Supreme court has determined that death sentences may be imposed and upheld only where "jurors confronted with the truly awesome responsibility of decreeing death for a fellow

human ... act with due regard for the consequences of their decision...." McGautha v. California, 402 U.S. 183, 208 (1971). Accordingly, the Court has concluded that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985). In the instant case, the trial court's and prosecutor's comments made throughout the trial, and even reiterated during the jury's deliberations, mischaracterized the law and actively diminished the jury's sense of responsibility, rendering the resulting verdict and sentence constitutionally defective under the Eighth and Fourteenth Amendments.

Under long-standing Florida law, the trial court may not override a jury recommendation unless "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908 (Fla. 1975). Since the jury's finding is presumptively correct under Tedder, the jury has been found to play the "'critical' role in determining the appropriateness of death." Adams v. Wainwright, 804 F.2d 1525, 1529 (11th Cir. 1986), modified, 816 F.2d 1493 (1987), reversed on other other grounds, Dugger v. Adams, ___ U.S. ___ (Case No. 87-121, Feb. 28, 1989). Thus, the Caldwell holding applies to Florida capital proceedings. Id. at 1528; See Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987), on rehearing, 844 F.2d 1446 (11th Cir. 1988).

In the instant case, both the court's comments and the prosecutor's statements misled the jury about the truly pivotal determinative nature of its role under Tedder. Any such suggested diminution of the presumptive weight carried by the jury's finding casts doubt on the reliability of that determination. The Supreme Court has stated:

> Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an awesome responsibility has allowed this Court to view sentencer discretion as consistent with - and indeed as indispensable to - the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'

Caldwell, 472 U.S. at 330 (citations omitted). A lessened sense of responsibility and awareness of the impact of the result creates "an intolerable danger of bias toward a death sentence: Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts." Caldwell, 472 U.S. at 331 (emphasis added). Such concerns taint the legitimacy of capital sentencing proceedings, which "should facilitate the responsible and reliable exercise of sentencing discretion." Id. at 329.

In stark contrast to any process likely to produce "responsible and reliable" use of sentencing discretion, repeated efforts in the instant case were made to divert the jurors from Proper consideration of their decisive punitive role. This litany included prosecutorial urging that the jurors should not

"feel bad" [Tr.1102] about voting for death, and should not "feel like it is on you, like the burden's on you." [Tr.1093] This systematic diversion began prior to voir dire. The trial court initiated the characterization of a subordinate role of the jury in its opening remarks to the prospective venire:

> Then, after hearing such mitigating and aggravating circumstances and the arguments of the attorneys, the jury will then render an advisory sentence to the court as to whether the defendant should be sentenced to life imprisonment or death. This advisory sentence may be by majority vote of the jury, and thereafter the Judge, myself, will sentence the defendant to either life imprisonment or death, and it is my job, and I am not required to follow the advisory sentence of the jury, but it will be given great weight. Thus, the jury does not impose the punishment if a verdict of guilty is rendered. The imposition of the sentence is the function of the Judge of this Court and it is not the punishment of the jury.

[Tr.358-59] (emphasis added). This introduction to the jurors' role, which subjugated their relative importance, was amplified by the prosecutor's comments and questions:

> MR. DE LA RIONDA: ...And it is also important to note that the Court, that is, Judge Wiggins, can impose the death penalty even if you recommend that the person receive a life sentence. Do all of you understand that?
>
> THE PROSPECTIVE JURORS: Yes.
>
> MR. DE LA RIONDA: That is, only Judge Wiggins sentences the defendant, you all don't, you make a recommendation. Do all of you understand that?

[Tr.402] (emphasis added). This passage clearly evinces the prosecutor's intent to divert the jurors' attention from their proper role as presumptively determinative sentencers under the

Tedder holding. Since the indoctrination began prior to any evidence presentation, this systematic devaluation of the jurors' role also tainted the entire guilt-determination process by diverting the jurors from the legal consequences of their findings. Thus, the verdict's correctness was undermined by the jurors' incorrect instruction that they would not be responsible for the imposition of sentence.

During sentencing phase instructions, the trial court again mischaracterized the law by trivializing the jurors' role for the sentencing phase:

> THE COURT: Ladies and gentlemen of the jury, you earlier this morning have found the defendant, Joey Thompson, guilty of murder in the first degree. The punishment for this crime is either death or life imprisonment without possibility of parole for twenty-five years. The final decision as to what punishment shall be imposed rests solely with the court, myself. However, the law requires that you, the jury, render to the court, to myself, an advisory sentence as to what punishment you feel should be imposed upon the defendant, Joey Thompson.

[Tr.1073] (emphasis added). Thus, the jurors were not told their "advisory" sentence carried presumptive weight and did not know their recommendation could be rejected only if found to be unreasonable.

This diminution of responsibility was amplified by the prosecutor's opening statements during the penalty phase. The prosecutor assured the panel:

> To the mitigation you can assign whatever weight you want and then you can make your own independent moral judgment about the appropriate penalty.

> That's what he is going to instruct you as what the law is about that. You also need to remember that, too, that the judge is going to decide what the penalty is, he makes that decision. You are going to make a recommendation to him, but he is going to be the final person to make the decision. He can overrule your recommendation, but remember, he is the final person. Don't feel like it is on you, like the burden's on you.

[Tr.1093] (emphasis added). The prosecutor reiterated:

> You will have to vote on whether to recommend life or death to Judge Wiggins. That's what you will have to do and it may be an unnatural thing for you to do, that is, you have never done this before, but the bottom line is you are making a recommendation to Judge Wiggins. He is the one that is imposing the sentence. You should not feel bad for being here or having to vote. If you vote for death, which I argue is appropriate and just, then you are following the law of the State of Florida which we all must uphold.

[Tr.1101-02] (emphasis added). These statements served to give the jury a misleading picture of its role in the sentencing process. The jury was repeatedly encouraged to distance itself emotionally from its sentence by being told not to "feel bad," thereby removing its responsibility for its sentence.

This misleading characterization of the jury's responsibility presented by the prosecutor was not corrected by the trial court, and in fact the erroneous assessment was amplified by the court's instructions. This distortion significantly undermines the validity of the sentence imposed. In Caldwell, the court found that misleading statements regarding the curative nature of appellate review unconstitutionally interfered with the jury's proper role. The Court stated:

> The argument was inaccurate, both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform.
>
> . . .
>
> The argument here urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death - a determination which would eventually be made by others and for which the' jury was not responsible. Creating this image in the minds of the capital sentencers is not a valid state goal...

472 U.S. at 336 (emphasis added). Thus, the repeated characterizations to the jury of its "advisory" role represented a violation of Caldwell.

The trial court further failed to clarify the jury's role in its final charge:

> BY THE COURT: Ladies and gentlemen of the jury, is is now your duty to advise the court as to what punishment should be imposed upon Joey Thompson for his crime of first degree murder. As you have been told the final decision as to what punishment shall be imposed is the responsibility of myself. However, the law require me to give great weight to your recommendation. It is your duty to follow the law that will now be given to you by myself and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances that are found to exist.

[Tr.127] (emphasis added). After this instruction was given to the jury, the trial court compounded the mischaracterization of

its role by answering a jury question for repeated instructions by stating:

> As you have been told the final decision as to what punishment shall be imposed is the responsibility of myself. Moreover, the law requires me to give great weight to your recommendation.

[Tr.1135] (emphasis added).

In further violation of the Caldwell doctrine, the trial court refused a curative instruction to impress upon the jury the finality and weight of their decision as requested by appellant's counsel:

> MR. CHIPPERFIELD: Yes, sir. Your Honor, my point in this one is that in this case during voir dire and also in the defendant's testimony there was some mention of delays in capital cases and that if a person gets the death penalty he never is really executed because appeals go on. I don't think the jury should be allowed to consider that. I think the jury should be told that if a death sentence is imposed that it will be carried out and if a life sentence is imposed it will be carried out. This instruction will prevent them from speculating about what might happen in the Appellate Court.

[Tr.1069] (emphasis added). The trial court rejected this instruction, stating:

> THE COURT: Well, Mr. Chipperfield, I am not going to give this because what we have done here this week will be reviewed by more courts than I care to list at this time, and I am never sure any more of what any sentences mean at this point without getting into a discussion on that topic, so I think the jury and I am satisfied that I informed them Monday as we were going through the day that they know what is at stake, what the penalties, what the choices are, and I just don't see that this has any probative value to them, and I will deny it.

[Tr.1070] The trial court's failure to impress upon the jury the importance and finality of their role as presumptive sentencers thus was never corrected. The Caldwell court commented squarely on such a failure:

> Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

1472 U.S. at 333.

Emphasizing its constitutional significance, the Tedder rule has been repeatedly cited by the United States Supreme Court as the fundamental underpinning of Florida's capital sentencing procedure. In Spaziano v. Florida, 468 U.S. 447 (1984), the petitioner mounted a constitutional challenge to the Florida sentencing procedure, which was rejected by the Court precisely because of the Tedder standard:

> Petitioner's final challenge is to the application of the standard the Florida Supreme court has announced for allowing a trial court to override a jury's recommendation of life. See Tedder v. State, 322 So.2d 908, 910 (1975). This Court already has recognized the significant safeguard the Tedder standard affords a capital defendant in Florida. See Dobbert v. Florida, 432 U.S. 282 (1977). See also Proffitt, 428 U.S. at 249. We are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role. See Richard v. State, 437 So.2d

> 1091, 1095 (Fla. 1983); Miller v. State, 332 So.2d 65 (Fla. 1976). Our responsibility, however, is not to second-guess the deference afforded in a particular case, but ensure that the result of the process is not arbitrary or discriminatory.

Id. at 465 (emphasis added).

Similarly, in Barclay v. Florida, 463 U.S. 939 (1983), the Court cited the importance of the Tedder standard:

> The Florida Supreme Court has placed another check on the harmless-error analysis permitted by Elledge. When the jury has recommended life imprisonment, the trial judge may not impose a death sentence unless 'the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.' Tedder v. State, 322 So.2d 908, 910 (1975). In Williams v. State, 386 So.2d 538, 543 (1980), and Dobbert v. State, 375 So.2d 1069, 1071 (1979), the Florida Supreme Court reversed the trial judges' findings of several aggravating circumstances. In each case at least one valid aggravating circumstance remained, and there were no mitigating circumstances. In each case, however, the Florida Supreme Court concluded that in the absence of the improperly found aggravating circumstances the Tedder test could not be met. Therefore it reduced the sentences to life imprisonment.

Id. at 955-56.

Despite the numerous citations recognizing Tedder as the substantive safeguard protecting the constitutionality of Florida's capital sentencing procedure, this Court has seemingly retreated from the Tedder holding in a manner which jeopardizes the integrity of this Court's decisions in death cases. This Court found that comments stating the jury's role is merely advisory are correct representations of Florida sentencing

allocation in Grossman v. State, 525 So.2d 833, 851 (Fla. 1988); Cf., Grossman v. State, 525 So.2d 833 (Fla. 1988) (Barkett, J., specially concurring) (Caldwell is applicable to Florida advisory jury); see also Combs v. State, 525 So.2d 853, 860 (Fla. 1988) (Barkett, J., specially concurring); Foster v. State, 518 So.2d 901, 902 (Fla. 1987) (Barkett, J., specially concurring); Phillips v. Dugger, 515 So.2d 227, 228 (Fla. 1987) (Barkett, Jr., specially concurring). This Court in Grossman, however, failed to articulate its holding with reasons that directly acknowledge the dangers presented in Caldwell, therefore significantly undermining the validity of the holding. In Grossman, the defendant, who had been sentenced to death, contested the constitutionality of trial court instructions which denigrated the sentencing role of the jury by failing to advise the jury of the great weight given its advisory sentence. This Court stated:

> The jury here recommended death but appellant argues that the deference paid to the jury recommendation under Tedder is so great that the jury becomes the de facto, if not the de jure, sentencer and our instructions do not adequately inform the jury of the overwhelming power it possesses to determine the sentence. Thus, appellant urges, had the jury understood the very nearly conclusive impact of its recommendation under Tedder, it might have recommended life imprisonment. We are not persuaded that the weight given to the jury's advisory recommendation is so heavy as to make it the de facto sentence. our case law contains many instances where a trial judge's override of a jury recommendation of life has been upheld. See Craig v. State, 510 So.2d 857 (Fla. 1987).

Id. at 840. This reasoning fails to address the Caldwell admonition that the "intolerable danger of bias toward a death

sentence" can occur when a jury votes for death, with the knowledge that the sentence can be corrected at some future juncture. This Court reasoned from the opposite situation, where a "trial judge's override of a jury recommendation of life has been upheld." Id. (emphasis added). The Grossman case is also factually distinguishable. The errors in the instant case were committed throughout the trial, not only during the jury instructions, and were reiterated both by the trial court and the prosecutor, unlike the isolated statement in Grossman.

Since the United States Supreme Court has significantly relied on this Court's adherence to the Tedder holding in passing upon the constitutionality of the Florida capital sentencing scheme, and the Court has repeatedly emphasized the important procedural safeguard represented by the Tedder holding, any abrogation or retreat from the Tedder rule fundamentally undercuts the constitutional validity of this Court's decisions in capital sentencing. This Court must not apply the Grossman holding to deprive Mr. Thompson of his constitutional right to a jury that appreciates the somber power it exercises under Florida law.

Moreover, in direct opposition to Grossman, the federal courts of this jurisdiction have held that Caldwell claims attach to Florida capital proceedings. In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1987), the Eleventh Circuit Court of Appeal held that the Florida capital sentencing procedure was subject to the

Caldwell analysis. The court cited dozens of Florida Supreme Court decisions to support its conclusion that the jury is the presumptive sentencer in Florida capital murder cases:

> ...we must look to how the Supreme Court of Florida, the final interpreter of the death penalty statute, has characterized the role.
>
> A review of the case law shows that the Supreme Court of Florida has interpreted section 921.141 as evincing a legislative intent that the sentencing jury play a significant role in the Florida capital sentencing scheme.
>
> . . .
>
> In the supreme court's view, the legislature created a role in the capital sentencing process for a jury because the jury is "the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors." Cooper v. State, 330 So.2d 1133, 1140 (Fla. 1976), cert. denied, 431 U.S. 925 (1977); see also McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982) (the jury's recommendation "represent[s] the judgment of the community as to whether the death sentence is appropriate"); Chambers v. State, 339 So.2d 204, 209 (Fla. 1976) (England, J., concurring) (the sentencing jury "has been assigned by history and statute the responsibility to discern truth and mete out justice").

Id. at 1454 (emphasis added). The Mann court was aware of Grossman and cited it in its opinion, found at page 1455.

The statements of the trial court and the prosecutor in the instant case were as egregious as those found impermissible in the Caldwell case, and presented the identical danger that the

jurors would abdicate responsibility for sentencing to the trial and appellate courts. As the Caldwell opinion states:

> It is certainly plausible to believe that many jurors will be tempted to view those respected legal authorities as having more of a "right" to make such an important decision than has the jury. Given that the sentence will be subject to appellate review only if the jury returns a sentence of death, the chance that an invitation to rely on that review will generate a bias toward returning a death sentence is simply too great.

Id. An identical danger is presented in the guilt-determination phase, namely, that the verdict will only be reviewed if it is that of guilt, and thereafter any error may be corrected on review.

The cumulative effect of the statements in the instant case unconstitutionally tainted the jurors by propelling them toward a sentence of death in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. The statements diverted the jurors from a reliable finding in favor of guilt and in favor of the imposition of death, by deceptively lifting that grave and somber burden from their shoulders. Given that the verdict and jury recommendation of death were rendered fundamentally unreliable by these repeated improper mischaracterizations of their sentencing power, the verdict and sentence must be rejected and this cause remanded for a reliable sentencing proceeding.

IV.

THE PENALTY PHASE JURY INSTRUCTIONS FAILED TO CHANNEL THE JURY'S DISCRETION IN CONSIDERING WHETHER THE CRIME WAS "COLD, CALCULATED AND PREMEDITATED."

Before trial, appellant moved the trial court to declare the "cold, calculated and premeditated" aggravating factor unconstitutionally vague in violation of the Eighth and Fourteenth Amendments. [R.248] Alternatively, he urged that the factor was not applicable to his case and should not be included in the instructions to the jury. [R.255] These arguments were rejected by the trial court. [R.250] The trial court did grant a requested instruction which defined, in an insufficient fashion, the aggravating circumstance of cold, calculated and premeditated. [R.264] The standard penalty phase jury instruction used and the special instruction read as follows:

> The aggravating circumstances you you may consider are limited to the following that are established by the evidence:
>
> 1. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> The phrase "cold, calculated and pre-meditated" refers to a higher degree of pre-meditation than that which is normally parent in a pre-meditated murder. This aggravating factor applies only when the facts show a particular lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator....

[Tr.265] The instructions given were unconstitutionally vague because they failed to inform the jury of the findings necessary

to support the aggravating circumstance of "cold, calculated and premeditated," the only circumstance found to support appellant's sentence of death. Maynard v. Cartwright, ___ U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 372 (1988); Adamson V. Rickets, 865 F.2d 1011, 1029-1036 (9th Cir. 1988) (en banc).

In Maynard, the Supreme Court held that Oklahoma's "especially, heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague under the Eighth Amendment. The Court concluded that the language of the aggravating circumstance failed to apprise the jury of the findings it must make to impose a death sentence. The jury was left with unchannelled discretion in reaching its sentencing decision. Relying on Godfrey v. Georgia, 446 U.S. 420, 998 (1980), the Court affirmed the decision of the Tenth Circuit Court of Appeals invalidating the death sentence:

> We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the 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. The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous," does not, is untenable. To say that something is "especially heinous" merely suggests that the 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." Godfrey, supra, at 428-429, 64 L.Ed.2d 398, 100 S.Ct. 1759. Likewise in Godfrey the addition of "Outrageously or wantonly" to the term of

> "vile" did not limit the overbreadth of the aggravating factor.

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

Similarly in Adamson, the Ninth Circuit Court of Appeals, sitting ~~en banc~~, held Arizona's capital sentencing scheme to be unconstitutional because it failed to channel the discretion of the jury with respect to the aggravating factor of "especially heinous, cruel or depraved." Id. at 1029. In holding the statute to be unconstitutional the court noted the efforts undertaken by the Arizona Supreme Court to provide a specific definition of the phrase but held:

> In sum, Arizona has been unable to provide clearly discernible parameters to establish what kind of conduct falls within the ... [heinous, cruel or depraved] circumstance. The court appears to rely on whatever events are presented to it. The court is therefore free to review the record for any actions or events that it believes to be especially heinous, cruel or depraved. Given the complete lack of any objective standards that guide the court in the decisionmaking, and its unlimited authority to consider any and all facts present in a particular case, we can only conclude that the Arizona Supreme Court's attempts to constitutionally narrow the (F)(6) circumstance have failed.

Id. at 1036-1037. The rationales of Maynard and Adamson apply equally to Florida's cold, calculated and premeditated aggravating factor. This Court has limited the class of cases which qualify for the circumstance, e.g., Banda v. State, 536 So.2d 22 (Fla. 1988); Rogers v. State, 511 So.2d 526 (Fla. 1987); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Jent v. State, 408 So.2d 1024 (Fla. 1981), but the jury instruction given failed

to incorporate these limitations. The jury could have concluded from the instructions given, that virtually any premeditated murder justifies finding this aggravating circumstance. Although the special instruction given stated that not every premeditated murder requires a recommendation of death, the instruction did not advise the jury that any pretense of a moral or legal justification or the absence of a prearranged plan precludes a finding of the factor. Consequently, the jury was left with no guidance by which to determine whether the death penalty was appropriate under the facts of this case.

Since the aggravating factor of "cold, calculated and premeditated" was the only aggravating circumstance presented to the jury, and found by the judge, the danger that the vague jury instructions tainted the jury's recommendation is particularly acute. Furthermore, it cannot be said that the facts of this case would warrant finding this circumstance under any construction the jury might have employed. The facts did not justify the court's finding this aggravating circumstance. Proper jury instructions were critical. Joey Thompson was entitled to have a jury's recommendation based upon proper guidance from the court concerning the applicability of the aggravating circumstance. He has been deprived of his rights as guaranteed by the Eighth and Fourteenth Amendments and his death sentence must be reversed.

V.

THE TRIAL COURT ERRED BY EXCLUDING EXCULPATORY POLYGRAPH RESULTS FROM CONSIDERATION DURING THE SENTENCING PHASE OF THIS CASE.

Since death is an extreme and final penalty, capital sentencing proceedings must be conducted to insure the jury's recommendation is never the result of arbitrary or misinformed decision-making. Emphasizing a need for certainty, the United States Supreme Court has required sentencing jurors to be fully informed, about both the character of the person whose fate they determine and the full facts and circumstances of the crime involved. Woodson v. North Carolina, 428 U.S. 280, 304 (1976). This need for complete information is particularly acute in the presentation of mitigating evidence, as a guarantee against the unwarranted imposition of death. In relation to such mitigating evidence, the United States Supreme court has concluded:

> ...[T]he sentencer, in all but the rarest kind of capital case, [shall] not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.
>
> . . .
>
> The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (emphasis in original) (footnotes omitted), accord Eddings v. Oklahoma, 455

U.S. 104 (1982). This full disclosure requirement reflects the inherent value placed upon human life by our society. Woodson at 304.

In the instant case, however, the sentencing jury was prevented from considering critical evidence, which significantly undercut the correctness of the verdict and created the degree of doubt for a recommendation of life, because the trial court refused to admit the exculpatory results of a polygraph test that corroborated Mr. Thompson's claim of innocence. The jury's recommendation, by a vote of eight to four, was based upon the improper restriction of mitigating evidence. Therefore, its recommendation was tainted.

In rejecting automated, mandatory sentencing in death cases, the Court has emphasized the sentencer's need for information regarding the circumstances of the offense by stating:

> In capital cases, the fundamental respect for humanity underlying the Eighth Amendment ...requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of infliction of the penalty of death.

Woodson, at 304 (emphasis added). The Court further articulated this requirement in Lockett, concluding that "any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" must be considered, subject to the "traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Id., at 604,

f.n. 12 (emphasis added). The Florida legislature has included this standard in its sentencing procedure.

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

§921.141(1), Fla. Stat. (1989) (emphasis added).

At the beginning of the sentencing phase of trial, the defense offered a polygraph test expert's conclusion that Mr. Thompson was not lying when he stated that his wife had committed the murder of Annette Place. [Tr.1047] The trial court allowed the qualifications and conclusions of the expert to be proffered out of the presence of the jury, but refused to admit the result, stating:

> THE COURT: All right. Let me ask what is the State's position on admitting the results of a polygraph examination apparently run by the Public Defender's Office investigator on the defendant Joey Thompson?
>
> MR. BLAZS: The State would oppose it, Your Honor. We would object to it.
>
> THE COURT: All right. Mr. Chipperfield, I don't feel that it is relevant or has any bearing. The jury has made their finding, and this is not admissible evidence, and the Court doesn't feel that it has any relevance to this or any other proceeding.

[Tr.1047-48] (emphasis added). The trial court clarified the basis of its ruling:

> MR. CHIPPERFIELD: Yes, sir. Your Honor, I think there are two problems with the motion. I think one is reliability and the other is admissibility.
>
> THE COURT: My ruling is on the admissibility.

[Tr.1048] (emphasis added).

The trial court erred in its ruling, since the rules regarding admissibility of evidence are clearly relaxed by the Florida statute, providing that evidence may be considered "regardless of its admissibility under the exclusionary rules of evidence." §921.141(1), Fla. Stat. (1989). This evidence was indeed relevant to the issue of the circumstances of the offense, under Lockett and was consistent with Mr. Thompson's testimony at trial that his wife had killed his girlfriend, the victim, in a jealous rage. It was also relevant to a consideration of the correctness of a death sentence, since a fundamental consideration in such cases must be whether the defendant in fact committed the offense for which he is to be executed.

In denying the jurors the right to hear the polygraph evidence, the trial court limited the factors the jury could consider in mitigation, foreclosing a consideration of possible innocence, in violation of Hitchcock v. Dugger, 481 U.S.___, 95 L.Ed.2d (1987). This unconstitutional restriction of mitigation is underscored by the trial court's framing of its reason for suppression of the evidence: the court did not preclude its

presentation on any assertion of unreliability, but solely upon its admissibility and relevance. [Tr.1048] The trial court held that the jury need not hear any evidence of innocence, since "[t]he jury has made their finding." [Tr.1048] Thus, it disallowed the evidence on the basis of content, not on any reservations regarding the source of that content.

This Court has twice previously upheld trial court rulings excluding polygraph results in capital sentencing proceedings. See Christopher v. State, 407 So.2d 198 (Fla. 1981); Perry v. State, 395 So.2d 170 (Fla. 1981). In the later case of Christopher, this Court applied an abuse of discretion standard to uphold the trial decision to exclude polygraph results, stating, "[T]he statute provides that evidence as to any matter the court deems relevant to sentencing may be admitted. It is within the discretion of the trial court to determine what is relevant in the sentencing proceeding." Id. at 202 (citation omitted). In Perry, this Court relied on two non-death cases to conclude that the trial court correctly excluded the polygraph evidence. Neither decision states any policy reasons for the decision, nor does either treat the specific constitutional concerns of a capital sentencing procedure. Therefore, this Court should retreat from the holding in these decisions to the extent required by Lockett.

Concern over the correctness of the jury's verdict is a significant aspect of the Supreme Court's recognized requirement

of certainty in the imposition of the death penalty. In Lockett the court stated:

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important that in noncapital cases. A variety of flexible techniques--probation, parole, work furloughs, to name a few--and various post conviction remedies, may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Lockett, at 605.

In light of this recognized concern over the lack of curative measures in capital cases, the trial court's conclusion that Mr. Thompson's guilt or innocence was irrelevant to the determination of his sentence was erroneous. The factor of residual doubt from the guilt-determination phase, standing alone, has been recognized by the former Fifth Circuit as a significant mitigating factor. In Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981) (Unit B), [2] the court acknowledged the validity of such doubt as a mitigating factor:

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[2] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Elventh Circuit Court of Appeal adopted (Footnote Continued)

> The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt--doubt based upon reason--and yet some genuine doubt exists. It may reflect a mere possibility; it may by but the whimsy of one juror or several. Yet this whimsical doubt--this absence of absolute certainty--can be real.
>
> The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice nor engaged in an exercise in futility when his counsel mounts a vigorous defense on the merits. It may be proffered in the slight hope of unanticipated success; it might seek to persuade one or more to prevent unanimity for conviction; it is more likely to produce only whimsical doubt. Even the latter serves the defendant, for the juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death.

Id. at 580-81.

The polygraph results would have also served the purpose of rebutting the State's theory of the lone aggravating factor found, namely that the homicide was committed in a cold, calculated, and premeditated manner. [Tr.1094-96] The prosecutor's argument for the aggravating circumstance was based on appellant's statement at arrest suggesting that he may have decided some thirty minutes prior to the killing to commit it. [Tr.648-51, 19961 The results of the polygraph examination would

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(Footnote Continued)
as precedent decisions of the former Fifth circuit rendered prior to October 1, 1981.

have rebutted this argument and thus, should have been allowed into evidence.

Although polygraph results are not generally admissible into evidence during trial where there is an objection, the results are deemed sufficiently reliable to permit their introduction in evidence upon stipulation of the parties. See, Codie v. State, 313 So.2d 754 (Fla. 1975); Brown v. State, 452 So.2d 122 (Fla. 1st DCA 1984)). Moreover, this Court has implicitly approved the consideration of polygraph results in the capital sentencing process. In Hawkins v. State, 436 So.2d 44 (Fla. 1983), the defendant's polygraph test corroborated his version of the facts surrounding the homicides and bolstered his trial testimony that he had not fired the fatal shots. Id. at 47. In Hoy v. State, 353 So.2d 826 (Fla. 1978), this Court approved a death sentence which was imposed in part in reliance on a polygraph examination that corroborated the defendant's confession and the circumstances of the killings. Id. at 833. Thus, where the rules of admissibility have been relaxed, and the corresponding need for certainty and complete access to information is great, the results of polygraph examinations should be admitted and considered. Because the trial court failed to admit such results, this case must be remanded for a new sentencing hearing.

VI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER THE VICTIM'S FATHER IDENTIFIED THE VICTIM AS HIS DAUGHTER TO THE JURY.

As its very first witness at trial, the State called the victim's father, Raymond Tienter, for the sole purpose of identifying the victim. [Tr.560] Defense counsel immediately advised the court that the witness would testify to nothing more than the identity of the deceased in violation of the rule prohibiting family members from testifying solely for that purpose. [Tr.561] In response to this objection, the prosecutor stated he intended to have a non-relative witness identify the victim. [Tr.563] This witness was not called, however, and instead the State announced its intention to call Mr. Tienter as a witness. [Tr.561-563]

The court ruled that the State could call Mr. Tienter to testify, provided the jury was not apprised of the family relationship. [Tr.563-565] Rather than have the witness testify and run the risk of revealing the relationship, the defense offered to stipulate to identity of the deceased. [Tr.562-566] The State rejected such stipulation and instead called the victim's father - deliberately inviting the very error which subsequently occurred. For when Mr. Tienter took the stand, he identified a photograph of the victim stating, "That's my daughter, Annette Louise Place." [Tr.567] With this answer, the familial relationship was identified to the jury.

Defense counsel immediately moved for a mistrial, arguing that the State could have obtained another identification witness. [Tr.567-572] In fact, the State had previously indicated it would call a non-relative witness to identify Ms. Place. Moreover, Mr. Tienter testified that his daughter had lived in Jacksonville for twelve years and that he knew some of her coworkers and friends. [Tr.573-575] The trial judge found error occurred because Mr. Tienter had revealed his familial relationship with the deceased, but found the error to be harmless, despite the fact that no other evidence had been presented to the jury. This finding of harmlessness was erroneous.

As an initial matter, it is clear that in a homicide prosecution, the State may not present the testimony of a relative of the victim for the sole purpose of identifying the deceased. Steinhorst V. State, 412 So.2d 332, 335 (Fla. 1982); Lewis V. State, 377 So.2d 640, 643 (Fla. 1980); Rowe v. State, 120 Fla. 649, 163 So. 22 (Fla. 1935); Hathaway V. State, 100 So.2d 662 (Fla. 3d DCA 1958), rev. on other grounds, State V. Hines, 195 So.2d 550 (Fla. 1967). The purpose behind this rule is to exclude the irrelevant consideration of family status and to avoid eliciting sympathy for the surviving relative. The rule is designed to "assure the defendant as dispassionate a trial as possible and prevent the interjection of matters not germane to the issue of guilt." Welty V. State, 402 So.2d 1159, 1162 (Fla. 1981). Two exceptions to this general rule exist. First, a

relative may testify to identify only if there is no other witness available to identify the deceased. Lewis v. State, 377 So. 2d 640, 643 (Fla. 1980); Adan v. State, 453 So.2d 1195 (Fla. 3d DCA 1984); Furr v. State, 229 So.2d 269 (Fla. 2d DCA 1969). Second, a relative may identify the deceased at trial if also testifying to other relevant facts. Steinhorst v. State, 412 So.2d 332; Scott v. State, 256 So.2d 19 (Fla. 4th DCA 1971).

In the instant case, the victim's natural father took the witness stand for the sole stated purpose of identifying a photograph of his daughter's body. In addition, the State made no showing of the unavailability of another sources for identification testimony and in fact had another witness available to it. Thus, the trial court correctly concluded that error had occurred.

In determining the error to be harmless, the trial court relied heavily upon the fact that Mr. Tienter did not become emotional before the jury. This fact, however, does not resolve the issue. Merely viewing a father appearing in court to identify the photograph of his dead daughter is sufficient to stir sympathetic feelings in the jurors, especially when the witness is the first person the jurors hear. This is precisely the harm the rule was created to prevent.

In Hathaway v. State, supra, the State presented the victim's widow as a witness solely to identify a morgue photograph of the deceased. The appellate court reversed the case for a new trial noting on the harm caused:

> We do not find that the purpose of the wife's testimony was to prejudice the defendant, but it can readily be conceded that it might have that effect. The State urges that since the wife's testimony was for a proper purpose, i.e., to establish the identity of the deceased, it is immaterial that her testimony may have induced sympathy for her loss to the prejudice of the defendant. Proof of the identify of the deceased by his widow or other members of his family may be proper or even necessary under certain circumstances. However, under the circumstances presented by the record in this case, we find that it was improper and prejudicial. Attorneys for both the state and the accused are under a heavy responsibility to present their evidence in the manner most likely to secure for the accused a fair trial, free, insofar as possible, from any suggestion which might bring before the jury any matter not germane to the issue of guilt. Viewed in this light the decedent's wife was not under the circumstances of this case a competent witness to establish the identity of the deceased. See Filippo v. People, 224 Ill. 212, 79 N.E. 609.

Ibid. at 664. (emphasis added)

The prejudice did not stop at the guilt phase of the trial. Presenting the father's testimony aroused the jurors' sympathies and constituted improper evidence of victim impact. See, Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987); Grossman V. State, 525 So.2d 833 (Fla. 1988); Patterson V. State, 513 So.2d 1257 (Fla. 1987). Such evidence was not only irrelevant to the issue of guilt, it was also irrelevant evidence of nonstatutory aggravating circumstances. The victim's father would not have been permitted to testify at penalty phase.

The jury's recommendation of death is tainted, and Thompson's death sentence violates the Eighth and Fourteenth

Amendments. Allowing the victim's father to testify solely to identify a photograph of the deceased deprived Thompson of a fair trial and violated his right to due process in both the guilt and penalty phases of his case. This Court must reverse his conviction and order a new trial.

VII.

THE TRIAL COURT ERRED IN PERMITTING JANICE THOMPSON TO TESTIFY AT TRIAL AFTER SHE HAD DELIBERATELY CONCEALED HERSELF FROM DEFENSE COUNSEL PRIOR TO TRIAL AT THE STATE'S ACQUIESCENCE.

On March 25, 1988, counsel for Mr. Thompson filed a demand for discovery requesting all names and addresses of witnesses the State would present. [R.91] The State responded to this request by listing the name of Janice Diane Thompson, appellant's wife, but provided no address where she could be located. [Tr.99] when the State finally responded with an address for Janice Thompson, counsel for appellant promptly attempted to serve a subpoena for deposition upon her. [Tr.921) On September 13, 1988, Janice Thompson contacted the State expressing knowledge of the subpoena and the scheduled deposition for September 19, 1988. [Tr.924] She asked the State if she had to appear for appellant's deposition, and was told "that's up to you." [Tr.924] Janice Thompson told the State she would not appear, in fact, did not appear for the defendant's deposition schedule for September 19, 1988. [Tr.921, 924-9251

The State did inform Janice Thompson it needed to know how she could be reached and that for its own purposes, it could "bring you in whether you want to come or not." [Tr.925] Janice Thompson told the prosecution that she could be reached at 8401 Southside Boulevard, Apt. 1013, Jacksonville, Florida 32256. [Tr.925] The State informed appellant's counsel of this address. [Tr.922] Appellant's counsel scheduled additional depositions

and attempted to serve subpoenas on Janice Thompson on three separate occasions at the two addresses provided by the State for the witness. [Tr.922] A moton for a more definite address of Janice Thompson was filed on September 23, 1988. [Tr.923] In addition, appellant's counsel called the state attorney the week before trial on numerous occasions requesting this information, and the State continually indicated it would let appellant's counsel know "as soon as [it] knows." [aTr.923]

In fact, the State's investigator readily contacted Janice Thompson on the afternoon of Tuesday, October 4, 1988 after trial began. [Tr.930] By 5:30 p.m. on that day, the State had arranged for Janice Thompson to arrive by plane in Jacksonville that night at 9:45 p.m. [Tr.931] Janice Thompson was in the State Attorney's office at 8:00 a.m. on Wednesday, October 5, 1988, after the defendant had completed his direct testimony and thus had presented his defense. [Tr.930] Trial resumed at 10:30 a.m. on that day with the State's cross-examination of defendant. [Tr.815] It was not until the State finished its cross-examination of defendant at about 11:30 a.m., that appellant's counsel was told of Janice Thompson's availability. [Tr.883,935]

The State thus knew of Janice Thompson's location approximately eighteen and one-half hours before it disclosed this material information to appellant's counsel. [Tr.815,883, 930-9351 It knew appellant's counsel was seeking to learn of Janice Thompson's location in order to depose her. [Tr.922-923]

The State's delay in conveying this material information constituted a willful violation of Fla.R.Crim.P. 3.220(f). This Court, in Cooper v. State, 336 So.2d 1133 (Fla. 1976), has stated that "a delay of days might be sufficiently prompt where several months remain before trial, but where a complex trial involving a human's life was scheduled to begin in one week, immediate disclosure is dictated by the Rule." Id. at 1138

In the instant case, appellant's counsel was informed of the witness' location, after the State had cross examined appellant four hours before the surprise witness was to testify. [Tr.815] Due to the magnitude of this complex trial involving appellant's life, the State was subject to the strict confines of the immediate disclosure dictated by the Rule.

Since the State did not inform defense counsel of Janice Thompson's whereabouts until it had concluded its cross examination of the defendant's last witness, it effectively made the disclosure after the defense rested its case. [Tr.883,935] The Second District has held a trial court did not abuse its discretion when it excluded witnesses because the tardy witness list had been provided only after the State rested. See, Morgan v. State, 405 So.2d 1003 (Fla. 2d DCA 1981), where the testimony of the excluded witnesses was to be used to impeach the State's last witness. Id. at 1006. In the instant case, Janice Thompson was called to rebut appellant's testimony. [Tr.947-954] Yet once appellant testified, the defendant had completed the presentation of his defense and had, in effect, rested. The

trial court abused its discretion by not excluding Janice Thompson's testimony, in light of the State's willful violation of Fla.R.Crim.P. 3.220. See Richardson v. State, 246 So.2d 771 (Fla. 1971).

In Richardson this Court addressed the question of whether noncompliance with what is now Fla.R.Crim.P. 3.220, regarding disclosure by the State of names and locations of witnesses, requires reversal of a conviction. Id. at 773. The Richardson Court first held that violation of a rule of procedure prescribed by the court does not warrant reversal of a conviction unless noncompliance resulted in "prejudice or harm to the defendant." Id. at 774. In doing so, this Court adopted the standard set forth in Ramirez V. State, 241 So.2d 744 (4th DCA 1970), to access the potential for "prejudice or harm":

> Without intending to limit the nature or scope of such inquiry, we think it would undoubtedly cover at least such questions as whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what effect, if any, did it have upon the ability of the defendant to properly prepare for trial.

Id. at 775. Further, the Richardson decision requires a trial court's findings of non-prejudice to "affirmatively appear on the record." Id. The Richardson Court found that reversal was warranted due to the prejudice stemming from the State's failure to furnish the name of a material witness to the defense. Id. at 777.

The Richardson inquiry involves at least three areas: substantiality of the violation, willfulness of the violation, and effect of the violation. In the present case, each of these three areas of inquiry prompt reversal of appellant's conviction.

First, the violation was substantial, in that the eighteen hours the State withheld the witness' location were the critical hours of the defense's presentation of its case. Further, the witness' testimony was crucial to the State's case, since Mrs. Thompson's testimony directly rebutted the defendant's testimony and defense of the case. Thus, the testimony of the withheld witness was not trivial, but substantial. Unlike the facts leading to this Court's holding in Tafero v. State, 403 So.2d 355 (Fla. 1981), the instant case did not involve testimony which was tangential to the core issues of the case.

Janice Thompson's testimony in this case changed the entire tone of the trial, turning it into a contest of credibility between the husband and wife. The State's claim of ignorance of the appellant's defense does not alter the nature of the violation, since Fla.R.Crim.P. 3.220 applies to rebuttal witnesses. See Smith v. State, 500 So.2d 1125 (Fla. 1986); Witmer v. State, 394 So.2d 1096 (Fla. 1st DCA 1981); Kilpatrick v. State, 376 So.2d 386 (Fla. 1979). Thus, the surprise admission of Janice Thompson's testimony was a substantial violation of Richardson. The trial court acknowledged this fact when it stated, "[I]t would appear that until your opening

statement...Mrs. Thompson was an insignificant witness." [Tr.936]

The State's violation of Fla.R.Crim.P. 3.220 also implicates the second prong of Richardson in its willfulness. The State covertly arranged for Mrs. Thompson to fly down to Jacksonville from her hiding place and testify for it as a rebuttal witness. The State had its agent contact her, and even picked her up from the airport. The appellant, however, was not told until the next day - at the end of his testimony and the end of the presentation of his case. The willfulness of the violation is thus manifestly evident.

The final inquiry of the Richardson test is the effect the State's violation had on the defendant's ability to prepare for trial. Richardson, 246 So.2d at 775). This Court has deemed it "essential that the circumstances establishing non-prejudice to the defendant affirmatively appear in the record." Id. at 775. The reviewing court's scrutiny of the record is strict, for if prejudice occurred the conviction must be reversed:

> If it is evident from the record that the non-compliance with the Rule by the State resulted in harm or prejudice to a defendant through failure to furnish the names of witnesses, and such witnesses were permitted to testify in behalf of the State, or if it should affirmatively appear that the State failed to furnish to the defendant the name of a witness known to the State to have information relevant to the offense charged against the defendant, or to any defense of the defendant with respect thereto, and the latter situation resulted in harm or prejudice to the defendant, an appellate court reviewing his conviction must reverse. Id. at 775.

In the instant case, the State disclosed the name of its witness, but affirmatively withheld that witness' location until the appellant presented his defense.

The State has the burden of showing that there was no prejudice to the defendant. The State made no effort to show there was no prejudice to the defendant. The statements made by the State only addressed the willfulness of the violation and the alleged surprise as to the defendant's theory of the case. [Tr.924-925] The trial court, in spite of a definite objection and strong argument by appellant that his preparation was prejudiced, merely stated that Janice Thompson's testimony did not hamper the appellant's ability to prepare for trial. [Tr.936] The record clearly reflects the failure of the State to carry its burden of showing non-prejudice.

In Wilcox v. State, 367 So.2d 1020 (Fla. 1979), this Court stated that the "purpose of a Richardson inquiry is to ferret out procedural rather than substantive prejudice." Id. at 1023. That is, the court "must decide whether the discovery violation prevented the defendant from properly preparing for trial." Id. at 1023. Simply arguing that the aggrieved party was deprived of the possibility of obtaining impeachment material is not what the procedural prong of a Richardson inquiry contemplates. See Baker v. State, 438 So.2d 905 (Fla. 2d DCA 1983). Instead, the inquiry is whether the aggrieved party's case would have been different if it had knowledge of the evidence or witness. See Smith v. State, 499 So.2d 912 (Fla. 1st DCA 1986); walker v. State, 484

So.2d 1322 (Fla. 3d DCA 1986); Wilkerson v. State, 461 So.2d 1376 (Fla. 1st DCA 1985); Cf. Raffone v. State, 483 So.2d 761 (Fla. 4th DCA 1986).

In the instant case the trial court's focus on prejudice was misplaced, since the trial court stated the correct test, but did not in fact apply it. The court stated it could not "under any stretch of my imagination see where her coming here today" would harm defendant's trial preparation, implicitly reflecting the fact that the trial was effectively over at that point. [Tr.936] (emphasis added). The trial court thus failed to inquire as to the effect of the State's nondisclosure of Janice Thompson's location on appellant's trial preparation.

Appellant made a timely objection to the admission of Janice Thompson's testimony, [Tr.920-921], stating that his defense would have been different had the State complied with discovery. [Tr.938-937] The trial court allowed appellant's counsel a total of an hour and fifteen minutes to take Janice Thompson's statement. [Tr.932, 940] Absent a finding of no prejudice, an opportunity to depose an undisclosed witness does not cure a discovery violation. See Wendell v. State, 404 So.2d 1167 (Fla. 1st DCA 1981); McClellan v. State, 395 So.2d 869 (Fla. 1st DCA 1978).

In Loren v. State, 518 So.2d 542, 347 (Fla. 1st DCA 1987), the State inadvertently left a firearms identification expert off the witness list furnished to defense counsel. The court recessed the trial to allow defense counsel to interview the

witness. Id. at 347. The witness was allowed to testify because the witness' testimony was "merely cumulative and corroborative" of another witness' testimony, clearly establishing non-prejudice to that defendant. Id. at 347. In contrast, the witness' testimony in the instant case was not "merely cumulative and corroborative," for it directly and solely rebutted the defendant's testimony. [Tr.947-954]

Similarly, in McGee v. State, 435 So.2d 854, 859 (Fla. 1st DCA 1983), the State filed a supplemental response to the defense's discovery request a few days before trial. The trial court conducted a Richardson hearing and allowed the witness to testify. Id. at 359. Not only did defense counsel have an opportunity to depose all the witnesses the date before trial began, but all three witnesses testified as to "merely formal matters." Id. at 859. Hence, there was no prejudice to defendant. Id. at 859.

The instant case is distinguishable in three ways. First, the state's "late" disclosure in McGee was a few days before trial; in the instant case, appellant's counsel was told of Janice Thompson's location only after the State finished its cross-examination of the appellant. [Tr.935] Second, the defendant's counsel in McGee had an opportunity to depose the witnesses before trial, whereas in the instant case counsel could depose Janice Thompson only after he rested appellant's case. [Tr.919, 936-9371 Both distinctions go directly to the issue of procedural prejudice. The third distinction is that the

witnesses in McGee all testified about "merely formal matters. McGee. Janice Thompson's testimony directly rebutted defendant's testimony and therefore was not a "merely formal matter." [Tr.947-954]

The instant facts strongly implicate all three of the Richardson inquiries requiring reversal, and add another, the fact that this is a death case. This consideration of the harshness of the penalty faced by Mr. Thompson as a result of the State's willful, substantial, and prejudicial withholding of the location of Mrs. Thompson heightens the requirement for reversal of the trial court. This case must therefore be reversed and remanded for a new trial.

VIII.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE HIGHLY PREJUDICIAL PHOTOGRAPHS OF THE DECEASED VICTIM WHICH INFLAMED THE JURY AND PREVENTED A FAIR CONSIDERATION OF THE EVIDENCE.

Photographs in a homicide case are admissible only to illustrate, explain or clarify a conflict in the evidence. Blake v. State, 156 So.2d 511 (Fla. 1963). Such photographs have relevance only when they enable the jury to better understand other evidence presented at trial. Those photographs which show nothing more than a gruesome scene and which inflame or incite the emotions of the jury are inadmissible. Porter v. State, 81 So.2d 519 (Fla. 1955); Thomas v. State, 59 So.2d 517 (Fla. 1952); United States v. Brady, 579 F.2d 1121 (9th Cir. 1978).

The test for admissibility of photographic evidence is whether the photograph is "relevant to any issue required to be proven in a given case." Adams v. State, 412 So.2d 850, 853 (Fla. 1982), quoting State v. Wright, 265 So.2d 361, 362 (Fla. 1972). ~~See also~~, Grossman v. State, 525 So.2d 833 (Fla. 1988). Foster v. State, 369 So.2d 928 (Fla. 1979) quoting Young v. State, 234 So.2d 341 (Fla. 1970); Bauldree v. State, 284 So.2d 196 (Fla. 1973); Kingery v. State, 523 So.2d 1199 (Fla.App. 1st DCA 1988).

In the instant case, the State sought to admit the photographs on the grounds that they were relevant to show: 1) the victim's identity [R.581]; (2) when the time of death occurred [R.603-605]; (3) the position of the body [R.590-599];

(4) the position of the victim's wounds [R.593-599, 601]; and (5) premeditation [R.682], and the "length that the assailant would have to go in order to inflict the wounds given [the victim's] position in the bed." [R.682] Admission of these photographs was opposed by appellant's counsel both prior to and during trial. [R.187-189]

Examining the record as a whole, the challenged photographs should not have been admitted into evidence. They were not necessary to establish the facts as alleged by the prosecution inasmuch as the prosecution presented other evidence to establish those facts. For instance, Dr. Sander, the physician who performed an autopsy upon the victim [Tr.580-581] and Mr. Tienter, the victim's father, adequately identified the victim in court. [Tr.567] Moreover, Dr. Sander determined without benefit of the photographs when the time of death had occurred. [Tr.612-613] He also testified satisfactorily to the location and nature of the knife wound [Tr.600-601] and gunshot wound. [Tr.599] Finally, the position of the body could not be established through the photographs because the photographs only established how the victim was found, not her position when the shot was fired. [Tr.597]

Thus, the photographs were irrelevant and illustrative of no new issue in contention. They were introduced despite appellant's offer to stipulate to the cause of death, which was rejected by the State. [R.189] In light of this offered stipulation, it is clear that the State introduced the gruesome

photographs for the sole purpose of inciting the passions of the jury. In Jackson v. State, 359 So.2d 1190 (Fla. 1978), this Court held that "gory and gruesome photographs admitted primarily to inflame the jury will result in a reversal of conviction."

In Leach v. State, 132 So.2d 329, 332 (Fla. 1961), this Court held that the trial judge in the first instance and the appellate court on appeal must determine whether the gruesomeness of the portrayal by the photograph is so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence. ~~See also~~, United States v. Brady, supra, (a "photograph of [a] body is inadmissible only when [a] picture is of such [a] gruesome and horrifying nature that its probative value is outweighed by danger of inflaming [the] jury.")

In applying the test set forth in Leach and Brady, supra, it is evident that the trial court erred in admitting Exhibits One, Two, Three, Ten and Eleven into evidence. Their slight probative value was substantially outweighed by their extreme prejudicial effect. Exhibit Number One was a state autopsy photograph of the victim's face in a bloated, partially decomposed condition. [Tr.271] Exhibit Number Two was a photograph of the entry wound to the back of the victim's head. [R.271] Exhibit Number Three was a stab wound to the victim's back. [R.271] Exhibit Number Ten was a close-up photograph of the victim. [Tr.680] It showed her from the waist up, face down on the bed. The photograph depicted a great deal of blood and brain matter in the victim's

hair. [Tr.680] It also showed discoloration of the body due to lividity. [Tr.681] Exhibit Number Eleven was a cropped photograph of a bullet laying on the bed. Even as cropped, there was still an unnecessary amount of blood in the photograph.

These photographs failed the Leach and Brady test since they were not relevant to any issues in the case. They were needless because they did nothing more than display a gory scene to the jury. The Porter court held that photographs which display nothing more than a gory scene should be excluded. See also, Rivers v. United States, 270 F.2d 435, 437-438 (9th Cir. 1959) ("admission of photographs of deceased body in homicide case should be excluded where their principle effect would be to inflame jurors against defendant...")

Even if the photographs did have some slight relevancy they were nonetheless inadmissible under 590.403, Fla. Stat. (1987), which provides, "relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice ... or needless presentation of cumulative evidence." The probative value of these photographs was substantially outweighed by their prejudicial effect. They were admitted for the sole purpose of inflaming the jurors against the appellant. Their admission was error. For this reason, appellant's case must be reversed and remanded for a new trial.

IX.

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR DISCOVERY OF PROSECUTORIAL INVESTIGATIONS OF PROSPECTIVE JURORS OR FUNDS TO CONDUCT SIMILAR INVESTIGATION.

Prior to trial, counsel for appellant filed a Motion for Discovery of Prosecutorial Investigations of Prospective Jurors or Funds to Conduct Similar Investigation. [R.174-175] This motion, which was renewed at trial was denied by the trial court. [R.190; Tr.533-535] As a result, the State was permitted to utilize information received from law enforcement agencies concerning prospective jurors and to withhold such information from appellant's counsel. The State was thereby given an unfair advantage in the jury selection process.

The reasons compelling the State to disclose its knowledge of the criminal records of prospective jurors to the defense are based in the Fourteenth Amendment's due process clause and the Six Amendment's guarantee to a trial by an impartial jury. The United States Supreme Court has not hesitated to derive a notion of what constitutes a fair trial from the Fourteenth Amendment's due process mandate. See Note, "The Constitutional Need for Discovery of Pre-Voir Dire Juror Studies," 40 So.Cal.L.Rev. 597, 608 and the cases cited therein.

Moreover, courts of three sister states have held a criminally charged defendant is entitled to discovery of the criminal records of prospective jurors when the prosecution uses

the information on the grounds that it would be fundamentally unfair to allow the state to have such an advantage over the defense. State v. Bessenecker, 404 N.W.2d 134 (Iowa 1987); People v. Aldridge, 209 N.W.2d 796 (Mich. Ct. of App., Div.2 1973); Losavio v. Mayber, 496 P.2d 1032 (Colo. 1972); cf. Commonwealth v. Smith, 215 N.E. 2d 897 (Mass. Supreme Judicial Ct., Middlesex 1966).

This Court has never addressed the issue of whether, given the liberal discovery rules in this State, the prosecution should be required to provide to a defendant's counsel the criminal records of prospective jurors in its possession. In Monahan v. State, 294 So.2d 401 (Fla 1st DCA 1974), however, the First District Court of Appeal summarily rejected a defendant's right to receive such information without extensive discussion. Similarly, in Robertson v. State, 262 So.2d 692 (Fla. 2d DCA 1972), the Second District Court of Appeal held, without extensive discussion, that "... an accused is not as of right entitled to the information sought by the motions here involved." Id. at 693.

Both of these lower decisions are erroneous and should be rejected by this Court. Allowing the State to use information about prospective jurors, without providing defendant's counsel access to it, places the State at an unfair advantage during voir dire and enhances the danger of a biased jury. Such unfair advantage is enhanced in a capital case, where the defendant's very life is at stake. For this reason, this Court should

follow the reasoning of the Iowa, Michigan, and Colorado courts and hold that the information sought was erroneously withheld from appellant's counsel.

X.

THE TRIAL COURT ERRED WHEN IT REMOVED A QUALIFIED JUROR FOR CAUSE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO AN IMPARTIAL JURY.

In the instant case, a prospective juror was removed for cause because she expressed her belief that she could never vote to impose the death penalty. This juror was qualified to serve during the guilt portion of the trial, since she was able to follow the law to reach a verdict during that phase. Thus, her removal for cause over objection was a violation of appellant's Sixth and Fourteenth Amendment rights to an impartial jury.

During voir dire, the prospective juror stated:

> MRS. GLOVER: I have a question.
>
> MR. CHIPPERFIELD: Okay.
>
> MRS. GLOVER: Okay. Say the case might last three or four days and is it that I will be here maybe you know for the first three days and I wouldn't be here the fourth day? I don't understand that. You were mentioning a phase or something.
>
> MR. CHIPPERFIELD: Yes. In a first degree murder case there are two phases, or there may be two phases, let me put it that way. The first is the guilt or innocence phase, and you have to decide whether it has been proved beyond a reasonable doubt that he is guilty of first degree murder. If you find they have not proved that, there is no phase two. If you find they have proved by the evidence beyond a reasonable doubt and if the other jurors agree with you and you decide unanimously that he is guilty, then there is a phase two, and at that point you have to listen to facts about his life, facts about the crime and weigh a different set of rules about punishment, and then you have to recommend to Judge Wiggins whether he should get a life sentence or a death sentence.

That's what we mean by phase two and if there is a phase two we have already talked about it, we plan to do it this week and it should not take more than this week. Does that answer your question?

MRS. GLOVER: My beliefs are I feel that I can go in the trial but when that certain day comes to convict him as being guilty or not guilty or having the death penalty or if he is going to prison, I can't make that decision. I mean I can't agree to the death penalty.

MR. CHIPPERFIELD: You could not make a recommendation of death?

MRS. GLOVER: Of the death penalty, but I can go through the trial.

MR. CHIPPERFIELD: Why do you feel that way, can you tell me that?

MRS. GLOVER: I just don't agree with the death penalty.

[Tr.442-443] (emphasis added).

Florida's statutory capital sentencing procedure contained in 1921.141, Fla. Stat. (1987), does not require the same jurors from the guilt phase of the trial to sit in judgment during the penalty phase. Subsection one of that statute provides:

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by 5775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial judge is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty.

(Emphasis added). The same jurors are not required by statute to sit in judgment at both the guilt and penalty phases of the trial. Further, the decision of the jurors under Florida law is not required to be unanimous, and is followed by an independent weighing of the aggravating and mitigating factors by the trial court. See §921.141(3), Fla.Stat. (1987). Thus, an individual prospective juror's ability to impose the death penalty is unrelated to the separate guilt-determination task the juror is to perform.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the United States Supreme Court found unconstitutional a statutory system which allowed the automatic exclusion of jurors expressing conscientious scruples against the application of the death penalty. Id. at 522-23. The Court has also held that a violation of this rule is reversible error not subject to the harmless error rule. Gray v. Mississippi, 481 U.S. ____, 95 L.Ed.2d 622, 107 S.Ct.____ (1987). In Lockhart v. McCree, 476 U.S. 162 (1986), the Court held that the constitution did not prohibit the removal for cause of prospective jurors whose opposition to the death penalty was so strong that it would have prevented or substantially impaired the performance of their duties as jurors at the sentencing phase of the trial. Id. at 165 (emphasis added).

The Lockhart rule does not apply in the instant case, since that case adjudicated the defendant's constitutional claim in the context of an Arkansas capital sentencing procedure that required

the same panel of jurors for both the guilt and sentencing portions of the Arkansas bifurcated capital proceedings. Lockhart addressed the situation in which a juror was selected to follow and apply state law regarding both guilt-determination and applicability of the death penalty. The Arkansas statute required the juror to perform both tasks, and therefore a prospective juror's inability to apply the death penalty was a rational basis for a trial court's removal for cause of such a prospective juror. The statute provided in pertinent part:

> The following procedures shall govern trials of persons charged with capital murder:
>
> . . .
>
> (3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) hereof, and to determine sentence in the manner provided by 541-1302...

Ark. Stat. Ann. §41-1301 (1977) (emphasis added). Thus, the Arkansas statute required jurors to be both finders of fact as to guilt and to a final sentencing determination.

Further, the Arkansas procedure required unanimity at the sentencing phase. The statute provided in pertinent part:

> The jury shall impose a sentence of death if it unanimously returns written findings that:
>
> (a) Aggravating circumstances exist beyond a reasonable doubt; and
> (b) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating factors found to exist: and
> (c) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.

Ark. Stat. Ann. 541-1302 (1977) (emphasis added). This requirement is not present in Florida's statutory scheme.

In contrast, in Florida, the capital sentencing procedure requires neither unanimity nor a single panel for both trial and penalty phase determination. Therefore, the Lockhart holding, predicated on a prospective juror's substantial impairment during the sentencing phase of a capital proceeding, is inapplicable to the Florida procedure because the Florida statute allows substitution of jurors who have an "inability" to serve at the penalty phase. Excusal of this prospective juror for cause was thus reversible error.

XI.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO RECORD THE PROCEEDINGS OF THE GRAND JURY.

Although the State does not typically record Grand Jury proceedings, stenographic recording in the Grand Jury is permitted. See 55905.17, 905.27, Fla. Stat. (1987). In the seminal case State V. McArthur, 296 So.2d 97 (4th DCA 1974), ~~cert. den.~~, 306 So.2d 123 (Fla. 1975), the court recognized that, although many federal courts "have denied the existence of any constitutional legislative right to have grand jury testimony recorded as a matter of law," "numerous [federal courts] have stated that recordation is the most desirable procedure, and the better practice." Id. at 99. The McArthur court then cited

United States v. Cramer, 447 F.2d 210 (2d Cir. 1971), and stated that the Cramer court:

> hinted that, at a time when a defendant comes forth with evidence of bad faith, or of arbitrary prosecutorial behavior, or has a viable need for grand jury testimony, lack of recordation may be found to have contravened the constitutional rights of the accused. It is proper for this court therefore to consider whether this defendant has proven such a need.

Id. (emphasis added). The McArthur court, however, found that the defendant failed to prove such a "viable need." Id. The defendant in McArthur asserted only that these were discrepancies between the unrecorded Grand Jury testimony and the deposition testimony of certain witnesses. Id.

Although the McArthur court concluded that the defendant failed to establish the requisite need for recorded Grand Jury proceedings, the court did indicate that recordation should be required in certain circumstances.

> The practice of recordation may very well be superior to that of non-recordation. Accordingly, any request' for recordation should be given great weight. In the instant case, however, the subject indictment was proper, and should not have been quashed where no constitutional rights were abrogated, no Florida law was contravened and no request for recordation was made by [defendant].

Id. at 100 (emphasis added). In the instant case, of course, appellant duly filed a Motion to Record Grand Jury Proceedings. [R.12] Furthermore, because this is a capital case, the "great weight" McArthur demands of requests for recordation is all the

more appropriate. The trial court erred in denying summarily appellant's Motion to Record Grand Jury Proceedings.

XII.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE VOIR DIRE EXAMINATION OF PROSPECTIVE GRAND JURORS.

The selection of grand juries is governed by Chapter 40 and 905, Florida Statutes, (1987). Neither chapter includes a provision permitting a voir dire examination of prospective grand jurors. In addition to an absence of statutory authority supporting the practice of a voir dire of prospective grand jurors, no common law authority supports the practice. The trial court erred in permitting the State to conduct a voir dire examination.

XIII.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO ENJOIN GRAND JURY DELIBERATIONS ON THE GROUND THAT THE GRAND JURY WAS IMPROPERLY CONSTITUTED.

According to §905.01(1), Fla. Stat. (1987), a grand jury "shall consist of not fewer than 15 nor more than 18 persons." The Grand Jury convened on November 2, 1987, which indicted appellant, consisted of 23 members. [R.6] Therefore, appellant was indicted by an impermissibly large grand jury, in manifest violation of the statute. In addition to a statutory violation, the excessive number of grand jurors violates the Equal Protection provisions of the Florida and Federal Constitutions. The excessive size of the Duval County Grand Jury resulted in a

greater likelihood of obtaining a true bill, for under the existing legislature scheme the concurrence of only twelve members is necessary to indict. The range of grand jury sizes permitted by statute, fifteen to eighteen, allows indictment when, at the greatest, 80% of the grand jurors concur in the indictment (12 of 15), and at the lowest, 67% concur (12 of 18). With Duval County's enlarged, 23-member grand jury, however, only 52% of the panel (12 of 23) need concur in the decision to indict.

In requiring, at a minimum, 67% of the grand jurors to concur in a decision to indict, Florida's statutory scheme honors the Equal Protection values implicit in relevant decisions of the United States Supreme Court. In Burch V. Louisiana, 441 U.S. 130 (1979), for example, the Court held that, although juries as small as six members are permissible, their verdicts must be unanimous. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court suggested that, of a twelve-member jury, the minimum number of Persons opting for a conviction is 9 (or 75%). Under this rationale, a scheme in which a mere 52% of a grand jury members must concur in a decision to indict is impermissible. Thus, the trial court erred on both statutory and constitutional grounds in denying appellant's motion to enjoin grand jury deliberations.

This issue has previously been presented in this case by petition for writ of prohibition, and has been rejected by this Court on its merits.

CONCLUSION

Based upon the arguments presented herein, this Court should reverse appellant's conviction for murder in the first degree. Alternatively, it should reverse appellant's death sentence and order that a sentence of life imprisonment be imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bradley R. Bischoff, Esq., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite #29, Tallahassee, Florida 32301, by hand, this 19th day of June, 1989.

ATTORNEY