IN THE

SUPREME COURT OF FLORIDA

ROBERT HENRY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 73,433

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the 17th Judicial Circuit of Florida, In and For Broward County (criminal Division)

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STATEMENT OF THE CASE

Robert Henry, was arrested by the Deerfield Beach Police Department at 6:46 a.m. on November 3, 1987 for robbery, murder, and aroon. R2708. He was not brought to a first appearance hearing under rule 3.130, Florida Rules of Criminal Procedure, until the afternoon of November 4, 1987. R2710. At that time he invoked hie right to counsel. Id. He was indicted on November 18, 1987 for premeditated first degree murder in the death of Phyllis Harris, premeditated first degree murder of Janet Themidor, armed robbery of Me. Themidor, and armed arson. R2711-12. He was arraigned on November 24, 1987, and at that time an assistant public defender announced that his "office would have a difficult time representing Mr. Henry," and he had "a very close relationship with a member of the family, one of the victims." SR8. The court made no inquiry as to how this conflict had affected the Public Defender's investigation or representation of Mr. Henry during the period when the case was preeented to the grand jury.

Mr. Henry moved in limine to exclude statements made by ME. Thermidor to the police, R2810-11, and to suppress statements he made to police and state agento. R2812-15. The court denied the motion in limine, R2917, and granted the motion to suppress as to some of Mr. Henry's statements. R2918-19.

The jury found Mr. Henry guilty as charged of all offenses. R2872-75. The jury voted for death as to both murder charges. R2894-95. The trial court adjudicated him guilty, R2897, and sentenced him to death €or the murders, R2906-12, finding five aggravating circumstances: the murders occurred during the commission of a felony: they ware committed for the purpose of avoiding or preventing lawful arrest; they ware committed for pecuniary gain; they were especially wicked, evil, atrocious or cruel: and they were committed in a cold, calculated and premeditated manner without any pretenea of moral or legal justification. R2907-2098. It found one statutory mitigating circumstance (no significant history of criminal activity), and one nonstatutory circumstance (service in the United States Marine Corps). R2909-10. It sentenced Mr. Henry to concurrent terms of life imprisonment for the robbery and arson. R2915-16.

STATEMENT OF THE FACTS

The following was not in dispute: Janet Thermidor and Phyllis Harrie were employees at a Cloth World store in Deerfield Beach. Part of a chain, the store sold cloth and items necessary for sewing. Mr. Henry waa employed in the store as a maintenance man. In the course of his employment he bought a hammer for the store. On the night of November 2, 1987, ME. Harrie was tied to a stall in the men's room in the store; she was blindfolded, struck with a hammer, and then set on fire. Although the blows from the hammer would have been sufficient to kill her (apparently the blowe were so forceful aa to splatter blood on the walls), she was alive at least until the fire began, because there were soot and burne in her windpipe. Ms. Thermidor was etruck on the head with a hammer in the office, and wae set on fire, and ahe then apparently went to the women's room, where she collapsed. When fire fighters arrived, Ms. Harrie was dead, but Ms. Themidor wae still alive. Taken to the hospital, she made two statements (one of them taped) to the police, and died the next morning. Approximately $1200 was missing from the store. Around 6:46 the next morning, Mr. Henry telephoned the police to report that the store had been robbed. He was immediately taken into custody, and made varioue statements to the police.

A. Motion in limine

Mr. Henry moved to prevent the state's use of Ms. Thermidor's statements on the ground that they were hearsay. R2810-11. The trial. court conducted an evidentiary hearing on the motion, at which the following evidence wae heard.

The first witness, George Podgorny, an emergency room phyeician from North Carolina, was qualified as an expert in "thermal injury burn, injuries and head trauma." R16. Although he did not treat Ms. Themidor, he reviewed her medical records, the autopsy report, the depositions of varioue doctors and nurses, and listened to her taped statement. Ha formed an opinion as to whether she believed she waa going to die and whether she was coherent and lucid at the time. R18-19. He based his opinion with respect to coherence and lucidity on several factors. Firet, soon after the injury "she was able to move from one location to another. In order to do so, an individual haa to have a certain degree of

presence of mind, lucidity, intent and judgmental element to be able to do so."[1] R20. Second, Ms. Thermidor was conversing with medical personnel at the hospital in Broward County, and waa interviewed by the police. Dr. Podgorny was impressed by the fact that Ms. Thermidor said that a person who attacked her wore a beige shirt: "Beige is probably one of the most difficult colors in [the?] English language to deal with. It is basically a French word, it's not a common color, it's not usually discussed, it's not a primary color euch as green, red, black, white and so forth." R21. When taken to Jackson Memorial Hospital, Ms. Themidor had "a very substantial abnormal blood pressure, and would epeak also in favor that there was no particular reason physiologically that she wae not in a position to be alert, clear, lucid, and able to comport herself in conversation." R21-22. At the hospital in Broward County, Me. Thermidor was medicated with Demerol and Vistaril, and an antibiotic and a tetanus booster. R22. As to the Demerol, Dr. Podgorny testified that "in the case of someone who is burned, just about all of the medication will be utilized by the pain receptors in order to alleviate the pain and very little will be left for anything else. So, this amount of medication should have no appreciable affect on her." R23. As to the Vistaril, he assumed "that it would have had some degree of alleviating the anxiety that she had and would not have affected her cognitive skills." R24. The head injuries caused by the hammer did not affect her mental and thinking abilities. R27. Dr. Podgorny testified that, within a reaeonable degree of medical certainty, Ms. Thermidor was lucid and coherent when making the statements to the police. R27-28. Defense couneel unsuccessfully objected that Dr. Podgorny was not competent to give this opinion without speaking with the attending doctors or nurses and meeting Me. Themidor. R28-30. Dr. Podgorny testified "she was clear, lucid, able to think, had a cognitive element preeent, and wae able to respond in the usual reasonable manner." R30.

Asked whether, "with the degree of medical certainty," he believed that

[1] The evidence was that Ms. Thermidor had burne over 90 percent of her body, and was taken by ambulance to a hospital in Broward County, and then by helicopter to Jackeon Memorial Hospital in Miami. There was no evidence that she had made these moves on her own.

Ms. Thermidor "knew ehe wars going to die *or* reasonably believed that she was going to die, and on the glidepath of death so to speak," R31, Dr. Podgorny responded that most people know that excessive burns cannot be treated: "the estimate that the lay people use is that the likelihood of death roughly equals the percentage of the body that is burned. These are kind of a general idea, if you ask [an?] average individual." R32. He opined that Me. Thermidor was "an average individual who would fit into the situation that underatand in general what's going on." Id. He said she was "certainly ... cognizant that euch injuries are very likely to be fatal." R33. She was aware of being treated by a number of doctors and nurses, and was "of course, cognizant that it would not have been done if she did not have an extremely serious problem." Id. She was told that she was being moved to "a very large hospital in Miami, that is certainly, if anything, to any individual is clearly an ominous eye [sic] that is only done as a kind of a last reeort in hopes of doing something." Id. Me. Thermidor asked if she was going to die, and was given evasive responses. R33-34. He concluded: "So, baaed on all of this data, it is clear to me that she had a [sic] unusual good idea that her chances of survival are extremely limited, if any." R34.

Questioned by the court about hie experience with serioualy burned patients, Dr. Podgorny testified that probably a fourth or a third of the *60* to 70 seriously burned patients that he had treated had ultimately died. R36. The trial court asked whether there were "any common characteristics that thoae patients exhibited vis-a-vis the question of whether or not they appreciated the probability of death in their cases," and Dr. Podgorny said that they did, and defined those characteristics as follows: First, they are very lucid for a period after the burn. They are conversant, and try to cooperate, "recognizing that there's a serious problem, and behave in a markedly different manner than those individuals who sustained other type of injuries." R36-37. Second, they are greatly preoccupied with the issue of whether they are going to die: they are "anxious to do things that most people would do, They want to see their family, they want to take care af certain decisions, items, et cetera, that's

a second common characteristic." R37. Third, doctors and nurses try to avoid discussing with them that they are about to die. Id. Dr. Podgorny testified that if a person were to say, "I know I'm going to die," that would be dispositive of whether the person truly believed he or she was going to die. R37-38. At this point, defense counsel argued that the question of whether Me. Thermidor thought she wae going to live or die was not within Dr. Podgorny's expertise. R38-39. The court overruled, stating that Dr. Podgorny was an expert in dealing with eeverely burned patients, including terminal burn patients, and that his testimony was a mixed opinion in terms of containing some expert opinion and same lay opinion. R39-40. Dr. Podgorny testified that Me. Thermidor knew the most likely outcome of her injuries and that her injuries were fatal. R41. Dr. Podgorny did not think ahe abandoned all hope. R42. He did not know if she saw any part of her body that was burned. R47. Asking if ehe was going to live indicated "she knew that she was near significant likelihood of dying," R50.

Myles McGrail, a paramedic, spoke with Me. Thermidor at the scene of the fire. She repeatedly said, "help me." R113. He concluded that she knew she was going to die because she was very much afraid:

> I've been there seven and - a half - years. I have seen -- I can't even count how many runs that I've seen. As an average, if I saw one a month for *my* career, I've seen eighty-five of them, I've seen people with heart attacks that know they're ready to die, I've seen the fear in their eyes before, the look in this lady's face is one that I have seen.
>
> *Q* All right. Could you describe the look in this lady's face that you saw?
>
> A She was scared, she wae really scared. She was just -- I feel Like I would be giving an opinion here, but -

R115. Mr. McGrail contInued:

> This lady was begging for me to help her, I mean, she wae -- it's not -- I can't tell you ahe twitched her eye in a certain way, I can't tell you that her mouth looked a certain way. All I know this look is the one I've seen before. It's the look of eomebody who knowe that something drastic has happened, and, you know, tho person that just got caught in a car accident that we're trying to get her out, she's bleeding to death, she knowe it. This lady knew that she wasn't --

R115. He t ld her to hold on, they were doing all they could, R118, ahe ehould

hold still, they would get her to the ambulance as quickly as possible. R121.

The state's third witness, Dr. Richard Dellerson, Chief of Emergency Servicee at Memorial Hospital in Hollywood, Florida, was qualified as an "expert in emergency -- " R128. He did not treat Me. Thermidor, but reviewed her medical records for the burn injuries, the report of the medical examiner, and statemente by attending phyaiciane at the Broward Hospital and "a couple of nurses," and a transcript of Ms. Thermidor's atatement. R129. Notwithatanding her head trauma and medication and other injuries, he thought she was well oriented and aware of her surroundings, was a reliable historian, and knew she wae going to die. R130. Asked the basis of his conclusion as to cognitive ability, he replied:

> Well, a variety of things. She was oriented as to who she was. She answered questions in an appropriate manner, her concerns seemed appropriate when asked for certain descriptions, relative things were mentioned, one of which wae the color of clothing that was being worn, I believe her response here waa beige, you have to be relatively with it, so to speak, to respond in that manner.

Id. He testified that he thought that ehe knew ehe wae going to die because ehe was "relatively calm" in the light of her serious injuries, becauee

> in my experience, in the experience of othere who I've spoken to, individuals who are aware of the fact that they're going to die generally are calm in the face of the disastrous injuries and she displayed the oort of -- there was some minimal concern at one point, she said, God help me, or somebody help me, and then later on, in the course of her transportation at Jackson, she did inquire as to whether she was going to die, but, her countenance was relatively calm and this is one of the things that you frequently see in an individual.
>
> It's difficult to explain why, but these are the people who generally do go ahead and expire as opposed to the individual who's in a panic, somewhat agitated, pleading situation. Thoee are the individuals who usually have a better chance, and one [sic] they, quote, lose that panic and appear relatively calm inspite [eic] of their injuries, that's usually a pretty good sign that they are aware of tho fact they're going to die, and indeed, do.

R132. Dr. Dellerson was emphatic on the importance of her relative calm. Aeked for the basis of his opinion that ehe knew she was going to die, he replied:

> Well, again, she was -- her cognitive functions were not impaired, she could certainly see her body which was

> horribly burned, she was certainly aware of her surroundings, the concern, individuals who were tending to her, getting ready to transfer her to the burn center at Jackson Memorial Hoepital, and, again, the calmness, the relative lack of panic, which I had mentioned earlier, which are important findings, I believe, or I've seen thia frequently in patiente who appear to be aware of the fact that death is imminent.

R133-34. On cross examination, he compared Ms. Thermidor with patiente who are panicky, and ask whether they are going to live. Tho panicky persons Ones have a better chance. R142. He gave, as common intimations of mortality, a desire to see a parent or clergyman, R139, and an urge to defecate. R146-47. The effect of the druge "on her cognitive functione probably wouldn't have been much more than say having a drink or two on an empty etomach." R150.

The state's laet witneee on the motion was Detective James Dusenberry, who spoke with Ms. Thermidor at the emergency room at North Broward Hospital. He spoke with her without a tape reaorder for eeveral minutes, R153, left the room, but returned and told her that "she was looking bad." R163. She wae moaning and crying, saying that she was hurting He said he knew ehe wae hurting, and he took the taped statement from her. R163-64. Toward the end of the tape, she "was less coherent in her answers." R170. She did not ask to eee a clergyman. R171.

Mr. Henry's court-appointed Lawyer called Kathleen Selby, a nurse at North Broward Medical Center, who spoke with Ms. Thermidor a couple of times. R66. She told her she would be taken to Jackson Memorial, but did not tell her that she thought she was going to die. R67. No doctor or nurse told her ahe was going to die. Id. Ms. Thermidor asked if she wae going to die eeveral times. R68. It was difficult for her to speak; she seemed to be in tremendous pain. R69. Ms. Selby told her to hang in there and that she needed to go to Jackson if she had a chance at all. R70. Sometimes ehe did not answer when Me. Thermidor asked if she was going to die. Id. Baaed on her asking over and over if she was going to die, and Ma. Selby's avoiding the question, Me. Selby thought that it appeared that Ms. Thermidor knew ahe wae going to die. R71. This waa baaed in part on the fact that ehe became increasingly anxious the cloeer they got to Jaekaon Memorial. R71-72. (Ms. Selby accompanied Ms. Thermidor on the helicopter to Jaekaon. R75-76.) Me. Thermidor did not ask Ms. selby to contact her family, and Ms. Selby

did not recall her asking for a clergyman. R77. Asked if Ms. Thermidor had lost all hope in the world to Live, Ms. Selby testifiedthat she could not guess what she was thinking. R77-78. Ma. Thermidor was alert, conscious, and lucid. R79.

The second defense witness, Michael Manley, a laboratory phlebotomist who was present in the emergency room, testified that Me. Thermidor was very much in pain, that he did not think that she was even coherent enough to know what was going on. *R87.* All he could remember was that Ms. Thermidor said how hot she waa and how much pain she felt. R88. No one told her that ehe was going to die. On cross-examination, Mr. Manley eaid that Ma. Themidor was coherent. R93.

A third defense witness was William Gray, a paramedic, who saw He. Themidor at Cloth World. She was in severe pain and was in shock. R96-97. She did not ask if ehe was going to die, did not request to see a prieet or clergyman, and did not request that her next of kin be contacted. R99. She did not say or do anything indicating that ehe knew rhe was going *to* die. R101.

B. Motion to suppress

Testimony on the motion to suppress showed that the police arrested Mr. Henry around 6:40 a.m., took him to the police station, began interviewing him around 7:00 a.m., R225, obtained statements from him without reading him hie Miranda righte, and then read him his righte at 9:10 a.m., R226, and toak a taped statement from him. For much of the day, he was kept in a cage-like cell at the police department without being fed anything except a package of cookies, R273-78, and was then taken to the Broward County Sheriff's Office where fingernail scrapings and hair samples were taken from him that evening.[2] Detectives Foley and Corpian of the Broward County Sheriff's Office bought him a hamburger. R299. Mr. Henry talked about hie Marine Corps service, eaid he had many friends who ware killed in the Beirut massacre in 1983, and asked why the detectives were being so nice to him. R300. Detective Corpion replied that everyone has an explanation for his actions. Id. Mr. Henry said hie memory about the previous night was epotty, and the detectives eaid they were willing to help

[2] During the afternoon, the police had been working with a senior assistant state attorney in working up a search warrant in the case. R235-36. The warrant was signed by a circuit court judge at 5:15 that afternoon. R466.

him fill in the gape. Id. He then "began unrambling the story," and later made a taped statement to Deerfield Beach officers ending around 9:00 p.m. The Deerfield offieere then took him to the county jail. R242. The next morning they went to see him at the jail and took another statement. R242-43. That afternoon he went to a first appearance hearing and invoked hie right to counsel. R2710. The police officers went to talk to him again the next day, and he said that notwithstanding the fact that he was represented by counsel he still wanted to speak to the police officers, R246, and made another statement.

Detective Kenny, who took moat of the statements from Mr. Henry, testified that it was a conecioua decision by Sergeant Murray, Detective Qianino, and himself not to read the Miranda rights prior to the initial questioning. R262. This wae done "because we did want: to listen what he had to say about the robbery in regard to this." R263. Mr. Henry was questioned for two hours while in handcuffe and perhaps leg cuffs (Detective Kenny was unsure) without being told why he was being held and without being advised of hie rights. R266-67. Detective Gianino testified that ha initiated the conversation with Mr. Henry with respect to the ease. R387. He testified that the decision not to comply with Miranda "was ultimately by Sergeant Murray." R432.[4] Detective Gianino believed that Mr. Henry had been informed that he was under arrest for first degree murder by Sergeant Anderson, but he was not sure. R439-40.[5]

The court granted the motion to suppress only as to the initial statement made prior to the reading of Miranda rights on November 3, 1987, and as to the final taped statement made after the firet appearance hearing. R2918.

c. The trial

The fact that there were two murders and an arson at Cloth World was not in dispute. Nor was the fact that Mr. Henry was present at the store that night. The defense was that the crimes were committed by robbers who kidnapped Mr.

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[3] In hi0 statement to Detective Corpion, Mr. Henry was remorseful and buried hia face in his hands. R308, 309, 326.

[4] Sergeant Murray did not testify at the hearing on the motion to suppress.

[5] Sergeant Andereon also did not testify.

Henry, but released him after psychologically torturing him.

1. The circumstantial or forensic evidence did not especially link Mr. Henry to the crime. Although over $1200 was taken, R1561-62,[6] Mr. Henry had only $42 on him when arreeted. R1735-36. Some blood found on his shoes could not be definitely linked to the crimes. When arrested the next day, he had an injury on one of hie fingers which was photographed. Examining the photograph, Dr. Podgorny testified that it showed a second degree burn. R1466-68.

There wae testimony that Detective Gianino and another officer saw Mr. Henry around 6:40 a.m. on November 3. The officers were in a white Firebird. R2081. They were in plain clothes, but wore police jackets. As they drove past Mr. Henry, he kept turning and looking at them. R2083. When they slowly turned around and began to come after him, hie pace increased, and he eventually began to run. R2083-2084. Detective Gianino got out and "yelled either freeze or atop, police, and I shouted out his name several times. That's exactly what I did as I exited the vehicle." R2084. Mr. Henry was 25 to 35 feet away and running at the time. R2084-85. It was "approximately" as light as dawn. R2088.

2. The evidence linking Mr. Henry to the killings came from Ms. Thermidor's statements, and from his statements to the police.

a. The evidence regarding Ms. Thermidor's statements was as follows:

Juan Montalvo, a fire fighter who went with Me. Thermidor in the ambulance, testified that she said ahe war hit over the head twice with a hammer and was set on fire. R1157. Asked who did it, "she mumbled and ehe said the maintenance man, and she mentioned that to me several times." R1157-58. She wore an oxygen mask, and Mr. Montalvo was "not sure, but she mumbled maintenance man,

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[6] The testimony about this came from Michael Balke, a management employee of Cloth World. He totalled up the amount of the apparent loss between 1:00 and 2:00 p.m. on November 4. R2349. Nevertheless, the probable cause affidavit, prepared on the morning of November 3, R235-36, shows that the police knew that morning the approximate amount of the loss. R2709 ("It is believed the approximate lose from the business is $1,200, however the exact amount cannot be specifically determined until management completes the daily audit of the days [sic] proceeds."). Although Mr. Balke's testimony was somewhat vague on this point, it appeare that he made a rough accounting of the loss on the night of the fire: Exhibit 4H, the day's cash regieter receipt ehowing the total of the day's receipts wae found that night by him in the office, R1546, 1548-49, and he took and totalled the amount of money remaining in the store that night. R1545.

and she mumbled that several *times,* more than once." R1165. He thought she said maintenance man, but ha was not too sure. R1168. When he spoke to the police about this two days later, he was not too sure as to what she said. R1167, 1173.

Detective Dusenberry testified about Ma. Thermidor's statements to him. Regarding the first, untaped, statement, ha testified: Ms. Thermidor said that Robert had a hammer, that she called for Me. Harris, then turned and started to walk back, and that Robert hit her in the head twice and ehe fell to the ground. Robert took money and left, came back, poured something on her, and met her on fire. She identified Robert as the etorage man. R1367-68.

After obtaining this statement, Detective Dusenberry left the emergency room, then returned and told her "she wae looking bad." R1368-69. She wae moaning and crying out, and he took a taped statement from her. R1369. On the tape she identified the man who hit her with the hammer aa the etorage man, Robert. R1378-79. She said when he came into the office, she turned her back and he hit her in the head with the hammer, took some money, left, and then came back in and threw "that stuff" on her. R1379. She did not see anyone with him. R1379-80. She guessed that he had an a beige ehirt and beige jeans. R1383. she had only seen him for the first time about two weeks before. R1384. Ha hit her twice. R1385. Asked whether she could see him, ehe replied: "No. He hit me twice." R1385. Part of the questioning about what happened when she was met on fire went as follows:

Q Did he light you on fire?

A Yeah.

Q What did he use, do you know?

A I don't know.

Q Did you see him when he was doing it? Did he say anything to you?

A No.

Q He didn't talk to you at all?

A NO.

Q Did you get a chance to talk to him at all?

A No.

Q You didn't say anything to him?

A No.

Q And ha didn't say anything to you?

A No.

R1386. Ms. Thermidor was moaning with pain throughout the taped statement, and expressed an urgent need *to* go to the bathroom. R1380-81.

Dr. Dellereon testified that Ms. Thermidor "believed she waa about to die and an the glidepath of death." R1268. He testified that this conclusion was:

> Based for the most part on a rather extensive experience with having dealt with individuals who are facing death on many, many occasions over the laet nineteen or twenty years, and I have, you know, baeed on this experience, can -- have become. relatively good at predicting what patients are gonna survive based on their behavior, and once they have this awareness of death, the majority of the patients seem to die and I'll try to explain thie as best I can becauee this is not eomething that's very well written about in textbooks, but it's eomething in individuals who practice in situations such as I do, trauma surgeona, people who work in burn units I'm sure see.

R1269. Dr. Dellereon noted that Ms. Thermidor wae asking for help, and knew something was seriously wrong, "yet, inspite [sic] of all this, there was a relative, relative calm." R1270. Asked what thie calm indicated, he replied:

> This is the thing that in other patiente where I've seen thie leads me to believe that a patient has awareness they're gonna to die because there's no panic, they're not screaming, there's a certain amount of resolve, they may ask questions, I'd like to see a priest or I want to see my mom or I'm gonna die, am I gonna die, or I am going to die, but all of this taking place in a relatively calm setting as opposed to the individual who's etruggling violently.
>
> I think an interesting collorary (sic] in another one that I had some experience with when I was in the service are individuals in an airplane where something eerioue *goee* wrong where perhaps a wing falls off, an airplane goes into a spin and is heading toward the ground, and transcriptions of the individuals in these airplanes, pilot, at first, there's a panic eituation, and individuals etruggling to do something to avoid what may be an imminent disaster and then just before impact you frequently hear tell mom I love her or things like that in effect.
>
> The *727* that crashed in San Diego a few years ago, that wae the exact thing, the cockpit recorder, that exact type of eituation. They're etruggling, etruggling up to a point and then all *of* a sudden there's no more panic

> because they basically know they're going to die. It's a collorary [sic], but I think it explains the phenomena.

R1270-71. Dr. Dellereon testified that his conclusions were "within degree of medical certainty." R1271-72. He could give no medical definition of the term "relative calm," R1274-75, and in effect conceded that it was a subjective term:

> Q: Now, Doctor Dellerson's opinion is the same definition held by any other member of that community or it that different from any other member?
>
> A: We're getting into the subject of aspects to some extent with the term relative calm.

R1275. He conceded that his findings were subjective. R1277.

In testifying that the medication given her did not affect Me. Thermidor's mind, Dr. Dellereon emphasized that she was in a state of shock:

> This medication was deposited, according to the chart, in her buttock, intramuscular injection. Well, in an individual who's in ehock, as one almost certainly would be after having sustained third degree burne to the extent that thie woman did, blood flow into non-essential areas is cut off, that's a normal reflex in a shocked state, and the reason this occurs is to assure that the blood flow will be preserved and maintained to the most vital organa, namely the brain and the heart.
>
> So, therefore, thie pool of medication that's sitting in this large muscle is not really receiving adequate circulation because of the reflexes that I just mentioned. Therefore, the uptake of thie medication is going *to* be considerably diminished, and therefore, the actions of this medication will be insignificant.

R1262-63.

Dr. Podgorny, on the other hand, wae sure that Me. Thermidor wae not in a etate of medical ehock. R1459-60, 1478. He testified that ehe was aware that death was near. R1461. Be based his conclusion on four things. First, it is well known that little can be done for severe burns, and "that burns initially cause a great problem in regards to the loss of body fluids, and to the fact that the infection is frequently the immediate next step in the unfortunate course of events." R1461-62. He testified that women are more aware *of* their health, and "are also usually more oriented toward concern about burns, and about destruction of their ekin for reasons that all of us are concerned, and women even more particular." R1462. He thought that Ms. Thermidor could see her body, could feel

pain, knew the nature of the assault, and "these issues were amongst those issues that certainly gave her an indication of a serious life-threatening problem." R1462-63. Second, there were many people taking care of her, moving her to different hospitals. R1463. Third, the response to her questioning whether she was dying was either delaying or nonresponsive. R1464. Fourth, she continued to ask for help. R1465. Being told that they were doing everything they could "also indicates that the situation is extremely critical." R1465.

b. The evidence regarding Mr. Henry's statemante was ae follows:

The first taped statement was to the effect that he wae an unwilling participant in the robbery acting under coercion by robbers. At closing time a man with a gun standing by the loft confronted him and had him open the back door, where he found another man. R1770. Although unclear on this point, the statement suggests that there was another man in the loft as wall. R1771. The robbers told him to take Ms. Harris into the restroom and tie her up. R1771. He told her that there were men in the store with firearms, and he said that they should do as they were told. R1772. He took her to the restroom and tied her up. R1771. One of the men took Mr. Henry to the office door and stood by while he knocked on the door. R1773. Me. Thermidor opened the door, and turned around, at which point the man burst into the room and another man pulled Mr. Henry out. R1773. Mr. Henry wae taken to their car: they drove around for several hours and then went to an abandoned house. R1774. They repeatedly threatened to kill him, and played Russian roulette, holding a gun up against him head. Id. They finally. released him in an area well out of town. R1774-75. He walked and hitchhiked back to town, where he told hie brother's girlfriend what had happened, and then he went to telephone the police. R1775. There ware three robbers, a11 wearing masks. R1777. They were talking in a way that disguised their voices. R1781. He did not expect there would have been more than $1000 in the etore. R1789. Asked about a scratch (apparently on hia arm or on his eyelid), he said he did not

know how he got it. R1794.[7]

Detectives Foley and Corpion of the sheriff's Forensic Services Unit testified about their convereation with Mr. Henry on the evening of November 3. R1910-11. They bought him some food, and he asked why they were oo nice to him after what he had done. R1911, 2044. They said everyone has an explanation for what they do, and he agreed to talk to them. Id. He said there were gapa in hie recollection, and they said they were there to help him. R2044, 1912.

Detective Foley's version of the etatement wae: Mr. Henry eaid he felt really bad about the women because they had been very nice to him. R1912. He helped the women close the store, and then told Me. Harris there were robbers and had her hide in the men's bathroom, where he tied her hands and feet, and put a cloth around her head. R1912-13. He got a hammer, knocked on the office door, and, after Me. Thermidor answered the door and turned around, hit her on the back of the head and took the money. R1913. According to Detective Foley, Mr. Henry said that he sprayed Ms. Themidor with a flammable liquid in an aeroeol can. R1913. He went to the men's bathroom, and as he walked there Ms. Themidor was on fire; he left by the back door. R1914.

Detective Corpion's version of this statement was as follows.[8] Mr. Henry told Ms. Harris that there were men in the store to rob them, and he tied her up and blindfolded her in the men's room. R2044. Ms. Harris complained that the rope was tied too tight. R2045. He got a hammer and knocked on the office *door.* Id. When Ms. Themidor turned around he hit her with the hammer, took the money, and then got liquid from a shelf in the store. Id. He set Me. Themidor on fire and followed her across the store to the women's bathroom, then he went to the men's bathroom and set Ms. Harrie on fire. R2046. Asked if he hated women or what wae the motive, Mr. Henry replied: "No, that he loved them, that they were

[7] This statement was played during the testimony of Detective Kenny. *On* cross-examination, Detective Kenny admitted that it waa a conscious decision "agreed amongst the officers" not to read Mr. Henry his rights when taking the initial, untaped statement. R1830. This decision "was indicated to ue by our superiors and we agreed with him." Id. There was a conscious decision not ta read Mr. Henry his rights. R1831.

[8] It appears that Detective Corpion's version wae read from notes that he wrote some weeka after he spoke with Mr. Henry. R2045, 2049.

very nice to him." R2046. It was not for the money, he had a job, a business with his brother, had plenty of money and did not need the money. R2046-47.

The taped statement made after Mr. Henry spoke with Corpion and Foley was introduced during the testimony of Detective Gianino. Mr. Henry said that, when he told Ms. Harris that the robbers wanted him to tie her up, she cooperated, and sat down: she trusted him wholeheartedly. R2107. When he knocked on the office door, Ms. Thermidor asked where Ms. Harris was, and Mr. Henry said he did not know. R2107-2108. When she turned to walk back into the office, he hit her with the hammer. R2108. He then went into the restroom and struck Ms. Harris with the hammer. R2109. Mr. Henry said that at this point he just went blank. R2110. Aaked whether he went back, he replied: "I can't believe I did thie. I just can't believe it (inaudible)."[9] He sprayed the Ma. Thermidor and lit a match, and she was screaming and burning. R2111-12. He sprayed the Me. Harris and lit a match. R2112. At this point in the interrogation, the following occurred:

> Q ...What happened after you eprayed the white lady [Ma. Harris] in the bathroom? Did you ever see the black lady [Ms. Themidor) again?
>
> A Oh, I just --
>
> Q Robert?
>
> A I can't really, I can't --
>
> Q Okay.
>
> A I -- I --
>
> Q I can only ask you to tell me what you remember, right? ...

R2113. Detective Gianino then continued to interrogate Mr. Henry, who admitted that there were no robbers in the store, that ha acted alone. R2120. Between the robbery and the arreat, he was just walking around. R2120-21. He was trying to ask himself if this really happened, if it were real. R2121. Asked whether Me. Thermidor said anything, he replied: "She says no, she says, don't burn me up,

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[9] Mr. Henry was emotional and upset during thie statement. See also record pages 2109, 2110, 2113, and 2122-24. See also Detective Corpion's testimony at the motion to suppress hearing regarding Mr. Henry's emotional condition and remorse. R308, 309, and 326.

please, don't burn me up, that's what Ohe said." R2121. He reiterated that ha could not believe that it had happened, that he could not figure it out. R2125.

Donna Manganiello, a nurse at the jail, testified that ehe spoke with Mr. Henry on the night of November 3-4. She was filling out a medical screening sheet with him, telling him what medical services were available at the jail. R2061-62. She asked him if he were Robert Henry, and he said he was. He then aeked her if she knew who he was, she aeked if he were Robert Henry again, and ha eaid yes. R2062. She told him to have a seat, and the following occurred:

> And he said, do you know what I did, I said, no. And he eat down, and he said I guess you didn't watch the news this evening, did you, and I said no, I did not, and he proceeded to tell me that he killed two women that he worked with at Cloth World, and that he did not understand why he did it, and then I proceeded with a medical screening, explaining the medical consent form, how to obtain medical treatment and whatnot while he's in the jail, and proceeded with the medical screening and the questions.

R2062-63. Nurse Manganiello did not give a statement about this until May 16, 1988, when the prosecutor's office contacted her. R2065-66.

After the second statement, Mr. Henry aeked the officers to speak with him again. R2128. The next morning, Detective Gianino interviewed him on tape again. R2130-31. This statement wae similar to the second taped statement. He said that he was treated fairly by Ms. Harris and Ms. Thermidor: "I've never been treated better by people that I came in contact with an euch a ahort basis." R2154. He did not see Ms. Thermidor move from the office. R2159.

3. Mr. Henry testified on his own behalf that robbere in the store forced him to tie up and blindfold Ms. Harrie. R2248-50. They forced him to go to the office door and knock at it, and when Ms. Thermidor opened the door and turned around one of the robbers rushed in and hit her. R2250-51. Mr. Henry was than immediately taken to the robbers' car. R2251-52. During the night the robbers played Russian roulette, holding a gun against hie head. R2252. After being held hostage, he wae pushed out of their car, and they laughed at him and said, "Have a good day." R2252-53. He hitchhiked into town, told his brother's girlfriend that he had been robbed, and went to the laundromat to telephone the police. R2254-55. During the police interrogation he offered to take a polygraph if they

let him talk to a Lawyer, but the only response was for the officer to leave the room. R2255-56. The officers gave him their version of what happened. R2256-57. Mr. Henry had been up all night, and had not eaten in almoet 24 hours. R2259-60. While he was in the holding cell, Detective Gianino kept eaying that he did it, that they had the woman's statement; Mr. Henry replied that he wanted to see a lawyer, and he denied committing the crime. R2260. Around 3:00 p.m., he waa taken to the Sheriff's Office. There was a crush of members of the media, and they were yelling, asking whether it was worth killing two women for $1200 or something to that effect. R2261. A document read to Mr. nenry (apparently the search warrant), set out the facte of the caee. R2263-64. He was threatened with being placed in a call with "guys who have heard about it and they're not gonna appreciate it." R2265. They offered to give him food if he would make a statement without mentioning the robbers. R2266. After unsuccessfully asking to speak with a Lawyer, R2266-67, Mr. Henry did as he had been taught in the Marine Corps[10] and went ahead and made a statement in accordance with what he thought the officers wanted -- namely, a statement saying that he acted alone and that there were no robbers. R2267. He did not hit the women, did not set them on fire, did not take the money. R2268. He testified that although he saw a Firebird the next morning, he did not run from it, and he did not know who waa in it. R2269-70. He did not recall talking to Nurse Manganiello. R2339.

4. The state called several rebuttal witnesses. June Clark, a Cloth World employee, contradicted some of Mr. Henry's statements concerning what time he came to work the day of the fire. R2350-54. Detective Kenny testified that he recalled that Mr. Henry made contradictory statements about how the robbery began: "Initially, he stated was one man waa hiding up in the loft area and ordered him to open the back door and othere rushed in. One statement was that they were already all in the store and basically that's what I recall." R2355. He aleo teetified that Mr. nenry had said that the men disguised their voices,

[10] Mr. Henry testified that he had attended various interrogation schools in the Marine Carps, at which he was taught that, if he were in a position that he could not get out of, he should feed back whatever he wae told, regardless of whether it was true. R2243.

using a voice modifier. R2356. Detective Kenny testified that Mr. Henry did not request a lawyer, and declined to take a polygraph. R2362-63. Sergeant Anderson testified that, when he arrested him, Mr. Henry said that the last thing he remembered was being at Cloth World and then waking up on Military Trail. R2374.

After the etate rebuttal testimony, Mr. Henry was questioned by his attorney about not calling witneasee. It was revealed that the reason that witnesses were not called was that counsel did not want to lose the final argument to the jury, and that Mr. Henry concurred in this. R2379.

There was no evidence presented during the sentencing phaee of the trial.

SUMMARY OF ARGUMENT

I. Guilt issues

A. To get a etatement from Mr. Henry, the police arreeted him and interrogated him in handcuffs and perhaps leg cuffs after making a deliberate decision among themselves not to advise him of hie rights. Once they obtained a statement they read him hie rights. Because the atatement was exculpatory, they detained him in a cage-like cell. without taking him to court as required by law, thereby avoiding the inconvenience of having him invoke his right to counsel. They ran him through a media gauntlet, read him a search warrant as a form of accusatory document, and then "played nice *guy*" and obtained an inculpatory etatement from him. During the course of this etatement hie interrogator overrode his attempt to invoke his right to remain eilent. Even then they did not take him to court until they had obtained another etatement from him the next day. Mr. Henry's statement8 ehould have been suppressed. The atatement to Nurse Manganiello should also have been suppressed where there was no finding of voluntariness.

B. In opposition to Mr. Henry's motion to exclude the statements of Ms. Themidor, the etate presented the testimony of various aelf-appointed experts in the supposed field of knowing when someone knowe that he or she is on the verge of death. There was no showing for scientific acceptance of euch testimony, and the "experts" contradicted each other on crucial points. Their testimony was factually false and did not ehow that Ms. Thermidor knew that she was faced with immediate death. At moat they showed that they thought that she

thought she was going to die. It wae error to deny the motion and admit the statements.

C. The theory of defense was durese. Mr. Henry's testimony was that he was an unwilling participant in the robbery and (therefore) the murdera and arson. This made out a defense of dureea. There was no instruction to the jury on the theory of defense. Mr. Henry *is* entitled to a fair trial in which the jury is instructed on his theory of defense.

D. The prosecution did not disclose in discovery that it intended to praeent expert testimony regarding fiber identification. The admission of this testimony, without a finding as to whether the discovery violation was willful or inadvertetent and as to whether it wae trivial or substantial requires reversal of Mr. Henry's convictions.

E. The prosecutor made a factually false assertion in his final argument. He also gave hie own vereion, without any factual basis, regarding what is taught in Marine Corps interrogation schools. These improper arguments were ueed in an attempt to undermine and denigrate Mr. Henry's testimony.

F. It was improper to submit the case to the jury without the calling of defense witnesses. The only reason defense witnesses were not called was to avoid loss of the final argument under a procedural rule. Hence the procedural rule directly burdened the constitutional right to call defense witnesses. This violation of Mr. Henry's right to call witnesses requires a new trial.

G. The prosecution presented exteneive improper evidence designed to elicit sympathy for the decedents and their families.

H. The prosecution introduced into evidence gruesome photographs not relevant to any matter in issue.

I. The trial. teetimony laying the predicate for the admission of Ma Thermidor's statements to the police was false and improper.

5. Submission of thia cause to the jury on alternative theories of first degree murder was error. First, it exposed Mr. Henry to double jeopardy aa follows: If the jury accepted Mr. Henry's testimony that he was an unwilling participant, it could have convicted him on a felony murder theory, especially

absent an instruction on duress. If it did convict him only of felony murder (and therefore acquitted him of murder by premeditated design), use of the premeditation aggravating circumstance violatee double jeopardy. Second, failure to charge felony murder violates the Due Process and Notice Clauses. Third, it violatee the right to a unanimous jury verdict.

II. Penalty Issues.

A. The trial court erred by applying the reaeonable doubt standard to the mitigating evidence. The waiver of mitigating circumstances was improper. Even if a judge can sentence a person to death without fully informing himself about the relevant circumstances, such a procedure should only occur with the greateet care. Here the waiver occurred in circumstances showing a complete lack of advocacy by defense counsel and a failure of counsel to investigate the case. The trial court should have inquired of Mr. Henry whether he wished to continue to be represented by counsel, and, if he did, it should have directed counsel to fulfill hie duty of investigating and presenting mitigating evidence. Proper consideration of sentencing issues was thwarted by the trial court's refusal to give jury instructions requested by the defense.

B. The prosecutor's argument, the jury instructions, and the trial court's findings ae to the aggravating factors were improper. The prosecutor presented and relied upon improper aggravating evidence.

C. Other guilt phaee issues were prejudicial in the penalty phase.

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

E. The trial court erred by conducting a portion of the proceedings in the absence of Mr. Henry.

F. The aggravating circumstances used at bar are unconetitutionally vague,

have not been strictly construed, do not conform to their legislative purposes, and have been so inconsistently applied as to make them unconstitutional.

H. The preeentsnce investigation report violated the Confrontation Clause.

I. Mr. Henry's noncapital sentences violate the sentencing guidelines.

ARGUMENT

GUILT ISSUES

A. The Legality of Mr. Henry's Statements

The record shows a deliberate police conepiracy to deprive Mr. Henry of his rights. The police agreed among themselves not to read him hie righte until he began talking. They illegally held him without making any effort to take him to a first appearance hearing within 24 hours of his arrest.[11] When he invoked his right to remain silent by saying that he could no longer talk, the police overrode that proteatation, and continued to interrogate him.

The fourth amendment forbids illegal detentions. The fifth and fourteenth amendments, and article I, section 9 of the Florida Constitution provide that one may not be compelled to be a witness against oneself. The sixth and fourteenth amendments and article I, section 16 guarantee the right to counsel. Under rule 3.111(a), Florida Rules of Criminal Procedure, and the Florida Constitution, this right attaches when one is formally charged with an offense, or as soon as feasible after custodial restraint, or upon first appearance before a committing magistrate, whichever occurs first. Sobczak v. State, 462 So.2d 1172 (Fla. 4th DCA 1984).[12] Florida Rule of Criminal Procedure 3.130(a) provides that unless already under lawful custody on another matter, "every person shall be taken before a judicial officer, either in person or by

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r Detective Kenny was working with an attorney in the State Attorney's homicide division about the case during the afternoon of November 3, and obtained a search warrant from a judge at 5:15. Apparently the police concealed their illegal actions from the prosecutor and judge.

[12] In State v. Hoch, 500 So.2d 597 (Fla. 3d DCA 1986), the court wrote at page 599 that, becauee Sobczak was 'decided on a constitutional basis, it was "no longer good law" in light of Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1535, 89 L.Ed.2d 410 (1986) (holding that, where formal initiation of adversary judicial proceedings hae not occurred, sixth amendment right to counsel had not attached). Nevertheless, in Smith v. State, 501 So.2d 657 (Fla. 4th DCA 1987), the Fourth District followed Sobczak. This Court affirmed on other grounde in State v. Smith, 547 So.2d 131 (Fla. 1989).

electronic audiovisual device in the discretion of the court, within twenty-four (24) houre of his arreet." In a capital case, a higher standard of due process applies. See Maynard v. Cartwriaht, 108 S.Ct. 1853 (1988).

The actions of the police at bar violated theee provisions of law.

1. Fourth amendment and due process

The trial court found Mr. Henry's statements voluntary, but suppressed the initial statement made prior to the Miranda[13] warnings and the final statement made after the first appearance hearing on November 4. The trial court erred by not ouppreeaing the other statements. Where, as here, the police have conspired to keep from advising an arrestee of his rights until he has talked, and have held him without taking him before a magistrate as required by law, it is appropriate to *impose* the sanction of suppressing hie statements. See Watte v. Indiana, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949). The fact that a confession may be admissible for purposes of the fifth amendment, in the sense that Miranda warnings were given and understood, is not sufficient to purge the taint of an illegal detention. A finding of voluntariness for purposes of the fifth amendment is merely a threshold requirement for fourth amendment analysis. See Taylor v. Alabama, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982). The state must show a sufficient break in events to undermine the inference that the confeaaion was caused by the fourth amendment violation, Orsaon v. Eletnd, 470 U.S. 298, 306, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). The fourth amendment requires judicial determination of probable cause for continued pretrial detention of one arrested without a warrant. Gerstein v. Puah, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). This determination must be made by the judicial officer either before or promptly after arreet. Id. 420 U.S. at 125.

The police arrested Mr. Henry around 6:40 a.m. on November 3. To bring him to a first appearance hearing within 24 hours, as required by the rule and the fourth amendment, they would have had to bring him to court that day.

Aa the afternoon came and went, the police had only exculpatory statements from Mr. Henry. To bring him to a court hearing where he would invoke his right

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[13] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

to counsel would thwart their investigation. They avoided thie inconvenience, keeping Mr. Henry isolated, putting him through a gauntlet of reporters, taking him to the Sheriff's Office, and, after 6:00 p.m., obtaining statements after giving him something to eat. The statemente obtained that evening and the next morning before the first appearance hearing, were obtained in violation of the fourth amendment. There wae no sufficient break in events to undermine the inference that the confeeaion was caused by the violation.[14]

In making this argument, Mr. Henry is aware that in Keen v. State, 504 So.2d 396 (Pla. 1987) this Court rejected the appellant's argument that hie statement should be suppressed because it was obtained more than 24 hours after hie arrest, without his being taken before a magistrate. This Court wrote that noncompliance with the rule must be shown to have induced the confession.

Keen is distinguishable on two grounds. First, it did not involve a fourth amendment analysis.[15] Second, the violation of the rule at bar did result in Mr. Henry's statements. When finally was brought to a first appearance hearing, he did invoke his right to counsel, and the trial court inadmissible his subsequent statement. Hence, had the officers brought him before a committing magistrate on November 3, hie other statements would have been similarly suppressed under Michigan v. Jackson, 47 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986).

2. Article 1, section 9 and the fifth amendment

The statements obtained after the initial reading of the rights were tainted because they were fruit of the initial decision not to read Mr. Henry hie rights under the "cat out of the bag" doctrine articulated in United States v. Bayer, 331 U.S. 532, 67 S.Ct. 1394, 91 L.Ed. 1654 (1947). The trial court rejected thie argument on the basis of Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). R522-30. The trial court erred.

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[14] Of course the classic "break in the events" to satisfy this requirement is to be brought before a committing magistrate. See Thomas v. State, 494 So.2d 248, 250 (Fla. 4th DCA 1986).

[15] The rule of Keen (that the statement will not be suppressed unless induced by the illegal detention) is in fact contrary to the fourth amendment rule (eet out in, e.g., Oregon v. Eletad) that the statement will be suppressed absent a sufficient break in the events.

In Oregon v. Eletad, officers obtained a statement at Elstad's home without reading his Miranda rights. At the police station, they read him his rights, and obtained another etatement. The court wrote that mere failure to read Miranda rights, without more, did not cause the resulting etatement to be involuntary:

> Neither the environment nos the manner of either "interrogation" waa coercive. The initial conversation took place at midday, in the living room area of respondent's own home with his mother in the kitchen area, a few steps away. Although in retrospect the officers testified that respondent waa then in custody, at the time he made his statement he had not been informed that he was under arrest.

Id. at 315. The Court specifically noted that the initial questioning "had none of the earmarks of coercion." Id. 316.

What are the earmarks of coercion? In Miranda the court noted that custodial interrogation at a police station is inherently coercive.[16] At bar, Mr. Henry was taken to the police station questioned in handcuffs and perhaps in leg cuffs (Detective Kenny did not recall whether he was in leg cuffe). R266. He wae questioned thus for two hours without being told why he was being detained. R267.[17] This interrogation had the earmarks of coercion. There was no significant break in the interrogation between the obtaining of the untaped statement, the reading of the Miranda rights, and the taking of the taped etatement. R29-30. Hence, there is a presumption of coerciveness from the first etatement which carries over to the second, taped statement, and admission of them two statements violated the fifth amendment and article I, section 12 of the Florida Constitution. Mr. Henry's Statements were not voluntary.

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[16] "We have concluded that without proper safeguards the proceee of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. At pages 448-58 the Court detailed at length the coercive aspects of police station interrogation. At pages 449-50, the Court highlighted that interrogation at one's home (as in Oregon v. Eletad) does not have the coercive aspects of interrogation at a police station.

[17] Listening to the tape of Mr. Henry's telephone conversation reveals that Mr. Henry was in an extremely agitated state minutes before police picked him up. Being arrested and held while in this condition added to his susceptibility to coercion.

3. **Article 1,** section **16,** and eixth amendment

As already noted, under Florida **law the** right **to** counael attache8 under rule 3.111(a) and the Conetitution **as** soon as possible **after** arreet.

When finally taken **to** a first appearance hearing, Mr. Henry invoked his **right** to couneel. The **police** initially **avoided** this inconvenience by **illegally** detaining him without bringing **him** before **a** committing magistrate within **24** hours **of** his arreet. Hence his statements should **be** euppresaed.

In making this argument, **Mr.** Henry is aware **of** Keen **v.** State, **504** So.2d **396** (Fla. **1987).** Keen argued violation of **his sixth** amendment right to couneel becauee he **was** interrogated after having asked **one** of his employees to call an **attorney** for the purpose of bail at the time of his arrest. This Court **wrote:**

> Keen's eixth amendment claim **fails** becauee at the **time** the atatement waO **made** formal charges had **not** yet been **filed** against him and, therefore, adversary proceedings had not yet commenced. Moran v. Burbine, **475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).**

Id. 400. **Keen** rejected only **a** sixth amendment claim on this issue without addressing rule **3.111** or of article 1, section 16. It does not **appear** that **in Keen** thie Court intended to overrule **Sobceak** or nullify the plain Language **of rule 3.111. Keen does not** control Mr. Henry's claims **under** those two provisions.

If Keen stands **for** the proposition that the sixth amendment right to counael **does** not attach at **the time of** the first appearance hearing, and therefore overrules Sobceak on the eixth amendment ieeue, **it is** incorrect. In addition **to** being the forum **for** a nonadversarial **probable** cause determination **(for** which the sixth amendment **right to** counsel arguably does not apply), **it is a forum** for advising the defendant of the reason for hie arrest, appointing counsel, and taking evidence on an adversarial proceeding **for bond.** Hence, **adversarial** proceedings have commenced **at** the time **of** the first appearance hearing **so** that the sixth amendment right to couneel attaches. **See** Coleman v. Alabama, 388 **U.S. 1, 7-10, 90 S.Ct. 1999, 26 L.Ed.2d 387** (1970) (right to couneel attaches **at** preliminary hearing, which, although not required etep **in prosecution,** involved determining whether evidence justified eubmitting **case to** grand jury, and fixing of bail; among other things, couneel can "be influential

at the preliminary hearing in making effective arguments for the accueed on such matters as the necessity for an early psychiatric examination or bail").

By preventing appointment of counsel at a first appearance hearing, the officers created a situation in which they induced Mr. Henry to make further statements. After questioning him in handcuffe, holding him in a cage at the police station during the day without feeding him, R273-78, and exposing him to a crush of the media, they "played nice guy" and obtained incriminating statements. Hie statements ehould have been suppressed.

4. Invocation of silence

During Mr. Henry's taped statement to Detective Gianino on the evening of November 3, the following occurred:

> Q ...What happened after you sprayed the white lady in the bathroom? Did you ever eee the black lady again?
>
> A Oh, I just --
>
> Q Robert?
> A I can't really, I can't --
>
> Q Okay.
>
> A I -- I --
>
> Q I can only ask you to tell me what you remember, right? ...

R2113. Detective Gianino continued to interrogate Mr. Henry, eliciting, among other thinga, his etatement that Ms. Thermidor begged: "don't burn me up, pleaee, don't burn me up." R2121. Detective Gianino went back the next day and obtained further incriminating statements on November 4 and 5.

A suspect's equivocal invocation of the right to silence terminates any further questioning except that which is designed to clarify the suspect's wishes. Owen v. State, 15 F.L.W. S107 (Fla. March 1, 1990), Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), modified, 781 F.2d 185 (11th Cir.).

"I can't really, I can't --" was at least an equivocal invocation of the right to remain silent. Detective Gianino did not eeek to clarify Mr. Henry's wishes. He just forged ahead with the questioning. The subsequent statements were improperly obtained.

5. Statement to Nurse Manganiello

Mr. Henry moved for suppression of Statements made to all state agents. R2812-15. The etatement to Nurse Manganiello waa not mentioned during the suppression hearing, and the court made no finding with respect to it. Mr. Henry argues that it was error to allow the state's use of thie statement.

The Conetitution forbids submission of a confession to a jury without a determination of voluntariness by the judge. Sims v. Georgia, 385 U.S. 538, *87* S.Ct. 639, 17 L.Ed.2d 593 (1967). Since Mr. Henry's motion challenged all statements to state agente, and since Nurse Manganiello was a state agent, being employed at the county jail, the admission of thie statement without a determination by the trial court as to voluntariness violates due process.

B. The Statements of Ma. Thermidor

Mr. Henry challenges the admission of Ms. Thermidor's statements on three grounds. First, the trial court erred by admitting improper expert testimony as to thia issue. Second, the prosecution improperly introduced false testimony on thie issue. Third, the evidence failed to support the trial court's finding.

1. Propriety of expert testimony

The court erred by overruling Mr. Henry's objection that the Dr. Podgorny's testimony was outside the scope of his expertise. R38-39. Once the court made thie ruling, it was futile for Mr. Henry to make further objections to thie testimony and to that of other state witnesses on thie ground. Hence, the matter is preserved for appeal. It is not necessary that counsel flog a dead horse. See Birge v. State, 92 So.2d 819 (Fla. 1957) and Thomas v. State, 419 So.2d 634 (Fla. 1982). The trial court aleo erred by overruling Mr. Henry's objection that Dr. Dellerson did not speak with or treat Ms. Thermidor. R28-30.

At the hearing on the motion in limine, Dr. Podgorny was qualified as an expert in "thermal injury burn" and head trauma; Mr. McGrail gave opinion testimony baeed on his experience as a paramedic; Dr. Dellerson testified as an "expert in emergency --" (defenee'counsel stipulated to thie expertise). Each was a self-proclaimed expert on the field of knowing when people think they are about to die. The state did not lay a proper predicate €or this testimony.

The etandard for the admission of expert testimony is whether it haa general scientific acceptance. Bundy v. State, 455 So.2d 330 (Fla. 1984). This etandard is required by due process. Expert testimony is not allowed unless the witness has expertise in the area in which the opinion is sought. Husky Industries, Ine, v. Black, 434 So.2d 988 (Fla. 4th DCA 1983). Expert testimony is inadmissible where it is apparent that it is based on insufficient data. Id. The testimony at bar was inadmissible under these etandards.

The state failed to show that the sort of testimony preeentad on the motion in limine and at trial hae general scientific acceptance.[18] Examination of the teetimony an this issue reveals that: it was pseudoscientific mumbo jumbo. Dr. Podgorny was taken with the fact that Me. Thermidor identified the attacker as wearing a beige shirt, giving hie opinion that beige "is probably one of the most difficult colors in English language to deal with." R21. Ha apparently did not know Ms. Thermidor worked in a cloth store. Although "beige" may not come up very frequently in the emergency room, it is probably a fairly common word and not difficult to deal with in a cloth store. He testified that Me. Thermidor's "very substantial abnormal blood pressure" indicated that she was able to be alert, clear, lucid, and able to comport herself in conversation. R21-22. Dr. Podgorny offered no medical basis for thie fascinating thesis.[19] He said the Demerol and Vistaril would not have affected her because it would have been ueed up by the pain receptors. R23. This was contrary to the testimony of Dr. Dellerson that the drugs were pooled in Ma. Thermidor's buttocks, and were

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[18] In fact, Dr. Dellerson candidly admitted at trial that there is ecant authority for this soft of testimony. R1269 ("This is not something that's very well written about in textbooks, but it's something in individuals who practice in situations such as I do, trauma surgeons, people who work in burn units I'm sure see."). Dr. Dellerson further testified during the trial that his opinion wae based in part on hi6 apparent familiarity with airplane disasters in which wings fall off. R1270-71. The anecdotal nature of hie testimony belies any claim of scientific seriousness.

[19] Dr. Podgorny did not testify ae to what thie abnormal blood pressure was. Nevertheleaa, at trial, he was quite definite that Ms. Thermidor was not in a etate of medical shock, which is aseociated with an abnormally low blood pressure. R1459-60. Hence, he must have meant that ehe had an abnormally high blood preeeure. Unfortunately, this teetimony was flatly contradicted by the testimony of the other etate expert, Dr. Dellerson, who testified that Ma. Thermidor waa in a etate of shock. R1262-63.

therefore not doing their jobe. R1262-63. Ha testified that the medication should have had no appreciable affect on her, and that it would merely serve to alleviate her anxiety without affecting her cognitive skills. R23-24. Thie wae contrary to the testimony of Dr. Dellarson that the druge would have affected the cognitive functions like a drink or two on an empty stomach. R150.

In addition to being an expert on colors, Dr. Podgorny was apparently an expert on eociology. He said (on the basis of what it is not clear) that lay people believe the likelihood of death roughly equale the percentage of the body that is burned. R32. Knowing nothing about her, he opined that Me. Thermidor was "an average individual who would fit into the situation that underatand in general what's going on." Id. Apparently this meant that she wae one of the lay people who believe the likelihood of death roughly equals the percentage of the body burned. How he arrived at this conclueion is anyone's guess.

Dr. Podgorny thought that being moved in an ambulance ehowa that one is coherent and lucid. He testified that, soon after the injury, Me. Thermidor "was able to move from one location to another, Oh order to do so, an individual has to have a certain degree of preeence of mind, lucidity, intent and judgmental ability to do so." R20. That presence of mind and lucidity are prerequisites far being moved in an emergency medical vehicle is preposterous.

He believed that being moved to a very large hospital in Miami waa a sure portent of doom ("an ominous eye"). R33. While this might make for a joke in the Panhandle, it is not competent testimony.

Dr. Podgorny, based on his having treated 60 to 70 seriously burned patients, R36, testified about the common characteristics of such persons with respect to whether they appreciate the probability of death. He said the first characterietic is that they are lucid for a period after the burn, and *try* to cooperate with those taking care of them. R36-37. He considered this just remarkably different from the way that other people react to injuries. Second, he said that such persons are grehtly preoccupied with whether they are going to die, and "want to see their family, they want to take care of certain decisions, items, et cetera, that's a second common characteristic." R37. This

criterion simply does not apply to Me. Themidor. Third was that doctors and nurses try not to discuss impending death with patients. R37. It is silly to say that one knows that one is going to die because people avoid the topic.

Mr. McGrail, the paramedic, had a different view of the characteristics of thoee on the verge of death. His feeling was that persons who think they are going to die are in a state of panic. R115. However interesting hie anecdotal testimony, there wae no showing of any serious etudy of thie matter.

Dr. Delleraon, the follower of airplane disasters, had hia own calculus for determining who thinks that death is approaching. *The* centerpiece of hie theory was the notion of "relative calm." He felt that persons who are panicky, and aek whether they are going to live are not the ones who are on the verge of death. R142. He felt that Ms. Thermidor fell into the category of thoee who anticipate their death, those who are "relatively calm," because she displayed only "minimal concern" by saying "God help me, or somebody help me." R132. He testified that "her countenance was relatively calm and this is one of the things that you frequently see in an individual." Id.[20] The rather obvioue conclueion, that Ms. Thermidor's "relative calm" may have been caused by the drugs taking effect, doe0 not seem to have occurred to Dr. Dellerson. One listening to the tape of Me Thermidor's statement (Dr. Delleraon did not Listen to it, but only read a tranecript of it, R129) will wonder how Dr. Delleraon could have concluded ehe was in a etate of calm repose in contemplation of death. The tape reveals considerable pain and agitation on her part. Further, Dr. Dellerson's "relatively calm" conclueion is contrary to the testimony of Nurse Selby that Ms. Themidor was quite anxious and that of Mr. McGrail about her panic and fear,[21]

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[20] Dr. Dellerson did not actually see Me. Thermidor at the time, so that his remarks about her countenance do not make a lot of sense.

[21] In his deposition, which was admitted into evidence as Defense Exhibit 1 on the motion in limine, Dr. Montoya, the treating physician, said that he was very surprised by Ms. Thermidor's calmness, testifying as follows about her mental status: "I was also very surprised, because like I said, I have seen a hundred cases of extensive burne, but since than I have asked and I have seen more, and one thing that people have told me that these people can come in and can be very calm intitially." Pages 10-11 of deposition of Dr. Montoya. In other words, such a person may or may not be calm, and hie or her mood may fluctuate.

Dr. Dellerson also identified, as a sign that one thinke that one is going to die, a desire to see a parent or a clergyman. R139. As already noted, Me. Thermidor did not express such a desire. He also testified that an urge to defecate is a sign of impending death. R146-47.

The witnesses were not psychologists or psychiatrists. Their expertise consisted of simply watching a number of people die during the course of their work. What waa on the minds of these people is conjecture. Although it might be nice to believe that when you go you know you are going, the record shows no scientific agreement on thie matter.

Same people think the slightest injury will result in their demise. Others face the gravest injuries with stoic silence or brave cheerfulness. *Any* ten people could bring up anecdotes demonstrating varioue things that supposedly prove that a person knew that death was near. This doe0 not elevate the testimony at bar from the Level of sortilege, augury, and the reading of tea leaves.

Further, the testimony at bar was based on ineufficient data. The doctors could not even agree on such elementary matters as Ms. Thermidor's blood pressure, whether she was in shock, and whether the drugs were circulating in her system. All three witnesses had entirely different theories of how one can determine whether one knows one is going to die, and all three of them managed to come up with frequently contradictory "facts" to support their conclurions.

In making this argument, Mr. Henry is aware that in Teffeteller v. Statq, 439 So.2d 840 (Fla. 1983) there wae testimony from the decedent'e attending physicians to the affect that terminal patients are aware of their impending death, and that the doctors believed that the decedent knew he was dying (they could tell because he said ha was dying). It does not appear from the decision that the competency of this testimony was challenged. Since it was the treating physicians who testified in Teffeteller, the decision does not support the use of self-styled experts who did not attend the decedent. In *any* event, the testimony at bar was not competent: opinion testimony.

2. False testimony

Similarly, Mr. Henry argues that the state used false testimony on this

matter. Either the testimony of Mr. McGrail or that of Dr. Dellerson was false on tho issue of whether Ms. Thermidor wae in a panic or was in a state of "relative calm." Either one or the other them was incorrect in asserting as a fact that a person in a state of contemplation of death is either in a state of panic or in a state of "relative calm." Either Dr. Dellereon or Dr. Podgorny gave false testimony with respect to Ms. Thermidor's blood pressure. Either one or the other of them gave false testimony as to whether she was in a state of shock. Either one or the other of them gave false testimony as to whether the drugs were circulating in her system.[22]

Where the state lets perjured testimony go uncorrected there is a denial of due process. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). A new trial is required if there is any reasonable likelihood that the judgment of the jury could have been affected. Id. At bar, there is a reasonable likelihood that the false teetimony affected the decision of the trial court in denying the motion in limine. Given the importance of Me. Thermidor's statements to the state's came, it is likely that the admission of the statements and the false testimony about them affected the judgment of the jury.

3. Sufficiency of evidence

The evidence was insufficient to support the trial court's finding that the statement was made under a belief of impending death under section 90.804-(2)(b), Florida Stafutes.

The main case (and the case upon which tho trial court relied) is Teffeteller v. State, 439 So.2d 840 (Fla. 1983) in which the appellant argued that the trial court had erred by allowing into evidence the decedent's statement. The decedent said, "Oh God, I'm going." The doctors coneoled him and told him not to worry, but he died soon thereafter. This Court, concluding that the decedent's *cry* that he wae "going," and statements of the attending physicians that terminal patients are aware of their impending death and that

[22] The state may argue that these are matters of opinion, rather than of fact. This exposes the state's evidence to the argument, already made, that the state's evidence consisted merely of opinions of various self-styled experts without any solid factual support, and was therefore incompetent.

the doctors believed that he knew he was dying, comprised a sufficient predicate to allow the introduction of the dying declaration. This Court wrote that it is not necessary that the decedent expressly state that he knows he is going to die, for proof may be made by circumstantial evidence sufficient to satisfy the judge that the decedent "knew and appreciated hie condition as being that of an approach to certain and immediate death." Id. 843 (e.s.).[23]

At bar, the state did not preeent evidence that Me. Thermidor knew and appreciated her condition aa being that of an approach to certain and immediate death. There was no testimony or evidence that she knew that she was going to die right away. The witnesses relied on totally contradictory indicia and theories for concluding, at most, that she was certain that ehe wae going to die. Ms. Thermidor's statement doea not reflect that it wae made in contemplation of death. Admittedly, Mr. Henry's court appointed attorney preeented the testimony of Nurse Selby that Ms. Thermidor knew ahe was going to die. But her testimony is no more competent than that of the other witnesses, and conflicts with Dr. Dellerson's testimony that a person showing the degree of agitation and Concern observed by Nurse Selby would not think that she was going to die.

Finally, it is worthwhile to consider the underpinnings of this exception to the heareay rule. The theory is that one preparing to meet one's Maker will want to do so with a clear conscience, and therefore will not lie. There is no evidence that Ms. Thermidor saw herself in this situation. She did not aek to see a clergyman or member of her family, did not say anything about trying to put her affaire in order, did not express any belief that she was going to die. Accordingly, it wae error to admit into evidence the statemente of Ms. Thermidor.

4. Constitutional Issues

In addition to violating the hearsay rule, admission of the statements violated the Confrontation Clauaee of the state and federal conetitutiona. Mr. Henry's convictions must be reversed unless admission of the statements was

[23] It has alwaye been required that the expectation be both of certain and immediate death. E.g. Sealey v. State, 89 Fls. 439, 105 So. 137 (1925) ("speedy and inevitable death").

harmless beyond a reasonable doubt. See Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). The dispute in the guilt phase was whether Mr. Henry was an active participant in the attacks on the women or whether he was merely there and was himself also a victim of the robbers. The statements contradicted the defense theory, and helped the jury to reject the defense theory. Accordingly, they had an effect on the verdict. Further, being filled with moans of pain and cries for help, they created sympathy for Ms. Thermidor and prejudice against Mr. Henry both in the guilt and penalty phases. Hence, their admission was prejudicial, and Mr. Henry is entitled to a new trial.

Capital cases require a higher standard of due process and greater certainty in fact finding. See Proffitt v. Wainwright, 685 F.2d 1227, 1235 (11th Cir. 1982). Use of the pseudoscientific testimony and the resulting admission of the statements violated the Cruel and Unusual Punishment Clauses of the state and federal constitutions.

C. Jury Instructions

Mr. Henry admits that his court appointed counsel did not object to the jury instructions as given. Nevertheless, he argues that the trial court committed fundamental error by failing to instruct on his theory of defense. The waiver of a crucial jury instruction issue in a capital case must be made personally by the defendant. Cf. Harris v. State, 438 So.2d 787 (Fla. 1983).

Florida Rule of Criminal Procedure 3.390(a) and the Due Process and Jury Trial Clauses of the state and federal constitutions require complete and accurate jury instructions. "The failure to give an instruction on a defense encompassed within the evidence is fundamental error and reviewable notwithstanding the absence of a requested instruction or an objection." Tobey v. State, 533 So.2d 1198, 1200 (Fla. 2d DCA 1988) (en banc). Failure to instruct on the theory of defense, if supported by evidence, violates the state and federal constitutional rights to trial by jury even where there is no objection. See Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945) (state constitutional right). The Cruel and Unusual Punishment Clauses require heightened reliability

in the fact-finding in a capital trial. This requirement applies to guilt phase jury instruction issues. See Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (instructions on lesser included offeneea).

The defense theory was that Mr. Henry was involved in the crimes under dureae. His testimony was that robbers coerced him into tying up Ms. Harris and having Ms. Thermidor open the door. If the jury believed this testimony, it received no clue from the instructions as to the applicable law. The jury may have convicted Mr. Henry under a set of facte under which he was innocent.

The rule is that duress is not a defenes to intentional homicide. See Wright v. State, 402 So.2d 493 (Fla. 3d DCA 1981). Although it is generally stated that coercion is not a defense where an innocent life is taken, e.g. Corujo v. State, 424 So.2d 43 (Fla. 2d DCA 1983), this statement seems to apply only where one has actually committed the killing under the coercion of another. There is, however, authority for the proposition that dureaa is a defense to felony murder, where one was a participant in the underlying felony only under duress. See Wright, 402 So.2d at n.8, 498-99. See also Hawkins v. State, 436 So.2d 44, 46 (Fla. 1983) (voluntary participant in felony guilty of felony murder). Since the murder statute is silent on this point, the atatutory and due process rule of lenity requires that thia silence be strictly construed in favor of the accused. Unlesa the law is clearlyto the contrary (which it is not), the duress defense should apply to the facts at bar.

Although Mr. Henry was charged only with murder by premeditated design, the court instructed on both premeditation and felony murder theories. Absent a special verdict, we do not know whether the jury found Mr. Henry guilty of murder by premeditated design. It may be that the jury accepted hie version of the facts, and, without an inetruction on how duress applied, thought him guilty of participating in the felony and therefore guilty of felony murder. Such a conclusion would have followed directly from the jury instruction that he was guilty of felony murder if the decedents died "as a consequence of and while" he was engaged in the robbery. R2847. The instruction was practically a direction to enter a verdict of guilty as to felony murder, since the defense

theory was that Mr. Henry was a participant (albeit an unwilling one) in the robbery.

A jury verdict must be set aside if it could be supported on one ground but not another, and the reviewing court is uncertain which ground was relied upon by the jury. Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988). If a defendant is convicted upon a general verdict after a jury has been instructed on several theories of guilt, one of which is held to be invalid, a new trial is required. Id.; Zant v. Stephens, 462 U.S. 862, 882, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Mr. Henry is entitled to a new trial.

The convictions for robbery and arson are similarly improper, because the jury was not instructed on duress as a defense to those crimes.

D. Discovery

During the trial the prosecutor revealed that he had given an expert fibers found on Mr. Henry's fingertips at the time of his arrest, for comparison with fibers of the material used to bind He. Harris. R1865-66. Apparently, he did not think of doing this until the time of trial. The record does not ehow how long he delayed the dieclosure. Defense counsel argued that this was a discovery violation, but, after an extended discussion, and after briefly interviewing the witness, said there was no prejudice. R1865-71, 1978-84. Nevertheless, he continued to object to the discovery violation. R1984. The court said it did not consider this a discovery violation, and found no prejudice. It made no finding whether there was an inadvertent or willful violation, or whether there was a trivial or substantial one. The witness was allowed to testify.

Rule 3.220 (a)(1)(x), Florida Rules of Criminal Procedure, requires that the state make a timely diecloeure of reports or statements of experts. Once a discovery violation has been brought to the court's attention, it muet determine whether the violation was inadvertent or willful, whether it was trivial or substantial, and whether it has procedurally prejudiced the defense. A determination as to only one these three matters is not sufficient. See Haversham v. State, 427 So.2d 400 (Fla. 4th DCA 1983) (inquiry discloeed only that violation

was inadvertent). See also Brev v. State, 382 So.2d 395, 398 (Pla. 4th DCA 1980) (court must conduct hearing and "specifically determine" all three issues), and paffone Y. State, 403 So.2d 761, 763 (Fla. 4th DCA) (same) dismissed, 491 So.2d 281 (Fla. 1986), and State v. Hall, 509 So.2d 1093 (Fla. 1987) (citing Raffone with favor). Failure to comply with this rule mandatea a new trial. Cumbie v. State, 345 So.2d 1061 (Fla. 1977).

E. The Prosecutor's Argument

To contradict Mr. Henry's testimony, the prosecutor in hie final argument relied on two factual aesertione nat supported by the record, one of which is refuted by the record. Reliance on a false fact and on unsupported factual assertions in countering the theory of defense renders the convictions illegal.

1. When amount stolen was known

Mr. Henry testified that on the afternoon of November 3, 1987, he wae mobbed by members of the news media while being taken to a police car at the Deerfield Beach Police Station. R2261. Aeked if he recalled what was being said, he replied: "Something to the effect, was it worth it killing those two women for twelve hundred dollare or something to that effect, questions like that.* R2261. On cross examination, the proascutor asked him whether he had said on direct examination that media people yelled out that he killed two people for $1200. R2333. Mr. Henry replied: "I stated that the media people questions were, was it worth killing the two women over twelve hundred dollars." R2333-34.

The proeecutor urged the jury to disbelieve Mr. Henry's testimony that his statements resulted from being given information by the police arguing that, since ths amount stolen wae not known until November 4, the only way Mr. Henry could know the amount on November 3 was by having stolen the money himself:

> Mr. Raticoff wants you to believe all these facts were given to him by the police officere. They said what happened, tell us what happened, and he did, and that's hie voice on there telling exactly what he did, and does that match with what Janet Thermidor said? Absolutely.
>
> He tied that woman up in that room, Phyllis Harris, whacked her on the head and lit her on fire, and he hit Janet Thermidor in her head and lit her on fire and took that money. He wanted the money, and then it's interesting to note on cross examination, I asked him about twelve hundred dollars, and he said to Mr. Raticoff on

> direct that when ha was leaving the Deerfield Beach Police Department, the media yelled out, killing two women or eomething to that effect for twelve hundred dollars.
>
> Well, Mike Balke didn't figure out how much was missing until the very next day, which was November 4th, and he waa walking out of Deerfield station November 3rd, it's twelve hundred and sixty-nine dollars and twenty-six cents. For twelve hundred and sixty-nine dollars and twenty-six cents, Janet Thermidor and Phyllis Harris were brutally murdered.

R2469-70.

Due proceee forbids the use of false testimony. Napue v. Illinois, 360 U.S. 264, *79* S.Ct. 1173, 3 L.Ed.2d 1217 (1959). A new trial is required if there is any reaeonable likelihood that the judgment of the jury could have been affected. Id. The prosecution may not rely on false matters in final argument. See Brown v. Wainwright, 785 F.2d 1457, 1464 (11th Cir. 1986).

The implication that the amount atolen was not known until November 4 is a false one, The probable cause affidavit prepared on the morning of November 3, R235-36, states: "It is believed the approximate loss to the business is $1,200, however the exact amount cannot be specifically determined until management completes the daily audit of the days [sic] proceeds." R2709. Hence this information wae known from Mr. Balke on November 3.

2. Marine Corps

The prosecutor in effect testified in rebuttal to Mr. Henry's testimony that he had been taught in the Marine Corpe to feed back to an interrogator whatever tho interrogator wanted to hear. The prosecutor said:

> He's tired, and he tells you that they teach you in the Marines that when you're under a preseure eituation, you collaborate. Well, if there's any branch of the Service where they obviously teach you go to the max, it's the Marine Corpe. Name, rank, and serial number.

R2454.

The only evidence regarding the interrogation schools came from Mr. Henry. There was no evidence impeaching hie testimony on this point. The prosecutor's comments were outside the evidence. Comments on matters outside the evidence are "clearly improper." Pope v. Wainwright, 496 So.2d 798, *803* (Fla. 1986).

3. Prejudice

The jury's verdict necessarily hung on a determination of whether it believed Mr. Henry's trial testimony and hie first statements to the police, or whether it believed hie other statements. The argument concerning the Marine Corps went directly to Mr. Henry's explanation of why he made the inculpatory statements. Hence, it went to the heart of the case. Accordingly, the prosecutor's improper argument requires a new trial, Similarly, the prosecutor's impeachment of Mr. Henry's testimony with false evidence requires a new trial, since the false assertion that the amount stolen could have been known only by the robbers ae of November 3 wae used directly to refute Mr. Henry's testimony. Since this testimony was crucial to the defenae, the prosecutor's improper argument could have affected the verdict. To let a man *go* to hie death where the promecutor has misled the jury as to the facte would violate the Cruel and Unueual Punishment Clauses of the state and federal constitutions.

F. Submission of the Case to the Jury Without Defense Witnesses

After Mr. Henry's testimony, the following occurred:

> MR. RATICOFF [defense counsel]: Judge, before we go on to the jury inetructiona, Robert is present, the one thing I did want to put on the record, Robert, you and I discussed the case that we put on for you, are there any other witnesses that you and I discussed that you felt I should have called or I should have called, other than yourself?
>
> **THE DEFENDANT:** Not at this time, no.
>
> **THE COURT:** This is it, there's no other time, this is the trial.
>
> **MR. RATICOFF:** You and I have had an opportunity to talk about your case, forget your testimony, we discussed your case?
>
> **THE DEFENDANT:** Yes, we have.
>
> MR. RATICOFF: And we could have put on other witnesses, in other:. words, we could have called other witnesses possible *to* teetify to certain things?
>
> THE **DEFENDANT:** Yeah, we could have.
>
> MR. RATICOFF: And I advised you that if we called other witnesses, depending on what they had to say, that once we put on any other testimony, but your testimony, that we would lose what he described *to* you aO the sandwich, our opening and closing in the closing, correct?
>
> THE **DEFENDANT!** Correct.

MR. RATICOFF: And what you indicated to me wae the fact that baeed on what those witnesses would have eaid, you wanted to keep the sandwich?

THE DEFENDANT: Correct.

MR. RATICOFF: And not call. any other witnesses but yourself?

MR. RATICOFF [sic]: Correct.

R2378-80.

The foregoing shows a violation of Mr. Henry's right to present a defense under article I, sections 9, 16 and 17 of the Florida Constitution and the fifth, sixth, eighth, and fourteenth amendments. The rule penalizing the presentation of defense evidence is unconstitutional. Submission of this cause to the jury without the defense witnesses was error. The error was such as to require a new trial.

Mr. Henry was discouraged from exercising hie constitutional right to present evidence by opexation of Florida Rule of Criminal Procedure 3.250, which penalizes a defendant who presents testimony other than his own by preventing him from making the concluding argument to the jury.

The right to present defense evidence is essential to due process. Chambers v. Mississippi, 410 U.S. 284, 43 S.Ct. 1058, 35 L.Ed.2d 297 (1973). The sixth and fourteenth amendments guarantee the right to present defense witnesses. Pennsylvania v. Ritchie, 107 S.Ct. 989, 100, n. 13 (1987). Restrictions on this right are constitutional only if they further other Legitimate interests in the criminal trial process and are not arbitrary or disproportionate ta the purpose they are designed to serve. See Rock v. Arkansas, 107 S.Ct. 2704, 2511 (1987). Under Florida law the right to make the concluding argument to the jury is of such importance that its improper denial constitutes reversible error as a matter of law. Raysor v. State, 272 So.2d 067 (Fla. 4th DCA 1973). As a general rule, penalties for exercising constitutional rights are unconstitutional as violative of due process because they make their assertion coetly. Griffin v. California, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). See aleo Brooks v. Tennessee, 406 U.S. 604, 610-11, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972) (rule requiring defendant to testify first in defense or not

at all violates right to "guiding hand of counsel"). Courts must indulge every presumption against waiver of fundamental constitutional rights. E.g. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

Here, Mr. Henry wae compelled to enter into the weighing procees the procedural penalty under rule 3.250 in deciding whether to present evidence. The record shows that the operation of the rule burdened the decision whether to exercias the right. It cut down on the right to present evidence by making it coetly. The waiver of the right to present testimony was coerced and invalid.

Admittedly Mr. Henry's court-appointed attorney did not make this argument. Nevertheless, the contemporaneous objection rule does not prevent a constitutional challenge to a atatute for the first time on appeal. See Trushin v. State, 425 So.2d 1126 (Fla. 1982). That principle ehould apply to this issue.

In making this argument, Mr. Henry is not unmindful of Preston v. State, 260 So.2d 501 (Fla. 1972), upholding rule 3.250 against a similar attack. He submits, however, that Preston is incorrect for the reasons set out above.

The harmless error rule does not apply where the defendant has been denied his right to present evidence. In Rose v. Clark, 106 S.Ct. 3101 (1986), the Court wrote that harmless error analysis presupposes a trial at which the defendant was afforded the right to present evidence. 106 S.Ct. at 3106.

The trial of thie cause without defense witnesses violated Mr. Henry's constitutional right to great reliability in fact-finding in capital cases under Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982).

G. Evidence Concerning Decedents and Their Families

It is immaterial, irrelevant and prejudicial to prove the decedent's family status in a homicide case. Hathaway v. State, 100 So.2d 662, 664 (Fla. 3d DCA 1958). The fact that the deceased may have had a family is immaterial, irrelevant and impertinent. Rowe v. State, 163 So. 22, 23 (Fla. 1935); Melbourne v. State, 51 Fla. 69, 40 So. 189, 190 (1906). gee also Gibson v. State, 191 So.2d 58 (Fla. 1st DCA 1966). To present a close relative of the deceased as a witnees for identification purposes should be avoided to prevent interjection of sympathy for the victim or undue prejudice against the accuced. Welty v.

State, 402 So.2d 1159, 1162 (Fla. 1981); Ashmore v. State, 214 So.2d 67, 69 (Fla. 1st DCA 1968); Barnes v. State, 348 So.2d 599 (Fla. 4th DCA 1977). During cloeing arguments the prosecuting attorney should not attempt to elicit the jury's sympathy by referring to the victim's family. See Johnson v. State, 442 So.2d 185, 188 (Fla. 1983),and Edwards v. state, 420 So.2d 357 (Fla. 3d DCA 1983). Such evidence and argument in a capital case violates the fifth, sixth, eighth and fourteenth amendments to the United States Constitution and article I, sections 2, 9, 16, and 17 of the Florida Constitution. Booth v. Maryland, 107 S.Ct. 2529 (1987); South Carolina v. Gathers, 109 S.Ct. 2207 (1989).

At bar, the prosecutor began his theme of sympathy in hie opening statement. He asserted that both of women were working two jobs. R1042. He continued this theme by calling Debra Cox, the sister of Janet Themidor, as a witness. R1290. She testified that they had lived together. R1290-91. She described both *of* the decedents' jobs. R1291. She then went on to identify the clothing which her sister wore on the morning of the incident. R1291-96.[24]

The prosecutor highlighted the theme of sympathy for the deceased by eliciting descriptions of the scene. He questioned the paramedic, Miles McGrail:

> Q. Describe the condition when you first saw Janet Themidor, what condition was she in?
>
> A. Janet Thermidor was laying on the ground, conscious with her arms spread out, I didn't see her arms as I opened the door because she was laying directly in front of the door feet towards the sink, her clothe0 were burned off her with the exception of where the bra lines and panty lines were, it didn't -- you could tell the difference in where it was burning.
>
> She was hot on fire, she was not smoldering, ehe was out at this time. Her skin was coming off her, I don't believe -- I think her hair waa burned off her, she was burned over her entire body as far as I could see.

R1130-31.

Tho prosecutor brought out similar testimony from Officer Dusenberry, concerning Ms. Thermidor's condition at the hospital:

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[24] Her testimony was clearly unnecessary as identification teetimony since Robert Zimmerman, the store manager, also identified Mr. Themidor. See Lewis v. State, 377 So.2d 640 (Fla. 1979).

Q. Would you deecribe the condition and where this person was, this female was, when you spoke to her?

A, When I first -- after I was directed to this room or where the person waa located, she wae lying on a -- some type of table, she was in -- appeared to be pretty bad shape, very few clothes -- there were just pieces of clothing on her, there was quite a few medical personnel around the table, I'm not sure exactly what they were doing.

She wae laid on her back, her right arm was hanging down from the table. Her skin was in very bad shape, there were pieces of skin falling from her arm or appeared to be, there wae fluid -- some type of -- it was pink in color, fluid was all over the floor around the table.

Q. What part of her body did you see?

A. As I recall, I could see her whole body, her feet right up to her head, I remember there was portions that appeared to be stockings were -- appeared to be melted off or burned off, there seemed to be some type of girdle or pantyhose or something partially -- moat of it was gone.

R1365-66.

The prosecutor preeented similartestimony concerning Me. Harris, beginning with calling of her husband as a witness. R1409. He described his awn job, R1409, which had no relevance to any issue in the case, but waa eolely designed to elicit sympathy and increase the jury's identification with him. He went on to identify his wife's handwriting, R1409-1410, and testified that she worked two full-time jobs. R1410. He identified her handwriting on an exhibit, R1411.[25]

The issue of victim eympathy was exacerbated by use of irrelevant testimony from Mr. Balke concerning losses from the fire:

Q. What did you have to do to reopen the store?

A. We had to build a new office because we closed off the other one which was burned, and we had to refinish the bathrooms, and I also euggested that we purchase new fixtures for the store to give it a new look to the customers and we did that.

Q. What did it cost, approximately, to repair the damage done by the fire?

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[25] His identification testimony of his wife was unnecessary since Mr. Balke, former manager of Cloth World, identified Ms. Harris, R1548.

A. About fourteen thousand dollars.

Q. And you indicated you reopened on what date?

A. It seems -- it's January 7th. We were trying to get opened by the 1st, but I couldn't get to that time. So, it was the next week.

R1572-73.

The proeecutor continued this theme in his closing argument in the penalty phase. He explicitly argued the pain and Buffering of Me. Themidor. R2449. He stated that she was "brutally violated." R2449. This provocative term is normally ueed to refer to a eexual assault. Its use served only to arouse fury and engender speculation concerning a possible sexual assault, of which there is no evidence. He continued the theme of victim sympathy by arguing:

For twelve hundred and eixty-nine dollare and twenty-six cents, Janet Themidor, and Phyllie Harris were brutally murdered.

R2470.

Admittedly, there was no objection. This Court ha0 in other cases held that improper identification of the decedent by a family member has not been fundamental error. E.g. Barclay v. State, 470 So.2d 691 (Fla. 1985). In Ray v. Statg, 403 So.2d 956 (Fla. 1981), upon which this Court relied in Barclay, this Court set out the following standard for fundamental error at page 960: "for error to be so fundamental. that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process."

Mr. Henry submits that what happened below violated due process. Capital cane require heightened standards of due process, see Maynard v. Cartwriaht, 108 S.Ct. 1853, 1857-58 (1988) and Elledae v. State, 346 So.2d 998 (Fla. 1977) (special scope of revIew in capital cases), in both the guilt and the penalty stages. See Beck v. Alabama, 447 U.S. 625, 643, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) ("uncertainty and unreliability [in] the fact finding process cannot be tolerated in a capital case"). The evidence and argument discussed hare violates the rights of the accused in a capital case. Use of such matters turns the case into "a 'mini-trial' on the victim's character." Booth, 107 S.Ct. at 2535. In South Carolina v. Gathers, 109 S.Ct. 2207 (1989), the court affirmed the

reversal of the death sentence on this issue without an Objection at trial.

From the foregoing, the evidence and argument regarding the decedents and their families were improper, went to no issue in dispute, and constituted a violation of Mr. Henry's rights euch as to require a new trial.

H. Photographs

The trial court erred by letting into evidence irrelevant, cumulative, and prejudicial photographa. This Court has written that "photographs ehould be received with great caution." Thomaa v. Statg, 59 So.2d 517 (Fla. 1952). Admission of numerous, otherwise relevant, gruesome photographa can require reversal, if unduly prejudicial. Young v. State, 234 So.2d 341 (Fla. 1970). Use of the photographa denied Mr. .Henry due process of law, deprived him of his right to trial by jury on the basis of competent evidence, resulting in cruel and unusual puniehment in violation of hie rights under the fifth, sixth, eighth, and fourteenth amendments to the United States Conetitution and article I, sections 2, 9, 16, and 17 of the Florida Constitution. They ahould also have been excluded as the prejudice outweighed their probative value. § 90.403, Fla. stat.

The gruesome photographe ware irrelevant to the disputed issue of whether Mr. Henry was the killer. The defense never contested the death, reeting its case on the issue of the identity of the perpetrator. R1074-1088.

Photographs admitted over repeated defense objection were extremely gruesome. Exhibit 3, which was admitted over objection, R1114-1117, is a depiction of Ms. Thermidor with exteneive burne. It shows her on a burn sheet, with tubee in her nose and throat. Thue, it clearly is not a picture of the ecene, but reflecta changes caused by medical treatment. Exhibit 4, also admitted over defenee objection, R1132-1133, is an equally gruesome photograph of the burned and bound Ms. Harris. Exhibits 10-15, which were admitted over defenee objection, R1191-1192, are extensive bloody crime scene photographe. Exhibits 16-21, which were admitted over defense objection, R1202, were additional bloody crime scene photographe. Exhibit 23, which was admitted over defense objection, is a particularly gruesome photograph of a burned and bloody

person. Exhibit 68, also introduced over defense objection, R1617-1629, is a gruesome depiction of the deceased. Exhibits 67, 69, 70, 71, 72, 73, 74, 75, and 76 were also gruesome depictions of the deceased, although not objected to.

In Hoffert v. State, 15 F.L.W. D 921, 922 (Fla. 4th DCA Apr. 11, 1990) the court wrote:

> Appellant contends the trial court erred when it permitted the introduction of an autopsy photograph of the victim's head. The photograph depicted the internal portion of the victim's head after an incision had been made from behind the ears to the top of the head, with the scalp rolled away revealing the flesh which underlies the hair and overlies the ekull. The state arguea that it introduced the photograph to show that in addition to the other injuries sustained by the victim, he had suffered a separate blow to the left side of his head, and that he received the worst of the fight. The record contains other evidence which showed that the victim had broken fingers, bruises above the nose and lacerations on the back of the head. The medical examiner could have testified that the victim had a bruise on the left side of his head and a hemorrhage to the temporalis muecle without reference to the photograph. The danger of unfair prejudice to appellant far outweighed the probative value of the photograph and the state had failed to show the necessity for its admission. On retrial, the photograph should be excluded.

The present caee must be reversed due to the number, the gruesome nature, and the lack of relevance of the photographe.

I. False Testimony

As argued at point I.B.2 of thie brief, the testimony concerning Me. Thermidor's condition contained numerous falsehoods. Hence, the use of this testimony before the jury violated due process under Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). The false testimony cannot be shown not to have affected the verdict: it is likely that the jurors took to heart the "expert" testimony about Me. Thermidor's mental condition and the testimony affected the verdict. This testimony also violated Mr. Henry's constitutional rights to great reliability of fact finding in a capital case and to trial by jury on competent evidence.

J. Alternative Theories of First Degree Murder

The indictment charged Mr. Henry with murder by premeditated design. Nevertheless, the prosecution waa allowed to proceed on both felony murder and premeditation theories pursuant to thie Court's ruling in Knight v. State, 338

So.2d 201 (Fla. 1976). The jury was told that it could convict on either theory. The jury returned a general verdict of guilty of first degree murder.

1. Double jeopardy

The theory of defense was that although he was an unwilling participant in the felonies and had no intent to kill. The general verdicts do not reject this theory. As shown at point I.C above, the jury instructions authorized a felony murder conviction even if the jury believed Mr. Henry's testimony. It cannot be said that the jury did not acquit him of murder by premeditated design. Hence, he was subjected to double jeopardy by use of the premeditation circumstance. See Delap v. Duaaer, 890 F.2d 285, 306-319 (11th Cir. 1989).

2. Failure to Charae Felony Murder

The Constitution requires that a charging document state the elements of the crime charged with sufficient clarity to apprise the defendant what he must defend against. Russell v. United Statea, 369 U.S. 749, 763-769, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). Specifically, the sixth amendment: forbids proceeding on a felony murder theory where the indictment charges only premeditated murder. See Givens v. Housewright, 786 F.2d 1378 ((9th Cir. 1986).

Letting the prosecution proceed on the felony murder theory violated Mr. Henry's rights under the Due Process, Notice, Jury Trial, Double Jeopardy, and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

3. Jury unanimity

Although told that its verdict must be unaninimous, the jury was not required to agree unanimously on what Mr. Henry wae guilty of: murder by premeditated design or one of three different theories of felony murder.[26] The vote could have been three votes for each of the four theories of guilt, so that there wae not even a majority verdict.

There are "size and unanimity limits that cannot be tranegreeaed if the essence of the jury trial right is to be maintained." Brown v. Louisiana, 447 U.S. 323, 331, 100 S.Ct. 2214, 65 L.Ed.2d 159 (1980). Conviction by less than

[26] The three theories of felony murder were murder while engaged in the commission of a robbery, while attempting to commit robbery, or while escaping from the immediate scene of a robbery.

a majority violates due process and the right to jury trial. Id. The Cruel and Unusual Punishment Clauses of the atate and federal constitutions require a higher etandard of due process in capital cases. These rights were violated by the absence of a special verdict on the theory of guilt. Mr. Henry is aware that this Court rejected a similar argument in Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1980). He submits that Gorham was wrongly decided on this issue.

II. PENALTY ISSUES

A. Consideration of Mitigatio and Defense Issues

1. Use of the reaeonable doubt standard

Discussion of the mitigating circumstances in the sentencing order begins:

> The Court has carefully and conscientiously complied with the provisions of Section 921.141(2)(b) and finds from the evidence at trial and in the eontencing proceeding beyond a reasonable doubt as follows:

R2909.

The trial court erred by applying the beyond a reaeonable doubt standard to the mitigating evidence. See Floyd v. State, 497 So.2d 1211, 1216 (Fla. 1986) (discussing standard instructions). The Cruel and Unusual Punishment Clauses of the atate and federal constitutions require consideration of all mitigating evidence. The use of the Improper standard precluded coneideration of a broad range of mitigating evidence, and waa unconstitutional.

The record showe mitigating factors which the court could have found by using the right standard of proof.[27] Testimony on the motion to suppress shows that Mr. Henry wae genuinely remorseful. R308, 309, and 326. The taped statement shows the same. Genuine remorse is a "particularly compelling" mitigating circumstance. Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989).

Mr. Henry was a hard worker. Roger Zimmerman, superviaor at Cloth World, testified that he had a lot of common sense, and could group tasks and do them well. R1334. He was considered for promotion to assistant manager. R1338. He worked more than 40 hours a week even though ha was only paid for 40 hours of

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[27] It may be that the state will argue that the court could have rejected the circumstances discussed here. The point is, however, that the trial court could have found them had it applied the proper standard for mitigating evidence.

work, R1342, and did a very nice job. R1345. Being a hard worker is a recognized mitigating factor. See Fead v. State, 512 So.2d 176, 179 (Bla. 1987), McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982), and Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988).

Mr. Henry's positive intelligence and personality traits conetituted a nonetatutory mitigating circumstance. McCampbell. These factors reflect a potential for rehabilitation, another recognized nonstatutory mitigating circumstance. See Cooper v. Dugger, 526 So.2d 900, 902 (Fla. 1988) ("a defendant's potential for rehabilitation is a significant factor in mitigation"). His cooperation with the police is another mitigating factor. See Bell v. Ohio, 430 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1977), and Waehinaton v. State, 362 So.2d *650* (Fla. 1978) (rejecting surrender to police as mitigation where defendant surrendered only after fellow perpetrators were caught, but writing that eurrsnder to police will be mitigating circumstance in appropriate case) and Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (defendant'e voluntary surrender to authorities). Hie lack of a history of violence is yet another mitigating factor. See Perry v. State, 522 So.2d 817, 821 (Fla. 1988).

The failure to apply the correct standard resulted in failure to consider a wide variety *of* mitigating evidence apparent on the record. Had the court applied the correct standard, it may have found those additional circumstances. Further, as shown below, the trial court's findings regarding the aggravating circumstances were flawed. Mr. Henry is entitled to a sentencing hearing since it is not clear that the trial court would have imposed the death penalty after correctly considering and weighing the aggravating and mitigating factors. Use of the unconstitutionally high standard precluded Consideration of mitigation in violation of the teachings of Hitchcock v. Dugger, 107 S.Ct. 1821 (1987).

2. Waiver of mitigation

a. What happened below

Mr. Henry was absent at the start of the penalty phase proceedings when, out of the presence of the jury, defense couneel maid he believed Mr. Henry was

going to testify about his military record. R2548. He also said that he had "subpoenaed, in spite of my client's wishes, certain witnesses that I feel might present some evidence that may work in mitigation also, although not statutorily [sic] circumstances, but other circumstances that could be considered by the jury." R2548. He said if these persons failed to appear, "it's not desired to aeek rulee to show cause and force them to come in here." R2548-49. He gave the prosecutor a confidential psychological report, but maid he did not feel it should go into evidence. R2549. Mr. Henry was then brought into the courtroom. R2549-50. After a short recess, with no prompting, defense counsel said:

> Judge, ae to the defense presentation, I've spoken with Mr. Henry with regard to three areas. The first area that Mr. Henry was a little surprised at wae he had given me a list of the witnesses, the witnesses' names were Shirley Johnson, Sonia Johnson, Martha Brinson, Carolyn Ford and Elizabeth Kyle.
>
> In fact, Mr. Henry indicated to me several days ago that he did not wish for me to subpoena theee people and [sic] if they were not willing to *come* in voluntarily.
>
> I took it upon myself to go ahead and issue subpoenas and have service on certain witnesses. I don't see any of those witnesses here in the court today and I indicated to Mr. Henry that if we wanted them here, I would move for a continuance and move for a rule to show cause.
>
> Mr. Henry's position still remains, he's angry at me for subpoenning [sic] them, he doesn't feel that I ehould have done that because hie wishes were not to.

R2550-51. Defense counsel questioned Mr. Henry about thie, and Mr. Henry concurred. The judge told Mr. Henry that he would be willing to force the attendance of the witnesses, and Mr. Henry turned down the offer. R2552-53.

Defenee counsel then stated:

> The second issue that Mr. Henry and I discussed wae a little more difficult, and that wae the issue of a report written by Doctor Trudy Block that was done as a confidential report that Mr. Sidney Solomon, who's Mr. Henry's original attorney, had requested,
>
> Although that report contains same language that might, in fact, be favorable towards certain mitigating circumstances, I advised Mr. Henry that that report, in fact, contains some information that would also -- I would consider devastating as to the facts of the case as to possibly the aggravating circumstances and to the jury's view of him when determining whether or not to recommend life imprisonment or death by electrocution.

It was my advice that we not call Doctor Block.

R2553. Defense counsel obtained from Mr. Henry a waiver of the right to call Dr. Block. Aeked whether he wanted to testify, Mr. Henry replied: "Not really." R2554. Couneel continued to question Mr. Henry, eliciting testimony that counesl had advised him to testify about his military background, but that he did not desire to testify. R2554-55. Asked for a reason, he replied: "Just reason for myself. That's all." R2555. The prosecutor said he wanted Mr. Henry questioned as to whether he was competent to make the decision, and whether it was an intelligent, knowing decision not to call the witnesses. R2555-56. The judge said the matter might be covered by the attorney-client privilege, and he did not think it could compel Mr. Henry to identify what the witnesses would say if it were confidential. R2556. Defense counsel said:

> Judge, so the record is clear, as far as what we've done on the record with Mr. Henry, that was with regard to preserving the record and was in no way intended as a waiver of all of our conversations or attorney/client relationship in this case, I think as the Court ha0 accurately perceived.
>
> Ae far as what these witneaees who testified to, I've just spoken with Mr. Henry and he's indicated to me that at this point in time, he does not wish to discuss their testimony or why he gave me their names or anything along thoee lines. So, I have to remain mute as far as those issues are concerned,

R2557. The trial court questioned Mr. Henry as to whether he understood or had an idea as to what the witnesses might be able to testify to, and Mr. Henry said that he did. R2557. Mr. Henry turned down the trial court's offer to put off the hearing so that hie attorney could get the witneesee in. R2557-58.

Curiouely, Mr. Henry was placed under oath and questioned again. We told the court he did not wish to have the witnesses called, and would not take the stand. R2559. Asked if there was anyone he wanted to have present to testify, and he said there was not. R2560. No evidence was preeented during the sentencing proceeding.

when the case came up for sentencing by the judge, defense counsel said:

> Judge, prior to proceeding in this matter there is one thing I'd like to put on the record, I did attempt to contact several of Mr. Henry's relatives, people who are listed to come in and speak to the Court, they declined

on that invitation.

> In discussions with Mr. Henry I was informed by him that he did not wish for me to issue subpoenae to require there [sic] attendance here in Court, that is what occurred at the time of the advisory phase, in fact, I did issue subpoenas which they do not respond to.
>
> Mr. Henry was not happy with actions in eubpoenaing them to come in. His feeling was that if they didn't want to come in voluntarily they could not and I told him that I could come in and ark the Court to issue a rule and have them come in, but he did not wieh that.
>
> Robert, is that a fair and accurate statement?

R2679-80. Mr. Henry replied in the affirmative to the last question.

b. Applicable law

The Constitution does not permit a consent judgment to death. Goode v. Wainwright, 704 F.2d 593, 600 (11th Cir. 1983). The action of the eovereign in taking the life of a person differs dramatically from any other legitimate state action, so that it is of vital importance to the community that any decision to impose death be based on reason rather than caprice or emotion. Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

Counsel in a capital case has a duty to make a thorough investigation respecting penalty phase evidence. Prevailing ethical standards provide that this investigation should be conducted regardleas of any initial assertion by the client that mitigation is not to be offered. Guideline 11.4.1.C, ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases. see also Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986), (condemning failure to investigate mitigation at client's request). Cf. Chambers v. Armontrout, 885 F.2d 1318 (8th Cir. 1989) (attorney violated sixth amendment and ethical duty by failing to investigate viable self-defense issue even after obtaining written waiver of defense by defendant). Strategic and tactical decisions are the exclusive province of counsel after consultation with the client except as to the following matters: the plea to be entered, whether jury trial is to be waived, and whether the client will testify. See Jones v. Barnes, 463 U.S. 745, 75 S.Ct. 3308, 77 L.Ed.2d 987 (1983). But waiver of substantial rights in capital cases usually must be done by the defendant. See Harris v.

State, 438 So.2d 787 (Fla. 1983) (waiver of lesser included offenere), Waiver of an important constitutional right must not be done in a vacuum. The choice must be an informed one, with the defendant fully aware of the consequences. Courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in their loss. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

The lawyer-client privilege (which is inherent in the constitutional right to counsel, United states v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981)) is set out in section 90.502, Florida Statutes. Section 90.502(2) provides that it is the client's privilege to bar the dieclosure of attorney-client communications. The Law Revision Counsel Note to subsection 3 states that the privilege and its exerciee "is firmly assigned to the client." The Note to subsection 2 states that the privilege "belongs to the client." Although subsection 3(e) states that the lawyer's authority to claim the privilege is presumed In the absence of contrary evidence, it does not provide for any presumption in favor of the lawyer's waiver of the privilege, It stands to reason that, if the privilege belongs to the client, it cannot be waived by the attorney without express authorization by the client. Mr. Henry concedes that in Tucker v. State, 404 So.2d 1299 (Fla. 4th DCA 1986) the court held that couneel can waive the lawyer-client privilege on behalf of the client. He eubmite that cam was wrongly decided in view of the foregoing. In any event, Tucker was not a capital case. In a capital case, waiver of a constitutional right (and especially one pertaining to the right to counsel) must be made by the defendant. Cf. Harris.

There ia a conflict of interest when counsel serves adverse interests. See Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) nnd Cuvler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). The essence of the sixth amendment right to effective assistance of counesl is privacy of communication with couneel. United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981) (citing Glasser). Since the judge is the eentencer under Florida law, it is improper for a defense attorney to emphasize to the judge that there is no mitigation, and otherwise make remarks adverse to the defen-

dant's interests which might affect the sentencing decision. See Douglas v. Wainwright, 714 F.2d 1532, 1557 (11th Cir. 1983). The trial court must inquire where the record discloses a conflict of interest on the part of defense counsel. See Cuyler v. Sullivan, 446 U.S. at 345-347, and Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed. 220 (1981) (court, sua sponte, noted possible conflict of interest, and remanded for determination if conflict existed).

This Court has not directly addressed whether counsel, acting on the defendant's instructions, can waive mitigation. It has, however, held that the defendant can invoke the right to self-represent and then not present mitigation. See Hamblen v. State, 527 So.2d 800 (Fla. 1988) (upholding death sentence, but noting cases from other jurisdictions holding it improper for counsel to comply with client's wish that no mitigation be presented).

c. **Discussion**

If Hamblen was correctly decided (and Mr. Henry argues that it was not, relying on the reasoning sat out in the dissenting opinions in that case), it repreeente the outer edge *of* the "right" to use the state as a vehicle for suicide by use of the right to self-representation. Hamblen does not relieve counsel of the duty to investigate and present mitigation.

The record shows that there was no independent investigation of mitigation. The entire investigation consisted of asking the client for the names of some people, and then epeaking with them on the telephone. Counsel set about waiving the lawyer-client privilege in diecussing with the court, out of him client's presence, confidential communications, and gave the prosecutor a psychological report covered by the lawyer-client privilege. Later, in Mr. Henry's presence, but without hie waiver of the lawyer-client privilege, counsel diecusaed the confidential psychological report, indicating to the judge that it contained "devastating" evidence respecting aggravating circumstances. R2553. Also in Mr. Henry's presence, but without a waiver *of* the privilege, he discussed confidential communications regarding calling witnesses, and told the judge that Mr. Henry was angry at him. R2550-51. When the trial judge pointed out that the lawyer-client privilege was implicated, counsel made the bizarre

response that he was not waiving the privilege, but was only "preserving the record." R2557. In the same breath in which he waa denying waiver of the privilege, he further diecussed his conversatione with Mr. Henry. Id.

There was no reason to breach the lawyer-client privilege, except perhaps to advance counsel's own interest against a subsequent collateral claim. Thus, he wae serving his own interests rather than those of the client. The trial judge did not inquire whether Mr. nenry was aware that the lawyer-client privilege wae being breached, and did not inform him that he had a right to prevent the breach. The judge was confronted with a situation in which counsel showed unfamiliarity with the nature of the mitigation proceaa. Defense counsel was apparently unaware that the testimony of the state's witness Detective Corpion on the motion to suppress raepecting Mr. Henry's genuine remorse was admissible as mitigation, and no one told Mr. Henry of this, so that there wao no valid waver of this important mitigating evidence. Further, nobody told Mr. Henry (so that there was no valid waiver) that testimony about his work habits wae important mitigating evidence. Counsel's remarke respecting the psychological report reflect that there was apparently psychological mitigating evidence, and no one made clear to Mr. Henry that the expert could not be compelled to testify an cross examination concerning Mr. Henry's version of the killinga under Parkin v. State, 238 So.2d 817, cert. denied 401 U.S. 974, 91 S.Ct. 1189, 28 L.Ed.2d 322 (1971). No one pointed out to Mr. Henry (for no one seemed to know) that evidence of positive character traits such as the record discloses would also be a source of mitigation. No one pointed out (for no one seemed to know) that his lack of a history of violence and his cooperation with the police were mitigation.

Under the unique facts of this case, where defense counsel ceased to act as an attorney, failed to make any independent investigation of mitigating evidence, failed to inform Mr. Henry af valid mitigation apparent on the record (but not disclosed to the jury as valid mitigating evidence), and sought to serve his own interest rather than that of his client, the resulting death sentences are illegal. The judge should have found out whether Mr. Henry wanted

to continue to be represented by counsel, and, if he did, ehould have had the attorney perform hie duty of investigating and presenting mitigation.

3. Defense requested jury inetructions

A trial court judge has the duty to instruct the jury on the law of the case. Fla.R.Crim.P. 3.390. The eighth amendment requires a higher standard of definiteness than does the Due Process Clause with respect to jury instructions in capital cases. See Maynard v. Cartwright, 108 S.Ct. 1853 (1988). Jury instructions which preclude the consideration of mitigating evidence are improper. Hitchcock v. Dugger, 107 S.Ct. 1821 (1987).

a. Mr. Henry's proposed jury inatruetion number 8 reads as follows:

> With regard to your. decision to recommend life or death, the Court hereby instructs you that there is nothing which would suggest that the decision to afford an individual Defendant mercy violates our Constitution. You are empowered to decline to recommend the penalty of death even if you find one or more aggravating circumstances and no mitigating circumstances.

R2889.

It appears that the court denied this instruction on the ground that counsel could argue it for the jury, and that argument was an adequate substitute for the inatruetion. See the discussion at R2602-2604 and 2605-2606.

The requested instruction is a correct statement of the law. The death penalty is not always called for even where there are aggravating circumstances and no mitigation is found. See Wilson v. State, 493 So.2d 1019 (Fla. 1986) (death penalty dieproportionate in case of domestic violence even where trial caurt properly found two aggravating circumstances and no mitigating) and Rembert v. State, 445 So.2d 337 (Fla. 1984) (death sentence improper where one aggravating factor and no mitigating). accumulation of aggravating factors is not enough: they must-be "sufficient" to warrant the death penalty. §921.141(3)-(a), Fla. Stat. Mercy is a legitimate consideration for the jury in capital sentencing. See Parka v. Brown, 860 F.2d 1545, 1552-58 (10th Cir. 1988). Argument by counsel is no substitute for correct jury instructions. Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981).

The trial court erred by failing to instruct on this issue. The juror6 had

been instructed in the guilt phase that sympathy could play no role in the verdict. R2865. They could not know that thie instruction did not carry over into the penalty phase. The refusal to give the requested inetruction on the role of mercy necessarily curtailed the jury's consideration of thie important issue. Hence, the trial court's error was prejudicial under the teachings of, e.g., Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). Admittedly, this Court rejected an identical instruction in Mendyk y. State, 545 So.2d, 846, 850 (Fla. 1989), writing that "there is no requirement that a jury be instructed on its pardon power." Mr. Henry submits that Mendyk wae wrongly decided on thie point. Apparently Wilson, Rembert, and Parke were not brought to this Court's attention. The jury must be instructed on the law. The law is set out properly in the inetruction. Hence the instruction should have been given.

b. The trial court also denied requested jury instruction number 6, which waa as follows:

> The death penalty is warranted only for the moat aggravated and unmitigated of crimes. The law does not require that death be imposed in every conviction in which a particular eet of facts occur. Thus, even though the factual circumstances may justify the aentence of death by electrocution, this does not prevent you from exercising your reasoned judgment and recommending life imprisonment without eligibility for parole for twenty-five (25) years.

R2891. Again, the trial court refused to give thie inetruction on the ground that it could be covered by the argument of counsel. R2602-2603.

This Court's decision in Alvord v. State, 322 So.2d 533, 540 (Fla. 1975) amply justifies this instruction. The refueal to give the inetruction constitutes reversible error. The other instructions do not make clear that under Florida law the trial jury may vote for life imprisonment even where factual circumstances could justify a death sentence. Hence, the instructions given precluded consideration of this important area by the jury. In Mendyk thie Court disapproved of thie instruction. Mr. Henry contende that Mendyk was incorrect for the reasons set out regarding the preceding inetruction.

c. The trial court aleo refueed to give defenae requested instruction number 5 which is as follows:

> If you find, more likely than not, that the Defendant did not possess a deliberate intent to kill, you are to consider that factor as a mitigating circumstance.

R2892. The trial court refused to give this inetruction saying that the jury had convicted Mr. Henry of premeditated murder. R2602.

The trial court simply stood the law on its head. A jury instruction muet be given if any evidence supports it. E.g. smith v. State, 424 So.2d 726 (Fla. 1982). The theory of defense was that, at most, Mr. Henry was a participant in the felonies which resulted in the killings, so that he was at moet only guilty of felony murder. The jury's verdict does not neceesarily reject this claim. It may be that the jury found him guilty only of felony murder. Hence, the trial court's reason for refusing the requested inatruction was improper.

The refuaal to grant the instruction constitutes revereible error. In Lockett v. Ohio, 438 U.S. 586, *608*, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the death sentence was set aside where the death penalty atatute did not provide for full consideration of the mitigating factor of lack of intent *to* kill. Here, the refusal to grant the requested inetruetion, especially when coupled with the improper instruction that felony murder,[28] without more, wae an aggravating factor, gave the jury no clue that lack of intent to kill was a mitigating.

d. The trial court refused to grant defense inatruction number 2 which reads as follows:

> The State may not rely upon a single aspect of the offenee to establish more than a single aggravating circumstance. Therefore, if you find that: two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance.

R2893. The trial court gave the following reason for denying this inatruction:

> I see no cases cited and I'm not sure how it would apply in this case at all. I can see an argument that Mr. Ratlcoff could make and I think it is inconeistent. I would deny that proposed instruction.

R2600.

The requested jury instruction was a correct statement of the law under, e.g., Provence v. state, 337 So.2d 783, 786 (Fla. 1976). It is troubling that

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[20] See Mr. Henry's argument at point II.D.2 below.

the judge, who had Mr. Henry's fate in his hands, wae unfamiliar with thie basic principle of our capital law.[29] If, as is manifest, the trial court wae unfamiliar with thie principle of law, there is no way that the jury could have known about it. Hence, failure to instruct the jury on thie point was improper. It was prejudicial because the jury may have improperly doubled the avoiding arrest and premeditation aggravating factors. It may also have improperly doubled the financial gain and premeditation aggravating factors. It also may have improperly doubled the felony murder and financial gain aggravating factore. This Court should order a new eentencing hearing before a new jury.

Admittedly in Mendvk v. State, 545 So.2d 846, 849 (Fla. 1989) this Court found an identical instruction."not to be an entirely correct statement of the law under Garcia v. State, 492 So.2d 360, 366 (Pla.), cert. denied, 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986), and the trial court properly did not give it." The cryptic mention of Garcia apparently referred to the following at page 366 of that opinion (footnotea omitted):

> ...appellant arguee that the argument was improperly directed to the aggravating factors of heinous, atrocious and cruel, and cold, calculated and premeditated, factors that were not presented to the jury for its conaideration. We have examined the comments and agree with appellee that the comments were directed at the aggravating factor that the murders were committed to kill witnesses in avoidance of arrest and prosecution. Evidence ok comments intended to show a calculated plan to execute all witnesses can also support the aggravating factors of heinoue, atrocious and cruel and cold, calculated and premeditated. Aethe appellee points out, facts cannot be antiseptically packaged when presented to the jury.

Theee remarks in Garcia do not purport to overrule Provence. Garcia has nothing to do with the Provence principle. It stands for the proposition that the state can argue the witness elimination circumstance even where it is not seeking the premeditation circumetance. Mendvk was wrongly decided on thie issue.

B. Consideration of Aggravating Circumstances

1. Statutory circumstances found by the court

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[29] This may explain the trial court's errors in improperly doubling the aggravating circumstances, as argued elsewhere in this brief.

The prosecutor's argument an the aggravating circumstances misled the jury as to how they ehould be applied. The incorrect argument was not cured by the jury instructions, and the two combined ensured erroneous application by the jury, depriving Mr. Henry of hie right to the reaeoned judgment of his peers as to whether he should be condemned to death. Great care must be taken in defining aggravating circumstances for the jury, and their incorrect application must be carefully avoided. Cf. Maynard v. Cartwright, 108 S.Ct. 1853 (1988). The opposite occurred at bar. Further, the judge's findings are erroneous. In fine, consideration of the circumstances below was a hopeless muddle. This Court should order a new sentencing hearing.

a. Felony murder.

Under Knight v. State, 338 So.2d 201 (Fla. 1976), the murder counts charged Mr. Henry with all theories of first degree murder. Hence he was charged with first degree felony murder with areon as the underlying felony. But the state abandoned this theory when the jury wae inetructad only on robbery as the underlying felony during the guilt phase. R2847. Accordingly, Mr. Henry wae acquitted of arson felony murder. Hence, uae of an arson felony murder theory violates double jeopardy under Delap v. Dugger, 890 F.2d 285, 310-311 (11th Cir. 1989) (double jeopardy bare use of felony murder aggravating circumstance where jury not instructed on felony murder theory of guilt).

In the penalty phase, the state abandoned the robbery felony murder theory. The prosecutor argued only an arson felony murder theory:

> Another aggravating circumstance that. you're gonna be asked to consider is whether the crime, and when I speak about the crime, I mean Count I, the murder -- the first degree murder of Phyllie Harris and Count II, the first degree murder of Janet Thermidor, wae during the commission of that crime, either ane of them, wae during the commission of an arson, and the defendant has been found guilty of arson and an arson took place during the commission of the first degree murder of Janet Themidor, and the first degree murder of Phyllis Harris.
>
> So, as to that second aggravating circumstance, I submit to you based on the testimony and the evidence that that: aggravating circumetance has been proven beyond a reasonable doubt.

R2629-30. The judge instructed only on an arson felony murder theory:

> The crime for which the Defendant is to be sentenced wae committed while he was engaged in the commission of the crime of Arson;

R2879.

Uae of arson as the underlying felony violates double jeopardy. Further, to let the atate abandon the arson felony murder theory during the guilt phase and then resurrect it during the penalty phase violates the teachings of Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948) (due process; etate may not switch from one etatutory theory of guilt at trial to another on appeal) and Russell v. United States, 369 U.S. 749, 768, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (Notice Clauee; prosecution may not "shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal").

The jury had no way of knowing that the prosecutor's argument and the jury instruction constituted an abandonment of the felony murder circumstance. The jury's consideration of thie circumstance could not have bean proper.

The trial court found: "This circumetance is applicable as it waa indicated in the defendant's own statement to police that he had just robbed the store and set the two victims an fire as they remained in the store." R2907.

It was improper for the trial court to find arson felony murder for the reasons set out above. Similarly it wae improper to find robbery felony murder where the prosecution abandoned that theory during the jury penalty proceeding. Hence the finding of the felony murder circumetance was improper.

There *ie* another eighth amendment problem with use of this factor at bar. An aggravating circumetance violates the eighth amendment unless it genuinely narrows the class of death eligible persons. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The felony murder circumstance does not serve thie function: it makee all who commit felony murder -- the least aggravated form of first degree murder -- eligible €or capital punishment. Hence it is constitutional only where it applies to persons convicted of premeditated murder. See Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

The felony murder circumstance, when applied to unpremeditated murder, turns a mitigating circumstance into an aggravating circumstance. Lack of premeditation is a mitigating circumetance. See Lockett v. Ohio, 438 U.S. *586*, 608, 98 S.Ct. 2954, *57* L.Ed.2d 973 (1978) (death sentence set aside where state

death penalty statute did not provide €or full consideration of, inter alia, mitigating factor of lack of intent to cause death). The felony murder inetruction at bar, especially when combined with the court's refusal to instruct on absence of deliberate intent to kill as mitigation, suffers from the vice condemned in Lockett. Because the inetruction forbade consideration of a legitimate mitigating circumstance,[30] it violated Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). Hence, this circumstance merges with the trial court's finding that the killings were cold, calculated, and premeditated, and thie circumstance should be stricken under Provence v. State, 337 So.2d 783 (Bla. 1975) (improper to double aggravating circumstances founded on same aspect of offense).[31]

b. Cold, calculated and premeditated

i. The prosecutor argued:

> ....The last aggravating circumstance that you are to consider, was this done in a cold, calculated fashion without any moral pretense or justification.
>
> Now, as I talked about also a while ago with the pecuniary gain, the robbery, could have committed a robbery that he was found guilty of, didn't have to go and do the reet.
>
> Phyllie Harrie was tied up, wrapped with material around her head, she was absolutely no threat, didn't prevent him from taking the twelve hundred and eixty-nine dollars.
>
> Janet Themidor, after that first whaok with the hammer is on the floor, defeneeleea, she was no threat. Do you remember in her declaration that he hit her on the head, ehe fell, he took the money, and he could have gone, he could have left, but he did not leave.
>
> Now, here's a situation where he had a choice to kill or not to kill, not what wae neceeeary just to rob because that wae already done. Phyllie Harris wae tied up, Janet Thermidor was defenseless.
>
> So, the force neceseary to take that money had already been done, didn't stop there, and Doctor Tate testified that Janet Thermidor was hit at leart three times on the head, she didn't know with what,

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[30] Of course the point here is not whether the evidence was insufficient to support premeditation. The point is that the jury could rationally have rejected the state's theory of premeditation and found Mr. Henry guilty only of felony murder.

[31] It appears that the trial court judge was ignorant of the Provence rule. He refused the proposed defense instruction on thie topic on the ground that he was unaware of any authority for it. R 2600. See Mr. Henry's argument at point II.D.1.d below.

> but it was coneistent with a hammer. We know it was a hammer, and Phyllis Harris was hit three times on the head. Those blows were sufficient, in and of themselves, to kill those ladies, but didn't atop there. He had a choice, and he chose to kill.. He poured a flammable substance, flammable liquid on both those ladies, consciously lit a match, and set them on fire.
>
> What could be more cold and calculating without any moral justification than those acts?

R2633-34. Thus the prosecutor's argument to the jury was that evidence, that the killings were not neceeeary to the robbery, and that they were done consciously, wae sufficient to support this aggravating circumstance.

The trial court's instruction did nothing to clarify the matter:[32]

> The crime for which the Defendant is to be eentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

R2880.

As the prosecutor knew, R2615, but the jurors did not (for neither he nor the judge told them), a heightened premeditation must be proved. Rogers v. State, 511 So.2d 526 (Fla. 1987). The state must prove "a careful plan or prearranged design to kill." Id. at 533. It appears that the degree of premeditation involved should be commensurate with that involved in execution or contract killings. See Garron v. State, 528 So.2d 353, 361 (Fla. 1988).

This Court has had difficulty in construing and applying this circumstance. See Rogers (condemning prior applications of this circumstance). Many cases show misapplication of this circumstance by trial courts. It is likely that the jury fell into similar errors when trying to apply this factor.

ii. The trial court found respecting this circumstance:

> This circumstance is applicable as evidenced by the guise [sic] which the Defendant used to Lure Phyllie Harris into the restroom and convince her to allow him to tie, blindfold and bound [sic] her. Although the Defendant was only a maintenance man and had been hired only four (4) weeks prior to the commission of this offense, upon questioning the store manager indicated that he had expressed a tremendous interest in learning about the cash register and the operations and proce-

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[32] Admittedly, the court-appointed defense attorney specifically rejected the trial court's offer to give a limiting inetruction. R 2615. Nsvertheleaa, it is clear that the prosecutor considered the standard instruction inadequate. Id. ("MR. SATZ: We'll, it's a heightened premeditation, isn't the same -- I mean, I don't care, I'm just suggesting that, if the defense objects, fine.").

> dures of the business. Notwithetanding the other theft related incidents in the Defendant's background, this preoccupation with responsibilities which are totally unrelated to the Defendant's job description appear to support the contention that at leaet the robbery if not the subsequent murders were premeditated. Certainly the element of time involved in committing these murders and the methodical manner in which they were carried out leaves little doubt of the premeditation which wae involved. A final aspect of the police investigation which wae never firmly established was the fact that the flammable liquid to douse both of the victims prior to their being lit on fire had a mineral spirit baee which wae not characteristic of any of the cleaning solvents or other compounds which were in the store. This tends to suggest that whatever this undetermined substance was, the Defendant must have brought it in from the outside with the premeditated intent of using it to commit arson. The cold and calculated manner in which the Defendant went back and forth between the sites of these murders as he accentuated the individual horror of each victim's plight and then gathered up the evidence and money and left the premises demonstrates that his actione were definitely calculated.

R2908-2909.

This circumstance "was intended to apply to execution and contract-style killings." Garron v. State, 528 So.2d 353, 361 (Fla. 1988). Substantive due process and equal protection require that a law be rationally related to its purpose. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). See also Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). These principles apply to criminal enactments. See State v. Walker, 461 So.2d 108 (Fla. 1984).

It is error to find this circumstance when the evidence is susceptible to conclusions other than that the murder was committed in a cold, calculated, and premeditated way. Harmon v. State, 527 So.2d 182, 188 (Fla. 1988). In finding an aggravating factor, the court cannot accept theories unsupported by the record. See Scull v. State, 433 So.2d 1137, 1142 (Fla. 1988).

The trial court's findings reflect doubt about this factor. Mr. Henry's interest in advancing himself in the business does not make the killing cold, calculated and premeditated. Indeed, it led the trial court to conclude only that at leaet the robbery "if not the subsequent murders" was premeditated. Speculation about the flammable liquid cannot support a finding of this circumstance. Moving back and forth showe confueion rather than calculation.

This was not an execution or contract killing. Application of this circumstance to the facts at bar etretchee the circumetance far beyond its original intent. Hence its application violates substantive due process and equal protection. Such broad application also violates the statutory and conetitutional rule of strict construction of provieions of criminal law.

Because of the speculative nature of the trial court's findings, and because the evidence does not show a contract-style, or similarly premeditated, killing, the trial court erred by finding this aggravating circumetance.

c. Avoid arrest

i. The prosecutor argued:

> The next aggravating circumetance, and the forth [sic] aggravating circumetance for you to consider is whether the first crime and the second crime, the first degree murder of Phyllis Harris and the first degree murder of Janet Thermidor was to eliminate witnesses, in other wards, prevent or avoid a lawful arreet.
>
> What that means is to eliminate somebody who's going to testify against you, and I submit to you that that aggravating circumetance, based on the testimony and the evidence that hae been aduced [sic], has been proven beyond a reasonable doubt.

R2631 (e.s.). The court's instruction tracked the language of the statute:

> The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

R2879.

There muet be "strong proof of the defendant's motive," and it muet be "clearly shown that the dominant or only motive for the murder was the elimination of the witnesses." Perry v. State, 522 So.2d 817, *820* (Fla. 1988). The mere fact that a witness is eliminated, without more, is not enough to prove this circumstance. Unfortunately, the jury had no way of knowing this. It had every reason to believe that the prosecutor's argument correctly summarized the law. It is quite likely that it fell into the same error as the judge in Perry.

ii. The trial court found concerning this circumstance:

> The Court finds that this aggravating circumstance wae proven beyond a reasonable doubt because the evidence shows the Defendant caused the deaths of Janet Thermidor and Phyllia Harris under circumstances that were clearly unnecessary to completion of the armed robbery as both victims had already been incapacitated by the Defendant and therefore the killings were clearly done to avoid

> having the victims identify Mr. Henry -- wall known to them as their co-worker ehould Mr. Henry later be apprehended for these crimes.

R2907.

There was no evidence of motive. Mr. Henry told Nurse Manganiello and the police, in statements heavily relied upon by the prosecutor, that he did not know why he had killed the women. That they knew Mr. Henry does not establish this circumstance. See Perry. This Court wrote at page 820 in Perry that there must be strong proof of motive, and it must be clearly shown that the dominant or only motive was elimination of the witnesses. See also Garron v. State, 528 So.2d 353, 360 (Fla. 1988) (striking the avoid arrest circumstance, although stepdaughter victim was on telephone with operator aeking for police when shot).

In finding an aggravating circumstance, the court cannot accept theories unsupported by the record. See scull v. state, 433 So.2d 1137, 1142 (Fla. 1988). Aggravating circumstances referring to the same aspect of the crime can constitute only one factor. See Provence v. State, 337 So.2d 783 (Bla. 1976) (felony murder and pecuniary gain). The trial court refused the requested jury instruction on the Provence rule under circumstances indicating that it did not understand the rule. The court used the same aspects of the crime to conclude that the killing occurred for the purpose of avoiding arrest and for concluding that the murder was cold, calculated, and premeditated, Hence, this circumstance should be struck. It a100 should be struck because the purpose of avoiding arrest was not proven beyond a reasonable doubt.

d. Financial gain

The prosecutor argued to the jury:

> Another aggravating circumstance, the third aggravating circumstance which you're going to consider is whether this crime, and when I say thie crime, I'm talking about Count I, the first degree murder of Phyllia Harris, and Count II, the first degree murder of Janet Thermidor, whether it was for pecuniary gain.
>
> Pecuniary gain means financial gain, and the testimony that has been aduced [sic] during the course of this trial indicated that Robert Lavern Henry, for twelve hundred and sixty-nine dollars and twenty-six cente killed Janet Therm dor and Phyllis Harris, and I submit to you, the State has proven that aggravating circumstance beyond and to the exclusion of every reasonable doubt.

R2630. The court's instruction simply tracked the language of the etatute:

The crime for which the Defendant is to be sentenced was committed for financial gain;

R2879.

This was an incomplete and misleading statement of the law. This circumstance applies only "where the murder is an integral step in obtaining some eought-after specific gain." Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988). Financial gain muet be the primary motive for the killing. See Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988). Given the foregoing, it is likely that the jury fell into the same error as the judges in Hardwick and Scull.[33]

The trial court wrote respecting this circumstance:

> This circumstance is applicable as it appears pecuniary gain was the predominant motive for these murders, although this goal could have apparently been easily achieved without the Defendant resorting to injuring or burning either of the victims. According to the store records, the Defendant was believed to have taken $1,262.92 in cash ae a result of this offense.

R2907.

This finding is contrary to the Hardwick. The trial court found that the taking could have been easily achieved without the killinge. Hence, the killings were not integral steps in obtaining the money.

The only evidence concerning motive came from Mr. Henry's statements, upon which the proeecutor so heavily relied, in which he said that he did not know why he took the money, he had plenty of money. The court cannot rely on speculation in applying aggravating circumstances. Scull. The court's wording of its finding ("it appeare pecuniary gain was the predominant motive") shows uncertainty and speculation. The finding of this circumstance muet be stricken.

Further, this finding is canceled by the finding that the killing was committed for the purpose of avoiding arrest. Ae already noted, except where a law enforcement officer has been killed, the avoid arrest factor applies only where the dominant or only motive was the elimination of witnesses. Perry. But here the trial court found that the dominant motive was financial gain.

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[33] The prosecutor made the same mistake. He conceded to the jury that the killings were unnecessary to (and therefore not integral to) the robbery. R. 2631, 2633-34. There wae no way for the jury to know that this constituted a concession on this aggravating circumetance.

Additionally, thia circumstance merges with the felony murder circumstance where the trial court relied on the fact that there was a robbery in finding the felony murder aggravating circumetance,[34] See Provence.

e. Especially wicked, evil, atrocious or cruel

The trial court wrote:

> In regards to Phyllis Harris, the most wicked perversion which may have occurred, if indeed one can be singled out, is imagining what was going through the Defendant'a mind as he coddled Ms. Harris into believing that he wae protecting her from some bogus armed robbers while knowing full well that after tying, bounding [sic] and blindfolding her he intended to repeatedly crush her skull with the blower of a hammer and then set her on fire. Without question, thia constitutee an especially wicked, evil, atrocious or cruel act.

R2908. This finding was improper.

A serious problem in discussing thie circumstance is that the cases are "all over the map." Nevertheless, this Court hae written that, with respect to thie aggravating circumstance, the defendant's mindeet is never at issue. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1984).[35] Under Pone, the court's finding regarding Ma. Harris, based entirely on the defendant's mindeet, was improper.

The evidence was that Ms. Harris cooperated in letting herself be tied up, although she complained that she was being bound too tight. After she was blindfolded, she wae hit her on the head with a hammer with great force, and later set on fire. Although the evidence was that ehe was alive as of the time that she was set on fire, it is most likely that she wae unconscious at that time, since the hammer blows to the head were so forceful as to epatter the walls with blood. She was probably rendered unconscious immediately.[36]

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[34] As shown above, the state abandoned its theory of arson as the underlying felony at the guilt phase of the trial..

[35] Admittedly, in Mills v. State, 476 So.2d 1 2, 178 (Fla. 1985), thie Court wrote that thia circumstance focuses on the "intent and method" of the defendant. This radical departure from Pope points out the constitutional problems with the application of this aggravating circumetance as discussed at length in point: II.T.4.b below.

[36] The medical examiner testified that one of the hammer blows was delivered with sufficient force to drive a sizable portion of the skull into the brain. R 1661.

This circumstance is raeerved for the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Brown v. State, 526 So.2d 903, 906 (Fla. 1988). See also Cook v. State, 542 So.2d 964, 970 (Fla. 1989) ("This aggravating factor generally is appropriate when the victim is tortured, either physically or emotionally, by the killer.") It does not apply where the decedent is unconscious or semiconscious. See Cochran v. State, 547 So.2d 928, 931 (Fla. 1989) ("Nor can the defendant's acte after the victim is unconacioua support this aggravating circumstance.") The crime must be "committed so as to cause the victim unnecessary and prolonged suffering." Brown at 907. In determining the existence of an aggravating circumstance, the trial court cannot accept theories unsupported by the record, See Scull v. State, 433 So.2d 1137, 1142 (Fla. 1988) and Hamilton v. State, 547 So.2d 630 (Fla. 1989).

From the foregoing, it was improper to find that the killing of Me. Harris was especially wicked, evil., atrocious or cruel. It appears that she was quickly or instantaneously rendered unconscious by the hammer blows, so that the subsequent burning plays no part in application of this factor to her death.

2. Nonstatutory aggravation

a. Guilt phase

As shown at point I.G of this brief, the guilt phase waa infected with improper evidence and argument eliciting sympathy for Ms. Themidor, Ma. Harris, and their families. The prejudice carried over into the penalty phase, voiding Mr. Henry's etatutory and constitutional rights to a fair eentencing proceeding. Mr. Henry incorporates into this point the argument contained in point X.G.

b. The PSI

After the jury's penalty verdicts were received, the trial court ordered the preparation of a pre-sentence investigation report (PSI) at the request of defense couneel. When the case came up for sentencing, the trial court warmly praised the report's author for his thoroughness. R2681, 2690.[37]

[37] The record does not reflect (and it seems unlikely) that the probation officer attended the trial. He obviously did not have a transcript of the trial, since the transcript was not prepared until months later. Apparently, his knowledge about the facts of the case came entirely from police officers, state witnesses, and the families of Ma. Thermidor and Ms. Harris.

The PSI contains an entire section titled "Victim Impact." It states:

VICTIM IMPACT:

Extent of Victim's Loss or Injury: According to the Medical Examiner's report, both of the victims, Janet Thermidor and Phyllis Harris, died as a result of the multiple injuries they auetained in the commission of these offenses.

(Continued)

Victim's Statement:

Mrs. Vera Cox, the mother of Janet Thermidor, expressed her feelings that the defendant should be punished for what he has done and ehould never be freed to do thie type of thing again. Mrs. Cox recommends that the subject receive the Death Penalty for his responsibility in her daughter's death.

Mr. Bert Harris, the husband of Phyllis Harris, stated that he certainly feels that the jury's recommendation of the Death Penalty is appropriate in this case as the defendant had obviously planned out what he was going to do and waited for the opportunity to commit this crime. Mr. Harris was particularly inceneed by the burning process which he describes as totally unnecessary. He stated that he and hie rife had previously discussed the hypothetical possibility that the store could one day be robbed, and ehe had agreed that ahe would willingly give up the money under those circumstances, and believes Janet Thermidor would have also. He also stated that he found it outrageous that the defendant has demonstrated no remorse or emotion for the appalling act which he has committed.

Extent of Victim's Lobs or Injury: (Continued)

Funeral expenses for Ma. Themidor totalled $4,460.00. Should the defendant be sentenced to terms of Life in prison and eventually be eligible for work Release, said payments should be made to the victim's mother, Mrs. Vera Cox, at 218 S.W. 3rd Street, Deerfield Beach, Florida.

Similarly, restitution in the amount of $8,048.00 for the funeral and transportation expenses involved in returning Me. Harris' body to her hometown of Spirit Lake, Iowa should be made to her husband, Mr. Bert Harris, at 1102 Southeast Third Street, Apt. #2, Deerfield Beach, Florida.
(Both victims' families have been referred to the Victim Crime Compensation Fund by the Broward County State Attorney's Office far possible reimbursement of these monetary consideratione.)

SR88-189.

The PSI was a vehicle for the expressions of government agents in favor of the death penalty, Virtually all of these invoke victim eympathy:

Deputy Fire Chief, Jim Ray of the Deerfield Beach Fire Rescue Unit, stated "This is as grotesque of a thing a0 I've ever been involved in. It is unimaginable that one human being could do thie to another. At what paint one person could so totally disassociate himself aa to be capable of committing such acts is totally beyond me. I definitely feel the Death Penalty is appropriate in this case."

Miles McGrail, the first firefighter at the scene, stated that he had to obtain psychological counseling to help him deal with this

experience and still goee to sleep thinking about it a year later. He atated that he feels the defendant deserves exactly what he gave the victims, the Death Penalty.

Juan Montalvo, of the Deerfield Beach Fire Rescue Unit, expresesd his sympathy for the families of the victime and stated that anyone capable of committing such cruel acts as these ehould definitely get the Death Penalty.

Mr. Michael Balke, Regional Manager for Cloth World, stated that even a year later all employees are still frightened about what happened and it has been very difficult to find people willing to work until closing time due to their paranoia. He recommends that the Court follow the Jury's recommendation and impose the Death Penalty upon the defendant.

SR195-98.

Another section, titled "Court Officials Statements," contained:

State Attorney: None: Attached:

Mr. Michael Satz stated that the act was despicable and that the photographs and facts of the case speak for themselves. As the Jury recommended, he feele that the Death Penalty is appropriate and stated that he will never know how someone could do that type of thing to another human being.

Law Enforcement: None: Attached:

Detective Andrew Gianino stated that he feels the defendant's actions were obviously not done at the spur of the moment as the offenses demonstrate that they were premeditated in nature. We further stated that for the lack of mercy which the defendant had shown for the victims and his lack of remorse throughout the entire investigation and the trial, he feels the Death Penalty is the only appropriate sentence in this caee.

Detective Sergeant Thomas Murray of the Deerfield Beach Police Department stated that in his thirteen (13) years of police work this wae the only case he has ever had reoccurring nightmares about. He expressed his feeling that he ham never seen or heard of a case that he felt was more deserving of an eye for an eye type of eentencing.

SR198.

The monetary losses were also emphasized:

Restitution: NO: YES; X (Specify amount, name, address, and how payable) As previously stated, Mrs. Vera Cox incurred funderal expenses of $4,460.00 for her daughter, Janet Thermidor. Should the defendant ever be eligible for Work Release if sentenced to Life in prison, said payments to Mrs. Cox should be sent to Mrs. Cox at 218 Southweet Third Street, Deerfield Beach, Florida.

Mr. Bert Harris, the husband of Phyllis Harris, incurred expenses totaling $8,048.00 of which $4,048.00 were direct funeral expenses and $4,000.00 in travel expenses to have hi0 wife's body returned to her hometown of Spirit Lake, Iowa. Said payments ahould be sent to Mr. Harris at 1102 S.E. 3rd Street, Deerfield Beach, Florida.

The Cloth World etore incurred monetary losses totaling [sic] $26,262.92 including $16,000.00 in fabric, other merchandise and repairs, $9,000.00 in sewing machines and $1,262.92 in caeh. Said Restitution payable to Cloth World would sent to 330 South 60th Avenue, Hallandale, Florida.

SR199.

The PSI concluded with the following description and recommendation:

The instant offenses involve the premeditated, calculated and incredibly sadistic murders of two (2) of the defendant's innocent female eo-workers at a fabric store after closing hours on the evening of November 2, 1987. By the defendant's own admission to the police, he had deceived one of the victims, Phyllis Harris, age 53, into believing the etore wae in the procese of being robbed by armed men resulting in her allowing him to blindfold, tie and bound [sic] her to the stall in the men's rest room of the bueinese. The defendant committed the most atrocious and brutal breach of this victim's truet imaginable by returning a ehort time later and not only striking the seated, bound and blindfolded victim repeatedly in the back of the head with a hammer but then ghouliehly returning a ehort time later to douse her body with a flammable liquid and then setting her on fire and burning her beyond physical recognition.

The cold-blooded and calculated manner in which the defendant carried out these acts demonstrates a total lack of remorse or reconsideration [sic] of his actione as well as an indescribable insensitivity to both the physical and emotional suffering he inflicted upon these victime. The defendant first bound and blindfolded Ma. Harris in the men's rest room, went and obtained a hammer from the storage room and proceeded to the office area which was approximately 50 feet from the men's rest room to strike the unsuspecting Ms. Harris at least twice in the back of her head. As if this were not enough pain to have inflicted upon the victims, and deepite the fact that he had already robbed the store, he then methodically made his rounds once more. He returned to Ms. Thermidor in the office and doueed her with a flammable liquid and eef her on fire and then returned for the third time to the men's rest room where the brutally beaten, bloodied and bound Me. Harris eat helpleee, hopeless and perhaps lifeless on the floor. He than experienced his grand finale of these disgusting and deepicable displays of brutality and human degradation by dousing her with the flammable liquid, lighting another match, and setting her on fire also.

SR200.

c. The prosecutor's argument to the judge

When the case came up for before the judge for eentancing, the prosecutor, a member of the Bar for over 20 years[38] and a distinguished elected public

[38] It cannot be claimed that the prosecutor was ignorant of the law governing capital cases. His argument throughout the penalty phase charge conference is filled with citations to case law, and at record page 2619 he refers to his personal experience in capital litigation and familiarity with Eleventh Circuit precedents.

official, weighed in heavily with his personal opinions about the came. Hie initial argument covers 67 lines of transcript, R2681-84, much of it involving discussion of eentancing on the non-capital offensea. Yet 21 line0 -- almost one-third of his argument -- is devoted to personal opinions:

> These crimes are most despicable. I can't think of anymore [sic] heinous or atrocious or cruel set of circumatancee in this particular case where two defenseless ladies ware hammered on the head, one tied up and then set on fire to be burned alive. I just can't think of anymore [sic] gruesome set of circumstances, so cold and calculating and for the obvious reasons to eliminate these people, who Mr. Henry had worked with and from individuals that figured he just did it for greed, for money, I just can't think of anymore [sic] aggravating set of circumstances than thie case.
>
> I certainly agree with the juries [sic] finding of guilt and certainly agree with the recommendation as to the death penalty.
>
> Weighing all capitol [sic] cases, I can't think of a more grievous one than that one. We would recommend, as the jury recommended, as to Count I and ae to Count II the death penalty as to each one of those counts, Your Honor.

R2683.

d. Applicable law

It is fundamental error to permit presentation of nonstatutory aggravating factors. Elledae v. State, 346 So.2d 998 (Fla. 1977). The character of the victims and their families is an improper sentencing consideration in a capital came. Booth v. Marvland, 107 S.Ct. 2529 (1987), Grossman v. State, 525 So.2d 833 (Fla. 1988). Admission of evidence about the killing's effect on othere violates Elledae. Walton v. State, 547 So.2d 622, 625 (Fla. 1989). Evidence of its effect on the decedent's co-workers and on law enforcement violate Booth. Jackson v. Dugger, 547 So.2d 1197, 1999 (Fla. 1989). Arguments concerning the personal beliefs of police officers and the prosecutor are fundamental error in appropriate circumstances. Rvan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984).

Mr. Henry anticipates argument that, because there was no objection to the foregoing, review is foreclosed by Grossman and its progeny. A review of Grossman, however, reveals that this Court there refused to apply Booth retroactively absent an objection in the trial court. See the discussion in Jackeon v. Dugger, 547 So.2d at 1198-99. In South Carolina v. Gathers, 109 S.Ct. 2207 (1989) the use of victim sympathy evidence resulted in the reversal of the

death sentence even though there was no objection to the evidence.

e. Discussion

Thie case is full of improper evidence, argument, and innuendo eliciting sympathy for the decedents, their families, the state's witnesses, and state agents. Such evidence has been condemned in Booth and numerous Florida cases. The PSI contains exactly the sort of material held to require reversal in Booth. The trial judge's warm praise of the PSI's thoroughness indicates that he thought the matters set out so extensively in it were of great importance to hie sentencing decision.[39] Mr. Henry is entitled to a new sentencing hearing.

3. Photographs

Mr. Henry has argued at point I.H above that the trial court erred by allowing into evidence various photographs during the guilt phaee of the trial. Mr. Henry incorporates into this paint the argument made there and adds:

Even if it wae not error to admit the photographs in the guilt phase, their use during the penalty proceeding requires resentencing. Before the jury, the praaecutor used the photographs to make out his argument that the killings were heinous, atrocious, or cruel:

> Now, I can stand up here and go through certain adjectives in describing what happened to Janet Thermidor and Phyllis Harris. I submit to you that a picture is worth a thaueand worde, better than I could ever describe, and yau have viewed thaee pictures, they're here for your consideration to view once again as to what happened to these ladies.

R2632.

Thie argument was improper. The prosecutor may not invite the jury to imagine the decedent's final pain, terror, and defenselessness. Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985) and Garron v. State, 528 So.2d 353, 358-59 (Fla. 1988). Evidence properly admitted in the guilt phase may not be used improperly in the sentencing phase. See south Carolina v. Gathers, 109 S.Ct. 2207 (1989) (death sentence improper where prosecutor ueed items, admitted in guilt phase, in improper manner during penalty phaea). The prosecutor's

[39] Indeed, the trial court went so far as to adopt the probation officer's curious use of "bound" for "bind" in hie sentencing order. Compare R 2908 ("to allow him to tie, blindfold and bound her") with SR 200 ("allowing him to blindfold, tie and bound her").

argument tended to arouse the passions of the jurors. The injuries sustained by Ms. Harris after she was rendered unconscious were irrelevant, as was Ms. Thermidor's appearance after being treated at the hospital. The prosecutor's argument was improper and prejudicial. It highlights why great care should be taken in the admission of such photographs in capital caaee.

C. Accumulation of Errors

It may be that this Court will find some or all of the guilt issues raised in this brief are harmless. Mr. Henry argues that even if they were harmless as to guilt they were not harmless as to penalty. Mr. Henry submits that his statements to the police and Nurse Manganiello were independently prejudicial ae to penalty. In arguing that the killing of Ms. Thermidor was heinous, atrocious, or cruel, the prosecutor relied on Mr. Henry's statement that Ms. Thermidor begged him not to burn her. R2633. Mr. Henry's statements were the only source of much information about how the crimes were committed. They had a powerful effect in reducing Mr. Henry's chances of a life sentence.

Ms. Thermidor's statements, especially her taped statement, had a devastating effect during the penalty phase. It would be impossible €or the jurors, hearing the tape, not to feel great sympathy for the woman. Further, the statements served to support several of the aggravating circumstances.

The failure to instruct on duress as a defense carried over into the penalty phaee -- the jury had no way of knowning that duress could knock out or substantially diminish the aggravating circumstances ueed at bar.

The false argument as to when the amount stolen was known, and the improper argument about the Marine Corps, went to negate the theory of defense, which would have eliminated or diminished the aggravating circumstances.

The prejudicial effect of other guilt phase errors is discussed elsewhere in thie brief.

The guilt phase errors deprived Mr. Henry of hie etate and federal constitutional rights to be free of cruel and unusual punishment.

D. Constitutionality of the Florida Death Penalty Statute

A capital sentencing scheme is constitutional only to the extent that it

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

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

1. The jury

a. Standard jury instructions

The jury playa a crucial role in capital eentencing. Its penalty verdict carries great weight. Nevertheless, the jury inatructione are such as to assure arbitrariness and *to* maximize diocretion in reaching the penalty verdict.

i. Heinous, atrocious, or cruel

Pope v. State, 441 So.2d 1073 (Fla. 1984) bars jury instructions limiting and defining the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application of in violation of the dictates of Maynard v. Cartwright, 108 S.Ct. 1853 (1988). Since, as shown below, this Court has been unable to apply this circumstance coneistently, there is every Likelihood that juries, given no direction in its use, apply it arbitrarily and freakishly.

ii. Cold, calculated, and premeditated

The same applies to the "cold, calculated, and premeditated" circumstance.

The etandard instruction simply tracks the statute.[40] Since the statutory Language is subject to a variety of conatruetione, the absence of any clear etandard instruction ensures arbitrary application. Mr. Henry is aware that this Court has written that Mavnard doee not apply to this aggravating circumstance. In Dauuherty v. State, 533 So.2d 287 (Fla. 1988), this Court wrote at page 288:

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

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

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

In Brown v. State, 15 F.L.W. S165, 5166 (Fla. Mar. 22, 1990), thie Court wrote:

> Based on Maynard v. Cartwright, 108 S.Ct. 1853 (1988), Brown also argues that the etandard instruction an the cold, calculated, and premeditated aggravating circumstance is unconstitutional. In Mavnard the court held the Oklahoma instruction on heinous, atrocious, and cruel unconstitutionally vague becauee it did not adequately define that aggravating factor for the eentaneer (in Oklahoma, the jury). We have previously found Maynard inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor. Smallev v. State, 546 So.2d *920* (Fla. 1989). We find Brown's attempt to transfer Maynard to thie state and to a different aggravating factor misplaced. See Jones v. Duaaer, 533 So.2d 290 (Fla. 1988); Daugherty v. State, 533 So.2d 287 (Fla. 1988). We therefore find no error regarding the penalty instructions.

This issue merits more analysis than it has received. In Smallev, this Court did not write that Maynard does not apply to Florida. It rejected a jury instruction claim on the ground that the issue was not preserved in the trial

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

court, and wrote that Florida's heinousness aggravator was not facially unconetitutional under Maynard because this Court had given it a narrowing conetruction. Smalley does not hold that the judge need not inetruct the jury correctly on the law in a capital eentencing proceeding. Even though the jury is not the ultimate eentencer, its penalty verdict is of great importance. The cruel and Unusual Punishment Clauses of the state and federal constitutions require accurate jury instructions during the sentencing phaee of a capital case. See Hitchcock v. Dugger, 107 S.Ct. 1821, 1824 (1987) (aentenee improper where "the advisory jury was inetructsd not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances").

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

iii. Felony murder, avoid arrest, and financial gain

As already argued at Paint II.D.1.c and IX.D.2 of this brief, the standard jury inetruction on the felony murder aggravating circumstance is unconstitutional. As argued at point II.F, the etandard instructions on avoid arrest and financial gain *are* similarly improper.

b. Majority verdicts

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

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

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

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

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

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

c. Advisory role

The standard instructions do not inform the jury of the great importance

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

of its penalty verdict. In violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) the jury is told that its verdict is just "advisory."

2. Counsel

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

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through to the preeent. See, e.g., Elledge v. State, 346 So.2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance), Groseman v. State, 525 So.2d 833 (Fla. 1988) (no objection to victim impact information forbidden by eighth amendment), Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984) (counsel acted under actual conflict of interest in 1977 appeal, to appellant's detriment), Rutherford v. State, 545 So.2d 853 (Fla. 1909) (failure to object to improper evidence used to support aggravating factor), Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1908) (failure to develop and preeent mitigating evidence), Spaziano v. State, 545 So.2d 843 (Fla. 1989) (failure to assert grounde in first motion for post-conviction relief), Alvord v. Duaaer, 541 So.2d 598 (Fla. 1989) (failure to argue and present nonstatutory mitigating evidence in 1974 trial), Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989) (presuming that appellate counsel will purposely fail to present arguable issues). Of course a complete list would fill a volume. The quality of counsel is so sadly strained that this Court has excoriated appellate capital attorneys as a class for failing to serve their clients by filing briefs containing "weaker arguments." Cave v. State, 476 So.2d 180, 183, n.1 (Fla. 1985) ("neither the interests of the clients nor the judicial system are served by this trend").[42]

Failure of the courts to supply adequate counsel in capital cases, use of

[42] See also Roae v. Duaaer, 508 So.2d 321, 325 (Fla. 1987) (appellate counsel "has either not clearly read the record or ha0 not accurately presented its contents to this Court").

judge-created inadequacy of counsel as a procedural bar to review on the merits of capital claims cause freakish and uneven application of the death penalty.

Notwithstanding this history, our law makes no provieion assuring adequate counsel in capital cases. The failure to provide adequate couneel assures uneven application of the death penalty in violation of the Constitution.

3. The trial judge

a. The role of the judge

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

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

Since the trial. judge is largely bound by the jury's recommendation, the great likelihood of error built into the penalty verdict procedure (improper standard instructions and the lack of competent attorneys to challenge them) becomes a great likelihood of error by the judge bound by the jury's verdict.[43]

That our Law forbids special verdicts as to theories of homicide and as

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

to aggravating and mitigating circumetancee makee problematic the judge's role in deciding whether to override the penalty verdict. The judge ha0 no clue of which factors the jury considered or how it applied them, and has no way of knowing whether the jury acquitted the defendant of premeditated murder (so that a eentancing order finding of cold, calculated and premeditated murder would be improper), or whether it acquitted him of felony murder (so that a finding of killing during the course of a felony would be inappropriate).[44] Similarly, if the jury faund the defendant guilty of felony murder, and not of premeditated murder, application of the felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons as required by the eighth amendment under, e.g., Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

b. The Florida judicial system

Like other Southern states, Florida has an unfortunate hietory of racial discrimination in the judiciary. The raeult is racially discriminatory application of the law."[45] Florida's system of at-large judicial elections in large judicial circuits perpetuates this hietory in violation of the Equal Protection and Due Process Clauses of the state and federal constitutions. The U.S. Department of Juetice has ruled that the Georgia judicial system violates the Constitution in the same way. Georgia's Way of Electing Judges Is Overturned by U.S. aO Biased, N.Y. Times, Apr. 27, 1990, at 1, col. 1.

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

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

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

4. Appellate review

a. Proffitt

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

> The statute provides for automatic review by the Suprema Court of Florida of all cases in which a death sentence has been imposed. §921.141(4) (Supp. 1976-1977). The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each euch sentence is made possible and the Supreme Court of Florida like its Georgia counterpart coneiders its function to be to "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." State v. Dixon, 283 So.2d 1, 10 (1973).

420 U.S. at 250-251.

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

Id. 252-53.

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

Id. 258-59.

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

b. Aggravating circumstances

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

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious, or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death eligible persons, or channel discretion as required by Lowenfield v. Phelps, 108 S.Ct. 546, 554-55 (1988). The aggravatore mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Herring). Compare also Provenzano v. State, 497 So.2d 1177, 1183 (Fla. 1986) ("Heightened premeditation necessary for this circumstance does not have to be directed toward the specific victim." CCP applied to killing of bailiff who came out of courtroom while defendant was trying to kill two police officere), with Amoros v. State, 531 So.2d 1256 (Fla. 1988) (CCP improperly applied to killing

of woman present when defendant sought to kill girlfriend).

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulereon v. State, 420 SO.2d 567 (Fla. 1982) (rejecting HAC on same facts). Compare also Mills v. State, 476 So.2d 172, 178 (Fla. 1985) (focus is on "intent and method" of defendant) with Pope v. State, 441 So.2d 1073, 1078 (Fla. 1984) ("nor is the defendant's mindset ever at issue").[46] Compare also Herzog v. State, 439 So.2d 1372 (Fla. 1983) (HAC rejected where victim semi-conscious), with Jennings v. State, 453 So.2d 1109 1115 (Fla. 1984), vacated 470 W.S. 1002, rev'd on other grounds 473 So.2d 204 (1985) (WAC applied where victim unconscious). Compare Brown v. State, 526 So.2d 903 (Fla. 1988) (HAC rejected where victim police officer beaten and killed during struggle for gun and must have known she was fighting for her life), with Grossman v. State, 525 So.2d 833 (Fla. 1988) (HAC applied where victim police officer beaten and killed during etruggle for gun and must have known she was fighting for her life).[47]

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

The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict conetruction in favor of the accused would be that the circumstance should apply only where the prior felony

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[46] In Stano v. state, 460 So.2d 890 (Fla. 1985), this Court refused to apply Pope retroactively. This resuIt scarcely promotes the evenhanded application of the death penalty required by Proffitt.

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

conviction (or at least the prior felony) occurred before the killing. The cases have instead adopted a construction favorable to the state, ruling that the factor applies even to contemporaneous violent felonies. See Lucas v. State, 376 So.2d 1149 (Fla. 1979).

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

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

Although the original purpose of the "hinder government function or enforcement of law" €actor was apparently to apply to political asssinations or terrorist acts,[48] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. Appellate reweighing

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

d. Procedural technicalities

Through use of the contemporaneous objection rule, Florida haa institutionalized disparate application of the Law in capital sentencing.[49] See, e.g.,

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

[49] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate reviewwithout objection below because of the "special

Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of eighth amendment); and Smalley v. State, 546 So.2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated eighth amendment). Use of retroactivity principles worka similar mischief.

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[50] eases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consietently. This frank admission strongly suggests that other legal doctrines are aleo arbitrarily and inconsistently applied in capital eases.

5. Other problems with the statute

a. Lack of special verdicts

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

Our law in effect makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. Hence, the lack of a unanimous

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scope of review" in capital cases. Mr. Henry contends that a retreat from the special scope of review violates the eighth amendment under Proffitt.

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

jury verdict as to any aggravating circumetance violates article I, sections 9, 16, and 17 of the state constitution and the fifth, sixth, eighth, and fourteenth amendments to the federal constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting a similar sixth amendment argument.

b. No power to mitigate

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

c. Presumption of death

Florida law creates a presumption of death where but a single aggravating factor appears. This creates a presumption of death in every felony murder case and in almost every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case).[51] If there is anything left over, it is covered by that omnium gatherum, "heinous, atrocious or cruel." Under Florida law, once one of these factors is present, there is a presumption of death to be overcome only by mitigating evidence so atrong as to be reasonably convincing and so eubetantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[52] This presumption of death does not square with the eighth amendment requirement that capital punishment by applied only to the worst

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

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

offenders under e.g. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). See Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988) and Adamson v. Ricketts, 865 F.2d 1011, 1043 (9th Cir. 1988). But see Blystone v. Pennsylvania, 110 S.Ct. 1078 (1990) (rejecting a similar argument).

E. Absence of Mr.Henry

The accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedinge. Faretta v. California, 422 U.S. 806, 819, n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

At the start of the penalty proceedinge, the defense attorney said that he thought Mr. Henry would testify about his military record, and that he had subpoenaed some persons against his client's wishes, and handed the prosecutor a confidential report which (he later explained) was "devastating as to the facts of the case as to possibly the aggravating circumstances." R2548-50, 2553. Mr. Henry was absent during this abandonment of the lawyer-client privilege. When brought into the courtroom, he was not advised on the record as to what had happened, and no effort was made to have him ratify counsel's action. It was unfair for the trial judge, in a capital proceeding, to let the court-appointed attorney violate the lawyer-client privilege (which is basic to the sixth amendment right to counsel) and hand the prosecutor a privileged report containing "devastating" evidence. The judge's later remarks indicate that he was aware that the privilege was being breached. R2556. In a criminal trial (and especially in a capital trial), the judge's role is not merely that of impartial arbiter. The court has an affirmative duty under the Due Proceee Clauee to intervene to assure that the accused receives a fair trial. Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974). Sea also Standard 6-1.1(a), ABA Standards for Criminal Justice. The absence of Mr. Henry while this was going on violated his rights under the Due Process, Counsel, Confrontation, and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

F. Constitutionality of the Aggravating Circumstances Used at Bar

1. Felony murder

As already argued, this circumstance doeu not serve the limiting function

required by the Constitution and arbitrarily createe a preemption of death for the leaet aggravated form of first degree murder. Further, it turns the mitigating circumstance of lack of intent to kill into an aggravating circumstance. Hence it violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions.

2. Avoid arrest

This factor is vague and prone to erroneous application to cases in which (aO at bar) witness elimination is not the predominant motive for the killing. Further, it is susceptible to application in cases where (as here) it should be merged with other aggravating circumatancee. Hence it is unconetitutional.

3. Financial gain

This factor suffers from the same defects as the avoiding arrest factor.

4. Especially wicked, evil, atrocious, or cruel

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

To be constitutional, thie aggravating circumstance must, at a minimum, be limited to conscienceless or pitiless crimes which are unneceeearily torturous to the victim. Bertolotti v. Dugger, 883 F.2d 1503, 1526-27 (11th Cir. 1989). History shows that it has been consistently applied to murders that *are* not "unnecessarily torturous,"[53] It has been caneietently applied to almost any situation where death was not instantaneous. See, e.g., Huff v. State, 495 So.2d 145 (Fla. 1986) (victim turned and placed hand up before fatal shot), Lamb v. State, 532 So.2d 1051 (Fla. 1988) (six blows to head with hammer), Hardwick v. State, 521 So.2d 1071 (Fla. 1988) (stabbed and shot, victim may have survived

[53] Mr. Henry argues that even this etandard violates the Cruel and Unusual Punishment Clause and the constitutional and statutory rule of lenity. Almost any first-degree murder is eonecienceless or pitilass. What a "necessarily torturous" murder is, or why it is not as bad as an "unnecessarily torturous" one, are mysteries. A more nearly constitutional etandard is that employed in Lloyd v. state, 524 So.2d 396, 403 (Fla. 1988) ("designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering"). (Of course the Lloyd standard is contrary to Pope v. State, 441 So.2d 1073, 1077 (Fla. 1983) ("nor is the defendant's mindset ever at iesue)).

Failure to limit thie aggravating circumstance to the strict Lloyd etandard violates the Due Process and Cruel and Unueual Punishment Clauses.

for up to five minutes), Swafford v. State, 533 So.2d 270 (Fla. 1988) (nine shots), Spinkellink v. State, 313 So.2d 666 (Fla. 1975) (two shots), Mason v. State, 438 So.2d 374 (Fla. 1983) (victim probably lived from one to ten minutes after being stabbed),[54] Stone v. State, 378 So.2d 765 (Fla. 1980) (contrasting facts with those in Swan v. State,[55] "Swan's victim lived for a week while Stone inflicted a beating sufficient to kill"), Grossman v. State, 525 So.2d 833 (Fla. 1988) (police officer beaten and killed during struggle for gun),[56] Washington v. State, 362 So.2d 658 (Fla. 1978) (it took "minutes for the victim to die"; another victim's wounde were not "instantly fatal"), Wilson v. State, 436 So.2d 908 (Fla. 1983) (under the evidence, the trial judge "could properly believe" that the victim was beaten with a hammer before the fatal ehot) and King v. State, 436 So.2d 50 (Fla. 1983) (victim struck in face with iron bar, defendant obtained pistol in another room, returned and fired fatal shote). This factor can be applied to any situation other than a single ahot or blow in a moment of anger.[57] See Alvord v. state, 322 So.2d 533, 540 (Fla. 1975) (strangulation "as distinguished by a single shot from a firearm during an outburst of anger"),[58]

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[54] Compare Mason with Teffeteller v. State, 439 So.2d 840 (Fla. 1983) (victim "lived for a couple of hours in undoubted pain and knew he was facing imminent death"; HELD, killing not heinous, atrocious, or cruel),

[55] 322 So.2d 485 (Fla. 1975).

[56] Compare Grossman with Brown v. State, 526 So.2d 903 (Fla. 1988) (murder not heinous, atrocious or cruel where victim police officer in agony begged not to be killed),

[57] Of course a defendant is not likely to be convicted of first degree murder in such a case anyway. Hence almost anyone convicted of first degree murder will be marked with this aggravating circumstance.

[58] In Alvord, at the page cited, this Court equated "heinous, atrocious or cruel" with "a cold, calculated design to kill." If this is a correct interpretation of "heinous, atrocious or cruel" then the aggravating circumstance merges with the cold, calculated and premeditated circumstance. If it is an incorrect interpretation, then it shows yet again that the circumstance

and Scott v. State, 411 So.2d 866, 869 (Fla. 1982) ("This is not one or two blows which resulted in instantaneous or near instantaneous death.") What is more, the constitutional Conjunctive "and" hae been replaced with the more slippery conjunctive "or". See Wilson v. State, 436 So.2d *908,* 912 (Fla. 1983) ("unnecessarily torturous or conscienceless"), Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988) ("so unnecessarily torturous, conscienceless of pitiless as to set the crime apart from the norm of capital felonies").

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

> Hie first claim involves the aggravating circumstance that the killing was especially heinous, atrocious, or cruel. His argument is predicated on the United States Supreme Court's recent decision in Maynard V. Cartwriaht, ___U.S.___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). In that case, the Court relied upon its early [sic] decision in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), to hold that Oklahoma's aggravating factor of "especially heinous, atrocious, or cruel" was unconstitutionally vague. Smalley argues that because Flarida uses the same worde (section 921.141(5)(h), Florida Statutes (1987)), Florida's aggravating factor also is unconstitutionally vague under the eighth amendment.
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> Initially, we note that Smalley did not abject to the standard jury instruction given on this subject which explained that in order for this circumstance to be applicable, it wae necessary for the crime to have been especially wicked, evil, atrocious, or cruel. Therefore, to the extent that Smalley now complains of the jury instruction, the point has been waived. Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S.911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976). However, Smalley's claim has broader implications because he contends that the aggravating circumstance *of* heinous, atrocious, or cruel is unconstitutionally vague under the eighth and fourteenth amendments. In order to set the issue at rest, we will discuss the merits of Smalley's argument.
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> It is true that both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital eentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who .then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the santencer

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cannot be consistently applied.

> relied in deciding that a certain killing was heinous, atrocious, or cruel.
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> This Court has narrowly construed the phrase "especially heinous, atrocious, or cruel" so that it has a more precise meaning than the same phrase has in Oklahoma. In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), we said:
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> It is our interpretation that heinoua means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of othere. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital feloniee -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> It was becauee of this narrowing construction that the Supreme Court of the United State8 upheld the aggravating circumstance of heinous, atrocious, or cruel against a specific eighth amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. E.g., Garron v. State, 528 So.2d 353 (Fla. 1988); Jackson v. State, 502 So.2d 409 (Fla. 1986), cert denied, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); Jackson v. State, 498 So.2d 906 (Fla. 1986); Teffeteller V. State, 439 So.2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). That Proffitt continues to be good law today is evident from Maynard v. Cartwright, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. See Maynard v. Cartwright, 108 S.Ct. at 1859.

Id. 722.

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

the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonatatutory mitigating circumstances, and that the proeeedinge therefore did not comport" with eighth amendment (e.s.)).

The fact that the trial judge must articulate the facts supporting a finding of the aggravating factor is of little consequence. Identical or virtually identical facts produce contrary results, ae shown above.[59]

The fact that this Court has frequently (but by no means always)[60] reiterated the Dixon definition is also of no consequence. The rules for application of the factor have altered radically and erratically since Proffitt.

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

> Appellant contends that the trial court erred in finding that the killing was especially heinous, atrocious, and cruel. He arguea that since the shooting wae spontaneous and caused nearly instantaneous death, it cannot come within the meaning of this aggravating circumstance, which, under the interpretations given by this Court, focuses on the inflicting of physical pain or mental anguish. State v. Dixon, 283 So.2d 1 (Fla. 1973), cart. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); White v. State, 403 So.2d 331 (Fla. 1981). In response the state correctly points out that the factor heinous, atrocious, or cruel ha0 aleo been approved based on the fact that a killing was inflicted in a "cold and calculating" or "execution-style" fashion. See, e.g., Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981); Alvord v. State, 322 3234, 49 L.Ed.2d 1226 (1976); Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

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

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

[60] As shown below, this Court rejected application of the State v. Dixon standard in Vaught v. State, 410 So.2d 147, 151 (Fla. 1982), and expressed dieapproval of it in Pope v. State, 441 So.2d 1073, 1077 (Fla. 1983) (disapproving of State v. Dixon standard because it focused on defendant's mindset and condemning jury instructione baeed on State v. Dixon definition).

Similarly, early cases held that torturous intent was of paramount concern. State v. Dixon contemplates a torturous design ("designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering" of the victim), and the 1975 jury instructions[61] speak of "utter indifference to, or enjoyment of, the suffering of others; pitiless." But Pope v. State,[62] 441 So.2d 1073, 1078 (Fla. 1983) changed everything: "the defendant's mindset [is never] at issue." This revolution was short-lived. In Miller v. State, 476 So.2d 172 (Fla. 1985), we read at page 178 (e.s.): "The intent and method employed by the wrongdoers is what needs to be examined."

Cases involving lingering death show similar swings. In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this factor wae improperly found where the defendant allowed "his victim *to* languish without assistance or the ability to obtain assistance." See aleo Stone v. State, 378 So.2d 765, 772 (Fla. 1979) (distinguishing Swan v. State[63], where aggravating factor did not apply because brutally beaten victim lingered for a week before dying). But a radical shift had occurred by the time of Mason v. State, 438 So.2d 374 (Fla. 1983). There a finding of heinous, atrocious, or cruel was upheld where the decedent lingered for several minutes choking on her own blood and was "probably aware of her impending death." Id. 378-79. The Law changed again in Mills v. State, 476 So.2d 172 (Fla. 1985), when this Court wrote at page 178: "whether death is immediate or whether the victim Lingers and suffers is pure fortuity."[64] Subsequent cases

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[61] Standard Jurv Instructions in Criminal Cases, 78 (1975).

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

[63] 322 So.2d 485 (Fla. 1975).

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

suggest yet another revolution is in the offing. It appears that, far from being a mere "fortuity," lingering death involving suffering is central to the analysis of this aggravating factor. See Cook v. State, 542 So.2d 964, 970 (Fla. 1989) (circumstance improperly found where "death was not drawn out").

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

5. Cold, calculated and premeditated

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

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

The constitutional principles of aubetantive dus process and equal protection require that a provision of law be rationally related to its purpose. Reed v. Reed, 404 W.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). See also Moore v. City of East Cleveland, 431 W.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). This principle applies to criminal enactments. See State v. Walker, 461 So.2d 108 (Fla. 1984). Thus a criminal statute "must bear a reaeonable relationehip to the legislative objective and must not be arbitrary." Potts V. State, 526 So.2d 104 (Fla. 4th DCA 1987), aff'd., State V. Potts, 526 So.2d 63 (Fla. 1988).

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

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

G. Confrontation Clause

The PSI was full of hearsay saying all kinds of terrible things about Mr. Henry and expressing vehement outrage. Attached to it were psychological evaluations by persons who did not testify in court. Use of these matters by the trial judge[65] in sentencing violated the Confrontation and Cruel and Unusual Punishment Clausae. See Rhodee v. State, 547 So.2d 1201, 1204 (Fla. 1989).

H. Guidelines Departure

Although the guidelines scorsheet[66] called for seven to nine years of imprisonment, the court imposed Life sentences on the noncapital offenses. The only reason given for the departure was: "Pursuant to State's Motion to Aggravate, nanebrouoh v. State, 509 So.2d 1081 (Fla. 1987), and two unecorable [sic] first degree murder convictions sentenced simultaneously herewith." Hansbrough held departure because of a first degree murder conviction wae "not prohibited by the guidelines," because not taken into account by the guidelines

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[65] The trial judge apparently relied on the PSI when writing about "the other theft related incidents in the Defendant's background," as part of the basis for finding that the killings were cold, calculated and premeditated. R. 2908.

[66] The scoresheet is contained in an unpaginated supplemental record filed by the trial court clerk in October 1989. It bears a time stamp indicating that it was filed in the trial court clerk's office on October 5, 1989 -- almost a year after Mr. Henry was eentsnced.

and not inherent in the robbery for which the defendant was being sentenced.

Mr. Henry submits that Hansbrough was wrongly decided and that in any event it does not apply to the case at bar. In Torres-Arboledo v. State, 524 So.2d 403 (Fla. 1988), this Court upheld an upward guideline6 departure sentence for attempted robbery where a death (and hence an unscoreable first degree felony murder) occurred during the attempt because victim injury points could not be scored far attempted robbery. As of the time of the offenses at bar,[67] however, victim injury points were scareable for all offenses. Florida Rules of Criminal Procedure Re Sentencing Guidelines (Rules 3.701 and 3.988), 509 So.2d 1088 (Fla. 1987) (amending rule 3.701.d.7 to provide that: victim injury "shall be scored for each victim physically injured during a criminal episode or transaction," effective July 1, 1987). In fact, both deaths were scored under "Victim injury (phyeical)." Hence, the departure was invalid becauee a departure cannot be founded upon something for which points are assessed. See State v. Mischler, 488 So.2d 523 (Fla. 1986) and Irizarry v. State, 496 So.2d 822 (Fla. 1986).

As a general rule, our law forbids the double use of a sentencing factor. Cf. Mischler and Provence v. State, 337 So.2d 783 (Fla. 1976). Mr. Henry submits that this is such a settled principle of Florida law as to be incorporated into article I, section 17 of our constitution. At bar, the capital convictions were used three waye to enhance: first, to score points for death; second, as a ground for departure; and third, becauee the noncapital sentences were consecutive to the capital sentences (so that the total sentence wae necessarily outside of the guidelines range). This third point requires some elaboration. In a capital sentencing, the minimum sentence is life imprisonment. Hence, any sentencing for the underlying felony in a capital sentencing will almost alwaye involve a guidelines departure. The departure from the guidelinee range to Life imprisonment constitutes a substantial departure at bar. Such multiple enhancement is contrary to our law.

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[67] The evente in this case occurred in November 1987, under the regime of the new rule. The events in Hansborough and Torres-Arboledo occurred during the period covering the old rule. Hence those cases do not cover this issue.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, this Court should vacate Mr. Henry's convictions and sentences and remand this cause for a new trial or grant such other relief as it deems appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, the Capitol, Tallahaaeee, Florida, 32399-1050 this 14 day of June, 1990.