IN THE

SUPREME COURT OF FLORIDA

MICHAEL CARUSO, JR.,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 73,507
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

INITIAL BRIEF OF APPELLANT

(On Appeal from the Seventeenth Judicial Circuit
In and For Broward County, Florida)

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TABLE OF CONTENTS

AUTHORITIES CITED

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURE

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R"	Record on Appeal
"1SR"	First Supplemental Record (Pursuant to this Court's Order of November 20, 1989)
"2SR"	Second Supplemental Record (Pursuant to this Court's Order of June 28, 1990)
"3SR"	Third Supplemental Record (Pursuant to this Court's Order of October 12, 1990)

STATEMENT OF THE CASE

Appellant, Michael Caruso, Jr., was charged with two counts of first degree murder that occurred on December 6, 1987 (R 2243). Jury selection began on September 19, 1988. At the close of the state's case, and at the close of all the evidence, Appellant moved for judgment of acquittal (R 1520, 1771). Appellant's motions were denied (R 1524, 1772). The jury found Appellant guilty as charged of all offenses (R 2321, 2322). Appellant was adjudicated guilty of the offenses (R 2348).

The jury voted 11 to 1 for life imprisonment for both murders (R 2142). The trial court sentenced Appellant to life in prison for one killing and overrode the jury's decision and sentenced Appellant to death for the other killing (R 2352, 2353).

STATEMENT OF THE FACTS

GUILT PHASE

The relevant facts are as follows. Officer Martin Smith of the Pembroke Pines Police Department testified that on December 6, 1987, at approximately 8:30 a.m. he was dispatched to 8411 N.W. 15th Court in Pembroke Pines (R 565-566). Smith could not gain entry to the residence (R 568). Firefighter Michael Holtz took an axe and took out six (6) panels of the door and went inside the residence (R 568). Holtz unlocked the front door and Smith and two firefighters entered the residence (R 568). Smith observed a woman's body lying in the kitchen (R 569). Holtz advised Smith that she was dead (R 569). Smith told the firefighters to leave the residence (R 569). Smith observed visquene piled in the hallway (R 570). Smith could not tell what was under the visquene (R 574-575). Smith observed a second body lying halfway in the

hallway and halfway in the bedroom. The front door had been open while Smith was inside the house and the scene had not been secured at that point (R 581).

Officer Steve Faby testified that he arrived at the scene at 7:42 a.m. (R 596). Officer Smith, paramedics, firefighters, and Appellant and his mother were there (R 596). Appellant was standing twenty (20) feet from the door of the residence (R 597). The front door was open (R 625). Faby went inside and observed a female who had been beaten on the head and face (R 599). Faby also saw a male whose face was covered with some type of plastic (R 599). Faby could not see the female from the front door (R 600). Faby exited the residence and proceeded to clear and rope off the area (R 598).

Faby talked to Appellant at the scene (R 605). Appellant was approximately 5'6" and weighed 140 pounds (R 605). He was wearing shorts and a t-shirt and his hair was wet (R 605-607). Appellant stated that at about 7:30 a.m. he was returning from a morning walk by taking a shortcut across the front lawn of the residence to his house next door (R 606-607). Appellant saw what appeared to be a dark colored man, approximately 5'10" tall, looking out the front window (R 606). Appellant made eye contact with the subject and the subject backed away from the window (R 606). Appellant didn't feel that the person belonged to the residence so he knocked on the front door and windows to check on the well-being of the Lelands (R 607). Nobody answered (R 607). Appellant went to the back door and looked inside (R 607). Appellant saw the body of Mrs. Leland and went next door to his house and called the police and paramedics (R 607). Faby later looked in the window and could

tell that someone was lying on the floor, but couldn't tell who it was (R 609). Faby further testified that during the eight (8) hours he was at the scene Appellant would have a number of mood swings from being fairly calm to being hostile (R 612).

Detective Jorge Corpion of the forensic services unit testified that he arrived at the scene at 9:15 a.m. (R 641). Corpion walked through the scene (R 643). There appeared to be fresh tool marks on the door panel and door frame side of the front door (R 643). A tip of a knife was found near the door mat (R 644). A single strand of hair was found on the door mat (R 644). Seventeen latent prints were found at the scene (R 663). Prints were found on the outside and inside of the middle panel of the front door (R 664-666). Other prints were taken off the lock area of the door (R 758).

Corpion testified that inside the southeast bedroom all the drawers were pulled out, the mattress was eschew to the box spring, and purses had been laid on top of a dresser (R 648). A print was lifted from the door of the room (R 761). A tube of cling wrap was later found in the closet (R 648). Prints were taken of the roll of Saran Wrap (R 708). Blood was found on the edges of the roll (R 681). Corpion entered the northeast bedroom where the body of Mr. Leland was found at the entrance (R 649). There was blood splattered on the walls near the entrance to the bedroom (R 649). The bed sheets had been pulled and there were blood smears on the bed (R 649). Everything that was handled inside the bedroom appeared to have been handled by a bloody towel or piece of cloth (R 650). A print was lifted from the phone (R 761). A towel was later found in the bathroom (R 650). It was wet

with water (R 763).

Corpion also testified that there was blood on the wall phone that was sitting on top of a portable dishwasher (R 645). Mrs. Leland's body was laying partly in the kitchen and partly in the dining room area (R 644). She had a number of stab wounds and trauma (R 652, 685). It appeared that the trauma was caused by something like the champagne bottle which was found shattered near Mr. Leland (R 768). Mr. Leland's body had plastic around it (R 652). After the plastic was removed, Corpion saw another piece of plastic around Mr. Leland's head (R 653). A box labelled "Saran Wrap" was found in the hallway near Mr. Leland's body (R 747). There were a number of wounds to Mr. Leland (R 653, 684).

Corpion also testified that Appellant had numerous cuts and abrasions about his hands and forearms (R 721). Based on a lack of scabbing, the cuts appeared to be fresh (R 722). Corpion didn't ask Appellant about the cuts or abrasions (R 756). The next morning, Corpion saw Appellant making a statement to Channel 10 News (R 738).

Matt Nickison of the Pembroke Pines fire department arrived at the scene with Michael Holtz and Sandy Butt at approximately 7:45 a.m. (R 1010). They met with Appellant and his father who said that they thought something might be wrong (R 1010). Nickison went to the back of the house with Appellant (R 1011). Appellant pointed where a body was through a window (R 1011). Later, after Nickison entered the residence, he checked the body of Mrs. Leland (R 1013). She had a long laceration on her forehead and blood pooled up in her eyes (R 1014). Holtz found signs of rigormortis (R 1014). Nickison noticed another body that had the top half

wrapped in visquene (R 1015). One had to be 4 or 5 feet towards the front door to see the body (R 1015). The door had remained open after the three medics went inside (R 1019). Because he was busy doing his job, Nickison could not say if others were inside the house (R 1016). Nickison was in the house 3 to 5 minutes (R 1022).

Firefighter Sandy Butt testified that she arrived at the scene with the others and Appellant showed them through a back window where a body was lying (R 1029). Butt could see the head and the hair when looking through the window (R 1030, 1034). Michael Holtz entered and let the others in through the front door (R 1030). The female patient was cold and rigormortis had set in (R 1031). Butt noticed another patient in the hallway (R 1031). He had a plastic bag wrapped around his head (R 1032). There was a broken bottle by his head (R 1032).

Detective George Miller of the Broward County Sheriff's Office testified that he arrived between 9:15 and 9:30 a.m. to help Detective Corpion (R 774). Miller observed pry marks on the front door (R 776). There was a broken knife tip lying on the concrete just underneath the door (R 776). There were workable prints on the wall phone (R 800). The phone appeared to have been moved and wiped down (R 800). A shoe impression was found in the southeast bedroom, but there was no sole design (R 795). When the medical examiner removed the plastic wrap off the body of the male, there was Saran Wrap around the head (R 791). When Miller was near the body of the female he could also see the body of the male (R 805). Miller testified that one can't see down the hallway from the front door (R 810).

Latent print examiner Jeanine McKenzie of the Broward County Sheriff's Office testified that she received 17 latent prints from Detective Corpion and 5 latent prints from Detective Miller (R 961-962). McKenzie identified one of the prints on the wall phone as belonging to Detective Miller (R 961-962). Some of the prints on the interior doorway to the bedroom were those of Detective Corpion (R 980). Gordon Leland's prints were found on a number of locations (R 981, 983). A thumbprint of James Montgomery was found on the wall phone (R 982). The left ring and left middle finger prints of Appellant were found on the inside middle panel of the front door to the house (R 972). A number of workable prints of value were found in the house, but were not identified to anyone (R 990-993). Prints at the bottom and top of the doorknob and from the inside panel were workable, but not identified to anyone (R 990-991). A workable print from the interior of a bedroom was not identified to anyone (R 991). A workable palm print from a bedroom was not identified to anyone (R 991-992). One of the prints from the telephone receiver was not identified (R 993). Four to five friction characteristics were found on the Saran Wrap (R 994). McKenzie tried to compare them with Appellant's prints, but came to the conclusion that there was not enough friction ridges to make an identification to anybody (R 994).

Howard Seidan of the Broward County Sheriff's Office crime laboratory testified that he received hair samples of the victims and an unknown hair that was located on the front door of the Leland residence (R 1316). Seidan concluded that the unknown hair came from a caucasian head similar to Genevieve Leland (R 1318).

Detective Charles Edel testified as an expert in blood stain

and blood pattern analysis (R 901). Edel noticed, that in the hallway, blood was on the walls 18 to 20 inches from the floor (R 903). In Edel's opinion, Mrs. Leland's head was near the floor during the attack (R 905). Blood stains were found 48 inches above the floor surface near the dresser in the bedroom (R 903). Edel opined that Mr. Leland was struck at a low position (R 913). Edel also concluded that the assailant had very little blood on him (R 913).

Marge Klinger testified that she knew Gordon and Genevieve Leland (R 1055-1058). Ms. Klinger identified the victims as Mr. and Mrs. Leland (R 1058).

Dr. Felipe Dominguez, the medical examiner for Broward County, testified that he had performed the autopsies on Genevieve and Gordon Leland (R 824, 837). Mrs. Leland's death was caused by multiple stab wounds and blunt head trauma (R 837). The trauma was consistent with the broken champagne bottle found near Mr. Leland (R 830). Mrs. Leland had been stabbed a total of six times (R 829).

Dominguez testified that Mr. Leland had nine stab wounds to his back (R 838). There was one stab wound to the front (R 838-839). There were injuries consistent with being hit with a bottle (R 839). Dominguez opined that because blood on the wall was found two inches from the ground, Mr. Leland may have been hit while on the ground (R 840). Mr. Leland had wounds to his hands and one to his left elbow (R 841-842). The wound to the front chest lacerated a few of the pulmonary arteries (R 843). Dominguez opined that the cause of death was blunt head trauma and multiple stab wounds (R 853). Dominguez opined that the time of death was between midnight

and 2:00 a.m. (R 855). The stab wound over the ears of the Lelands was sufficient in itself to cause death (R 864).

Lt. Thomas Walsh testified that he arrived at the scene at 8:30 a.m. (R 1077). Walsh observed Appellant at the scene and noticed that he looked very emotional; he looked "almost possessed" (R 1082). Walsh noticed that Appellant had cuts on his hands and that on a number of occasions he changed clothes (R 1083). Walsh doesn't know what Appellant changed into (R 1089). A couple of weeks after the killings, police came into possession of a charm, butterfly, and a necklace (R 1086). The Lelands' grandson indicated that the necklace belonged to his grandmother (R 1086). Walsh also testified that although Officer Smith had not seen Appellant in the house, Smith told Walsh that the possibility of Appellant being in the house when the officers were first at the scene could not ruled out (R 1091).

Craig Quinn testified that he met Appellant when he was dating Appellant's sister (R 1194). On Saturday, December 5, 1987, Appellant called Quinn and told him that he wanted to go out (R 1195). Appellant wanted to smoke crack cocaine (R 1271-1272). Quinn testified that was the only thing Appellant did (R 1271). Quinn said, "no" (R 1195). Appellant called Quinn the next morning and told him that the people next door had been murdered (R 1195). Appellant told Quinn that he had gone into the house with the police or paramedics (R 1245, 1247). Later that day Quinn drove to Appellant's house (R 1196). Appellant was high (R 1206). Appellant was on something like drugs or pills (R 1285). He appeared to be very sluggish (R 1285). He was very short-fused, short tempered and couldn't talk straight (R 1286). Appellant asked Quinn to tell

his father that he was with Quinn the night before and that Quinn had Appellant's bicycle at his house (R 1197). Quinn said he would (R 1197). Quinn told Appellant's father that the bicycle was at his house and that Appellant was with him watching tapes (R 1197). Appellant had an argument with his father in the kitchen (R 1207). Quinn testified that he and Appellant next went to Alpine Village (R 1198). Once they had parked the car, Appellant ran into the field and got his bike (R 1198). The boys then went to Weston to do some interior installation (R 1209). They didn't get much work done because Appellant kept tripping over lamps and breaking bulbs (R 1209). Quinn prodded Appellant about the night before (R 1209). Appellant said he was out all night (R 1209). Quinn and Appellant went to Quinn's grandmother's house so that Quinn could give Appellant money (R 1210). Quinn gave Appellant $20.00 cash (R 1210). Appellant did not have any money other than the $20.00 (R 1252). That night Appellant and Quinn smoked cocaine (R 1250).

Quinn further testified that there was a time the police contacted him (R 1212). Quinn obtained a piece of butterfly jewelry from Appellant because he said he needed a gift for his grandmother and Appellant owed him money (R 1281). Quinn turned it over to the police (R 1257). Appellant told Quinn that he had a lot of gold jewelry (R 1214). Quinn tried to obtain a knife with a broken tip from Appellant (R 1216). Appellant gave Quinn the knife and Quinn turned it over to the police (R 1216). According to Quinn, Appellant stated that he had broke the tip off on the old lady next door (R 1217). After the gold jewelry was given to the police, Appellant took his father's chain saw to a pawn shop (R 1259). Quinn testified that Appellant had gotten him involved

in crack cocaine (R 1266).

Officer David Belusko of the Pembroke Pines police department testified that he went to the scene to talk with the news media (R 929). Belusko saw Appellant in front of his home talking with several detectives (R 932). Appellant looked distressed when the bodies were brought out, his lips were quivering and he turned away (R 937). After Belusko left the scene, Dana Banker, a police reporter for the Sun-Tattler, came to his office (R 938, 941).

Dana Banker testified that she went to the crime scene at about noon to do a story (R 1107). Banker talked to Appellant (R 1108). Appellant was out walking or jogging (R 1108). Appellant said he saw a face in the window of the Leland house and became suspicious and knocked on the doors and window (R 1109). Appellant looked into a window and saw Mrs. Leland on the floor (R 1109). Appellant then got his mother next door (R 1109). Appellant said that he followed the police or emergency rescue in the residence when they first arrived at the scene (R 1113-1114). Appellant said that Mrs. Leland had been stabbed in the eyes and everywhere else and that Mr. Leland had Saran Wrap wrapped around his head (R 1109). Banker interviewed the police, including Detective Belusko (R 1111). She asked him about the stabbing of the eyes and the Saran Wrap (R 1111).

Detective Angelo Pazienza arrived at the scene at 8:30 a.m. (R 1324). Pazienza went in the house and saw a box labelled Saran Wrap laying next to Mr. Leland's body (R 1324, 1417). Pazienza talked to Appellant because he was told that Appellant had discovered the bodies (R 1326). Appellant gave a statement to Pazienza which was taped and played to the jury (R 1335-1350).

In the taped statement Appellant said that he went for a walk between 7 and 7:30, and cut through the Leland's yard (R 1337). Appellant saw a black man inside the house (R 1339). Appellant knocked on the front door and then went to the side and banged on the window (R 1342). Appellant went to his mother and told her that something was wrong (R 1342-1343). Appellant and his mother went to the door, but no one answered (R 1343). Appellant went to the back and looked through the screen door and saw Mrs. Leland laying on the floor (R 1343). Appellant's mother said, "Oh my God" and they went back to their house (R 1345). Appellant's father called the police (R 1345). They waited until the paramedics arrived (R 1345). Later, the paramedics and a police officer entered the Leland house (R 1346). Appellant also entered (R 1346). Appellant saw Mrs. Leland lying on the floor and there was blood on the walls (R 1346). Appellant looked over and saw another body with plastic or something around the head (R 1347). Appellant stated that he had taken a shower before talking to Pazienza (R 1347). Appellant's taped statement indicated that he had seen the Leland's the day before and was going to clean their awnings (R 1350).

Detective Pazienza testified that he had noticed cuts on Appellant's hands (R 1354). Pazienza also testified that sometime after 10 a.m., Appellant indicated that he was going to call a press conference (R 1363). Pazienza collected Appellant's shirt and sneakers (R 1364). Pazienza went inside Appellant's house (R 1363). Appellant's mother was doing the wash (R 1364). She does the wash everyday (R 1364). Appellant slept in the livingroom, he did not have a bedroom or dressers (R 1365). Whenever, he had

dirty clothes his mother would wash them (R 1365).

Pazienza testified that Appellant's behavior would fluctuate (R 1435). Sometimes it was extremely violent and uncontrollable (R 1435). At one point Appellant was acting crazy and yelling at anybody (R 1368). Pazienza talked to Craig Quinn about Appellant (R 1375). Quinn told Pazienza that Appellant had a knife without a tip that might be significant (R 1424). Quinn provided Pazienza with a knife without a tip (R 1426). The knife could not fit with the tip found outside the Leland residence (R 1427). Pazienza testified that portions of what Quinn told him was not being corroborated (R 1427).

Pazienza also testified that one could not see Mr. Leland's body by standing next to Mrs. Leland's body (R 1403). However, if one moved back toward the front door, and looked down the hall, one could see Mr. Leland (R 1403).

Myrel Walker testified that she lives at 8451 N.W. 15th Court in Pembroke Pines (R 1493). Walker came home on December 5, 1987, at approximately midnight (R 1494, 1497). She saw someone standing at her door (R 1495). He came toward her car and asked to use the phone because his car had broken down (R 1496). Walker did not let him use her phone (R 1496). There was a shiny object in his pocket (R 1497). He headed east down the street (R 1497). At the deposition she said he headed north (R 1508). He was 5'6" and weighed 140 lbs. and had blonde hair (R 1498). Walker got up on Sunday and noticed police cars in the area (R 1499). She told the police what she had seen the night before (R 1499). She later saw the person on television (R 1500). She told the police and a few days later was shown a video (R 1501). Walker identified Appellant

as the person she saw in front of her house (R 1504). Initially, when seeing Appellant on the television, Walker was "not sure" he was the person at her house (R 1509).

Detective Onofrio Raimondi testified that he interviewed Myrel Walker in reference to a male she had seen at her door on December 5 at approximately midnight (R 1482). After viewing a channel 10 video Walker identified Appellant as the person at her door (R 1484). Walker's house is three houses west of where Appellant lives, and four houses west of where the Lelands live (R 1483).

Jill Montgomery testified that the Leland's were her grandparents and that she talked to Appellant (R 1037, 1040). Montgomery asked Appellant if he had found her grandparents and if it looked like they had suffered any pain (R 1040). Appellant indicated that he had found them and that it was pretty bad and described where they were (R 1040). Appellant said that her grandfather had Saran Wrap around his head and plastic over him (R 1041).

James Montgomery testified that the Lelands were his grandparents and that he had visited them and left at 6:30 a.m. the day before their bodies were discovered (R 1122). The day after the bodies were discovered, Montgomery cleaned the house (R 1123). Montgomery noticed pry marks on the front door (R 1124). Montgomery noticed that a few drawers were open but the "house wasn't disturbed that much" (R 1124). There were a few things missing such as a radio and candle holders (R 1129). Montgomery never paid much attention to his grandmother's jewelry, but identified the butterfly piece of gold at the police station (R

1134). In a deposition Montgomery wasn't sure (R 1136-1137). Montgomery testified that the chain could have been different and that his mother did not identify the butterfly (R 1137-1138).

Patrick Sheehan testified that he used to work in the Uptown Pawn Shop in Hollywood, Florida (R 1471). Craig Quinn had pawned various pieces of diving equipment (R 1472). Appellant and Quinn pawned a chainsaw (R 1473-1475).

Betty Quinn testified that Appellant called on December 6 at 9:00 a.m. and asked to speak with her son Craig (R 1169-1171). Craig said he would call back and he did (R 1172). Mrs. Quinn found out that Appellant's neighbors had been murdered and talked with Appellant (R 1172). Appellant told her that the Lelands had been murdered and stabbed to death (R 1173). The police suspected that they had been robbed (R 1173). Later that day Appellant and Craig came in (R 1174). Appellant was acting funny, not walking right, and his speech was slurred (R 1174). Mrs. Quinn asked Appellant what was wrong with him (R 1175). Appellant stated that he was upset about the murders and his mother gave him something to calm him down (R 1175).

Michael Holtz is a firefighter/paramedic who was dispatched along with Sandy Butt and Matt Nickison (R 1705). At the scene, Holtz was confronted by a neighbor who said he was able to see someone inside lying on the floor (R 1705). The person took Holtz to the back of the house and pointed through the window (R 1706). Holtz looked through the window and could see a body sticking out of the kitchen (R 1706). Holtz broke a jalousie window and climbed into the house (R 1706-1707). Holtz opened the front door to let the others inside and turned to the lady (R 1708). Two emergency

technicians and a police officer walked through the door (R 1709). Officer Smith turned to the front door and told everyone to stay outside (R 1710). Holtz looked at the front door and noticed that some of the neighbors walked in a few steps and turned around and walked out (R 1711). The people were only two or three feet inside (R 1725). One can see the entrance to the bathroom from the front door (R 1726).

Jeffrey Ban an expert in Forensic Serology with the Broward County Sheriff's Office was asked to perform tests for comparison of bodily fluids in this case (R 1545-1546). Ban was given Appellant's blue t-shirt to examine (R 1548). There was no blood on the shirt (R 1549).

Marie Bobacher testified that Appellant is her grandson, and that she bought his mother a butterfly pendant in May of 1986 (R 1527-1528). Bobacher identified the butterfly pendant (R 1534).

Alicia Felin is a salesperson for Burdines (R 1560). Felin testified that a purchase slip dated 5-2-86 showed that Bobacher purchased a butterfly charm from Burdines (R 1564-1569).

Leon Rozio, a co-owner of a wholesale jewelry company, testified that he sold a butterfly charm to Burdines (R 1576). Rozio testified that Mark Anthony was the manufacturer of the charms and that Burdines does not do business with any other middle man for Mark Anthony other than himself (R 1577).

Appellant's father, Michael Caruso, Sr., testified that on December 6, 1987, Appellant ran into the house at between 7:00 a.m. and 7:20 a.m. (R 1585). Appellant said he thought something was wrong next door (R 1585). He thought he may have seen something moving in the window and thought it may have been a

black person (R 1585). Mrs. Caruso went next door with Appellant (R 1586). They returned in 7 or 8 minutes (R 1587). Mrs. Caruso explained what happened and Mr. Caruso called 911 (R 1587). When the paramedics arrived one of them entered the Leland residence by breaking the jalousie door (R 1589-1590). The front door was opened and the police, paramedics, and firefighters went inside (R 1591). Mr. Caruso told his son not to go in (R 1591). Mr. Caruso testified that Appellant was like a "normal kid" who wasn't listening and proceeded to walk inside (R 1591, 1623). Appellant was inside for a minute or two (R 1592). Mr. Caruso heard loud voices inside (R 1592). Appellant came out of the house alone (R 1593). Appellant said that both the Lelands were lying on the floor (R 1593). Mr. Leland was lying in the hallway and had Saran Wrap wrapped around his head (R 1593, 1626). The paramedics came out (R 1593).

Appellant's mother, Eleanor Caruso, testified that she was friends with the Lelands and that Irene Leland had asked her if Appellant would help clean some awnings, screens, and windows (R 1652). Appellant said he would (R 1652). On December 6, Appellant said that something was wrong next door and that he had seen a dark shadow (R 1652). Mrs. Caruso went next door and knocked on the door (R 1654). She then went around to the back of the house (R 1654). Appellant told her to look through the window (R 1655). Mrs. Caruso looked and saw a portion of Irene Leland's body on the floor (R 1655). Mrs. Caruso and her son returned home and Mr. Caruso called 911.

Mrs. Caruso also testified that a fireman broke the jalousie door to the Leland residence and opened the front door (R 1656).

Appellant followed the paramedics in the house (R 1657). Appellant was inside for 2 or 3 minutes (R 1658). Mrs. Caruso was going to enter the house when an officer came on the lawn and told everyone to get back (R 1657). Later that day, when Mrs. Caruso was doing the wash, Detective Pazienza wanted to go through his clothes (R 1661). Mrs. Caruso also turned over Appellant's shoes to Pazienza (R 1661).

Mrs. Caruso testified that she owned a butterfly jewelry piece (R 1663). She identified the butterfly piece in evidence as the one belonging to her (R 1666). It was missing after the Saturday after the killings (R 1665).

PENALTY PHASE

The following are the facts relevant to the sentence of death imposed for the murder of Gordon Leland.[1]

Dr. Felipe Dominguez testified that Mr. Leland was alive when he sustained his injuries (R 1985). Mr. Leland was stabbed eight or nine times (R 1987). The level of pain suffered would depend on the level of consciousness (R 1987). Mr. Leland was first hit on the head with a blunt instrument (R 1990). Dr. Dominguez testified that this blow may, or may not, have resulted in loss of consciousness (R 1990). Mr. Leland was probably conscious when he was struck on the head (R 1991).

Sandy Caruso testified that she was 19 years old and Appellant's sister (R 1992). Sandy never knew Appellant to be violent (R 1993). He was always protective toward her (R 1996). There was one occasion Appellant was not aware of what he was

[1] A life sentence was imposed for the murder of Mrs. Leland.

doing (R 1993). This strange behavior was due to the use of cocaine (R 1993). Appellant was hospitalized on three different occasions because of cocaine overdoses (R 1994). All three commitments were voluntary (R 1997). On one of the occasions Appellant had slit his wrist (R 1994-95). Appellant was trying to commit suicide because he thought he was failing his parents by using drugs (R 2000).

Mark Luback testified that he was a landscaper and that Appellant worked for him for the better part of a year and a half (R 2003). Luback testified that Appellant was a good worker (R 2003). Appellant was promoted from a worker to a foreman who was supervising the work crews (R 2003). If there were problems at work, Appellant would inform Luback (R 2004). Appellant got along with everyone (R 2004). Luback testified that he had a high opinion of Appellant and could trust him (R 2007-2008).

Elenda Adams, Appellant's grand-aunt, testified that she knew Appellant all his life (R 2009). Appellant was respectful and never violent (R 2009).

Joanna DeClemente, Appellant's grandmother, testified she had a loving relationship with Appellant and had never seen him violent or aggressive (R 2013-14).

Appellant's other grandmother, Marie Bobacker, testified that Appellant was respectful and that she had never seen him violent or aggressive (R 2019).

Dr. Glenn Caddy is a clinical psychologist, licensed in forensic psychology, who is experienced in treating cocaine addiction (R 2025). Dr. Caddy testified that he had reviewed Appellant's hospital and medical records and had spoken with

members of his family (R 2032). Appellant was very dramatically involved with cocaine (R 2033). Especially crack cocaine (R 2037). The use of one cocaine rock after another results in a quality of bizarreness that comes over one's thinking (R 2029). One becomes so emotionally disturbed that his or her conduct is likely to be very, very different than what would be seen under normal circumstances (R 2030). One's ability to reason is so dramatically reduced so as to cause incredibly stupid behavior which is often criminal (R 2031).

Dr. Caddy testified that the level of violence involved in the instant crimes suggests profound drug usage or sociopathic behavior (R 2036). Dr. Caddy did not see a history of sociopathy or juvenile disorder in Appellant (R 2034-35). Appellant's history did not reflect a history of violence (R 2034). The medical records, which were introduced into evidence (R 2038-39), show that Appellant was hospitalized on three separate occasions. The hospital diagnosis shows a chemical dependency "mixed, cocaine and marijuana and alcohol" (2d SR 95). Appellant had been using alcohol since the age of 15 and drugs since the age of 16 (2d SR 97).

When Appellant was in the emergency room of Memorial Hospital, the rescue unit stated that he was doing "crack" (2d SR 87). Restraints had to be applied when he became very violent (2d SR 87-88). The "combative behavior related to substance abuse/usage" (2d SR 91). When Appellant relaxed, he stated that he "wants to die" and that "crack has a hold on him" (2d SR 88). A later family/friend medical questionnaire indicates that due to drug abuse Appellant "sometimes doesn't care if he lives or dies"

and "when using drugs he's another personality ... most of all he's forgotten how to really laugh and enjoy himself and life" (2d SR 106). The questionnaire considered Appellant's drug abuse problem to be "life-threatening" (2d SR 104). Other medical records conclude that Appellant was "in need of in-patient drug treatment ASAP" (2d SR 72). Appellant was highly motivated to recover from his abuse problem (2d SR 72, 109).

Dr. Caddy testified that Appellant's family had an inadequate insurance program and despite needing treatment Appellant would be discharged "because there wasn't any financial coverage for continued service" (R 2056). Neither Appellant, nor his family, were sophisticated and were unaware of how to access the needed services (R 2056). Appellant had left school in the ninth grade at the age of fourteen (R 2052).

Appellant's mother, Ellie Caruso, testified that approximately two (2) years ago she became aware of Appellant's drug problem (R 2062). She received a call that Appellant had been drinking and "OD'd" and was taken to Memorial Hospital (R 2062). Appellant was hospitalized months later at Humana Hospital (R 2063). Appellant told Mrs. Caruso that something was wrong and asked to be taken to the hospital (R 2063). Appellant indicated the "something was wrong and he didn't know what was happening to him, and he needed help" (R 2064). Appellant stayed in the hospital for a week when the insurance coverage expired (R 2064). He stayed in an extra three (3) days at approximately $500 per day (R 2064). Mrs. Caruso could not afford to keep Appellant in the hospital at that point (R 2064). Appellant did attend all the AA meetings that were around the area every single night (R 2064).

Mrs. Caruso further testified that Appellant was again hospitalized at Memorial Hospital for three (3) days (R 2065). It was for the "same continuing drug overdose" (R 2065). Memorial's outpatient program cost $10,000.00 which the Caruso's were unable to afford (R 2065).

Appellant's father, Michael Caruso, Sr., testified that Appellant always lived with his family except for one occasion (R 2073). Appellant lived outside the house for thirty-one (31) days before he came back home (R 2073). Appellant was hospitalized in 1986 (R 2073). The Caruso's had received a call that Appellant had been drinking and taking drugs (R 2074). He was hospitalized a second time at Humana Hospital several months later (R 2074). A third time, the Caruso's had paramedics take Appellant to Memorial Hospital after he had slit his wrist and was not looking right (R 2075).

The prosecution and defense stipulated that a grand theft conviction was the extent of Appellant's criminal record (R 2082).

SUMMARY OF THE ARGUMENT

GUILT PHASE

POINT I

Over Appellant's objection, the state introduced evidence of Appellant's drug abuse and drug activities. Such testimony constituted an improper attack on his character. Appellant was on trial for murder; not for his drug activities. It was reversible error to admit the bad character evidence.

POINT II

Over Appellant's objection, the state introduced an autopsy photograph showing the scalp removed thus revealing the flesh

which underlies the hair and overlies the skull. The result shown in the photograph was the work of the medical examiner rather than anything attributable to a suspect. The photo was irrelevant and its inflammatory effect clearly outweighed any possible relevance it may have had. It was reversible error to admit the autopsy photograph.

POINT III

Over Appellant's objection, the state was permitted to introduce testimony as to out-of-court statements that the Carusos' were afraid of their son. Such testimony was irrelevant, and did not constitute proper impeachment evidence. It was reversible error to admit the prejudicial testimony.

POINT IV

The state introduced irrelevant bad character evidence that Appellant had stole a chainsaw and attempted to pawn it. The admission of such evidence was reversible error.

POINT V

The state failed to comply with the ten day notice requirement of § 90.404(2)(b) of the Florida Statutes. There was an inadequate inquiry into the state's failure to comply. Consequently, Appellant's convictions and sentences must be reversed.

POINT VI

The state failed to disclose the results of examinations made by the medical examiner as to the time of death and the cuts on Appellant's hands as required by Rule 3.220(b)(x), Fla.R.Crim.P. The trial court erred in failing to conduct an inquiry into whether Appellant was prejudiced by the violation. It was also

error to deny Appellant's motion for continuance to contact other experts to review the examination results. Appellant's convictions and sentences must be reversed.

POINT VII

Over Appellant's objection, Officer Walsh was permitted to give his opinion that he felt only the killer knew that Saran Wrap was found around the victim. It is error for a witness to express opinions or conclusions, where the conclusions to be drawn are for the jury to decide. The feeling of the officer also infers the possession of personal knowledge of guilt beyond what was presented. Appellant's convictions and sentences must be reversed.

POINT VIII

Over Appellant's objection, photographs of the outside of the Leland residence which were not an accurate representation of the scene at the time of the offense were introduced into evidence. Photos which can confuse or mislead the jury are not admissible. The photo were prejudicial to Appellant's defense. Appellant's convictions and sentences must be reversed.

POINT IX

Over objection, the state impermissibly bolstered Myrel Walker's testimony by introducing a prior consistent statement. This was error where Appellant was not claiming that Walker was deliberately fabricating a story. The error was not harmless.

POINT X

Over objection, Officers Raimondi and Faby both testified to prior statements made to them by Myrel Walker. The statements were clearly hearsay and improperly bolstered Walker's testimony. Appellant's convictions and sentences must be reversed.

POINT XI

Over objection, Officer Martin testified that a paramedic told him that the Leland residence was "secured". The testimony was hearsay and inadmissible. Appellant's convictions and sentences must be reversed.

POINT XII

Numerous times during trial the jury heard information which weakened the presumption of innocence. Thus, Appellant was denied due process and a fair trial and his convictions and sentences must be reversed.

POINT XIII

During preliminary instructions, the trial court informed the jury that they could not have any testimony read back to them. Such an instruction is improper and constitutes reversible error.

POINT XIV

The trial court instructed the jury that they could take notes during trial. Under the circumstances of this case, especially where the jury could not have testimony read back, such an instruction was reversible error.

POINT XV

The trial court informed the jury about the decisions of circuit court cases being reviewed by appellate courts. This instruction was capable of suggesting a dilution of the responsibility of the jury due to further review. Thus, it is improper, and constitutes reversible error.

POINT XVI

The state improperly introduced evidence that Appellant had exercised his right not to be fingerprinted. This was reversible

error.

POINT XVII

The instruction on reasonable doubt denied Appellant due process and a fair trial by informing the jury that a reasonable doubt is not a possible doubt.

POINT XIII

Submission of this cause to the jury on alternative theories of first degree murder was error. First, the general verdict deprived Appellant of the right to a unanimous verdict. Second, it subjects Appellant to the possibility that he was found guilty on an invalid theory. Third, it violates the Notice Clauses.

POINT XIX

The evidence in this case was insufficient to prove the identity of the killer. It is not capable of proving beyond a reasonable doubt that Appellant was the perpetrator. In addition, the evidence was insufficient to prove a premeditated intent to kill rather than a depraved mind.

PENALTY PHASE

POINT XX

By a vote of 11 to 1, the jury recommended a sentence of life imprisonment. The jury may have reasonably had a different view of the existence of mitigating and aggravating circumstances. The facts were not so clear and convincing that no reasonable person could differ as to whether a death sentence was appropriate. Thus, it was error to override the jury and to impose a sentence of death.

POINT XXI

Over objection, the trial court heard victim impact

information in the form of testimony and letters. This was error. Appellant's sentence must be vacated and a new sentencing hearing held before a different judge.

POINT XXII

The sentencing order contains substantial errors. The findings that the killing was heinous, atrocious, or cruel, and cold, calculated, and premeditated, are not applicable in this case. The trial court erred by ignoring uncontroverted mitigating evidence which formed a legitimate basis for the penalty verdict.

POINT XXIII

Florida's death penalty statute operates in an unconstitutional 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.

POINT XXIV

The aggravating circumstances used at bar are unconstitutionally vague, have not been strictly construed, do not conform to their legislative purposes, and are subject to such inconsistent application as to make them unconstitutional.

POINT XXV

The override in this case was arbitrary and irrational in violation of the Florida and United States Constitutions.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF BAD CHARACTER EVIDENCE REGARDING APPELLANT'S DRUG ACTIVITY OVER APPELLANT'S OBJECTIONS.

During trial, a number of attacks on Appellant's character took place which were irrelevant to whether he was guilty of the crime charged. Unless a defendant places his character in issue, an attack on his character deprives him of a fair trial and constitutes reversible error. Wilt v. State, 410 So.2d 924 (Fla. 3d DCA 1982). In the instant case Appellant was not on trial for the collateral activities. Rather, the issue was whether he committed the crime charged. It was error to overrule Appellant's objections and motions.

Prior to trial Appellant moved in limine to prohibit the prosecutor from introducing of evidence of drug activity by Appellant (R 6-7, 22). The prosecutor indicated he was not certain if such evidence would be presented, but that it might be presented through the testimony of Craig Quinn. The trial court ruled that Appellant's drug activity one week prior to his arrest would be admissible (R 22).

Prior to the testimony of state witness Craig Quinn, Appellant renewed his objection to the evidence of drug activity by Appellant (R 1097). On direct examination, Quinn testified that Appellant was "high" on the day of the killing (R 1206). On redirect the prosecutor elicited testimony that Appellant got Quinn involved in crack cocaine (R 1266). Quinn also testified that Appellant had the idea to go to Miami to get crack cocaine (R 1267-68). Quinn then detailed what Appellant did to get the cocaine in Miami (R 1267-

71). Quinn testified that Appellant smoked the cocaine (R 1269, 1271). Quinn testified that Appellant "didn't do anything but smoke" (R 1271). Quinn testified that Appellant took more cocaine than Quinn (R 1272). Quinn testified that Appellant knew the cocaine dealers (R 1273). The prosecutor also elicited evidence that Appellant had been arrested in a reverse sting for buying crack cocaine (R 1285).

None of this evidence of Appellant's drug activity was relevant to the offense for which Appellant was charged - murder. Rather, the evidence of drug activity merely constituted bad character evidence. Thus, it was reversible error to permit the introduction of the drug activity of Appellant. Green v. State, 376 So.2d 396, 398 (Fla. 3d DCA 1979) (in murder prosecution, the defendant's drug addiction and use of marijuana was irrelevant and could have only served to inflame and prejudice the jury against the defendant).

In the lower court, the prosecutor claimed that the drug activity was admissible to show motive. However, the motive for the killing was not that Appellant was using drugs or introducing Craig Quinn to crack cocaine. Moreover, the specific evidence of drug activity is too remote toward showing motive of needing money for a drug habit. Machara v. State, 272 So.2d 870 (Fla. 4th DCA 1973). The admission of improper collateral evidence is presumptively harmful. See Peek v. State, 488 So.2d 52, 53 (Fla. 1986).

There is also great prejudice from the evidence that Appellant knew drug dealers and that he introduced Quinn to cocaine. Evidence of a defendant being involved in the dealing of drugs is so prejudicial that it cannot be ignored by a jury. Clark v. State,

337 So.2d 858 (Fla. 2d DCA 1976) (reversal warranted even though jury instructed to ignore evidence). At bar, there was not even an attempt to sanitize the prejudicial evidence by an instruction. The introduction of the evidence deprived Appellant of due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, United States Constitution; Article I, Section 9, Florida Constitution. The introduction of this prejudicial evidence warrants a new trial.

POINT II

THE TRIAL COURT ERRED IN ADMITTING AN AUTOPSY PHOTOGRAPH INTO EVIDENCE OVER APPELLANT'S OBJECTION.

During trial, over Appellant's objection, the state was permitted to introduce state's exhibit #63, an autopsy photograph of Mrs. Leland's head (R 741-743). The photograph shows the results of the autopsy - the scalp is removed thus revealing the flesh which underlies the hair and overlies the skull.[2] The photograph is more disturbing when one looks at the bottom of the photo and sees Mrs. Leland's hair just below where the medical examiner made his incision. It was error to admit this photograph.

It is true that photographic evidence, if relevant, is generally held admissible regardless of its character as gruesome or gory. Allen v. State, 340 So.2d 536 (Fla. 3d DCA 1976). However, if such photographs primary effect is to inflame the passions of the jury, their introduction will result in a reversal of the conviction. Jackson v. State, 359 So.2d 1190 (Fla. 1978).

The photograph in question, revealing the flesh underneath the scalp removed during the autopsy, is the result of the medical

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[2] See State's exhibit #63 (original included in record sent to this court).

examiner's work rather than anything attributable to a suspect. The admission of a strikingly similar photograph revealing flesh as the result of an autopsy was held improper in Hoffert v. State, 559 So.2d 1246 (Fla. 4th DCA 1990):

> Finally, 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 behind the ears to the top of the head, with the scalp rolled away revealing the flesh which underlies the hair overlies the skull. The state argues 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 muscle without reference to the photograph. The danger of unfair prejudice to Appellant far outweighed the probative value of the photograph and the state has failed to show the necessity for its admission. On retrial, the photograph should be excluded.
>
> Accordingly, we reverse and remand this case for a new trial.

559 So.2d at 1249. Other cases have similarly held that photographs displaying wounds or injuries rendered by the medical examiner, or someone other than the suspect, should not be admitted into evidence. Czubak v. State, 15 F.L.W. S586 (Fla. Nov. 8, 1990) (photo showed condition of body caused by factor (dogs) other than crime itself); Rosa v. State, 412 So.2d 891 (Fla. 3d DCA 1982) (photograph which included the results of emergency procedures performed after the stabbing); Reddish v. State, 167 So.2d 858, 863 (Fla. 1964) (photographs of bodies after removal from scene were irrelevant and unnecessary); Wright v. State, 250 So.2d 333, 337

(Fla. 2d DCA 1971) (inflammatory photographs did not address the issue of the case as to who murdered the victim); see also Beagles v. State, 273 So.2d 796, 798 (Fla. 1st DCA 1978) (photographs showing body removed from scene should not be admitted unless they have some particular relevance). Even if the photograph has some relevance, the photo should not be admitted where the prejudice might outweigh the small relevancy of the photo. Czubak v. State, 15 F.L.W. S586 (Fla. Nov. 8, 1990).

The autopsy photograph in this case had no, or at best little, relevance and its primary effect would be to inflame the jury. Introduction of the photo denied Appellant due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, United States Constitution; Article I, Section 9, Florida Constitution. Appellant's conviction and sentence must be reversed and this cause remanded for a new trial.

POINT III

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY THAT MR. AND MRS. CARUSO HAD STATED THAT THEY WERE AFRAID OF APPELLANT.

After the defense rested the prosecutor called Officer Angelo Pazienza as a rebuttal witness. Over Appellant's objections and motion for mistrial (R 1745, 1756), Pazienza was permitted to testify that Mr. and Mrs. Caruso had stated that they were afraid of Appellant (R 1745, 1760). It was error to allow this testimony.

By eliciting hearsay testimony that the Carusos were afraid of Appellant, the prosecutor impugned the character of Appellant. "It is fundamental that the prosecution may not impugn the character of an accused unless the accused first puts character into issue at trial". Bates v. State, 422 So.2d 1033, 1034 (Fla.

3d DCA 1982). The Caruso's fear of Appellant was clearly prejudicial. See Dupont v. State, 556 So.2d 457 (Fla. 4th DCA 1990) (it was error to place defendant's threat in evidence). Likewise, the state of mind of a witness, or victim, is not relevant toward determining the identity of the perpetrator and there is a danger of the jury misusing such evidence for an impermissible purpose. Fleming v. State, 457 So.2d 499, 501-502 (Fla. 2d DCA 1984).

The prosecutor claimed that the Carusos' statement of fear of Appellant was admissible as impeachment. However, Mrs. Caruso never denied, nor admitted, during trial that she had previously stated that she was afraid of Appellant. Thus, Pazienza's testimony as to Mrs. Caruso making out-of-court statements does not constitute impeachment. It constitutes hearsay.

Moreover, assuming arguendo that Pazienza's testimony contradicted both of the Carusos, a witness may not be impeached on a collateral matter. Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981); Gonzalez v. State, 538 So.2d 1343 (Fla. 4th DCA 1989). When a witness gives an answer to a collateral matter, his answer is deemed conclusive and extrinsic evidence may not be introduced to contradict his answer. Gelabert, supra at 1009. If the evidence is introduced for the sole purpose of contradicting the witness on a collateral matter, the witness may not be impeached with extrinsic evidence. Id. at 1010.

At bar, any testimony as to whether the Carusos were in fear of Appellant was merely collateral to whether Appellant had committed the offense charged. The issue was whether he had killed the Lelands and not whether his parents were afraid of him. Consequently, the extrinsic evidence that the Carusos were afraid

of Appellant could not be used for impeachment. See Gelabert, supra (reversible error to introduce evidence that defendant had threatened son with knife to contradict testimony that such threat was never made where evidence did not relate to other issues at trial); Gonzalez, supra (reversible error to introduce evidence that defendant had sexual relations with more than one person in past to contradict his testimony that he had only sexual relations with wife in past, the number of people defendant had sexual relations with in past was collateral and not an issue at trial).

The introduction of the improper testimony denied Appellant due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, United States Constitution; Article I, Section 9, Florida Constitution. Appellant's conviction and sentence must be reversed and this cause remanded for a new trial.

POINT IV

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL WHERE THE PROSECUTOR INTRODUCED BAD CHARACTER EVIDENCE THAT APPELLANT HAD STOLEN A CHAINSAW AND ATTEMPTED TO PAWN THE CHAINSAW.

During trial the prosecutor introduced evidence showing that Appellant stole a chainsaw from his father (R 1258-59, 1277), and that he pawned the chainsaw for money to buy crack cocaine (R 1258, 1277, 1473, 1475).[3]

The evidence of Appellant stealing and attempting to pawn a chainsaw was not relevant to any of the material issues at trial. Rather, the evidence constitutes an improper attack on Appellant's character. Unless a defendant places his character in issue, an

[3] The prosecutor called Patrick Sheehan, who had worked for Uptown Pawn Shop, solely to testify that Appellant had pawned a chainsaw (R 1473, 1475).

attack on his character deprives him of a fair trial and constitutes reversible error. Wilt v. State, 410 So.2d 924 (Fla. 3d DCA 1982). Appellant was not on trial for stealing a chainsaw and never placed his character in issue. Appellant was denied due process and a fair trial due to the introduction of the collateral crime evidence. Fifth and Fourteenth Amendments, United States Constitution; Article I, Section 9, Florida Constitution. This cause must be remanded for a new trial free from the taint of the improper collateral crime evidence.

POINT V

THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE INQUIRY WHERE THE STATE FAILED TO COMPLY WITH THE TEN DAY NOTICE REQUIREMENT OF SECTION 90.404(2)(b), FLORIDA STATUTES.

As noted in Point I, the state introduced collateral crime evidence of Appellant's drug activity. Appellant also objected on the ground that the state failed to give ten (10) day notice as required by section 90.404(2)(b) of the Florida Statutes (R 13-22). Although the trial court indicated that it was conducting a "Richardson" inquiry, (R 18), the partial inquiry that was held was not adequate. The failure to hold an adequate inquiry was reversible error. Fedd v. State, 461 So.2d 1384 (Fla. 1st DCA 1984) (even though no discovery violation under Fla.R.Crim.P. 3.220, it was reversible error for trial court to fail to conduct a Richardson[4] inquiry into the failure to comply with other rules requiring notification).

Section 90.404(2)(b), Florida Statutes, provides, in no uncertain terms, what the state must do before it may rely on

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[4] 246 So.2d 771 (Fla. 1971).

collateral offense evidence at a trial:

> 1) When the state in a criminal action intends to offer evidence of other criminal offense under paragraph (a), no fewer than 10 days before trial, the state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.

Since Appellant did not testify, the exception stated in the last sentence of the statute clearly does not apply in the present case. Cf., Tuff v. State, 408 So.2d 724 (Fla. 1st DCA 1982). The state failed to meet its obligation under § 90.404(2)(b).

The minimum inquiry, required for an adequate Richardson hearing, must delve into:

> (1) whether the violation was inadvertent or willful;
> (2) whether the violation was trivial or substantial; and
> (3) what effect, if any, did it have upon the ability of the (other party) to properly prepare for trial.

Raffone v. State, 483 So.2d 761, 763 (Fla. 4th DCA 1986).

At bar, there was a complete failure to inquire into the willfulness of the prosecutor's failure to comply. In fact, the prosecutor represented that the defense only had to be on notice of the use of collateral crime evidence and in essence that a written statement describing the acts with particularity as required by § 90.404(2)(b), was not required of him (R 12). The prosecutor was either saying that he was in substantial compliance with § 90.404(2)(b) by giving oral notice, or that he had the total discretion of ignoring the rule as long as the defense was not prejudiced.[5] Since there was no inquiry into the willfulness or

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[5] Of course, the later attitude would demonstrate an extreme willfulness to violate the notice requirement which the court could, if appropriate, exercise its authority in imposing a sanction despite the lack of prejudice to the defense. It should

inadvertence of the violation, one simply does not know whether the prosecutor's actions were deliberate and justified the sanction of excluding the evidence. Thus, the inquiry was inadequate and this cause must be remanded for a new trial.

In addition, despite the fact that there was generalized discussion involving possible prejudice to Appellant due to the failure to provide written notice, there was not an adequate inquiry into the affect of the violation on Appellant's ability to prepare for trial. The failure to comply with § 90.404(2)(b), even at the inquiry, itself prohibited an adequate inquiry from occurring. In addition to not complying with 90.404(2)(b) by describing the collateral bad acts "with the particularity required of an indictment or information", the prosecutor did not describe the collateral bad acts at the inquiry. The inquiry only revealed that the bad acts involved drugs and would be elicited from Craig Quinn. The nature or specificity of the collateral acts were never discussed at the inquiry. Appellant's counsel explained that even at the inquiry he did not know of what specific acts of misconduct he would have to deal with:

> MR. MCDONNELL: This is taking me by surprise, Judge, as far as what specific acts of misconduct, one week before to approximately two to three weeks after this incident. I don't have Mr. Quinn's deposition in front of me, but I did take his deposition. I'm not trying to mislead you, Judge. I'm not in a position --

(R 21). Obviously, one is not conducting an adequate inquiry into

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be noted that the first complaint of the prosecutor's violation of the notice requirement was on September 19, 1988. Despite the fact that the prosecutor was made aware of the notice requirement, a week later, when the objection was renewed, (R 1099-1100), the prosecutor had still failed to comply with the notice requirement. In fact, the prosecutor never did attempt to comply with the written notice requirement.

the prejudice to the defendant by the prosecutor's failure to notify him of the specific acts of misconduct where the acts of misconduct are not specified during the inquiry. This is especially true where the rule requires that the acts be described with "particularity" of a charging document.[6]

Apparently, the trial court believed that the specificity required by 90.404(2)(b) only dealt with the dates when the acts occurred. However, § 90.404(2)(b) specifically requires that the acts be described with particularity. The misunderstanding of § 90.404(2)(b) would help explain why the trial court failed to conduct the proper inquiry into how the lack of a written notice describing the acts could prejudice Appellant in preparing for

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[6] Even after the inquiry, Appellant's counsel still complained he still was not aware of the specifics as 90.404(2)(b) required the prosecutor to provide regarding the acts described with particularity:

> MR. MCDONNELL: I don't know the perimeters of the - about the drug use and --
>
> MR. HANCOCK: I thought the court ruled on that.
>
> THE COURT: Didn't I say one week and up to the time of arrest?
>
> MR. MCDONNELL: I believe the court ruled from one week up to the time of the arrest. I recall the court making a ruling.
>
> THE COURT: You told him that, too?
>
> MR. HANCOCK: Yes.
>
> MR. MCDONNELL: But I would submit that's not what the specificity is as to the William's rule. And I'd like a continuing objection to his testimony concerning that stuff so I don't have to pop up and down.

(R 1099-1100).

trial. The failure to conduct an adequate inquiry into prejudice is reversible error.

Also, the particularity of the acts, which was not inquired into, would need to be inquired into to determine if the violation was "trivial or substantial". The failure to make the required inquiry is reversible error.

Failure to make the adequate inquiry involving the prosecutor's violation of the notice requirement is per se reversible error and Appellant's convictions and sentences must be reversed and this cause remanded for a new trial. Cf. Smith v. State, 500 So.2d 125 (Fla. 1986); Cumbie v. State, 345 So.2d 1061 (Fla. 1977).

POINT VI

THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY INQUIRE INTO THE DISCOVERY VIOLATION AND IN DENYING APPELLANT'S MOTION FOR A CONTINUANCE WHICH WAS MADE AFTER A DISCOVERY VIOLATION.

During trial, medical examiner Felipe Dominquez testified that the time of death was approximately midnight and to the age of the cuts on Appellant's hands (R 854-56). Appellant moved for mistrial because he was not informed of Dr. Dominquez's findings on the time of death or cuts until trial (R 880-881). Appellant's motion was based on the violation of Rule 3.220(b)(x), Fla.R.Crim.P., which provides that the "results of physical or mental examinations and of scientific tests, experiments or comparisons" are to be disclosed to the defense (R 886). The trial court denied the motion on the premise that the state did not have a continuing obligation to disclose the results of the experts findings on examinations (R 890-91). After the trial court denied Appellant's motion, Appellant

moved for a continuance to permit him to find an expert to contradict Dominquez's testimony (R 891). This motion was denied.

The trial court erred in ruling that there was no discovery violation and in failing to determine whether the violation was prejudicial to Appellant. Here, there obviously was a discovery violation. The state's medical examiner told defense counsel at deposition that he could not determine the time of death. At trial the state called the medical examiner and he testified that the time of death was approximately midnight (R 854-55). The medical examiner testified that upon examining photographs and other items three or four days prior to trial he was able to make a finding as to time of death (R 862). He also made findings on the age of the cuts on Appellant's hands (R 855). None of these state expert findings were disclosed to Appellant as required by Florida Rule of Criminal Procedure 3.220(a)(1)(x). As demonstrated in Lee v. State, 538 So.2d 63 (Fla. 2d DCA 1989), the non-disclosure of expert finding is a discovery violation requiring a Richardson determination as to prejudice:

> Here, the state's failure to inform Appellant of the results of the trigger pull test until the time of the FDLE firearms expert's rebuttal testimony constitutes a violation of Florida Rule of Criminal Procedure 3.220. Rule 3.220(a)(1)(x) imposes an affirmative and continuing duty on the state to disclose reports or statements of experts, including the results of scientific tests or experiments. *See Robinson v. State, 522 So.2d 869 (Fla. 2d DCA 1987); Raffone v. State, 483 So.2d 281 (Fla. 1986)*. Although the firearms expert had not reported his trigger pull findings either to the police or to the state attorney, the state is charged with constructive knowledge and possession of evidence held by other departments of the executive branch of Florida's government for discovery purposes. *See Antone v. State, 355 So.2d 777 (Fla. 1978); Robinson; State v. Alfonso, 478 So.2d 1119 (Fla. 4th DCA 1985), review denied, 491 So.2d 280 (Fla. 1986)*. Therefore, possession of the test results by the FDLE is imputed to the state attorney, who

> had a duty to disclose them prior to trial. In light of the state's discovery violation, the trial court erred in failing to conduct a *Richardson* hearing to determine whether Appellant was procedurally prejudiced as a result of the violation.

538 So.2d at 65. Here, the trial court erred in merely determining if a violation did, or did not, exist. Fedd v. State, 461 So.2d 1384, 1385 (Fla. 1st DCA 1984). Due to the failure to determine the extent of the prejudice, due to the violation, Appellant's conviction and sentence must be reversed.

Alternatively, at the very least the requested continuance should have been granted. Obviously, Appellant would be prejudiced. Appellant was travelling under the theory that time of death could not be shown and therefore was not prepared to present an expert to rebut the medical examiner (R 881). Also, Appellant's counsel had no notice of the finding as to the cuts on Appellant's hands. Again, if he had been notified he could have obtained his own independent expert to analyze the cuts to rebut the medical examiner. At the very least, a continuance could have given counsel an opportunity to review the findings with an expert to enable a more sufficient cross-examination of the medical examiner. Under the circumstances, the denial of the motion for continuance denied Appellant due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, United States Constitution; Article I, § 9, Florida Constitution.

POINT VII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO OFFICER WALSH'S TESTIMONY THAT HE FELT ONLY THE KILLER WOULD KNOW THAT SARAN WRAP WAS AROUND THE VICTIM'S HEAD.

During trial officer Thomas Walsh testified that Saran Wrap was found around the victim's head and "it was one of the elements

of the crime I felt only the killer would know" (R 1081). Appellant objected to the testimony (R 1081). The trial court overruled the objection on the ground that such evidence had already been admitted without objection (R 1081).

The trial court was mistaken in believing that the evidence had been admitted previously without objection. Officer David Belusko testified that generally that there are "certain things" about crimes that only the perpetrator knows (R 939). However, Belusko did not, unlike Walsh, opine that only the killer knew that Saran Wrap was found around the head of the victim in this case.

Officer Walsh's testimony that he "felt" only the killer would know about the Saran Wrap is clearly improper. It is error for a witness to express conclusions, where the conclusions to be drawn are for the jury to decide. See McGough v. State, 302 So.2d 751 (Fla. 1974); Johnson v. State, 393 So.2d 1069 (Fla. 1980). While the state may present testimony of a witness that he or she discovered unique circumstances as to the crime and that he or she never relayed the information, the witness may not conclude from this evidence that only the killer would know of the unique circumstance. This conclusion should have been excluded since the jury could have drawn its own conclusion based upon the evidence presented at trial. Surely, their ability to draw conclusions from the facts presented was every bit as great as Officer Walsh. In fact, this is their function.

Such an error is not harmless. As noted in Mills v. Redwing Carrier, Inc., 127 So.2d 453 (Fla. 2d DCA 1961) the admission of an opinion or conclusion of a police officer carries great evidentiary weight with a jury and cannot be dismissed as non-

prejudicial:

> This lay testimony concerning the pivotal point of the case by a highway patrolman could have unduly influenced the jury in its interpretation of the facts. As was said in Padgett v. Buxton-Smith Mercantile Co., 10 Cir., 1958, 262 F.2d 39, 42:
>
> > "The expressed opinion of the highway patrolman did not serve to enlighten the jury in respect to a matter outside its competence and should not have been admitted. While we are loath to interfere with the broad discretion of the trial courts in matters of this kind, the opinion came from an officer of the law whose badge of authority gave it evidential significance which may not be dismissed as harmless or non-prejudicial. As an official opinion of a fact matter within the knowledge or comprehension of the members of a jury it carries weight which tends to usurp the judicial function.

127 So.2d at 457 (emphasis added). The conclusion relaying what the officer "felt" also improperly infers that the police had additional personal knowledge of guilt beyond what was presented. As noted in Berger v. United States, 295 U.S. 78, 55 S.Ct. 629 (1935):

> Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

55 S.Ct. at 633 (emphasis added). The testimony improperly constituted an opinion as to guilt or innocence. See Farley v. State, 324 So.2d 662 (Fla. 4th DCA 1975); Spradley v. State, 442 So.2d 1039 (Fla. 2d DCA 1983).

The introduction of the improper testimony deprived Appellant of due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, United States Constitution; Article I, § 9, Florida Constitution. Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT VIII

THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHS OF THE OUTSIDE OF LELAND RESIDENCE WHICH WERE NOT AN ACCURATE REPRESENTATION OF THE SCENE AT THE RELEVANT TIME.

During trial the prosecutor moved to introduce State's Exhibit 92 into evidence over Appellant's objection (R 1387-88, 1396). The exhibits are photographs taken of the outside of the Leland residence in late January of 1988 - some six (6) weeks after the offense date - December 6, 1987 (R 1390-1392). Appellant's objection was that the photographs would unfairly display different lighting conditions outside the residence than what occurred on the relevant date of the offense (R 1389). The photographs should not have been admitted because they were not accurate representations of the Leland residence at 7:30 a.m. on December 6, 1987. The photographs were placed in evidence over Appellant's objections (R 1395-1396).

As has been long recognized in Florida, exhibits which could add to a jury's confusion by misrepresenting the scene they depict should not be admitted into evidence:

> The misrepresentation as to the tree affects the very spot of the homicide, bringing the limbs of the tree against the house or veranda, right where it occurred. We are, moreover, entirely satisfied that this picture could have been no assistance to the jury in the case, but would have served rather as an agency of confusion.

Ortiz v. State, 30 Fla. 256, 11 So. 611, 613 (1892). Even relevant evidence will be inadmissible if it can confuse or mislead the jury. § 90.403, Fla. Stat. (1985); Pepper v. Edell, 44 So.2d 78, 80 (Fla. 1949) (if the evidence "tends to obscure rather than illuminate the true issues before the jury then such evidence should be excluded"). It is reversible error to admit photographs

which are misleading. Loftin v. Howard, 82 So.2d 125 (Fla. 1955); Pensacola Inn Ltd. v. Tuthill, 404 So.2d 1173 (Fla. 1st DCA 1981) (where scene altered prior to taking of photographs, photographs were inadmissible). The reason for excluding photographic exhibits which are misleading is that there is a real danger that the exhibits will be given the effect of speaking for themselves. Reed v. Davidson Dairy Co., 97 Colo. 462, 50 P.2d 532 (Colo. 1935).

The lighting conditions outside the Leland residence at 7:30 a.m. on December 6, 1987, was fairly significant in this case. This was the time that Appellant believed he had seen what looked like a black man looking out a window from inside the Leland residence (R 1070). The state's theory was that, due to the lighting conditions at that time, Appellant could not have seen anyone inside the residence and that he was lying about doing so. The state used state's exhibit 92 in an effort to prove its theory. As one can see from the photos,[7] the photos tend to support the state's theory. However, the photographs are misleading in that they were taken six (6) weeks after the relevant date when lighting conditions, even though taken at the same time of day, are different due to different positioning of the sun.[8] This is precisely why photographic exhibits must, in a case where

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[7] Counsel has carefully studied the photos which have been sent to this Court along with the other exhibits in this case.

[8] For example, in South Florida, on December 6, 1988, sunrise would occur at 6:55 a.m. as opposed to 7:10 a.m. on January 20. Appendix. Since the most dramatic changes in natural lighting conditions occur shortly after sunrise, the difference in sunrise timing would be very significant. On December 6 at 7:30 a.m., it would be 35 minutes after sunrise which would result in much different and better light for viewing than at 20 minutes after sunrise on January 20 at 7:30. The photo is misleading and not a true representation of the conditions on December 6 at 7:30 a.m.

viewability is in question, show the same conditions as the time in question. The misleading photographs improperly bolstered a state's theory of the case and should not have been admitted into evidence. The admission of the photographs denied Appellant due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, United States Constitution; Article I, Section 9, Florida Constitution. Appellant must be given a new trial.

POINT IX

THE TRIAL COURT ERRED IN PERMITTING THE BOLSTERING OF STATE WITNESS MYREL WALKER'S TESTIMONY BY PRIOR CONSISTENT STATEMENTS.

One of the state's key witnesses was one Myrel Walker. During trial, over Appellant's objection, (R 1513), the prosecutor was permitted to improperly bolster her testimony by introducing her out-of-court prior consistent statements. Specifically, the prosecutor elicited testimony that Myrel Walker had previously made a statement to the police that the person she had seen on December 5 at her house headed east and went down a few houses and turned into a yard and headed north (R 1514-1515). The prosecutor also produced evidence of Myrel Walker's deposition with the same statements (R 1516-1517). These out-of-court statements were consistent with Myrel Walker's trial testimony, (R 1498, 1505-06), and were improperly used to bolster that trial testimony. It was error to permit the improper bolstering of a key state witness.

After Appellant objected, the prosecutor tried to justify the admission of the prior consistent hearsay statements by claiming

that they were offered to rebut a charge of recent fabrication.[9] However, the prosecutor's claim is without merit. Appellant's counsel never made any claim that Myrel Walker was deliberately fabricating a story. Nor did he point to any fact indicating bias or a motive to falsify.[10] Instead, defense counsel impeached Walker on the basis that she was mistaken in what she was testifying to rather than deliberately fabricating her testimony as to what she saw:

> A [Myrel Walker]: Anybody can make a mistake. But I'm quite sure the way I pointed that he -that's the way he went.
>
> Q [Defense counsel McDonnell]: Anyone can make a mistake?
>
> A: I don't -- maybe sometimes I may say north or east but it's really east.
>
> Q: It's really east but you said north, right?

(R 1510-11). Thus, the out-of-court statements were not admissible to rebut a charge of recent fabrication. The hearsay statements merely bolstered Walker's testimony. Prior consistent statements may not be admitted to bolster the credibility of a witness. Jones v. State, 16 F.L.W. D688 (Fla. 4th DCA March 13, 1991); McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982).

The error in this case cannot be deemed harmless. The use of prior consistent statements is prohibited because they improperly

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[9] If this were true the statements would be admissible pursuant to Section 90.801(2)(b), Florida Statutes.

[10] In order for § 90.801(2)(b) to apply the statement must have been made "prior to the existence of a fact said to indicate bias, interest, corruption or other motive to falsify." Kellam v. Thomas, 287 So.2d 733, 734 (Fla. 4th DCA 1974). Of course, we cannot determine whether the statements were made prior to the existence of the motive to falsify where Appellant never charged that such a fact showing a motive existed.

put "a cloak of credibility" on the witness's testimony. Perez v. State, 371 So.2d 714, 717 (Fla. 2d DCA 1979); Preston v. State, 470 So.2d 836 (Fla. 2d DCA 1985). Here, the consistent statements bolstered the testimony of Walker. Walker was a key state witness because, if she was not mistaken, her testimony could show that Appellant was at her house at approximately the time of the murders. There could be a legitimate doubt as to her identification of the person she saw. She was nervous when she saw the person. When she saw the tape of Appellant's interview on channel 10 she could only say "it looked like the guy but I'm not sure" (R 1509). The jury could have reasonably believed that she might be mistaken.[11] The bolstering of Walker's testimony by prior consistent statements may have been the catalyst to eliminate or ease the jury's doubt concerning Walker's credibility. It cannot be said beyond a reasonable doubt that the error was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The admission of the hearsay statements deprived Appellant of due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, United States Constitution, Article I, § 9, Florida Constitution. Appellant's convictions and

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[11] Courts have recognized the hazards of eyewitness identification of strangers made under stress such as in this case:

> We add only that in case such as this, which exemplifies the judicially recognized hazard of brief eyewitness identification of strangers made under stress, see e.g., United States v. Wade, 388 U.S. 218 (1967); Banks v. State, 380 So.2d 1312 (Fla. 3d DCA 1980) (Hubbart, J., dissenting); Jackson v. Fogg, 589 F.2d 108 (2d Cir. 1978); United States v. Russell, 532 F.2d 1063 (6th Cir. 1976), we must conclude that the error of admitting the hearsay substantially affected Postell's rights to a fair trial.
>
> Reversed and remanded.

Postell v. State, 398 So.2d 851, 856 (Fla. 3d DCA 1981).

sentences must be reversed and this cause remanded for a new trial.

POINT X

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE HEARSAY TESTIMONY OF OFFICERS RAIMONDI AND FABY.

On several occasions hearsay testimony was introduced by the state over Appellant's objections. Over objection (R 1481), Officer Raimondi testified that Myrel Walker gave him information that she observed a person at her door on December 5 at approximately midnight (R 1481-82). Over objection (R 621-623), Officer Faby testified that he received a description of the person from Myrel Walker and that description matched "the defendant" (R 621). The trial court ruled that if Walker testified it would be mute (R 623-24). It was error to permit the hearsay statements into evidence.

Hearsay is defined in Section 90.801(1)(c), Florida Statutes, as a statement other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted. Section 90.801(1) defines the "declarant" as the person who makes the statement.

Clearly, both out-of-court statements were inadmissible hearsay. The prosecutor claimed that the out-of-court statement made to Raimondi was merely elicited to show that Raimondi was investigating (R 1481). This explanation is of no merit:

> While the error in Freeman may have been harmless, as suggested by the special concurrence, we emphasize that it is not a sufficient justification for the introduction of incriminating hearsay that the statement explains or justifies an officer's presence at a particular location or some action taken as a result of the hearsay statement. There is a fine line that must be drawn between a statement merely justifying or explaining such presence or activity and one that includes incriminating (and usually unessential) details.

Harris v. State, 544 So.2d 322, 324 (Fla. 4th DCA 1989) (emphasis

added); State v. Baird, 15 F.L.W. S613 (Fla. November 29, 1990). Moreover, the fact that Myrel Walker later testified did not render the out-of-court statements non-hearsay. Wells v. State, 477 So.2d 26 (Fla. 3d DCA 1985); United States v. Freeman, 519 F.2d 67, 69 (9th Cir. 1975). Rather, the hearsay statements improperly bolstered the witness's testimony. E.g., Jones v. State, 16 F.L.W. D688 (Fla. 4th DCA March 13, 1991); see Point IX.

The erroneous admission of the hearsay statements deprived Appellant of due process and a fair trial. Fifth, Sixth, and Fourteenth Amendments, United States Constitution; Article I, Section 9, Florida Constitution. Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT XI

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE HEARSAY TESTIMONY OF OFFICER MARTIN THAT HE WAS TOLD BY A PARAMEDIC THAT THE LELAND RESIDENCE WAS SECURED.

Over Appellant's hearsay objection (R 567), Officer Martin testified that when he came to the Leland residence a paramedic "advised me the house was secured" (R 568). It was error to admit the hearsay statement.

Clearly, the testimony of Officer Martin, that he was told the Leland residence was secured, is inadmissible hearsay. The prosecutor and trial court indicated that the statement was to show Officer Martin's later actions (R 567). As explained in Harris v. State, 544 So.2d 322 (Fla. 4th DCA 1989) the content of hearsay statements cannot be introduced to show an officers later actions:

> We emphasize that it is not a sufficient justification for the introduction of incriminating hearsay that the statement explains or justifies an officer's presence at a particular location or some action taken as a result

of the hearsay statement.

544 So.2d at 324; see also, State v. Baird, 15 F.L.W. S613 (Fla. November 29, 1990).

The erroneous admission of the hearsay statements deprived Appellant of due process and a fair trial. Fifth, Sixth, and Fourteenth Amendments, United States Constitution; Article I, Section 9, Florida Constitution. Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT XII

APPELLANT WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY THE REPEATED DILUTION OF HIS PRESUMPTION OF INNOCENCE.

Appellant's presumption of innocence was erroneously diluted by evidence and argument that led the jury to believe that other bodies; including judges, grand juries, police and prosecutors had already determined Appellant's guilt. This evidence individually and cumulatively denied Appellant a fair trial, and due process of law, and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, 17, 21, and 22 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The destruction of Appellant's presumption of innocence began with voir dire and continued all the way through the prosecution's rebuttal closing argument. In voir dire the following colloquy took place between the prosecutor (Mr. Hancock) and a potential juror (Mr. Armstrong). (Mr. Armstrong ultimately became foreperson of the jury (R 1925).

> MR. HANCOCK: The reason I asked is that some people have a problem unless there's somebody that actually saw the crime, do you understand?

> Do you understand in a homicide, you don't have eyewitnesses. They're dead. So if the State met its burden and proved him guilty beyond and to the exclusion of all reasonable doubt, what would your verdict be?
>
> MR. ARMSTRONG: Guilty, but you wouldn't be up here if they had a good case, would you?
>
> MR. HANCOCK: We have an opportunity to present the facts to you, and then you make the determination. The Broward County Grand Jury has indicted Mr. Caruso and determined there's probable cause on that.

(R 200). Mr. Armstrong's comment indicated that he intended to deny Appellant his presumption of innocence and assume that there was strong evidence of Appellant's guilt even though no evidence had been introduced at that time. The prosecutor immediately and intentionally reinforced this notion in front of the entire panel with his statement that the indictment represented a finding of probable cause. This was improper and was especially prejudicial in light of Mr. Armstrong's comment and the fact that Mr. Armstrong ultimately became foreperson of the jury (R 1925).

The prosecution continued to reinforce this view that other governmental bodies had determined that there was strong evidence against Appellant. Early in his opening statement, the prosecutor emphasized the grand jury indictment:

> And the reason you are here is very simple. Someone is dead. And as indicated by Judge Speiser, the Broward County Grand Jury indicted Mr. Caruso for these two deaths. And as also indicated in the indictment while living, those people were known as Mr. and Mrs. Gordon Leland.

(R 538). Later in the opening statements the prosecutor emphasized that Appellant had been arrested and later indicted for these two homicides (R 545). This emphasized that the police and the grand jury believed that Appellant was guilty.

This emphasis continued during the prosecution's evidence. The

prosecution again emphasized the arrest during its questioning of Betty Quinn, Quinn's mother (R 1176). On redirect, the prosecutor emphasized the grand jury during the questioning of Ms. Quinn:

> Q. Did you testify to a Grand Jury?
>
> A. Yes, I did.
>
> Q. And do you recall when the Grand Jury was done, how much before the May 6th date?
>
> A. I think it was a couple months before that.

(R 1186). This was an improper attempt to bolster Ms. Quinn's testimony by pointing out that she testified before the grand jury and implying that her testimony was consistent. In fact, no one even knew what her testimony was. This was also an attempt to re-emphasize both the grand jury indictment and how much evidence the grand jury heard.

Police testimony continued this trend. The prosecutor brought out from Officer Pazienza that the police were "concerned" about Appellant's statements from beginning of the investigation (R 1357-1358). On redirect examination, Officer Pazienza testified that he obtained a search warrant to obtain fingerprints from Appellant and an arrest warrant for murder (R 1384-86). Pazienza specifically testified:

> Q. And what did you do in reference to that [the arrest warrant]?
>
> A. I wrote a warrant up and all the information that I had and presented it to a judge. And a judge reviewed it and signed it. And so what I did then -- And I wrote what is called a probable cause.

(R 1385). This entire line of questioning of Pazienza was improper. It emphasized that a search warrant had been issued for Appellant's fingerprints. It stressed that a judge had reviewed the police

evidence and found it sufficient to issue an arrest warrant for Appellant. This was devastating as it put a judge's stamp of approval on Appellant's guilt and the entire police theory of the case.[12]

The prosecutor continued the theme during his cross examination of Mr. and Mrs. Caruso, (Appellant's parents) who testified as defense witnesses. Appellant was cross-examined concerning his testimony before the grand jury (R 1624-1625). Ms. Caruso was also cross-examined regarding her grand jury testimony (R 1666-1667). Thus, the emphasis on the grand jury's action continued.

The prosecutor continued this in his rebuttal closing argument:

> And ladies and gentlemen, he (Michael Caruso) was Indicted on January 20, and this is after Mr. as [presumably this should be "and"] Mrs. Caruso testified.

(R 1869) (Bracketed material supplied). This was an improper attempt to use the indictment as evidence of guilt and to use it as evidence that Mr. and Mrs. Caruso are not credible as defense witnesses as the grand jury must have rejected their testimony.

The consistent introduction of evidence and argument along this theme denied Appellant his presumption of innocence. The evidence and argument here is improper under several different lines of caselaw from the Florida and Federal courts. There was a long colloquy concerning the search warrant and arrest warrant and the fact that a judge reviewed the arrest warrant and found

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[12] The prosecutor also brought out that the grand jury indictment on two other occasions during Officer Pazienza's testimony (R 1388, 1392).

probable cause to arrest Appellant. This was devastating in that it put a judge's stamp of approval on the police theory of the case and on Appellant's guilt. It has consistently held to be improper for a judge to make any indication of partiality concerning the weight of the evidence or the credibility of a witness. Whitfield v. State, 479 So.2d 208, 212-213 (Fla. 4th DCA 1985); Gordon v. State, 449 So.2d 1302, 1304 (Fla. 4th DCA 1984); Hamilton v. State, 109 So.2d 422, 424 (Fla. 3d DCA 1959).

> The trial judge is the dominant figure at a trial, and his comment tending to show his view as to the weight of the evidence, the credibility of a witness or the guilt of the accused destroys the required impartiality of the trial.

Whitfield, supra at 212-213. In the present case, the jury was told that a judge had approved the prosecution's case.

The prosecution also repeatedly brought out the fact of Appellant's arrest (R 545, 1176, 1384-1386). The fact of a person's arrest is normally irrelevant. Postell v. State, 398 So.2d 851, 855 n.7 (Fla. 3d DCA 1981). Here, it was additionally prejudicial as it was a continual, implicit reminder of the fact that he was arrested pursuant to a warrant approved by a judge.

The prosecutor also brought the police "concerns" about Appellant (R 1357-1358). The Florida courts have consistently condemned arguments suggesting that the police believe a defendant is guilty. Ryan v. State, 457 So.2d 1084, 1090-1091 (Fla. 4th DCA 1984); Buckhann v. State, 356 So.2d 1327, 1328-1329 (Fla. 4th DCA 1978).

The prosecution began the voir dire by explicitly using the indictment as an indicia of guilt (R 200). The harm from this evidence was exacerbated by the repeated references to the grand

jury's indictment (R 200, 538, 545, 1186, 1624-1625, 1666-1667, 1869). The explicit voir dire and repeated references led the jury to believe that another governmental body had determined Appellant's guilt. This type of evidence or argument is improper. Ryan, supra at 1090-1091; Buckhann, supra at 1328-1329; United State v. Elery, 723 F.2d 1522, 1526 (11th Cir. 1984); United States v. Phillips, 66 F.2d 971, 1030 (5th Cir. 1981); United States v. Morris, 568 F.2d 396, 401 (5th Cir. 1978); United States v. Lamerson, 457 F.2d 371, 372 (5th Cir. 1972); Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969).

The prosecutor also used the grand jury to pass on the credibility of certain witnesses. He first did this by bringing out that prosecution witness, Betty Quinn, had testified before the grand jury. This was an implicit attempt to put the grand jury's stamp of approval, through the repeatedly mentioned indictment, on her testimony. This Honorable Court has reversed when a party puts on a witness to vouch for another witness' credibility. Tingle v. State, 536 So.2d 202 (Fla. 1988). The Florida courts have also held it to be improper to imply that the prosecution or the police believe in the truthfulness of a witness. Ryan, supra at 1090-1091; Buckhann, supra at 1327-1328. Here, the error was worse at it put the stamp of a seemingly neutral body, the grand jury, on Ms. Quinn.

The prosecutor delivered the final coup to Appellant's hope of a fair trial in his rebuttal closing argument. After bringing out that Appellant's parents had testified before the grand jury, he went on to explicitly argue that the grand jury had indicted Appellant after hearing the testimony. This was an improper attempt

to denigrate the Carusos' based on the grand jury indictment. This was contrary to a substantial body of case law as it was telling the jury that another governmental body had passed on the testimony. See Ryan, supra and Buckhann, supra. This was far more prejudicial than the testimony of the expert witness in Tingle, supra.

All of this improper evidence deprived Appellant of the presumption of innocence, which is "the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895). Reversal for a new trial is required.

POINT XIII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THEY DID NOT HAVE THE RIGHT TO HAVE THE COURT REPORTER READ BACK ANY TESTIMONY.

During preliminary instructions, the trial court instructed the jury to listen carefully to the testimony because they would not have the right to have the court reporter read back any testimony:

> THE COURT: Number Four, you must bear in mind that the court reporter will not in rereading back to you the testimony of the witnesses once you begin to deliberate. You're going to have to listen carefully and attentively to what the witnesses have to say because you're not going to be given the right to have the court reporter read back to you the testimony of the witnesses in this particular case.
>
> Because once that happens, the attorneys never can seem to agree on what portion of that testimony of the witness should be read back to you. And then she will have to read back all the testimony of all the witnesses. And we have a tiny trial back in the jury room. So you only hear it one time and that's it.

(R 47). (emphasis added). Appellant objected that the instruction was improper, and requested that the court decide whether testimony be read back on an "issue by issue basis" when requested (R 1783).

It was error for the trial court to give the instruction.

It is reversible error for the trial court to give a blanket instruction to the jury that they have no right to a read back of testimony. Huhn v. State, 511 So.2d 583 (Fla. 4th DCA 1987); Biscardi v. State, 511 So.2d 575 (Fla. 4th DCA 1987). Of course, such an instruction clearly prohibits the jury from asking for a read back even though it might be confused or concerned about the nature of certain testimony. Id. As a result, the trial court deliberately creates a situation where the jury cannot review testimony, and the parties cannot be heard on whether the jury should review certain testimony, thus possibly creating an injustice.[13] Additionally, Rule 3.410, Florida Rules of Criminal Procedure (1987), specifically contemplates a situation where the jury requests a read back and provides that the court may order testimony to be read back.[14]

Since the jury is prohibited from asking for a read back, the state cannot show beyond a reasonable doubt that the error did not influence the jury in reaching its verdict. Thus, the error cannot be deemed harmless. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla.

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[13] This is unlike the situation where the trial court hears a jury's request for a read back, hears from the parties regarding that request, and then exercises its discretion in deciding to have the testimony read back. Instead, the trial court abandons its duty, rather than deciding whether to exercise its discretion. A trial court cannot exercise its discretion whether to grant, or deny, a jury's request for a read back of testimony where the court has prohibited the jury from asking such a question. Rodriquez v. State, 559 So.2d 678, 679 (Fla. 3d DCA 1990) ("The trial court has great discretion ... but the discretion cannot be properly exercised without knowing the nature of the request").

[14] Again, in order for the trial court to decide whether Rule 3.410, should be utilized, the jury must be given the opportunity to make a request.

1986). It should be noted that due to the nature of this particular case there was a possibility that the jurors could be confused. This was a lengthy capital case with volumes of testimony. The case was built on circumstantial evidence, and credibility of witnesses, which could depend on how well the jury analyzed the facts. For example, the credibility of Craig Quinn was seriously in question.[15] Would the jury remember that his testimony was inconsistent with other witnesses? They couldn't notice these differences via a read back to compare testimony. Instead, the only items they would have to refresh their memory were the exhibits - which included the inflammatory autopsy photo. See, Point II.[16] The error denied Appellant due process and a fair trial. Fifth and Fourteenth Amendments, United States Constitution; Article I, § 9, Florida Constitution. Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT XIV

THE TRIAL COURT ERRED IN INFORMING THE JURY THAT THEY COULD TAKE NOTES DURING THE TRIAL.

The trial court informed the jury that it had the prerogative to take notes during trial (R 46-47). The trial court then informed the jury that they would not have any testimony read back to them by the court reporter (R 47) (See Point XIII). Appellant objected to the trial court's instruction prior to the testimony of the

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[15] The statements Quinn was making could not be corroborated (R 1427), and was inconsistent with other witnesses.

[16] In addition, the fact that the jury knew that a court reporter was taking down every word of testimony, but was not reporting the testimony for the jury's use, obviously informed them that the reporting was for a separate function - appellate review. This is another form of dilution of the jury's responsibility.

state's first witness (R 527-528).

Generally, it is with the sound discretion of the trial judge to determine whether the jury can take notes during trial. However, as in all cases, the discretion given to the trial court is not unbridled. In the instant case the trial court abused its discretion by instructing the jury that it could take notes while also telling the jury that they could not have any testimony read back to them by the court reporter.

There are a number of serious problems when a juror takes notes during trial testimony. By taking notes a juror will later be unduly emphasizing one portion of testimony over others. This leads to overemphasis and distortion. During deliberations this distortion may be relayed to other jurors. The other jurors may in turn rely on the notes over their own memories because writing is generally deemed more reliable. Also, since the note taking juror is not a trained court reporter, there is a great danger that he or she will miss what is being said while trying to take down prior testimony. The notes could also be inaccurate. As a result of these potential problems, some jurisdictions have held that is reversible error to permit the jury to take notes during trial testimony. See Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344 (1955).

There is one protective mechanism which ameliorates the potential problems discussed above -- the jury having the ability to request a read back of testimony. Problems that jury may have in accurately remembering the testimony may be cured by a read back. Disputes in memory versus notes are properly resolved via a read back, rather than by the tendency to rely on the written notes. A juror's written notes lose their aura of accuracy when the

jury is aware that it has a trained court reporter to read back testimony.

In the present case the trial court prohibited any read back of trial testimony. In doing so, the mechanism to protect from the problems of jurors taking notes was eliminated. While the trial court can legitimately exercise discretion in permitting the jury to take notes if read backs are available to ameliorate the dangers of taking notes, it is an abuse of discretion to permit the jury to take notes without the protection of the option of the jury having a read back of testimony. Under the circumstances, the trial court abused its discretion. It was reversible error to permit the jury to take notes in this case. Appellant was denied due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, United States Constitution; Article I, Section 9, Florida Constitution. Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT XV

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT CIRCUIT COURT CASES SUCH AS THIS ONE ARE REVIEWED BY APPELLATE COURTS.

Over Appellant's objection (R 30), the trial court instructed the jury that circuit courts handle all felony cases, including death cases, and that appellate courts "entertain appeals and decisions of circuit court judges" (R 33). It was error to overrule the objection.

It is reversible error to give a comment susceptible of

suggesting a dilution of the final responsibility of the jury.[17] See Blackwell v. State, 76 Fla. 124, 79 So. 731, 735 (Fla. 1918) (comment that - if error is committed, Supreme Court will correct it - reversed); Pait v. State, 112 So.2d 380 (Fla. 1959) (comment that - defense has right to appeal, but state doesn't - fundamental error); United States v. Fiorito, 300 F.2d 424 (7th Cir. 1962); Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The instruction that the cases in circuit courts are reviewed by appellate courts suggest that final responsibility as to the case rests with the appellate court. This fact was not lost on juror D'auria who later commented that cases keep getting "appealed and appealed" (R 248). The prosecutor also later reminded the jury that "all defendant's are entitled to all their appellate rights" (R 269).

The instruction, which was susceptible to suggesting a dilution of the final responsibility of the jury due to review by appellate courts, deprived Appellant of due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, United States Constitution; Article I, Section 9, Florida Constitution. Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT XVI

APPELLANT WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW DUE TO EVIDENCE AND ARGUMENT CONCERNING HIS EXERCISE OF A LEGAL RIGHT.

Appellant was denied a fair trial and due process of law due

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[17] That fact that the comment is made by the court adds to the significance in light of the unique position the trial court occupies in court proceedings.

to the repeated introduction of evidence and argument concerning the exercise of his legal rights. Officer Corpion testified

> I asked him (Michael Caruso) if I could photograph him. He told me yes I could photograph him but if I wanted his fingerprints, I'd have to arrest him.

(R 721) (Italicized material added). Officer Corpion then repeated this same comment (R 728). Officer Walsh also testified concerning Appellant's refusal to give fingerprints (R 1083). Both of these were brought out on direct examination by the prosecution. In closing argument, the prosecutor affirmatively argued his exercise of this legal right as an indicia of guilt. The prosecutor stated:

> And he, in fact, processed the scene. And who refused to give him fingerprints? You heard that that man there (Michael Caruso). And you also heard he had - he saw fresh cuts on his hands. And he took fresh photos of the fresh cuts.
>
> Fingerprints. What fingerprints? And fingerprints come up inside the house and inside the door and when the door is closing. And it's the left tip. If you recall, the left tip just like if someone quietly goes in the house and shuts the door and puts it like here quietly. No one can hear it. And inside the door.

(R 1794) (Italicized material added). Not content with making this argument once, he made it again.

> And whoever committed this crime, ladies and gentlemen, was concerned about fingerprints because they wiped everything down. And remember the testimony of Corpion. They wiped everything. And fabric here and fabric there. And who, ladies and gentlemen, is concerned about fingerprints? Who wouldn't give his fingerprints to Corpion and refused to give them?
>
> (R 1871-1872).

It is well established that a citizen has a legal right to refuse to give fingerprints to the police unless the police have some legal basis to require them and require them through proper legal channels. Davis v. Mississippi, 89 S.Ct. 1394 (1969); Hayes

v. Florida, 105 S.Ct. 1643 (1985). It is improper to introduce evidence concerning the exercise of a valid legal right and/or to attempt to use the exercise of that right as an indicia of guilt. See State v. Burwick, 442 So.2d 944 (Fla. 1983); Jackson v. State, 359 So.2d 1190, 1193-1194 (Fla. 1978); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976).

In the present case, this evidence and argument was irrelevant and inappropriate, as legally obtained prints of Appellant was compared to those in the house (R 969-971). Thus, this is not a case where a defendant disobeyed a court order for prints or even where the prints were unavailable for comparison. The evidence and argument, at issue here, were irrelevant and improperly designed to penalize Appellant for exercising a valid constitutional right. It denied him due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, 17, and 21 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendment to the United States Constitution. Wherefore, Appellant's conviction must be reversed and remanded for a new trial.

POINT XVII

THE INSTRUCTION ON REASONABLE DOUBT DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL.

The trial court instructed the jury that "A reasonable doubt is not a possible doubt, a speculative doubt, imaginary or forced doubt" (R 1903) (emphasis added).

The instruction is infirm. The instruction improperly tells the jury that reasonable doubt cannot be a "possible doubt." Such an instruction is improper. United States v. Shaffner, 524 F.2d

1021 (7th Cir. 1975).[18]

Finally, the language stating that a reasonable doubt is not speculative, imaginary, or forced, is also improper. Although it is proper to instruct the jury that a reasonable doubt cannot be "purely speculative," a court is "playing with fire" when it goes beyond that. United States v. Cruz, 603 F.2d 673, 675 (7th Cir. 1979).

The improper instructions regarding reasonable doubt denied Appellant due process and a fair trial. Fifth and Fourteenth Amendments, United States Constitution; Article I, Section 9, Florida Constitution. Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT XVIII

FIRST DEGREE MURDER WAS IMPROPERLY SUBMITTED TO JURY ON ALTERNATIVE THEORIES OF PREMEDITATION AND FELONY MURDER.

Under this Court's decision in Knight v. State, 338 So.2d 201 (Fla. 1976), the indictment in the instant case charging premeditated murder (R 2243) was sufficient to charge not only premeditated murder but also felony murder. The jury here was in fact instructed on the two theories as alternatives, and the prosecution argued them both, but the jury's verdict did not specify on which theory their finding of guilt was based (R 2321-2322). As a result, it cannot be known whether there was a

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[18] In Shaffner the jury was instructed:

> It is not necessary for the government to prove the guilt of the defendant beyond all possible doubt.

524 F.2d at 1023. The reviewing court held that "It is quite clear that this part of the instruction favors the government on the issue of reasonable doubt." Id.

unanimous verdict on one theory or another or whether some jurors voted to convict on one theory and some on the other. The verdict is therefore not a unanimous one. Moreover, if this Court should accept Appellant's argument that the evidence of premeditated murder was insufficient (Point XIX, infra), then the general verdict leaves open the possibility that the jury improperly found Appellant guilty on an invalid and unsupported theory. Finally, the indictment provided no notice of the felony murder theory.

1. Non-Unanimous Verdict

The general verdict deprived Appellant of a unanimous verdict, since it may have been that some of the jurors voted for guilt on felony murder and some on premeditated murder, in which case neither finding would have been unanimous. There are "size and unanimity limits that cannot be transgressed if the essence of the jury trial is to be maintained." Brown v. Louisiana, 447 U.S. 323, 331, 100 S.Ct. 2214, 2221, 65 L.Ed.2d 159 (1980). This includes the requirement that jurors concur on the specific acts the defendant has committed as well as ont he ultimate question of guilt or innocence. United States v. Gipson, 553 F.2d 453 (5th Cir. 1977). The unanimity requirement has also been imposed where, as in this case, a defendant is charged with first degree murder under theories which incorporate varying degrees of intent. See Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982).[19]

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[19] See also United States v. Payseno, 782 F.2d 832 (9th Cir. 1986); United States v. Frazin, 780 F.2d 1461 (9th Cir. 1986); State v. James, 698 P.2d 161 (Alaska 1985); People v. Wesley, 177 Cal.App.3d 397, 223 Cal.Rptr. 9 (1986); State v. Benite, 6 Conn.App. 667, 507 A.2d 478 (1986); Hawkins v. United States, 434 A.2d 446 (D.C.App. 1981); and State v. Handyside, 42 Wash.App. 412, 711 P.2d 379 (1985).

In Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988), this Court rejected a similar unanimity challenge in a post-conviction proceeding, alternatively finding it waived and that the instruction was correct anyway. This Court said, "A careful reading of the transcript reveals that the jury was instructed that its verdict must be unanimous." Id. at 1070. The defendant there raised the issue post-conviction, and did not have an insufficiently underlying felony, so it may be distinguished here on those grounds. If not, this Court should recede from Gorham. A requirement of jury unanimity on the "verdict" is insufficient where, as here, the jury is instructed on two theories and its verdict is a general one. In such cases, the jury has not been required to find the defendant guilty of a single, cognizable incident or "conceptual grouping." See United States v. Acosta, 748 F.2d 577, 581 (11th Cir. 1984); United States v. Gipson, supra; and Scarborough v. United States, 522 A.2d 869 (D.C.App. 1987) (en banc). The general verdict where there were alternative theories of guilt denied Appellant his rights under Article I, Sections 2, 9, 16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

2. General Verdict Including Invalid Theory

As argued above, there was insufficient evidence of felony murder. The first degree murder conviction cannot be upheld because the general verdict leaves open the possibility that the jury, or at least some of the jurors, found Appellant guilty on the invalid theory. 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 of the two grounds was relied upon by the jury. Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1806, 1860, 100 L.Ed.2d 384 (1988).

The United States Supreme Court has consistently held as a matter of constitutional law that 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.[20] In capital cases, the court has required an even greater degree of certainty that the verdict rest on proper grounds, even where the error occurs at the guilt phase of the proceeding. Beck v. Alabama, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). See also Andres v. United States, 333 U.S. 740, 752, 68 S.Ct. 880, 92 L.Ed.2d 1055 (1948) (where jury might have concluded from instructions that unanimity was required to grant mercy, as well as find guilt, in pre-Furman unified trial, proceeding unconstitutional).

3. Lack of Notice of Felony Murder

The indictment in the instant case charged only premeditated murder and made no mention of felony murder (R 2243). Because of this lack of notice of felony murder, the trial court unlawfully

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[20] Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed.2d (1931); Williams v. North Carolina, 317 U.S. 287, 291-292, 63 S.Ct. 207, 209-210, 87 L.Ed.2d 279 (1942); Thomas v. Collins, 323 U.S. 516, 528-529, 65 S.Ct. 315, 321-322, 89 L.Ed. 430 (1945); Cramer v. United States, 325 U.S. 1, 5, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949); Yates v. United States, 354 U.S. 298, 311-312, 77 S.Ct. 1064, 1072-1073, 1 L.Ed.2d 1356 (1957); Street v. New York, 394 U.S. 576, 585-588, 89 S.Ct. 1354, 1362-1363, 22 L.Ed.2d 572 (1969); Bachellar v. Maryland, 397 U.S. 564, 570-571, 90 S.Ct. 1312, 1315-1316, 25 L.Ed.2d 570 (1970); Zant v. Stephens, 462 U.S. 862, 882, 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235 (1983). See also Crawford v. State, 254 Ga. 435, 330 S.E.2d 568 (1985), applying this principle to the felony murder/premeditation situation.

allowed this theory to be submitted to the jury.

An indictment or information is required to state the elements of the offense charged with sufficient clarity to apprise the defendant what he must be prepared to defend against. Russell v. United States, 369 U.S. 749, 763-769, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); Government of Virgin Islands v. Pemberton, 813 F.2d 626 (3d Cir. 1987); Givens v. Wainwright, 786 F.2d 1378, 1380-1381 (9th Cir. 1986).

In Givens, the Ninth Circuit held that it was a sixth amendment violation to allow a jury instruction and prosecutorial argument on murder by torture (under Nevada law analogous to Florida's felony murder) where the information charged willful murder (analogous to Florida's premeditated murder).

Appellant is aware that this Court has rejected a related claim in Knight v. State, 338 So.2d 201, 204 (Fla. 1976). However, Knight was well before Givens, supra, which holds the reasoning of Knight to be contrary to the sixth amendment. This Court should overrule Knight. Its application here was a violation of Appellant's rights under the Florida and United States Constitutions.

POINT XIX

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION OF MURDER IN THE FIRST DEGREE.

At the close of the state's case, and at the close of all the evidence, Appellant moved for judgment of acquittal on the ground that the evidence was insufficient to show murder in the first degree (R 1520, 1771). Appellant's motions were denied (R 1524, 1772). The evidence was not sufficient to prove that Appellant was

the person who committed the instant offenses. The evidence was also insufficient to prove that the killings were premeditated.

"A fundamental principle of our criminal law is that the prosecutor must establish beyond a reasonable doubt the identity of the accused as perpetrator of the charged offense." Owen v. State, 432 So.2d 579 (Fla. 2d DCA 1983). The evidence shows that the Lelands were killed, but it is not capable of showing beyond a reasonable doubt that it was Appellant who killed the Lelands.

The prosecution's primary evidence was the physical evidence. The prosecution relied heavily on the speculation that Appellant possessed a butterfly pendant belonging to Mrs. Leland. However, Mrs. Leland's daughter never could identify the pendant when shown it at the police station (R 1137-38). Mrs. Leland's grandson testified that the gold chain pendant could be different than his grandmother's.[21] Also, a radio and candle holders were missing from the residence after the killing (R 1129). None of these items were ever traced to Appellant.

The state also pointed to cuts on Appellant's hands. However, there was absolutely no evidence that the cuts were related to this case. In fact, no blood of Appellant's was found in the Leland residence. Moreover, despite the fact that the police examined Appellant's clothing and shoes for blood, absolutely no blood was found. There was one print belonging to Appellant found on the middle panel of the front door (R 972). However, this hardly places

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[21] In fact, Appellant's grandmother identified the butterfly pendant in evidence as the pendant she purchased for Appellant's mother (R 1527-28, 1534). The purchase was corroborated by "Burdines" (R 1560-69). Appellant's mother also identified the pendant as belonging to her (R 1666).

him inside the residence at the time of the murder. In fact, there was evidence that Appellant was inside the residence after the paramedics went inside.[22] Moreover, a number of other prints, not identified to the Lelands, or Appellant, were found inside the residence.[23] The physical evidence did not remotely identify Appellant as the killer.

The state also relied on a number of statements made by Appellant. However, the evidence in this case is not capable of identifying Appellant beyond a reasonable doubt, rather it only allows for conjecture and surmise as to the identity of the killer. For example, Appellant told channel 10 news that one body had Saran Wrap around its head. Clearly, Appellant could have possessed this information without being the killer. Mr. Caruso, Sr., testified that his son was like a "normal kid" who wasn't listening and followed the police and paramedics inside the Leland residence (R 1591, 1623).[24] When Appellant exited he told his father that Mr.

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[22] Appellant's father testified that Appellant was like a "normal kid" who wasn't listening and proceeded to walk inside the residence after being told not to do so (R 1591, 1623). Paramedic Holtz corroborated this by testifying that the neighbors walked a few steps into the residence (R 1711). Appellant could have touched the door around this time. See Ivey v. State, 176 So.2d 611, 612 (Fla. 3d DCA 1965) (print evidence must meet the requirement that it could only be made at the time of the offense).

[23] One set of workable prints were found on the telephone that the murdered had apparently touched (R 761, 993). Workable prints were also found in the bedroom and on the inside of the front door, but were not identified to anyone (R 990-993). Also an unknown hair was found but not identified to Appellant (R 1318).

[24] Paramedic Holtz confirmed this (R 1711).

Leland had Saran Wrap around his head (R 1593, 1626).[25]

Appellant also made a statement to a news reporter that Mrs. Leland suffered a stab wound to the eye. This is something the killer would not know, since Mrs. Leland was not stabbed in either eye. Obviously, Appellant was repeating conjecture as to what happened rather than personal knowledge. These type of statements do not constitute competent evidence of guilt.

Myrel Walker testified that Appellant was at her door the night/morning of the killing.[26] This does not implicate Appellant in the killings. See Owen v. State, 432 So.2d 579 (Fla. 2d DCA 1983) (evidence insufficient for conviction where defendant was in the yard and fled when chased by neighbors, but no one saw him enter or exit victim's home). The evidence was not sufficient to show that Appellant killed the Lelands.

In addition, there was insufficient evidence to show that the killer acted in a depraved mind rather than in premeditation. The evidence in this case is not capable of supporting a conviction for first degree murder beyond a reasonable doubt, rather it only allows for conjecture and surmise as to whether Appellant had a premeditated design to commit the killing. A premeditated design to effect the death of a human being is more than simply an intent to kill, it is, "a fully formed and conscious purpose to take human

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[25] It was obvious that Mr. Leland had some type of plastic wrapped around him. The conclusion about Saran Wrap would naturally result where a box labelled "Saran Wrap" was found next to Mr. Leland's body (R 747). See also state's exhibit #14.

[26] Although for the purpose of this issue it is presumed that Walker's identifying Appellant was accurate, it should be noted that her identification was made under circumstances which could make it unreliable. See Point IX.

life, formed upon reflection and deliberation, entertained in the mind, both before and at the time of the homicide." McCutchen v. State, 96 So.2d 152 (Fla. 1957); see also Miller v. State, 75 Fla. 136, 77 So. 669 (1918) (more than mere intent to kill must be shown to prove premeditation, premeditation is a design which must be thought upon before the act).

Of course, there is no presumption that a murder is in the first degree. Rather, if there is a presumption, the presumption is that a lower degree murder occurred. For the higher degree there must be evidence to support a finding beyond a reasonable doubt that the defendant did in fact premeditate the murder. There was no evidence as to the sequence of what happened prior to the killings. For all we know, the intruder was in the house when he was surprised by being confronted by the Lelands and, without premeditation, acted with a depraved mind.[27] The evidence was insufficient for conviction for premeditated first degree murder.[28]

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[27] If Appellant was the intruder, the evidence that the intruder acted in a type of rage is consistent with the state's evidence that Appellant was acting "possessed" on the morning of the killings (R 1082, 1804-05).

[28] As noted in Austin v. United States, 382 F.2d 129 (D.C. Cir. 1967) speculation must not result in an intentional, but unpremeditated second degree murder, in becoming a first degree murder conviction no matter how brutal and senseless the killing may be:

> The facts of a savage murder generate a powerful drive, almost a juggernaut for jurors, and indeed for judges, to crush the crime with the utmost condemnation available, to seize whatever words or terms reflect maximum denunciation ... However the core responsibility of the court requires it to reflect on the sufficiency of the Government's case ... evidence in this case did not establish a basis for a reasoned finding, surpassing speculation, that beyond all reasonable doubt that was not murder committed

A conviction based on insufficient evidence is a denial of due process. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Appellant's convictions and sentences must be reversed.

PENALTY ISSUES

POINT XX

THE TRIAL COURT ERRED BY OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

For both of the convictions, the jury recommended that Appellant be sentenced to life by a vote of eleven (11) to one (1) (R 2142). As to the offense involving Mrs. Leland, the trial court agreed with the jury's life recommendation (R 2353). As to the offense involving Mr. Leland, the trial court overruled the jury's recommendation of life imprisonment. This was error.

A jury recommendation of life imprisonment "is entitled to great weight, reflecting as it does the conscience of the community." Holsworth v.State, 522 So.2d 348, 354 (Fla. 1988). A jury recommendation of life imprisonment is to be overridden only when the facts suggesting sentence of death are so clear and convincing that virtually no reasonable person could differ. Hallman v. State, 560 So.2d 223 (Fla. 1990); Tedder v. State, 322 So.2d 908 (Fla. 1975); Holsworth, supra. In Cheshire v. State, 568 So.2d 908 (Fla. 1990) this Court noted that:

> If facts are evident on the record upon which a reasonable juror could rely to recommend life imprisonment, then the trial court errs in overriding the life recommendation.

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in an orgy of frenzied activity.

382 F.2d at 138-139.

568 So.2d at 911.

In the instant case there was mitigating evidence which could provide a reasonable basis for the jury's recommendation. In an override case, all mitigating circumstances "discernable from the record" should be analyzed in determining whether the jury could reasonably recommend life. Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987). In analyzing the existence of mitigating circumstances, the issue is whether any reasonable person could find such a circumstance even though "some reasonable persons might disbelieve" the testimony or circumstance. Carter v. State, 560 So.2d 1166, 1169 (Fla. 1990). The following evidence of non-statutory mitigating circumstances could support the eleven jurors recommendation of life.

1. Appellant had a history of cocaine and alcohol abuse. See e.g. Buckrem v. State, 355 So.2d 111, 113 (Fla. 1978); Norris v. State, 429 So.2d 688, 690 (Fla. 1983); Buford v. State, 570 So.2d 923, 925 (Fla. 1990) (defendant an alcoholic and taking drugs since early teens). Appellant had to be hospitalized three (3) times due to cocaine overdoses (R 1998). Appellant had been abusing alcohol since the age of 16 (2d SR 97). The drug abuse was considered to be "life threatening" (2d SR 104).

2. Appellant's judgment was impaired at the time of the offense. Amazon v. State, 487 So.2d 8, 13 (Fla. 1986). There is evidence from which a jury could find that Appellant's judgment was impaired. On the day of the murder, Appellant had indicated that

he wanted to smoke crack cocaine (R 1271-1272).[29] The police described Appellant's behavior as extremely violent and uncontrollable (R 1435). At one point Appellant was acting crazy and yelling (R 1358). This contrasts with the undisputed testimony that when not under the influence of drugs, Appellant is peaceful and respectful (R 2013-14, 2009).

Dr. Caddy testified that the use of crack cocaine would cause one to become so emotionally disturbed that his or her conduct is likely to be very different than what would be seen under normal circumstances (R 2030)[30], and that one's ability to reason would be dramatically reduced (R 2031). From this evidence, a jury could legitimately conclude that Appellant had taken crack cocaine and that his reasoning was impaired. Amazon v. State, 487 So.2d 8, 13 (Fla. 1986) (inconclusive evidence that defendant had taken drugs the night of murders could be used by jury to mitigate).

3. Appellant tried to overcome his drug addiction, but, due to his family's lack of financial resources, could not do so. There was evidence to support this. Appellant was highly motivated to recover from his abuse problems (2d SR 72,109). There were three occasions where Appellant was hospitalized due to drug abuse. However, Appellant would be discharged before the addiction problem could be addressed, because the insurance coverage expired (R

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[29] Craig Quinn testified that this was the only thing Appellant ever wanted to do (R 1271).

[30] This is consistent with the extreme violent behavior noted when Appellant was hospitalized due to his cocaine abuse (2d SR 87-88).

2064).[31] This is despite of the medical records showing that Appellant was "in need of impatient drug treatment ASAP" (2d SR 72). Memorial hospital's drug program costs $10,000.00 which the Carusos were unable to afford (R 2065). Thus, Appellant could not receive the drug treatment that was needed. However, due to his motivation, Appellant tried the only avenue for help that he knew of - he attended all the AA meetings that were around the area every single night (R 2064). Unfortunately, AA meetings are hardly the needed treatment for someone with a severe crack cocaine problem. The jury could have legitimately found this as a non-statutory mitigating circumstance to recommend a life sentence.

4. Appellant attempted suicide. Campbell v. Kincheloe, 829 F.2d 1453, 1463 (9th Cir. 1987) ("suicide attempt on one occasion"); Campbell v. State, 16 F.L.W. S1, S2 (Fla. Dec. 13, 1990) ("attempted suicide while in jail"). There was evidence introduced that Appellant tried to commit suicide by slitting his wrist (R 1994-5, 2075). Appellant's sister testified that Appellant tried to commit suicide because he thought he was failing his parents by using drugs (R 2000). During one of his hospital admissions Appellant also stated that he "wants to die" and that "crack had a hold on him" (2d SR 88). In looking at the background of the individual for which they were to recommend a sentence, the jury could consider this a mitigating circumstance.

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[31] As Dr. Caddy testified Appellant would be discharged "because there wasn't any financial coverage for continued service" (R 2056). Caddy also explained that Appellant's family was not sophisticated and was unaware of how to access the needed services (R 2056).

5. There was testimony that Appellant was a good worker.[32] Smalley v. State, 546 So.2d 1720 (Fla. 1989) ("willing worker and good employee"); Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988).

6. Appellant is a non-violent, respectful person. Perry v. State, 522 So.2d 817, 821 (Fla. 1988) ("he had never shown any signs of violence"). There was an undisputed consensus of testimony that when he was not under the influence of crack cocaine, Appellant was non-violent and respectful (R 2004, 2009, 2013-14).

7. Appellant was a good brother and son. See Perry v. State, 522 So.2d 817, 821 (Fla. 1988) (fact that defendant was "kind" and "good to his family" was mitigating); Pardo v. State, 563 So.2d 77, 79 (Fla. 1990) (trial court found "love and affection of his family" mitigating). Appellant's sister, Sandy Caruso testified that Appellant was always protective toward her (R 1996). Appellant's mother testified that Appellant was a good person (R 2068). Appellant also brought home sick animals and took care of them (R 2034). Thus, the jury could legitimately consider this evidence in finding the non-statutory mitigating circumstance above. The trial court disagreed by stating that Appellant had rejected his family's love and efforts to help him conquer his drug addiction (R 2362). However, the jury could reasonably conclude that Appellant did not reject his family. Especially where he attempted suicide because he thought he was failing his parents by

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[32] Mark Luback, a landscaper, testified that Appellant had worked for him and that he was a good worker who had been promoted to foreman of the crew (R 2003-2004). Luback always had a high opinion of Appellant and could trust him (R 2007).

using drugs (R 2000). It could be viewed that Appellant never rejected his family or that he purposely behaved in order to cause them concern. Rather, his drug addiction "had a hold on him" and neither he nor his family had the financial resources for adequate treatment.

8. Appellant had a history of depression. Cochran v. State, 547 So.2d 928, 932 (Fla. 1989) ("depression" is mitigating circumstance). The record shows that Appellant had been diagnosed as having "depression" as well as multiple drug abuse (2SR 79, 82).

9. Appellant's inability to handle pressure. Perry v. State, 522 So.2d 817, 821 (Fla. 1988) ("psychological stress"). There was evidence before the jury that Appellant "can't handle a lot of pressure" (2 SR 106).

10. Appellant did not have any history of prior violent crimes. This demonstrates that the instant crime was an isolated out-of-character act of physical violence. It also shows the potential for peaceably living in prison if sentenced to life.

Any of these non-statutory mitigating circumstances might provide a reasonable basis for the jury's recommendation. Certainly the cumulative effect of the mitigating circumstances would serve as a basis for a reasonable person to differ on the propriety of a death sentence for Appellant.

In addition, although the trial court found no statutory mitigating circumstances, there is evidence from which the jury could have found one or more of the following statutory mitigating circumstances.

One, the age of Appellant at the time of the crime. Appellant was 20 years old at the time of the offense. Thus, the jury could

find age as a mitigating circumstance. The trial court believed that there no evidence susceptible of showing that Appellant was immature or dependent on his parents. However, there was evidence to the contrary that the jury could rely on. Appellant lived with his parents all of his life with the exception of a one month period (R 2073). Appellant also relied on his family for financial support by living in their house and being covered by their insurance. These are not the indices of a mature, independent person. Moreover, the medical reports indicated the need to assist Appellant to develop and learn "constructive problem-solving techniques" (2 SR 91). In other words, to assist Appellant in what would be the normal maturation process. Clearly, the jury could have legitimately found that Appellant's young age, and need for maturity, could have constituted this statutory mitigating circumstance. Perry v. State, 522 So.2d 817 (Fla. 1988) (21 years old); Smith v. State, 492 So.2d 1063 (Fla. 1986) (where defendant was 20 years old instruction on mitigation should have been given so that jury could decide).

The trial court also found that, despite of the evidence that he was addicted to crack cocaine, the use of crack cocaine on the day of the murder cannot be "conclusively established" and thus rejected the mitigating factor of **substantial impairment of Appellant's capacity to appreciate the criminality of his conduct**.

First, mitigating circumstances do not need to be "conclusively established" to be considered by the jury. If there is some evidence to support a theory of mitigation, the mitigating circumstance may be used by the jury. On the day of the murder Appellant had indicated that he wanted to smoke crack (R 1271-72).

The police described Appellant at the scene as extremely violent and uncontrollable (R 1435, 1368), which is the very same of demeanor Appellant had when hospitalized due to crack cocaine (2 SR 87-88) and which is consistent with Dr. Caddy's testimony regarding the effects of crack cocaine (R 2030). Thus, the jury could reasonably infer drug use on the night of the murder. Amazon v. State, 487 So.2d 8, 13 (Fla. 1986) (jury could consider "some inconclusive evidence that Amazon had taken drugs the night of the murders" to find that he acted under extreme mental or emotional disturbance).

Dr. Caddy testified that the use of crack cocaine would cause one to become so emotionally disturbed that the conduct would be very different than normal (R 2030). One's ability to reason would be dramatically reduced (R 2031). A quality of bizarreness comes over one's thinking (R 2029). Certainly, the jury could find from this evidence that there could be a substantial impairment of Appellant's ability to appreciate the criminality of his conduct.

The jury also might have reasonably found the statutory mitigating circumstance that Appellant was suffering from an **extreme mental or emotional disturbance**. The trial court rejected this statutory mitigating factor noting:

> "... the testimony of a psychologist that the defendant was suffering from some form of emotional disturbance, standing alone, does not require a finding of extreme mental or emotional disturbance."

(R 2359) (emphasis by trial court). The trial court mistakenly believed that the disturbance had to be extreme to be mitigating. However, "any" emotional or mental disturbance must be considered. Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990) ("no matter what

the statute says"). Furthermore, by stating that the testimony of one psychologist that Appellant suffered from an emotional disturbance "does not require" a finding of the mitigating circumstance, the trial has not given due deference to the 11 to 1 life recommendation. The question is not whether the evidence "requires" such a finding. Rather, the question is whether there is any evidence from which the jury could legitimately find mental or emotional disturbance. Clearly, Dr. Caddy's testimony, the medical records, and the other evidence at trial provide a basis for the jury's conclusion.

The jury could have reasonably found the statutory mitigating circumstance that Appellant had **no significant history of prior criminal activity**. The prosecutor and defense stipulated that a grand theft conviction was the extent of Appellant's criminal record (R 2082). From this evidence the jury could legitimately conclude that Appellant had no significant criminal history. Combs v. State, 4 03 So.2d 418 (Fla. 1981) (trial court found history insignificant where burglary conviction and evidence of cocaine use).

In rejecting "no significant criminal history" the trial court had to resort in part to an arrest for speeding. Obviously, there is a stretching to find "criminal history" rather than giving due deference to the jury recommendation. Despite the agreement by the prosecutor to the one grand theft being the extent of Appellant's criminal history, the trial court relied on prior arrests. Arrests simply do not show criminal activity. Brothers v. Dowdle, 817 F.2d 1388, 1390 (9th Cir. 1980); Hines v. State, 358 So.2d 183 (Fla. 1978). Thus, the arrests, without testimony as to

the underlying conduct, could reasonably be discounted. The jury could have legitimately found no "significant criminal history."

As shown above, there exists mitigating evidence to support the jury's decision. From this mitigating evidence itself, the jury could have reasonably recommended a life sentence even with the existence of the aggravating circumstances. Thus, it was error to override the jury's recommendation.

Furthermore, the jury may have decided that not all the aggravating factors found by the trial court were proven beyond a reasonable doubt, or that some were entitled to little weight. See Hallman v. State, 560 So.2d 223 (Fla. 1990). For example, the jury could have reasonably rejected the cold, calculated and premeditated aggravating circumstance. This circumstance involves a "heightened premeditation." Rogers v. State, 511 So.2d 526 (Fla. 1987). It must be proven that "a careful plan or prearranged design to kill" was implemented. Id. at 533. "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987); Bates v. State, 465 So.2d 490 (Fla. 1985); Garron v. State, 528 So.2d 353 (Fla. 1988).

In the present case the trial court found CCP based on trauma to the area around the victim's eyes and opined that there was a "subconscious reflection" to eliminate the Lelands as witnesses. Obviously, CCP is not a "subconscious" reflection. It is the opposite - a conscious form of heightened premeditation.[33] This

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[33] There, the prosecutor argued that Appellant was "possessed" and that whoever did the killings was possessed (R 1804-05).

aggravating factor is totally absent from this case.[34]

The jury could have reasonably rejected the heinous, atrocious or cruel aggravating factor. The trial court found HAC on the hypothesis that Mr. Leland suffered and was in pain.[35] However, Dr. Dominquez testified that Mr. Leland was first hit by a blunt object and it was possible that this blow rendered him unconscious (R 1990). Under these circumstances the jury could legitimately find that Mr. Leland did not suffer and that killing was not HAC.

Moreover, this was not a situation where Mr. Leland labored under the apprehension that he would be killed.[36] Thus, the jury could reject HAC. Also, the prosecutor argued to the jury that Appellant was acting "possessed" during the killing (R 1804-05). A frenzied attack during a possessed rage does not qualify as HAC. See Halliwell v. State, 323 So.2d 557 (Fla. 1975). Also, this factor applies to crimes where the killer desires to inflict a high degree of pain, rather than the pain resulting from pure fortuity. Porter v. State, 564 So.2d 1060 (Fla. 1990); Smalley v. State, 546

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[34] It should also be noted that for a witness elimination theory to be valid it must be based on more than the mere fact that the witnesses could have identified their assailant. Perry v. State, 522 So.2d 817, 820 (Fla. 1988). There must be strong proof of such a motive. Id. Here, the hypothesis that the Lelands awoke in the midst of a burglary and therefore needed to be eliminated is not sufficient. A more consistent hypothesis is a panicked reaction after being discovered in the midst of a burglary.

[35] The HAC issue is properly limited to Mr. Leland's death because Appellant was only sentenced to death for the killing of Mr. Leland. Appellant was given a life sentence for the death of Mrs. Leland.

[36] Again, the theory was that Mr. Leland awoke to find a burglary in progress and was then hit on the head with a champagne bottle.

So.2d 720, 722 (Fla. 1989). Here, the killing was not designed to inflict pain, rather it was done by someone in a possessed rage. At best one can only speculate as to the exact events of the murder of Mr. Leland, thus HAC is not proven beyond a reasonable doubt. Cheshire v. State, 568 So.2d 908 (Fla. 1990). The jury could reasonably reject, or give little weight to, this reason.

The judge found a prior violent felony because the deaths were contemporaneous. The jury could reject, or give little weight, to this factor. Because the killings were contemporaneous, the jury could find the single episode was an isolated out-of-character act, instead of a representation of a propensity for violence as a prior separate violent felony would demonstrate. Thus, the jury could legitimately give this factor very little weight.

The remaining aggravating factor used by the trial court was that the killing occurred during the commission of a felony - i.e. the burglary. Obviously, this factor is probably the least significant of all the aggravating factors in that it has little, or no, effect on narrowing the class of individuals eligible for the death penalty. The fact that the killing occurred during a burglary is the very basis of the felony murder conviction. Where the aggravating factor essentially duplicates the very nature of the charged offense, the jury could reasonably conclude that the factor is duplicative and should be given little or no weight.

In light of the different view the jury may have had of the mitigating evidence, i.e. -- the statutory and non-statutory mitigating circumstances, and the aggravating evidence, it cannot be said that the facts are so clear and convincing that no reasonable person could differ as to whether a death sentence is

appropriate. The trial court erred by overriding the jury recommendation of life imprisonment and imposing a sentence of death.

POINT XXI

THE TRIAL COURT ERRED IN ENTERTAINING VICTIM IMPACT INFORMATION PRIOR TO SENTENCING APPELLANT.

Over Appellant's objections (R 2149-2150, 2186, 2187-88), the trial entertained a mass of victim impact information prior to overriding the jury's 11 to 1 recommendation (R 2154-55, 2187, 1SR 191-196). This was error.

The first of the victim impact information came from the testimony of Denise and Jim Montgomery. Denise Montgomery testified that the ten (10) months since the deaths have been filled with pain that can not really be expressed and that she missed her parents during the holidays (R 2154-55). Jim Montgomery expressed that his family has to go through this experience and it is something they can never forget (R 2155).

Next came a wave of victim impact information through a number of letters, addressed to the trial judge, from family and friends of the victims (R 2187, 1SR 191-196). One of these was in essence a "petition", signed by twenty-one (21) acquaintances of Denise Montgomery[37], explaining the impact of the deaths on her life:

> WE, the undersigned, all agree and attest to know Denise Montgomery for at least one (1) year, or longer.
>
> Denise is a very warm, compassionate, reputable young woman who has suffered, significantly, since the tragic death of her beloved parents. The undue stress caused by this heinous act has placed severe limitations on her job-related obligations and her social life. Denise has

[37] There is nothing indicating that these acquaintances knew the victims or Appellant.

> endured an overwhelmingly amount of pain and suffering, and we, as friends and acquaintances, have shared many of these tense and tender moments (hours) with her.
>
> Only God knows how deep the wound is that was inflicted in her heart by the loss of both parents by such a merciless act. The perpetrator is a heartless, Godless person who does not belong in the society of this great country.

(1SR 193). Another example was a letter from Denise Montgomery's fiance explaining in detail the impact that the deaths, and the trial, had upon the victim's family (1SR 194). The letter is closed by the following statement specifically to the trial court[38]:

> I hope that I have not just run on and on, but have enlightened you on what the family has went through and what it has ahead of them. I have the greatest confidence in your ability as a judge in the legal system, but I feel compelled by the brutality and the suffering of the family, that the death penalty should be invoked in this case.

(1SR 194-195).[39]

In Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) the United States Supreme Court held that the use of victim impact information violated the Eighth Amendment. The Court held that evidence of the emotional trauma suffered by the family and the personal characteristics of the victims were irrelevant and should not be admitted. There was concern that the sentencer's view of the circumstances of the case and the defendant's background could be distorted or diminished by the emotionally charged victim impact information. As this Court recognized in Jones v. State, 569

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[38] The victim impact information was given to the trial court between the time of the jury's 11 to 1 life recommendation (10/18/88) and the trial court's override of the jury recommendation (11/18/88).

[39] Similarly, there are other letters describing Denise Montgomery's grief and specifically requesting that the death penalty be imposed (1SR 191, 192).

So.2d 1234 (Fla. 1990):

> Booth recognized that the presentation of an emotionally charged opinion expressing grief and anger is inconsistent with the requirement for individualized sentencing and reasoned decision-making.

569 So.2d at 1239.

At bar, the dictates of Booth were clearly violated. The principles of Booth apply to the submission of victim impact information to trial judges. Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987). Certainly, the emotionally charged impact information could have consciously or subconsciously,[40] influenced the trial court in overriding the 11 to 1 jury recommendation. After all, judges are not machines that can automatically discard information. See Green v. State, 351 So.2d 941, 942 (Fla. 1977) ("a judge is not a computer").

Due to the violation of the Eighth Amendment of the United States Constitution, Appellant's death sentence must be vacated and this cause remanded for resentencing.

POINT XXII

THE TRIAL COURT COMMITTED SUBSTANTIAL ERRORS IN THE SENTENCING ORDER.

The trial court in his sentencing order found aggravating factors. The trial court found that the killing was cold, calculated and premeditated based on the conclusion that there was a "subconscious reflection" to kill the Lelands. Obviously, CCP is not a "subconscious" reflection. For a murder to be cold, calculated, and premeditated, it must be the result of a careful

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[40] See Smith v. State, 372 So.2d 86 (Fla. 1979) (impossible for trial judge to determine prejudice in post-trial Richardson hearing without possibly being "subconsciously" affected by jury's prior judgment).

plan or prearranged design. Rogers v. State, 511 So.2d 526 (Fla. 1987). This aggravating circumstance "was intended to apply to execution and contract-style killings." Garron v. State, 528 So.2d 353, 361 (Fla. 1988). A finding of this aggravating circumstance is to be set aside when the evidence is susceptible to conclusions other than finding the murder was committed in a cold, calculated, and premeditated way. Harmon v. State, 527 So.2d 182, 188 (Fla. 1988). Cf. Bryan v. State, 533 So.2d 744, 748-49 (Fla. 1988) (finding that murder cold, calculated and premeditated proper where it was the "only conclusion that can be drawn from the evidence"). This is not a case in which this aggravating circumstance applies.

The trial court also found that the killing was heinous, atrocious, and cruel based on Mr. Leland suffering and pain. The trial court's order on this factor was a matter of surmise.[41] Thus, the factor was not shown beyond a reasonable doubt as required for an aggravating factor. Moreover, this factor applies to crimes that are meant to inflict a high degree of pain, rather than the pain resulting from pure fortuity. Porter v. State, 564 So.2d 1060 (Fla. 1990); Smalley v. State, 546 So.2d 720, 722 (Fla. 1989). Here, the killing was not designed to inflict pain, rather it was done by someone "possessed" and in a rage (R 1804-05). This factor should not apply to this case. Where as here, one or more of the aggravating circumstances were improper, Appellant is entitled to a new sentencing hearing. See Alvin v. State, 548 So.2d 1112 (Fla. 1989). This is especially true where there was substantial

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[41] Dr. Dominguez testified that Mr. Leland was first hit by a blunt object (R 1990). This could have rendered Mr. Leland unconscious. Dr. Dominguez could not ascertain this for certain (R 1990).

mitigating evidence.

It is a violation of the Eighth Amendment, United States Constitution, and Article I, Section 17 of the Florida Constitution to ignore mitigating evidence. See Cochran v. State, 547 So.2d 928 (Fla. 1989) (and the cases cited therein); Nibert v. State, 16 F.L.W. S3 (Fla. Dec. 13, 1990); Campbell v. State, 16 F.L.W. S1 (Fla. Dec. 13, 1990). Uncontroverted factual evidence of non-statutory mitigating evidence must be considered in mitigation. See Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988). As shown in Point XX, there was substantial mitigation in the record, and the trial court erred by ignoring it.[42] Also, it was a violation of the Eighth Amendment, United States Constitution and Article I, Section 17 of the Florida Constitution, for the trial court to fail to expressly evaluate each non-statutory mitigating circumstance in its written order. Nibert, supra; Campbell, supra; Parker v. Dugger, 4 F.L.W. Fed. 1031 (U.S. Jan. 22, 1991).[43]

In addition, the trial court failed to apprehend the mitigating nature of certain evidence. See Campbell, supra. For example, Appellant's drug addiction. The trial court also dismissed the statutory mitigating factor that Appellant was under the influence of an extreme mental or emotional disturbance based on the wrong standard - that Appellant "was sane and competent" (R 2359). Likewise, the trial court rejected the mitigating factor

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[42] For example, the history of Appellant's cocaine addiction, hospitalizations, and financial conditions preventing the required treatment was uncontroverted, but ignored by the trial court. See Campbell, supra.

[43] These mitigating circumstances were proposed by defense counsel (R 2105-2123, 2193-2205).

that Appellant was substantially impaired because there was no evidence showing that Appellant did not know "the difference between right and wrong" (R 2360). Sanity is not the correct standard for deciding whether to consider these mental mitigating factors. Mines v. State, 390 So.2d 332, 337 (Fla. 1980); Campbell v. State, 16 F.L.W. S1 (Fla. Dec. 13, 1990).

Due to the sentencing error, Appellant is entitled to a new sentencing hearing.

POINT XXIII

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

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). Appellant 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 since occurred.

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 less 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 plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

i. Heinous, atrocious, or cruel

Pope v. State, 441 So.2d 1073 (Fla. 1983) 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 consistently, 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 standard instruction simply tracks the statute.[44] Since the statutory language is subject to a variety of constructions, the absence of any clear standard instruction ensures arbitrary application. Appellant is aware that this Court has written that Maynard does not apply to this aggravating

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

circumstance. In Brown v. State, 15 F.L.W. S165, S166 (Fla. Mar. 22, 1990), this Court wrote:

> Based on Maynard v. Cartwright, 108 S.Ct. 1853 (1988), Brown also argues that the standard instruction on the cold, calculated, and premeditated aggravating circumstance is unconstitutional. In Maynard the court held the Oklahoma instruction on heinous, atrocious, and cruel unconstitutionally vague because it did not adequately define that aggravating factor for the sentencer (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. Smalley v. State, 546 So.2d 720 (Fla. 1989). We find Brown's attempt to transfer Maynard to this state and to a different aggravating factor misplaced. See Jones v. Dugger, 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 Smalley, 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 court, and wrote that Florida's heinousness aggravator was not facially unconstitutional under Maynard because this Court had given it a narrowing construction. Smalley does not hold that the judge need not instruct the jury correctly on the law in a capital sentencing proceeding. Even though the jury is not the ultimate sentencer, 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 phase of a capital case. See Hitchcock v. Dugger, 107 S.Ct. 1821, 1824 (1987) (sentence improper where "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances").

Since the Constitution requires accurate instructions, the

question becomes whether the Florida standard jury instruction on this circumstance satisfies the stringent requirements of the Cruel and Unusual Punishment Clauses. The standard instruction tracks the statute. This very Court has been misled by the vague statutory language into applying this circumstance 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 standard instruction invites arbitrary and uneven application. Its use (and its approval by this Court) necessarily results in improper application in case after case.

iii. Felony murder

The standard jury instruction on felony murder does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least aggravated form of first degree murder. In this regard, the following discussion of the premeditation aggravating circumstance in Porter v. State, 15 F.L.W. S353, S354 (Fla. June 14, 1990) (footnote omitted) is especially pertinent:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder.

The same logic applies to the felony murder aggravating circumstance. It violates the teachings of Zant v. Stephens by turning the offense of felony murder, without more, into an aggravating circumstance. It applies an aggravating circumstance

to every first degree felony murder. Further, the instruction turns the mitigating circumstance of lack of intent to kill[45] into an aggravating circumstance. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process clauses of the state and federal constitutions.

b. Majority verdicts

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

Accepting for the purpose of argument that there is no federal constitutional right to a jury in capital sentencing, Appellant argues that the Florida right to a jury[46] 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

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[45] See Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (death penalty statute unconstitutional where it did not provide for full consideration of, inter alia, mitigating factor of lack of intent to cause death).

[46] 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).

applies to capital sentencing so that our statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote.

Appellant concedes that in Alvord v. State, 322 So.2d 533 (Fla. 1975), this Court rejected the contention that a penalty verdict for 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 less than a substantial majority violates due process.

In Burch, in deciding that a verdict by a jury of six must 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 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 present. See, e.g., Elledge v. State, 346 So.2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance), Grossman v. State, 525 So.2d 833 (Fla. 1988) (no objection to victim impact information forbidden by Eighth Amendment); 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").

Failure of the courts to supply adequate counsel in capital cases, and use of 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 provision assuring adequate counsel in capital cases. The failure to provide adequate counsel 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 ultimate sentencer 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 strong appellate presumptions against reversal. And it is small wonder that our conscientious 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 attorneys of doubtful competence or professionalism.

That our law forbids special verdicts as to theories of homicide and as to aggravating and mitigating circumstances makes problematic the judge's role in deciding whether to override the penalty verdict. The judge has 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 sentencing 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).[47] Similarly, if the jury found 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 history of racial discrimination in the judiciary resulting in racially discriminatory application of the law.[48] Florida's system of at-large judicial elections in large judicial circuits perpetuates this history in violation of the Equal Protection and Due Process Clauses of the state and federal constitutions. The U.S. Department of Justice 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. as 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 associations) who help them get elected violates the

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

[48] 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."

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).

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. See 428 U.S. at 250-251, 252-253, 258-259.

Appellant submits that what was 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 envisioned 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 aggravators 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).

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts).[49]

Similarly, the "great risk of death to many persons" factor has been inconsistently applied and construed. Compare King v. State, 390 So.2d 315, 320 (Fla. 1980) (aggravator found where defendant set 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

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[49] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 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).

facts) with White v. State, 403 So.2d 331, 337 (Fla. 1981) (factor could not be applied "for what might 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 construction in favor of the accused would be that the circumstance should apply only where the prior felony 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).

In Campbell v. State, 16 F.L.W. S1, S2 (Fla. Dec. 13, 1990), this Court went yet further and wrote that juvenile adjudications of delinquency can satisfy this aggravating circumstance:

> The court correctly found that Campbell was previously convicted of a felony involving the use or threat of violence. He cites no authority in support of his assertion that prior juvenile convictions cannot be considered in aggravation.

This remarkable construction of the statutory requirement that the defendant must have been previously "convicted" of a violent felony simply turns the due process rule on its head. It is contrary to the usual construction of "conviction" as not including juvenile adjudications. See, e.g., § 90.610(1)(b), Fla. Stat. (witness may not be impeached with juvenile adjudication of guilt) and Powell v. Levit, 640 F.2d 239 (9th Cir. 1981) (construing similar federal statute). It is contrary to the rule that juvenile adjudications do not count as prior convictions for habitual felony statutes. It is contrary to the principle, necessary to uphold the constitutionality of juvenile proceedings, that a juvenile

adjudication is not a conviction and serves the purpose of guidance and rehabilitation rather than punishment so that due process and sixth amendment procedural requirements necessary before a criminal conviction can be obtained do not apply with such force in juvenile proceedings. See, e.g., Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966) and McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971). The mode of analysis used in Campbell is directly contrary to the rule of lenity by imposing on the defendant the duty of showing why the statute should not be broadly construed. The silence of the statute was used against the defense rather than against the state. This manner of statutory constructions is contrary to the Due Process and Cruel and Unusual Punishment Clauses. The use of such a mode of analysis renders the Florida death penalty statute unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting) (death penalty statute unconstitutional where court liberally construed premeditation aggravating circumstances in favor of state).

The "under sentence of imprisonment" factor has similarly been construed in violation of the rule of lenity. It has been applied to persons who 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" factor was apparently to apply to political assassinations or terrorist acts,[50] 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 has institutionalized disparate application of the law in capital sentencing.[51] See, e.g., 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

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

[51] 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 review without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the special scope of review violates the eighth amendment under Proffitt.

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 works similar mischief.

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[52] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

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 does 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

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[52] 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 could differ.")

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 jury verdict as to any aggravating circumstance 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 his 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 punishment 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).[53] If there is anything left over, it is covered by that omnium gatherum, "heinous, atre4ocious 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 strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[54] This presumption of death does not square with the eighth amendment requirement that capital punishment by applied only to the worst 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).

POINT XXIV

THE AGGRAVATING CIRCUMSTANCES USED AT BAR ARE UNCONSTITUTIONAL.

1. Felony murder

As already argued, this circumstance does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least 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

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

[54] 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.

Clauses of the state and federal constitutions.

2. Especially wicked, evil, atrocious, or cruel

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

To be constitutional, this aggravating circumstance must, at a minimum, be limited to conscienceless or pitiless crimes which are unnecessarily 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."[55],[56]

The United States Supreme Court has recently held in Shell v. Mississippi, 111 S.Ct. 313 (1990), instruction on the heinous, atrocious or cruel aggravating factor, essentially identical to Florida's is unconstitutional, See 111 S.Ct. at 313; concurring opinion at 313-314.

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[55] Appellant argues that even this standard violates the Cruel and Unusual Punishment Clause and the constitutional and statutory rule of lenity. Almost any first-degree murder is conscienceless or pitiless. What a "necessarily torturous" murder is, or why it is not as bad as an "unnecessarily torturous" one, are mysteries. A more nearly constitutional standard 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)).

Failure to limit this aggravating circumstance to the strict Lloyd standard violates the Due Process and Cruel and Unusual Punishment Clauses.

[56] For example, it has been applied to almost any situation where death was not instantaneous. See, e.g., Mason v. State, 438 So.2d 473 (Fla. 1983) (victim probably lived from one to ten minutes after being stabbed). 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).

Under our law, the trial judge conducts a sort of appellate review of the penalty verdict. Flaws in the jury instructions leading to flaws in the verdict necessarily lead to flawed sentencing. The Constitution requires accurate jury instructions in Florida sentencing proceedings. 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 nonstatutory mitigating circumstances, and that the proceedings 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, as shown above.[57]

The fact that this Court has frequently reiterated the Dixon definition is also of no consequence. The rules for application of the factor have altered radically and erratically since Proffitt.

The heinous, atrocious or cruel aggravating circumstance violates the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. It does not rationally narrow the class of persons eligible for death, cannot be

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[57] See also 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).

consistently applied, and is unconstitutionally vague.

3. Cold, calculated and premeditated

This circumstance was adopted 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 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). It requires that a statute be strictly construed in favor of the defendant.

The constitutional principles of substantive due process and equal protection require that a provision of 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). This principle applies to criminal enactments. See State v. Walker, 461 So.2d 108 (Fla. 1984). Thus a criminal statute "must bear a reasonable relationship 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 constitutional 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 persons, 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 construed. It fails to genuinely narrow the class of persons eligible for the death penalty. It is not rationally related to its purpose. Hence, it is unconstitutional.

4. Prior violent felony

As already noted, this circumstance has been broadly construed in violation of the rule of lenity. Further, construction has permitted juvenile adjudications of delinquency to satisfy this aggravating circumstance contrary to the usual construction of "conviction" as not including juvenile adjudications. See Campbell v. State, 16 F.L.W. S1, S2 (Fla. Dec. 13, 1990). Due to such a construction, the silence of the statute is used against the defense rather than the state. This manner of statutory construction is contrary to the Due Process and Cruel and Unusual Punishment Clauses.

POINT XXV

THE OVERRIDE OF THE JURY'S LIFE RECOMMENDATION WAS ARBITRARY AND IRRATIONAL UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.

The trial judge arbitrarily and irrationally overrode the jury's recommendation of life in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 15, 16, 17, 21, and 22 of the Florida Constitution. This case involves a strikingly similar situation to that recently reviewed by the United States Supreme Court in Parker v. Dugger, ___ U.S. ___, 59 U.S.L.W. 4082 (Jan. 22, 1991). In the present case the jury recommended life by an 11-1 vote (R 2142, 2344-2345). The trial judge imposed the death penalty for one homicide and a life sentence for the other without any explanation for the difference (R 2352-2363). The mitigating evidence applied equally to both offenses. See Point XX. The judge ended his analysis of the aggravating and mitigating circumstances with the statement that the "aggravating circumstances ... outweigh the mitigating factors" (R 2363).

Parker, supra also involved two life recommendations. Id. at 4082. In Parker the mitigating evidence was also directed to both homicides. Id. at 4084. In Parker there was extensive non-statutory mitigating evidence presented. Id. at 4083. The Parker judge also used the "outweigh" language concerning the aggravating and mitigating circumstance. Id. at 4083. The Parker judge also gave no explanation for the different treatment of the two homicides. Id. at 4083-4084. The United States Supreme Court inferred from all these facts that the Parker judge must have found non-statutory mitigating circumstances otherwise there would be no reason to

impose a life sentence on one homicide and no reason to use the "outweigh" language. Id. at 4084. This Honorable Court has also recognized that use of the "outweigh" language is an indicator that the trial found mitigating circumstances. Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977).

In the present case, there was extensive non-statutory mitigating evidence that was presented and that much of it was unrebutted. See Points XX and XXII. The judge imposed a life sentence for one homicide presumably finding the jury's recommendation "reasonable". However, he imposed a death sentence for the other homicide presumably finding the jury's recommendation "unreasonable". The judge does this even though the mitigation is virtually identical. The life sentence in one case and use of the "outweighing" language is a strong indication that the judge found mitigating circumstances otherwise he would have imposed a death sentence on both counts and there would have been no "weighing". Parker, supra. However, he failed to discuss many of the proposed mitigating circumstances, failed to apprehend the mitigating nature of others, and failed to find others. See Point XX and XXII. He completely failed to explain why one of the jury's recommendation was "reasonable" and one was "unreasonable". This violates the requirements of due proces of law imposed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution and the unique need for reliability in a capital case imposed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution and the statutory requirements of

Florida Statutes 921.141. Parker, supra; Campbell, supra; Nibert, supra; Tedder, supra.

This Honorable Court has consistently held that if the trial judge's order does not show "reasoned judgment required by the statute and caselaw" the order is deficient and the sentence must be reduced to life imprisonment on this basis alone. Bouie v. State, 559 So.2d 1113, 1116 (Fla. 1990); Van Royal v. State, 497 So.2d 625, 628 (Fla. 1986). The order in the present case is less of an exercise in "reasoned judgment" than that in Bouie, supra. It contains absolutely no explanation why one recommendation is "reasonable" and one is "unreasonable" even though the mitigation is virtually identical. The judge had to have found mitigation yet he does not explain what he found. It does not consider much of the mitigation, misapprehends the legal effect of the other mitigation, and fails to find unrebutted mitigation. The order is fatally defective under the Florida Statute, caselaw, and the Florida and Federal Constitutions.

The override in this case is arbitrary, irrational, is based on fatally defective order, and is contrary to the strong evidence of mitigation. It results in a death sentence which is contrary to § 921.141, caselaw and the Florida and Federal Constitutions. See Parker, supra. This Court must reduce the death sentence to life imprisonment.

CONCLUSION

Based on the foregoing arguments, this Court should vacate Appellant's convictions, and vacate or reduce his sentences, and remand this cause for a new trial or grant 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 to FARIBA KOMEILY, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2d Avenue, Suite N921, Miami, Florida 33128 by U.S. Mail this 19th day of April, 1991.

Of Counsel

A P P E N D I X

SUNRISE AND SUNSET AT WEST PALM BEACH, FLORIDA

NO. 1073

EASTERN STANDARD TIME

DAY	JAN		FEB.		MAR.		APR.		MAY		JUNE		JULY		AUG.		SEPT.		OCT.		NOV.		DEC	
	Rise A.M.	Set P.M.	Rise A.M.	Set P.M.	Rise A.M.	Set P.M.	Rise A.M.	Set P.M.	Rise A.M.	Set P.M.	Rise A.M.	Set P.M.	Rise A.M.	Set P.M.	Rise A.M.	Set P.M.	Rise A.M.	Set P.M.	Rise A.M.	Set P.M.	Rise A.M.	Set P.M.	Rise A.M.	Set P.M.
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27	7 08	5 59	6 46	6 20	6 17	6 35	5 46	6 51	5 28	7 07	5 29	7 18	5 42	7 11	5 58	6 46	6 11	6 12	6 27	5 42	6 49	5 27	7 07	5 36
28	7 07	6 00	6 46	6 21	6 16	6 35	5 45	6 51	5 28	7 07	5 29	7 18	5 43	7 10	5 58	6 45	6 11	6 10	6 27	5 41	6 49	5 27	7 08	5 36
29	7 07	6 00	6 46	6 21	6 15	6 36	5 44	6 52	5 28	7 08	5 30	7 18	5 43	7 10	5 58	6 44	6 12	6 09	6 28	5 40	6 50	5 27	7 08	5 37
30	7 07	6 01			6 14	6 36	5 43	6 52	5 27	7 08	5 30	7 18	5 44	7 09	5 59	6 43	6 12	6 08	6 28	5 39	6 51	5 27	7 08	5 38
31	7 06	6 02			6 13	6 37			5 27	7 09			5 44	7 09	5 59	6 42			6 29	5 39			7 09	5 38

Add one hour for Daylight Saving Time if and when in use.

I certify that the above data are the result of an accurate and true computation by the Nautical Almanac Office, United States Naval Observatory, an agency charged by Federal Statute (9 Stat. L 374, 375) with the duty of making such computations and publishing the results.

E. W. WOOLARD
Director Nautical Almanac
U. S. Naval Observatory

C. G. CHRISTIE
Captain, USN
Superintendent
U. S. Naval Observatory

(OVER)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to FARIBA KOMEILY, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2d Avenue, Suite N921, Miami, Florida 33128 by U.S. Mail this 19th day of April, 1991.

Jeffrey L. Anderson
Of Counsel