IN THE SUPREME COURT OF FLORIDA

JOHNNY ROBINSON,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 74,113

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ST. JOHNS COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Johnny Robinson was originally indicted on September 5, 1985 on charges of first-degree murder, kidnapping, armed robbery, and sexual battery. Following a jury trial, Appellant was found guilty as charged. (R4-6) Subsequently, the trial court followed the jury recommendation and sentenced Robinson to die. The trial court, without stating any reasons, imposed three consecutive life sentences for the three noncapital offenses after a guidelines recommendation of life imprisonment. (R14) Robinson appealed to this Court. This Court found no reversible error in Appellant's conviction and, therefore, affirmed. However, this Court reversed the sentence of death as a result of improper and prejudicial argument and testimony during the penalty phase and remanded for a new sentencing hearing before a jury. This Court also vacated the consecutive life sentences imposed for the three noncapital

offenses and remanded for resentencing. (R4-18); Robinson v. State, 520 So.2d 1 (Fla. 1988).

Prior to the new penalty phase, Appellant filed several motions. The trial court denied Robinson's motion for the use of a special verdict form for the unanimous jury determination of statutory aggravating circumstances. (R28-29,167-71) The trial court denied Robinson's motion to preclude death as a possible penalty which was based on double jeopardy principles. (R30-33,151-55) The trial court also denied Robinson's request to hold an evidentiary hearing exploring the prosecutor's motives in causing the previous mistrial. Additionally, the trial court denied Appellant's motion for individual and sequestered voir dire. (R38-41,162-64)

The trial court also denied Robinson's motion to declare Section 921.141(5)(h) and (i), Florida Statutes, to be unconstitutional. (R44-63,164-67) The trial court did attempt to modify the standard jury instructions in attempt to more adequately define these aggravating circumstances dealing with cold, calculated and premeditated and heinous atrocious and cruel. (R100-101,164-67,553-558,565-573,581-89,606,611,696-98,726-29,739) In so doing, the trial court agreed that Robinson was not waiving any objections to the unconstitutionality of the statute or to the jury instructions.

The trial court denied Robinson's motion to prohibit any reference to the advisory role of the jury, but did agree to a requested special preliminary jury instruction dealing with voir dire about the possible penalties. (R34-35,42-43,145-51)

Robinson filed a motion in limine regarding the history of the case in an attempt to conceal from the jury the fact that Robinson had been previously tried and convicted by a jury which then recommended that he be put to death. Appellant also did not want the jury informed of the subsequent appeal and reversal of the death sentence previously imposed by the trial court. (R36-37) Both the state and the trial court agreed that the jury should not be informed of the previous death recommendation and this Court's reversal of Robinson's death sentence. (R146-47) Following jury selection, trial counsel moved for a mistrial based upon the fact that the venire (from which the jury had been selected) had discovered, during the luncheon recess, that this proceeding was a "resentencing." (R65-66,271-72) The trial court denied the motion for mistrial. Robinson also objected to the trial court instructing the jury that he "had been found guilty of first-degree murder." The trial court also overruled that objection. (R156-59,196)

During the penalty phase, Robinson objected to certain language contained in the preliminary jury instructions which Robinson contended unconstitutionally shifted the burden of proof. (R190-91,197-98,599) The trial court also overruled trial counsel's objection to proceeding without providing a coat and tie for Robinson to wear at trial. (R193-94)

The jury was allowed to hear the reading of Bernard Fields' prior testimony after the trial court declared Fields to be unavailable. Appellant objected based upon his constitutional right to confront witnesses. (R284-320,322) The trial court also

overruled two defense objections to two question asked of Fields. (R304,310)

Appellant objected to the introduction of certain evidence at trial including pictures of Robinson's automobile; the introduction of a gun similar to the one used in the murder; the introduction of a videotape of the crime scene; and a purse strap found at the scene. The trial court overruled the objections and allowed the introduction of this evidence. (R307-308,330-43,373-76,456-58,461)

During the testimony of Deputy Charles West, the trial court overruled defense counsel's objections to certain portions of West's testimony. (R349-50,356-65,376-77,397-98,405) The trial court also overruled Appellant's objection to a question asked by the state of Dr. McConaghie. (R444-50) The trial court sustained two objections by the state during the testimony of Dr. Krop, a defense witness. (R516,547-48) The trial court overruled Appellant's objection to a question asked by the state of Dr. Krop. (R522)

The trial court denied most of Appellant's requested, special instructions. (R93-99,563-65,570-71,599, 696) The trial court also denied Robinson's request to use the standard jury instruction relating to accomplices. (R578-79) The trial court also denied Robinson's request to specifically instruct the jury as to the eight nonstatutory mitigating circumstances that were supported by the evidence. (R594) The trial court persisted in its denial even after the jury specifically requested instructions thereon. (R703-710)

During summation by the prosecutor, the trial court overruled Appellant's timely objection which was based on racial grounds. (R633-34)

Following deliberations, the jury returned with an eight to four recommendation to impose the death penalty. (R69-71,713-16) The trial court denied Robinson's motion for new trial. (R89,108,725-29) The trial court then sentenced Johnny Robinson to die in the electric chair. (R732-38) The trial court found six aggravating circumstances and three mitigating circumstances. (R109-114) The trial court sentenced Robinson to life imprisonment as to each of the three noncapital offenses. The trial court ordered each sentence to run concurrent with each other and allowed credit for 1306 days previously served. (R115-21,731-32) Robinson filed a timely notice of appeal on April 27, 1989. (R125) This Court has jurisdiction under Article V, §3(b)(1) of the Florida Constitution.

STATEMENT OF THE FACTS

Beverly St. George left her home in Plant City at approximately 8 o'clock a.m. on August 11, 1985. She had approximately $200 in cash. Before leaving the house, she put her bills in her wallet which she then placed in her black purse. Ms. St. George's intended destination was Quantico, Virginia to attend a child custody hearing on August 13th. Her planned route would take her west on Interstate-4 and then north on Interstate-95. Her 1968 green Plymouth had been having overheating problems. (R452-53)

On the morning of August 12, 1985, the body of Beverly St. George was found in Pellicer Creek Cemetery, in St. Johns County, Florida. She was wearing blue jeans but no shirt. (R327-42) Several beer cans, a black purse strap, and a .22 caliber long rifle shell casing were found in the vicinity. (R340-41,369-72)

An autopsy revealed that St. George died sometime during the early morning hours of August 12, 1985 as a result of two gunshot wounds to her head. (R425-29) One bullet entered the left cheek while the other entered on the left side of her forehead. Both bullets penetrated the medulla. (R428) The medical examiner was unable to state with certainty the sequence of the two wounds. (R429,433-40,444-47) Either wound in and of itself would have caused her death. (R429) The doctor opined that St. George would have died in a matter of seconds after the first shot. (R429-30,440) The doctor also opined that St. George would have been rendered unconscious immediately at the time the

first shot was fired. (R430) The wound to the cheek showed characteristics of a contact wound indicating that the gun was pressed against the skin at the time it fired. (R432-34) The wound to the forehead was inflicted by discharge of a gun that was one to two feet away from the skin. (R434-35) Other than the two gunshot wounds, St. George had suffered only a scratch on her right thumb. There was no evidence of any other injury. (R430) Although sperm was present, there was no injury to her vagina. (R430,441) The medical examiner found no markings, indentations, or injuries of any type to St. George's wrists, hands, or arms. (R441)

On August 17, 1985, St. Johns County Deputies arrested Johnnie Robinson and Bernard Fields, a sixteen-year-old black male. (R343-44) Investigator Charles West interviewed Robinson at the Detective Division located in the Sheriff's office. (R344) Johnny Robinson cooperated with law enforcement authorities from the outset. (R346-49) West spoke to Robinson briefly at approximately two o'clock that afternoon during which time West informed Robinson of his constitutional rights pursuant to Miranda v. Arizona, 284 U.S. 436 (1966). West talked to Robinson once again at approximately 6:30 that evening, again informed him of his rights, and Robinson again signed a waiver of those rights. (R344-50) West and Detective Davis interviewed Robinson before they eventually reduced Robinson's statement to writing. (R345-46,351-54,360,383-84) Detective Davis wrote out the statement for Robinson. (R351,354)

Under oath, Robinson told Detective West that he had been at a party in Orange Mills throughout Sunday evening. He had been drinking Hennessy Cognac, some gin or vodka, as well as a quantity of beer. He left the party at approximately 11:30 p.m. accompanied by Bernard Fields. The pair headed toward Orlando on I-95 in order to visit Appellant's girlfriend. On the way, they spotted a green Plymouth pulled over on the side of the road. Since Robinson had some mechanical expertise, he turned around and went to the woman's aid. She told him that she was simply tired and had stopped to rest. Robinson talked and joked with Ms. St. George. During the conversation, she noticed that he carried a gun and wished aloud that she had something similar to kill her ex-husband. Ms. St. George eventually accompanied Robinson and Fields in their car to Pellicer Cemetery. Once they arrived, Robinson and Ms. St. George began to engage in some consensual sexual activity on the hood of his car. During this activity, the Appellant took his gun out of his pants and placed it on the hood. Bernard expressed a desire to leave, but Robinson stated that he wanted to "...take the bitch back to the party!" (R353) She replied, "Who the fuck are you calling a bitch!" Appellant told her, "Shut up whore!". (R353) Bernard began to laugh and the woman began pawing at the Appellant. He picked up the gun and tried to push her back as she pressed up against him. The gun went off accidentally and hit her in the face. When Robinson realized what had happened, he shot her again. He became scared when he realized the credibility problem that he would face concerning the accidental shooting of a white woman.

He drove her away from the area before deciding to get rid of her belongings. He threw her pocketbook, blouse, and other belongings out the car window. As dawn broke, he took Bernard home before heading for his own house. When he woke up the next morning, he partially destroyed the gun, using a screwdriver. He then carried the gun under the seat of his car for several days. As he was coming back from Orlando on the morning of August 17, 1985, he stopped the car on the interstate and threw the gun into the bushes. (R352-54)

There was physical evidence that supported Robinson's explanation that the killing was, in fact, accidental. The medical examiner could not exclude the possibility that the shots were accidentally fired. (R442-43) The doctor had no idea what St. George's position was when the shots were fired. (R436,443-444) The contact wound could have been caused while St. George was moving toward the gun barrel, that is, while she was on the offensive. (R442-43)

At the time of his testimony, Clinton Bernard Fields, Appellant's accomplice, was awaiting sentencing following his convictions for first-degree murder, armed robbery, kidnapping, and sexual battery arising from this incident. (R316-17) Although he did go to trial on these charges, he avoided any possibility of a death sentence when he agreed to testify against Robinson. (R317) The state promised to do its best to obtain concurrent rather than consecutive sentences. (R316) The state also granted Fields immunity from prosecution for any other proceedings arising from his testimony or depositions. (R318) Fields admitted

that he was looking and hoping for some, indeed any, benefit from the state resulting from his testimony against Robinson. (R317-18) Additionally Fields planned to appeal his convictions and steadfastly maintained his own innocence in the affair. (R318-321)

For whatever reason, Barnard Fields' account of the death of Ms. St. George differed dramatically from that related under oath by the Appellant at the time of his arrest. Fields testified that Robinson pulled out his gun as he got out of his car and walked up to St. George's car. He ordered her out of the car at gunpoint. Robinson and St. George got into the back seat of his car where he put handcuffs on her. Robinson took the woman's purse and threw it on the front seat. He ordered Fields to go through the purse, but Fields refused. Robinson then ordered Fields to drive to Charlie T's Truck Stop where Robinson took over the driving. (R294-295) From there Robinson drove to Pellicer Creek Cemetery where he took off the cuffs, had the woman undress and get onto the hood of the car. According to Fields, Robinson had sexual intercourse with the woman first and then ordered Fields to do likewise. Initially, Fields refused explaining that he had a steady sexual partner. However, when Robinson raised his voice, Fields feared for his life and reluctantly had intercourse with Ms. St. George. After Fields finished, Robinson once again had intercourse with the woman. (R296-98) When asked if the woman was agreeable to the sexual activity, Fields replied, "Well, in a way, she wasn't." (R298)

Fields testified that during the time that she was in their company, St. George asked on several occasions if they

meant her any harm. Fields testified that he reassured her about her safety. (R299-300) Fields also testified that, at the conclusion of the sexual activity, Robinson expressed concern that the woman could identify both him and his car. Fields reportedly dismissed this possibility, pointing out that the cemetery was dark. Robinson then allegedly stated that the only way she could not make an identification was if she were dead. According to Fields, Robinson then walked up to the woman and put the gun to her cheek. Fields turned his head, heard a shot, and later saw the woman on the ground. Robinson then shot her a second time. (R300-301) The pair then drove to a desolate area where they burned all of Ms. St. George's property. (R301-302) Fields testified that Robinson took cash from her purse. Fields swore that he received none of the money. (R302) Fields stated that Robinson later threw the gun out of the car window somewhere along I-95. (R308-309)

During the entire incident, Fields considered an attempt to flee, but did not do so as a result of his alleged fear of Robinson as well as his inability to run well. He had lost a leg as a result of a motorcycle accident. (R290-91,303-304)

The state presented evidence that Robinson had a 1979 rape conviction in Maryland. As a result, he was sentenced to ten years and was still on parole at the time of this offense. (R462-68)

Dr. Harry Krop, a clinical psychologist specializing in the forensic field, was accepted as an expert witness without objection. (R489-93) Dr. Krop examined Robinson on two occasions,

in March of 1986 and again on December 9, 1988. (R501) Each interview was approximately three hours long. (R501-502) In addition to Krop's personal examination of Robinson, Krop also reviewed records from prior testimony and hearings, reviewed the presentence investigation report, reviewed Department of Corrections records, examined defense counsel's complete file, and talked to individuals familiar with Robinson. (R502-03)

Krop testified that he was familiar with the mitigating circumstances set forth in the Florida Statutes. Krop concluded that none of the statutory mitigating circumstances were applicable to Robinson. Krop admitted that he reserved the application of the mitigator relating to "extreme emotional disturbance" to individuals who are actually psychotic. (R49-98) Dr. Krop admitted that, although the statute did not define "extreme", that was the standard that Krop had developed for his own use. (R497-500)

Dr. Krop found Johnny Robinson's background and upbringing most significant. (R509) Johnny's biological father, Reverend J.B. Robinson, left Johnny's upbringing to the Reverend's own father, Johnny's grandfather. In fact, Johnny mistakenly believed for quite some time that his grandfather was his biological father. Johnny never knew his mother and was never told why she had no part in raising him. (R509)

Physical and sexual abuse was a constant in Johnny Robinson's childhood. Johnny's grandfather would sometimes use a black leather belt to beat Johnny. (R509) A variation on the same theme involved forcing Johnny to squat with a broom handle

between his legs where he was forced to remain for a indefinite time. Sometimes his grandparents would beat Johnny while he remained in that position. On some occasions, the grandfather would tie Johnny's hands together and then use a switch on him. (R510) Johnny's living arrangements were corroborated by Reverend Robinson. (R503,509) The mother of one of Johnny's childhood friends corroborated the fact that Johnny was physically abused by his foster father. (R509-10) She reported seeing bruises on a number of occasions. (R510) Johnny frequently sought refuge at his friend's home. (R510)

Johnny's childhood was also replete with sexual abuse. He was sexually abused by an uncle at the age of seven. (R511) When Johnny was approximately eleven years old, his grandfather married a fifteen-year-old who then became Johnny's "step-mother." (R510-511) His "step-mother" also sexually abused Johnny on a number of occasions. (R511) This effectively drove Johnny from the home for good. He ran away and began living on the streets. (R511) Johnny had previously run away from home to live with an aunt but, his grandfather was called and he was returned home. (R511-12)

After successfully escaping from his grandfather and step-mother, Johnny lived in various migrant labor camps between the ages of twelve and fourteen. Johnny was also sexually abused while living in these labor camps, but he had no other place to go. (R512) Also around this time, Johnny encountered trouble with the law. After one arrest, Johnny became afraid that he would be sent home, so he lied about his age and told the police

that he was eighteen. Robinson was ultimately incarcerated in an adult prison at the age of thirteen. (R512) Since that time he has been incarcerated in various institutions during a large portion of his juvenile and adult life. (R512)

Dr. Krop opined that Robinson's social background precipitated his involvement in anti-social activity. (R513) Robinson's upbringing resulted in the development of an anti-social personality disorder, i.e. a character disorder which results in social disfunction. (R513) Dr. Krop also diagnosed Robinson as suffering from a psycho-sexual disorder. (R513) Dr. Krop explained that it was extremely common for victims of sexual abuse to develop such a disorder. (R514) The effect of the disorder in Robinson's case was inappropriate sexual behavior, specifically forced sex. (R513-14)

Dr. Krop concluded that Robinson's alcohol use the night of the offense contributed to the incident. Robinson began drinking that afternoon in Daytona where he consumed a pint of Crown Royal. (R515) At the party that evening, Robinson drank between two and four coffee-cup size containers of either gin or vodka. (R515-16) Robinson also drank two or three six-packs of beer during that period of time. He also bought another pint of Crown Royal which he drank that evening. (R516) Robinson reported that when drinking, he behaved differently. He becomes more easily frustrated and potentially more violent. (R514-15) However, Robinson's intoxication generally is not apparent to observers. Outwardly, he appears to hold his liquor well. (R515) Dr. Krop found seven nonstatutory mitigating circumstances: (1)

emotional deprivation (growing up essentially without a mother and without love or affection); (2) physical abuse as a child; (3) sexual abuse (especially homosexual abuse); (4) the emotional trauma suffered from his incarceration in an adult facility at a very young age; (5) a psychosexual disorder; (6) the impairment of his judgment as a result of alcohol consumption that night; (7) Robinson's ability and history of functioning productively while incarcerated. (R516-19) Dr. Krop pointed out that Robinson had obtained his GED while incarcerated and had also participated in tutoring other inmates. (R518-19) A review of Robinson's Department of Corrections records revealed no disciplinary reports. Dr. Krop pointed out that such an exemplary record was almost unheard of in the case of someone who had been incarcerated for any significant length of time. (R518-20) Krop explained that an inmate could be cited for something as trivial as talking back to a guard. (R520)

Dr. Krop concluded that Robinson's psychosexual disorder was treatable. (R544) In contrast, an anti-social personality is one of the more difficult disorders to treat. Dr. Krop testified that personality disorders generally "burn out" as a person ages. Dr. Krop had noticed a change in Johnny Robinson during the two-year period between each examination. (R544-45) Robinson had definitely changed his attitude in that he was much more mellow and less hostile. It appeared that Robinson was now taking responsibility for his actions. Dr. Krop revealed that this was the first step toward a possible recovery. (R544-45) Dr. Krop concluded that Johnny Robinson was attempting to become

a better person regardless of the outcome of his legal difficulties. Krop perceived a genuine desire in Johnny to change his life. (R548)

SUMMARY OF ARGUMENTS

POINT I: A critical contention at trial involved an accusation that Bernard Fields, the co-perpetrator, was lying. The jury had to choose to believe either Robinson or Fields in its termination of how the crime occurred. In spite of this, the trial court inexplicably denied a request to instruct the jury pursuant to Florida Standard Jury Instructions (Criminal) 2.04(b) which states that a jury should use great caution in relying on the testimony of a co-perpetrator.

POINT II; Due process, a fair trial, and the ban against cruel and unusual punishment dictate that the jury be instructed by the court on the specific nonstatutory mitigating circumstances which the defendant had submitted in the case. This is especially true where the jury requested that instruction and where the prosecutor impermissibly denigrated the importance of nonstatutory mitigating circumstances. The jury recommendation on which the court places great weight is unreliable.

POINT III: Robinson presented one witness, a clinical psychologist, whose testimony established certain nonstatutory mitigating circumstances. The trial court twice sustained the trial court's objections and refused to permit Dr. Krop to answer two questions. Both questions were proper ones to propound to an expert, especially where the question deals with the basis of the expert's opinion.

POINT IV: Robinson contends that he was denied his right to a fair trial where the jury became aware that he had previously been tried and, therefore, could logically conclude that Robinson had previously been sentenced to death. The trial court had granted Appellant's motion in limine regarding the case history.

POINT V: The death sentence imposed was improper for a variety of reasons. The state failed to prove that the victim knew of her fate beforehand. The killing was accomplished by a quick, single shot. The requisite heightened premeditation was not present to justify the finding that the murder was cold, calculated, and premeditated. The trial court engaged in impermissible doubling in finding that the murder was committed to avoid arrest. The trial court ignored valid mitigating circumstances that were established by the evidence. The death sentence in this case is disproportionate to life sentences imposed in other cases that this Court has reviewed.

POINT V: Robinson's previous death sentence was vacated by this Court based upon prosecutorial misconduct. Robinson contends that he should have been sentenced to life, since the prosecutor deliberately provoked the motion for mistrial. At the very least, the trial court should have granted an evidentiary hearing where the prosecutor's motive for his previous misconduct could be discerned.

POINT VII: Although use of the standard jury instructions is encouraged, where such instructions do not adequately inform the jury of their duties during deliberation, it is error to deny special requested instructions which correctly state the law and are particularly applicable to the facts of a particular case.

POINT VIII: Robinson's original death sentence was vacated by this Court based upon prosecutorial misconduct, i.e., injecting racial prejudice into the proceedings. Appellant attempted to prevent racism in the retrial by objecting to the prosecutor's use of a certain portion of Robinson's statement given to police which referred to a "white woman." The trial court overruled the objection and allowed the prosecutor to argue.

POINT IX: Appellant contends that certain parts of the standard jury instructions impermissibly and unconstitutionally shift the burden to prove mitigating circumstances. The trial court overruled Robinson's objections and denied his requests to modify the instructions.

POINT X: The aggravating circumstances dealing with heinous, atrocious, or cruel and cold, calculated, and premeditated are unconstitutionally vague. A jury recommendation, which is given great weight by the sentencer and the reviewing court, and which may be based, in part, on these aggravating circumstances, is unreliable, since a layman could honestly believe that every unjustified, intentional taking of life is especially heinous,

and is cold and calculated. There is nothing in the definitions of these circumstances to enable them to be applied in a meaningful, non-arbitrary fashion.

POINT XI: This point involves a claim under Caldwell v. Mississippi, 472 U.S. 320 (1985). Comments, argument, and instruction by the prosecutor and the trial court could have misled the jury as to the applicable law in recommending either life or death. This could have resulted in a denigration of the jury's role.

POINT XII: A death sentence violates the prohibition against cruel and unusual punishment where the jury is not required to make written findings of aggravating circumstances. Supreme Court review of the sentence is based on pure speculation in the absence of these findings. Where the court denied a request that aggravating circumstances be found by the jury, the death sentence must be overturned.

POINT XIII: Appellant urges reversal based upon cumulative error.

POINT XIV: Appellant urges that the Florida Capital Sentencing Statute is unconstitutional for a variety of reasons.

POINT I

IN CONTRAVENTION OF ROBINSON'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, 17 AND 22, OF THE FLORIDA CONSTITUTION, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO ACCURATELY INSTRUCT THE JURY ON A CRITICAL ELEMENT RELATING TO APPELLANT'S THEORY OF DEFENSE.

During the charge conference, defense counsel pointed out that Robinson's jury did not have the benefit of hearing the general jury instructions that they would have heard prior to deliberations at the guilt phase. (R573-74) The trial court agreed that the jury should receive some general instructions. (R574) Counsel and the court then sifted through the general instructions and agreed that the jury should be instructed on, inter alia, weighing the evidence, reasonable doubt, expert witnesses, and the defendant not testifying. (R574-81) During this discussion, defense counsel requested that the trial court instruct the jury pursuant to 2.04(b) from the Florida Standard Jury Instructions in Criminal Cases which provides:

> You should use great caution in relying on the testimony of a witness who claims to have helped the defendant commit a crime. This is particularly true when there is no other evidence tending to agree with what the witness says about the defendant.
>
> However, if the testimony of such witness convinces you beyond a reasonable doubt of the defendant's guilt, or the other evidence in the case does so, then you should find the defendant guilty.

Defense counsel specifically requested the first paragraph. The state wanted the second paragraph read to the jury, and defense

counsel agreed that such a reading would be fair. (R578) The prosecutor attempted to modify the instruction so that it applied to the establishment of aggravating circumstances. Defense counsel then stated:

> MR. QUARLES (Defense counsel): I think, though, that our request for this instruction goes more to mitigating factors. It's a nonstatutory mitigating that the relative culpability of Mr. Robinson and Mr. Fields, and to not instruct would be tantamount to not giving an instruction on one of the theories of our defense.
>
> THE COURT: To not instruct would be what?
>
> MR. PEARL (Defense counsel): Tantamount to not instructing the Jury as to one of our basic theories of defense.
>
> THE COURT: What was the basic theory of defense? I haven't heard of such a defense.
>
> MR. PEARL: That the relative culpability of Mr. Fields and Mr. Robinson.
>
> THE COURT: I haven't heard anything like that, except in Mr. Robinson's statement. Gentlemen, you have to remember that the Jury's already found him guilty of robbery, kidnapping and murder.
>
> MR. QUARLES: I understand, but anything is mitigating, Your Honor including the relative roles.
>
> THE COURT: What relative roles are you talking about?
>
> MR. PEARL: The relative degree of culpability in the offense, as well as the fact that Mr. Fields got life, and Mr. Robinson should as well.
>
> THE COURT: That had nothing to do with this, though.
>
> MR. QUARLES: I think it does, Your Honor.
>
> THE COURT: Well, I'm not going to give it.

(R578-579) Prior to closing argument, defense counsel stated that Appellant had no further objections to the instructions

other than those already placed on the record. (R611) As a result of the trial court's ruling, the jury was not instructed concerning the great caution to use in considering the testimony of Bernard Fields. In essence, the trial court denied Johnny Robinson an instruction that had a critical relationship to his theory of defense.

A defendant is entitled to a jury instruction on the theory of his defense if there is evidence in the record to support it, regardless of how weak or improbable it may be. Bryant v. State, 412 So.2d 347 (Fla. 1982); Solomon v. State, 436 So.2d 1041 (Fla. 1st DCA 1983). Failure to so instruct shall result in reversal and remand for a new trial. Id. The major thrust of Johnny Robinson's defense at trial was an attack on the credibility of Bernard Fields, the co-defendant and co-perpetrator. Defense counsel's initial attack during final summation was his greatest hurdle, the testimony of Bernard Fields. (R640)

> Now, much of what [the prosecutor] had to say about the proof in this case comes from the testimony of Bernard Fields . . . . The State Attorney wants you to believe Fields when it is not necessarily Fields who is telling the truth. . . . You are the sole judges of the credibility, the believability of every witness who appears and yet you're hamstrung and frustrated by having the testimony of a witness read to you who you have never seen and therefore can not evaluate. It is not that easy to do.
>
> But we have some of Mr. Fields' testimony, and I'd like to review some of it with you, because you're going to have to ask yourselves, among other things, what was Mr. Fields' trying to do? What was his position at the time he gave that testimony? What did he want in return? Was he going to be rewarded? Did he have a reason for saying what he said? Did he have a reason for speaking an untruth in this case or not?
>
> * * *
>
> And Bernard Fields, to a large extent, is the key to this . . . . (R640-43)

* * *

Now, as I say, we haven't seen Mr. Fields. We don't know. It may be a figure of speech with him, but it may not. We cannot judge him. We cannot judge his ability or willingness to tell the truth because we have never seen him. (R648)

* * *

Now, Johnny Robinson, in his statement, said that he threw her stuff out of the car somewhere along the highway. Difficult to know which one to believe, two statements one by the Defendant, it's in evidence and you can read it and testimony of Bernard Fields, which I'm sure that you believe that you remembered at least most of it. . .

But if Bernard Fields was telling the truth . . . . He refused to cooperate or it didn't happen that way.

It happened the way Johnny Robinson said. He threw out other things as well as the gun along the road, in which case Bernard Fields was lying. (R650-51)

* * *

And I guess if there's any sort of a policy that I think we all agree on, that we all think is true in cases where the question of a person's believability comes up and it can be expressed as lawyers say, false in one, false in all.

We folks generally say, well, he told me a lie once. I'll never believe another thing he says. And if that's a lie, then you don't know what else is a lie. How can you rely on the testimony of a man you have never seen and watched to testify. Now, we'll get to his interest in that in a moment. (R652)

* * *

One of them is he says that although he was scared and was afraid that Johnny Robinson would shoot him if he didn't do what he was told and he only had one leg, see. . . . And in spite of his fear and in spite of the tension of the situation, he says he was able to achieve a sufficient erection to, as he put it, "I stuck it in and I stuck it out," because he told me, "but I was scared," and in effect he said, "I was doing what he told me to do." . . . It seems doubtful to me. (R653)

* * *

And Bernard Fields testified that he shot the lady, that he did it deliberately, that he shot her twice and said, "well, I had to do that because she could identify me and she could identify my car."

But that's Bernard Fields talking. And I think we better be pretty suspicious about anything he says in this case. Why is it that it is doubtful that Johnny Robinson shot the lady deliberately to avoid her testifying against him as a witness? The truth is sitting right under our noses. It's called Bernard Fields.

If Bernard Fields himself felt that Johnny Robinson was the kind of person who was drunk enough, hey, if Bernard displeased him in any, he'd shoot and kill him.

Here we have a situation in which if you believe Bernard Fields, Johnny Robinson had just committed a deliberate cold-blooded first-degree murder on this lady he had picked up on the side of the road, so that's the reason he shot the lady. . . .

Ladies and gentleman, that's no basis for believing Bernard Fields when he said he shot her because he wanted to eliminate a witness. Bernard Fields is the living evidence of the falsity of that statement.

Now, further on in this testimony we learned that Bernard Fields will be sentenced at the very minimum to life in prison with a minimum mandatory 25 years. . . .

So, I said to him, "let's face it, you're looking for slack, all of the slack you can get." He said "yes." (R654-55)

* * *

And then I asked him, "but in the meantime one of the things you've got to do in order to get the help of the State Attorney is to help the State convict Johnny Robinson, and he answered "Yes."

Motive? A truck load of motive. Bernard Fields was in a very, very tight place and didn't like it there and he was going to do anything that he had to do, anything he had to do, say anything he had to say to get the help of the State Attorney and try to get out of that fix. . . . And among the things he was willing to do was to come in and testify under oath unjustly and untruly that Johnny Robinson killed that lady out there deliberately and maliciously and coldly in order to eliminate her as a witness and that, ladies and gentlemen, I submit to you is not true. (R656-57)

* * *

But Johnny Robinson says, A, she got mad at me, walked toward him, grabbed his shirt as she walked into the muzzle of the gun and it accidently went off the first time.

Now, the only thing that says -- the only person who says that's not true, based on his experience, is Bernard Fields, who I suggest to you cannot be believed beyond a reasonable doubt. . . . And yet his is the only testimony we have before you, other than the sworn statement of Johnny Robinson as to what happened, so you have to select between the two without knowing which is true. . . . I do not see how you can decide beyond a reasonable doubt what Bernard Fields said was true about what happened out there at the moment that Mrs. St. George met her death or whether what Johnny Robinson said was true and that she met her death by accident, although in the course of the commission of a crime. (R660-62)

* * *

And, therefore, Bernard Fields' testimony must be weighed against the statement made by Johnny Robinson. (R664)

* * *

Bernard Fields, to the extent that he can be believed . . . (R666)

* * *

Here in this case what do we have? We have two versions of what happened, Bernard Fields, himself, if you believe him -- I do not know how you can -- but if you do, . . . (R680)

* * *

I don't know how anybody can say that this killing was especially cold, calculated and premeditated when the only person who said that -- Johnny Robinson said to Fields, "I'm going to go over there and kill her because I don't want a witness," is Fields, who is unworthy of belief. No one else said that.

Johnny Robinson said it was an accident and in the encounter she ran into the muzzle of the pistol and the gun went off. I'm not saying you have to believe Johnny Robinson . . . but I don't

> see how you can believe Bernard Fields, who was the only other person there. (R683)
>
> * *
>
> Don't forget that his Co-Defendant, the man who was with him, the man who cannot be believed, in my opinion, received life in prison.
> What's good for one ought to be good for the other. I don't see how you can separate them out and say one received life, the other deserves death. Be evenhanded. (R685-86)

As evidenced from the above portions of defense counsel's closing argument, the testimony of Bernard Fields was absolutely critical to the state's case. The trial court used Bernard Fields' version of the events that night to find four of the aggravating circumstances used in imposing the death sentence. (R110-111) The jury heard two versions of what happened that night. The jury heard Johnny Robinson's statement which revealed that St. George went with the men voluntarily where St. George was accidently shot during some consensual sexual activity. (R351-54) However, the jury first heard the testimony of Bernard Fields who alleged that St. George was abducted, raped, and then eliminated as a witness. Fields maintained that he was an unwilling participant throughout. (R287-320)

The thrust of Robinson's defense at his trial was the inherent incredibility of Bernard Fields. Defense counsel attempted to discredit Fields and tried to raise some reasonable doubt about the scenario that evening. In doing so, defense counsel also attempted to shift the relative culpability from Robinson to Fields. Additionally, defense counsel urged the jury that, since both were guilty of the same crimes, it would be manifestly unfair to execute Robinson yet let Fields live.

Because of the trial court's denial of a clearly applicable standard jury instruction [Fla.Std.Jury.Instr. Crim. 2.04(b)] the jury was left to its own devices in determining how to weigh the testimony of Bernard Fields, the co-perpetrator. The jury never learned that they should use great caution in relying on his testimony. This is particularly true when no other evidence tended to agree with the scenario testified to by Fields. Fla.St.Jury.Inst. Crim. 2.04(b). The only other direct evidence of the events that night was Robinson's statement given to the police after his arrest and introduced at trial. These two divergent items of evidence were the only direct evidence of what occurred. Therefore, the jury's consideration of Fields' testimony was absolutely critical.

It matters not that defense counsel strenuously argued that Fields lacked credibility. In Mellins v. State 395 So.2d 1207 (Fla. 4th DCA 1981) the District Court held that, although defense counsel's summation apprised the jury of the effect of intoxication as to the scienter requirement, the trial court was still obligated to give an appropriate instruction. This conclusion is obvious when one realizes that the jury is constantly admonished that the lawyer's argument is not evidence Additionly, the jury is always given the standard instruction that the jury is to listen to the trial judge for instruction on the law. Id.

The law is quite clear that the trial judge must fully instruct the jury on the applicable law of the case, including defenses to the charges where some evidence of said defense exists. Williams v. State, 356 So.2d 46 (Fla. 2d DCA 1978);

Stripling v. State, 349 So.2d 187 (Fla. 3d DCA 1977); Carrizales v. State, 345 So.2d 1113 (Fla. 2d DCA 1977); Polk v. State, 179 So.2d 236 (Fla. 2d DCA 1965); §918.10, Fla. Stat. (1987); Fla.R.Crim.P. 3.390(a). In Johnson v. State, 449 So.2d 921 (Fla. 1st DCA 1984) the District Court awarded a new trial where the judge failed to instruct the jury to consider, in weighing the credibility of a witness, whether the witness had been convicted of a crime. The jury heard that the co-perpetrator pled guilty and the state had agreed to recommend a maximum sentence of ten years. Johnson's accomplice had not yet been adjudicated or sentenced at the time he testified against Johnson. The court reversed.

> We are unable to conclude that the error was harmless. Biggs' testimony was critical, if not indispensible, to the state's case and his believability was a crucial issue which had to be resolved by the jury by proper instructions by the court.

Johnson, 449 So.2d at 923.

Although an accomplice is competent to testify as a witness, his testimony should be relied on with "great caution." Smith v. State, 507 So.2d 788 (Fla. 1st DCA 1987). Credibility of an accomplice and the weight to be given his testimony is a matter for the jury. Id. at 790. The instruction on accomplices was intended to protect a defendant from the inherent unreliability of an accomplices' testimony. The instruction is intended to be a shield for an accused rather than a sword for the state. Dudley v. State, 405 So.2d 304 (Fla. 4th DCA 1981) and Wheelis v. State, 340 So.2d 950 (Fla. 1st DCA 1976).

The trial court committed reversible error in denying this requested standard jury instruction that was clearly applicable to the case. The jury's consideration of Fields' testimony was absolutely critical. The trial court's error, in essence, denied Johnny Robinson an instruction as to his only theory of defense. This resulted in a deprivation of his constitutional rights to due process and to a fair trial. Amends. V, VI, and XIV, U.S. Const.; Art. I, §§9, 16, and 22, Fla. Const. The jury recommendation for death and the resulting death sentence are constitutionally infirm. Amend. VIII and XIV, U.S. Const.; Art. I, §17, Fla. Const.

POINT II

IN CONTRAVENTION OF ROBINSON'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE NONSTATUTORY MITIGATING CIRCUMSTANCES WHICH WERE SUPPORTED BY THE EVIDENCE AND THE LAW AFTER SPECIFIC REQUESTS BY BOTH THE APPELLANT AND THE JURY.

Prior to the penalty phase, defense counsel sought to amend the standard jury instructions whereby the jury would receive separate instructions on valid nonstatutory mitigating circumstances for which evidence had been presented. (R594) The trial court denied the request and instructed the jury that the only mitigating circumstance that they may consider (if established by the evidence) is "any aspect of the Defendant's character or record and any other circumstances of the offense." (R594,698) The jury had just retired to deliberate when, two minutes later, they returned with the following question:

> The jury requests a list of the aggravating and mitigating circumstances involved in this case.

(R68,702-04) The prosecutor contended that the jury should be given a copy of the instructions previously read to them. Defense counsel responded:

> Your Honor, that is not what they want.
>
> I'm sure what they want to hear is the list of nonstatutory mitigating circumstances that I read to them during my final argument and they may also want to hear a replay of the statutory aggravatings that you read to them during the charges. But it would be unfair, grossly unfair, to merely tell the Jury that the mitigating circumstances

> that you read to them was any other aspects of the Defendant's life.

(R704) A lengthy discussion ensued during which defense counsel contended that there were nine nonstatutory mitigating circumstances supported by the evidence. (R705-09) The prosecutor did not object to the trial judge instructing the jury as to the seven nonstatutory mitigating factors testified to by Dr. Krop, but objected to an instruction concerning Robinson's change in attitude and the fact that the co-defendant had been sentenced to life. (R708) The trial court ended the debate by announcing that he would provide absolutely no guidance for the jury. The trial court brought the jury in and requested that they rely on their own recollection. The trial court also told the jury that the court would reread any jury instructions and/or any testimony if requested by the jury. The trial court refused to help the jury in any other manner. After the jury's failed attempt to obtain guidance from the trial court, the jury made no further such attempts. After deliberating for approximately four hours, the jury returned with a recommendation that Johnny Robinson die for his crime. (R702,712-723)

It is beyond dispute that the United States Supreme Court decision in Eddings v. Oklahoma, 455 U.S. 104 (1982), requires that in capital cases the sentencer not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any other circumstances of the offense that the defendant proffers as a basis for a sentence less then death. Eddings, 452 U.S. at 110. A defendant's performance in

prison and his potential for rehabilitation have been recognized as such bona fide mitigating factors.

> Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "Any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." Jurek v. Texas, 428 U.S. 262, 275, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976)(opinion of Stewart, Powell, and Stevens, JJ.) The court has therefore held the evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an "aggravating factor" for purposes of capital sentencing, Jurek v. Texas, supra; see also Barefoot v. Estelle, 463 U.S. 880, 77 L.Ed.2d 1090, 103 S.Ct. 3383 (1983). Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under Eddings, such evidence may not be excluded from the sentencer's consideration.

Skipper v. South Carolina, 476 U.S. 1, 5 (1986).

Previously, the standard jury instructions were deemed faulty because they were reasonably understood to limit mitigating circumstances to those expressly contained in Section 921.141(6), Florida Statutes. See Hitchcock v. Dugger, 481 U.S. 393 (1987). In an effort to clarify that a jury or trial judge is not limited in the things that may be considered in mitigation, the list of mitigating factors contained in the standard jury instructions now conclude with, "among the mitigating circumstances you may consider, if established by the evidence, are: ". . . (8) Any other aspect of the defendant's character or record, and any

other circumstance of the offense." Fla.Std.Jury Instructions in Criminal Cases, 2d.Ed., p. 80-81.

From these instructions, the jury may reasonably conclude that all mitigating factors other than those expressly provided for by statute may only be considered as a single factor, as opposed to considering each segment individually and attaching individual weight of each nonstatutory factor. This distorts the weighing process in favor of imposition of the death penalty in violation of the Fifth, Eighth and Fourteenth Amendments.

The precise question presented is whether the foregoing "catch-all" instruction is sufficient to inform the jury that a particular circumstance can properly be considered when defense counsel requests that the jury be specifically instructed that a particular factor adequately supported by the evidence, is valid mitigation under the law. The "catch-all" instructs the jury generally that it may consider any factor of the defendant's character or the crime which mitigates imposition of the offense. See Delap v. Dugger, 513 So.2d 659 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986). See Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985)(proper to instruct on all circumstances for which evidence had been presented). It is nonetheless appropriate, indeed, it is essential that the jury be informed by the trial judge that a particular consideration as a matter of law, whether recognized expressly by statute, constitutes valid mitigation.

The trial court's denial of the requested jury instructions and its refusal to answer the jury's question was extremely prejudicial in the instant case. During the state's cross-

examination of Dr. Krop (the only defense witness), the prosecutor began by asking Krop to, once again, explain the difference between nonstatutory and statutory mitigating circumstances. (R521-22) The prosecutor then asked:

> Q. Dr. Krop, though, did you find any statutory mitigating factors that are provided by the Florida Statute in Mr. Robinson's case?
>
> A. No, I didn't.
>
> MR. PEARL: I object. I consider that to be an incorrect characterization between statutory and non-statutory, as if one were more important than the other.
>
> THE COURT: Well, he just asked him if he's bound by the statutory mitigating circumstances. Objection overruled. And your answer to your question?
>
> THE WITNESS: No, I did not.
>
> Q. So, everything you just told this jury during Direct Examination by Mr. Pearl, thoseare all considered to be non-statutory mitigating factors.
>
> A. As I understand it, that's correct.

(R522) Appellant contends that the focus of the prosecutor's questioning quoted above was improper in that it did tend to denigrate the importance of nonstatutory mitigating circumstances. The clerk implication by the prosecutor was that the mitigating circumstances found by Dr. Krop were of no import, since the legislature did not include them in the statutory list of mitigating circumstances. As a limitation of the mitigating evidence, this is clearly improper. Hitchcock v. Dugger, 481 U.S. 393 (1987). Defense counsel attempted to emphasize the importance of nonstatutory mitigating circumstances in his closing argument

but, without an appropriate jury instruction, this effort was obviously futile. This is particularly true in light of the prosecutor's improper cross-examination of Dr. Krop on this issue.

It is respectfully submitted that the failure to give independent instructions to the jury identifying each valid mitigating circumstance that has been recognized by law and which is supported by the evidence, after timely request by the defendant, results in vague and confusing jury instructions which are biased in favor of imposition of the death penalty. As such, the recommendation has been made in violation of the Fifth, Sixth, Eighth and Fourteenth Amendment to the United States Constitution. The defendant is absolutely entitled to have the jury accurately and fairly instructed on all factors that properly mitigate against imposition of the death penalty. The trial court is the only entity to give the jury instructions on its lawful function. Unless the court instructs the jury that these considerations may properly be used by them in determining whether the death penalty is warranted, the jury may conclude that these factors previously recognized by the courts as valid mitigating are baseless. Worse, the jury may suspect that a defense attorney is attempting to mislead them about the propriety of a factor and thereby lose faith in his credibility. It is imperative that the trial judge adequately and completely define such considerations under the law when timely requested. Because the trial court erred in refusing the timely request by both defense counsel and the jury to instruct on valid nonstatutory mitigating circumstances that

had been established by the evidence, Robinson's death sentence must be reversed and the matter remanded for a new penalty proceeding before a new jury.

POINT III

IN CONTRAVENTION OF ROBINSON'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 16, FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN RESTRICTING ROBINSON'S PRESENTATION OF EVIDENCE.

The defense presented only one witness below. Dr. Krop testified in great detail about Johnny Robinson's sociological background in addition to Johnny's psychological profile. The state stipulated to Dr. Krop's qualifications as an expert witness in the field of clinical psychology. (R489-97) A key issue at trial was whether or not Robinson was intoxicated at the time of the offense. During Robinson's previous appeal to this Court, he raised the trial court's refusal to instruct the jury on the affirmative defense of voluntary intoxication. This Court pointed out that the only physical evidence of intoxication consisted of three beer cans found at the scene of the crime. The only other evidence was the testimony of Fields, who said that he had seen Robinson drinking earlier in the evening, and Robinson's statement to the police which included references to consuming unspecified amounts of cognac, gin, and beer. This Court held that, although there was evidence that Robinson consumed alcoholic beverages the night of the murder, there was no evidence that he was intoxicated. Robinson v. State, 520 So.2d 1, 5 (Fla. 1988). This Court pointed out that Dr. Krop's testimony was not relevant to the issue since Krop did not testify during the guilt phase. Id.

At this most recent penalty phase, Dr. Krop testified again as to the large quantities of alcoholic beverages that Robinson consumed throughout that fateful day. (R515-16) The doctor also reported the effect that alcohol generally had on Robinson. (R514-15) After the defense laid the aforementioned predicate, defense counsel asked:

> Q. In considering and making a diagnosis, have you arrived at a conclusion or diagnosis as to whether or not on the evening when he had the encounter with Mrs. St. George, was he in fact, in your opinion, intoxicated.
>
> MR. ALEXANDER (Prosecutor): Judge, I object. That calls for total conjecture on his part.
>
> THE COURT: Objection sustained.

(R516)

Another important issue at trial was the state's contention that Dr. Krop's testimony and conclusions were entitled to little consideration since Dr. Krop had obtained most of his information as a result of Robinson's self-report. (R524-25,527-28) On redirect, defense counsel attempted to rebut the state's assault:

> Q. Having seen Mr. Robinson on two occasions and having spent approximately six hours with him, to what extent, based upon your prior professional experience, are you confident, or on the other hand do you lack confidence in the truthfulness of the report made to you by Mr. Robinson.
>
> MR. ALEXANDER: Your Honor, I object. That's total speculation, once again, conjecture on his part as to his truthfulness.
> THE COURT: Sustained. He can relate to the jury what he was told by the Defendant.

> He can relate how he determines whether a man is telling the truth, but he certainly can't tell this jury whether or not the Defendant is telling him the truth.

(R547-48) Appellant contends that both of the above questions were proper questions, that the state's objections were improperly sustained by the trial court, and the witness' answers were improperly excluded. Appellant contends that the trial court's rulings resulted in a denial of his constitutional rights to due process and to a fair trial. Amends. V, VI, XIV, U.S. Const.; Art. I, §9,16, and 22, Fla. Const. Robinson's death penalty is therefore constitutionally infirm. Amends. VIII, XIV, U.S. Const.; Art. I, §17, Fla. Const.

Generally, expert testimony is not admissible to directly vouch for or attack the credibility of a witness. Tingle v. State, 536 So.2d 202 (Fla. 1988); Glendening v. State, 536 So.2d 212 (Fla. 1988); and, Ward v. State, 519 So.2d 1082, 1084 (Fla. 1st DCA 1988). Most of the cases deal with child sexual abuse experts testifying as to the truthfulness of the child victim. The instant case is distinguishable since it involves an entirely different situation. Defense counsel was attempting to establish a solid basis for Dr. Krop's findings. As part of that basis, the degree of confidence that Dr. Krop had as to the truthfulness of Robinson's self-reports was critical. (R547-48) This is especially true where the state attempted to denigrate the reliability of Dr. Krop's diagnosis by implying that a patient's uncorroborated self-reports lack truthworthiness.

In Tingle, this Court adopted the position taken by the

Eighth Circuit Court of Appeal allowing an expert to aid a jury in assessing the veracity of a victim of child sexual abuse.

> without usurping their exclusive function by generally testifying about a child's ability to separate truth from fantasy, by summarizing the medical evidence and expressing his opinion as to whether it was consistent with [the victim's] story that she was sexually abused, or perhaps by discussing various patterns of consistency in the stories of child sexual abuse victims and comparing those patterns with patterns in [the victim's] story.

United States v. Azure, 801 F.2d 336, 340 (8th Cir. 1986). This Court recognized that expert testimony such as this, by its very nature, might tend to either bolster or refute the credibility of a child victim. However, the ultimate conclusion as to the victim's credibility always will rest with the jury. The expert will merely be equipping the jury with the knowledge necessary to make this determination. Tingle, 536 So.2d at 205.

Dr. Krop's testimony simply would have illustrated the sound basis upon which he based his conclusions. These conclusions had a critical bearing on the mitigating circumstances applicable to Robinson. Section 90.704, Florida Statutes (1987), provides:

> The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, him at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible into evidence.

Dr. Krop's degree of confidence in the veracity of Robinson's self-reports constituted data on which he based his opinion. As such, the trial court erred in excluding this pertinent and

critical evidence. The same argument applies to the trial court's refusal to allow Dr. Krop to testify that he had concluded that Robinson was intoxicated at the time of the offense. In light of the critical nature of the evidence, its exclusion by the trial court cannot be deemed harmless error. A new trial is required.

POINT IV

IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY, THE TRIAL COURT ERRED IN DENYING THE MOTION FOR MISTRIAL WHEN THE VENIRE WAS APPRISED THAT ROBINSON HAD BEEN PREVIOUSLY TRIED AND, THUS, LOGICALLY CONCLUDED THAT ROBINSON HAD PREVIOUSLY BEEN SENTENCED TO DEATH.

Robinson's original trial occurred in 1986. At that time, he was convicted of first-degree murder, kidnapping, armed robbery, sexual battery, and subsequently sentenced to death pursuant to the jury recommendation. This Court affirmed Robinson's convictions on appeal but vacated his death sentence based on prosecutorial misconduct during the penalty phase. This Court ordered a new penalty phase before a new jury. Robinson v. State, 520 So.2d 1 (Fla. 1988). Prior to the retrial, Robinson filed a motion in limine concerning the case history. (R36-37) Robinson contended that the fact that another jury had previously found him guilty; that another jury had recommended death; that the trial court had once before imposed the death sentence; and that this Court had vacated the sentence would be highly prejudicial when considered by a jury of laymen. Appellant contended that the jury's consideration of the previous legal maneuverings in the case would serve to deny him his right to a fair and impartial jury. (R36) At a pretrial hearing, both the state and trial court agreed with Appellant's motion in limine, concluding that the jury should not be informed of the previous death recommendation nor this Court's vacation of Robinson's death sentence. (R146-47)

Jury selection consumed the first morning of trial. (R145-269) After the jury was seated and sworn, the trial court gave a cautionary instruction before the lunch time recess. (R269-71) After the lunch recess, trial counsel moved for a mistrial based upon the signs he had noticed posted around the courthouse. These signs directed prospective jurors to various court proceedings including traffic, first appearances, and criminal jury trials. (R66) The signs were posted in prominent locations around the courthouse such that entering jurors could not fail to notice them. (R271-72) The top of the sign contained the following:

Monday, February 13, 1989

JUDGE WATSON - ROOM 303

CRIMINAL RE-SENTENCING HEARING - 9 O'CLOCK A.M.

(R66) Trial counsel argued that, especially in light of the trial court's granting of the motion to prohibit any reference to the past case history, the signs were extremely prejudicial. Appellant moved for a mistrial and to strike the venire. The trial court denied the motion pointing out that the notice did not refer to Mr. Robinson by name, stating only that it was a "criminal resentencing hearing." Appellant contends that the trial court's denial of the motion for mistrial violated his constitutional rights to due process of law and to a fair trial. Amends. V, VI, and XIV, U.S. Const.; Art. I, §§9 and 16, Fla. Const. His resulting death sentence is unconstitutional. Amends. VIII and XIV, U.S. Const.

This Court stated in Russ v. State, 95 So.2d 594, 600 (Fla. 1957), that:

> It is improper for jurors to receive any information or evidence concerning the case before them, except in open court and in the manner prescribed by law. [citations omitted].
>
> Arguments of jurors should not be based on assertion of facts not in evidence before them. Evidence to prove guilt may not be supplied by what a juror knows or believes independent of the evidence properly received in the course of the trial. The jury should confine their consideration to the facts in evidence as weighed and interpreted in the light of common knowledge. They must not act on the special and independent knowledge of any of their members.

This Court went on to hold that the juror misconduct in that case was of such character as to raise the presumption of prejudice.

In Jennings v. State, 512 So.2d 169 (Fla. 1987), this Court dealt with a similar situation as the one presented in the case at bar. Three Jennings jurors discovered between the guilt and penalty phases that Jennings had been tried before for the same crimes. During deliberations, the jury sent a note to the judge asking him if they were allowed to know the reasons for the retrials. This Court stated:

> It is not uncommon that jurors become aware that the case before them may have been previously tried as a result of references to prior testimony. There is no indication that the jurors knew what had occurred at appellant's previous trial. We conclude that the judge made the appropriate response and committed no error in denying Appellant's motion for mistrial.

Jennings, 512 So.2d at 174. The Jennings trial judge told the jury that the question and answer "should not be considered by

you. . . ." Id. Appellant acknowledges that this Court's decision in Jennings would appear to be controlling. Appellant notes however that the Jennings court cited no authority or precedent in dealing with this point. Appellant urges this Court to reconsider its position.

A layman with even a rudimentary understanding of this country's constitutional protection from double jeopardy could easily conclude that Robinson had previously been sentenced to death where Robinson faced a new proceeding which could result in a death sentence. A simplistic explanation of the doctrine of double jeopardy is that a person cannot be retried for an offense once that person was acquitted of that same offense. A corollary is that a person cannot receive a sentence more harsh than the original sentence. Appellant contends that it would be a simple matter for the jury to realize that Robinson, now facing the death penalty, must have originally been sentenced to death.

The United States Supreme Court has recognized that prospective jurors may be improperly influenced where they were apprised of an accused's guilt in an unrelated case. Leonard v. United States, 378 U.S. 544 (Fla. 1964). The inherent prejudice that accrued resulted in a tainted jury recommendation to impose the death sentence. The trial court should have granted the motion for mistrial and selected a jury from a new venire. Amends. V,VI, VIII, and XIV, U.S. Const.; Art. I, §§9, 16, 17, and 22, Fla. Const.

POINT V

IN CONTRAVENTION OF ROBINSON'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN IMPOSING THE SENTENCE OF DEATH WHICH IS NOT JUSTIFIED IN THAT IT IS BASED UPON INAPPROPRIATE AGGRAVATING CIRCUMSTANCES, ADDITIONAL MITIGATING CIRCUMSTANCES SHOULD HAVE BEEN FOUND, AND THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

Following deliberations at the penalty phase, the jury returned an advisory recommendation (eight to four) that the trial court sentence Johnny Robinson to death. (R69) In sentencing Robinson to death, the trial court found six aggravating circumstances: (1) the capital felony was committed by a person under sentence of imprisonment; (2) Robinson had a prior conviction of a felony involving the use of violence or threat of violence; (3) the capital felony was committed while Robinson was engaged in the commission or an attempt to commit sexual battery and kidnapping; (4) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (5) the crime was especially wicked, evil, atrocious or cruel; and (6) the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R110-111) The trial court concluded that no statutory mitigating circumstances applied. (R111) The trial court found several nonstatutory mitigating factors. The trial court found that Johnny Robinson had a difficult childhood. The trial court considered the physical abuse that Robinson suffered and the sexual abuse to constitute only one mitigating factor. (R112) The trial court

assumed that the absence of a mother affected Johnny Robinson. The trial court also found in mitigation that Robinson suffered from a psychosexual disorder. (R112) The trial court rejected the other evidence presented in mitigation. (R112-13) The court concluded that death was the appropriate sentence for Johnny Leatrice Robinson. (R113) Appellant contends that this Court must vacate the death sentence imposed. The trial court found improper aggravating circumstances and failed to consider relevant mitigating factors. Proper weighing of all the factors must result in a life sentence.

A. THE TRIAL COURT ERRED IN FINDING THE INAPPROPRIATE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS, AND CRUEL.

In finding that this aggravating circumstance had been proved by the state beyond a reasonable doubt, the trial court stated:

> Defendant jammed the pistol into the face of Beverly St. George and fired. Prior to her execution she had begged Defendant not to harm her. She was obviously terrorized - having been taken out of her automobile at gunpoint in the middle of the night by two strange men, handcuffed, taken to a remote cemetery, sexually assaulted three times and shot. Robinson discussed the necessity of killing her in her presence. Her fear of harm or death during the commission of the crimes prior to her death was proved beyond and to the exclusion of reasonable doubt. Swafford v. State, 533 So.2d 270 (Fla. 1988).
>
> This murder was especially wicked, evil, atrocious and cruel. This aggravating circumstance was proved. (R110-12)

This Court defined "heinous, atrocious, and cruel" in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973):

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

Recognizing that all murders are heinous in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only applies to crimes especially heinous, atrocious and cruel, that is, only to those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So.2d at 9. This factor must be proved beyond a reasonable doubt. See e.g. Lewis v. State, 377 So.2d 640 (Fla. 1979) and Kampff v. State, 371 So.2d 1007 (Fla. 1979).

The facts recited by the trial judge simply do not support the finding of this factor. Furthermore, the trial court's written findings are unsupported by the record. The trial court stated, "Prior to her execution she had begged Defendant not to harm her." (R110) There is no evidence in the record to support this statement. While the victim may have expressed some apprehension during the incident, the state's case showed that she was constantly reassured that no harm would befall her. The prosecutor asked Robinson's co-defendant:

> Q. From the time that you picked this lady up off the side of the road until the cemetery, what was she saying to you and Mr. Robinson?

> A. She was saying, you know, 'Is you - all going to do anything to me?' I told her, you know, no, we was going to let her go. And she went -- she went along with that, you know, she said okay. (R299)

(R299)(emphasis added) There is absolutely no evidence that the victim did not believe the reassuring statements. Indeed, the fact that she apparently cooperated during the sexual acts, supports the conclusion that she thought that she would not be harmed. There is simply no evidence to support the trial court's conclusion.

The record also lacks sufficient evidence to prove beyond a reasonable doubt the trial court's statement that, "Robinson discussed the necessity of killing her in her presence." (R110) The pertinent testimony on this issue was that of Bernard Fields:

> Well, he told me, you know, as she put back on her trousers, told me, you know, she can identify how he looked, you know. And she know what kind of car he driving. And I told him, I said, 'Well, it's dark. You know, ain't no way she could do that there, you know.' He said, 'Well, only way she can't do that there, I just go ahead and kill the bitch.'
>
> Next thing I know, he walked up to her and put the gun to her cheek, and I turned my head, you know. I heard the shot went off, and then I seen her laying on the ground there. And then he standing over her and gave her another shot.

(R300)(emphasis added) The above testimony indicates that Robinson and Fields were having a discussion outside the presence of St. George as she got dressed. This makes more sense under the state's theory. If St. George had heard Robinson planning her elimination,

she might have attempted to flee. The fact that Robinson "walked up to her" before the shot was fired implies that she did not hear the discussion between Robinson and Fields. Certainly, the state has failed to meet its burden of proving this aggravating circumstance beyond a reasonable doubt.

Disregarding Robinson's inculpatory statement to the police in which he explained that St. George was shot accidently, the scenario related by Fields fails to support this aggravating circumstance. When the state attempted to establish that St. George was raped and terrorized, Fields testified regarding her lack of consent, "Well, in a way, she wasn't [agreeable]." (R298) Fields constantly reassured St. George that she would not be harmed. (R299) Hence, there is absolutely no evidence that St. George knew her final fate after the first shot, which she could not have known was coming. She was rendered immediately unconscious and died within seconds. (R429-30,440) Hence, the scenario proven by the state is practically indistinguishable from a single-shot homicide of an unsuspecting victim. See e.g. Teffeteller v. State, 439 So.2d 840 (Fla. 1983).

This Court has also found this aggravating circumstance unsupported by the evidence where, during a robbery, the defendant told the victim not to try anything and he would not get shot. The defendant then fired two shots resulting in the victim's death. Randolph v. State 463 So.2d 186 (Fla. 1984). The finding of this circumstance was also disapproved in Blanco v. State, 452 So.2d 520 (Fla. 1984), where the victim surprised a burglar. During the ensuing scuffle, the victim was shot and landed on a

nearby bed. Blanco then shot the victim six more times before fleeing.

Appellant submits that the State has failed to establish that this capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies. Even Bernard Fields' testimony fails to establish that St. George was unnecessarily tortured. The state has failed to prove this aggravating circumstance beyond a reasonable doubt. The trial court's finding regarding this factor must be rejected by this Court.

B. THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING FACTOR OF COLD, CALCULATED, AND PREMEDITATED WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION.

In finding this circumstance, the trial court wrote:

> Beverly St. George was shot in the side of the face at point blank range. Prior to the first shot Defendant informed his accomplice of his intent to kill Beverly St. George and his reason for doing so. After the first shot Defendant fired a second shot into her head while she lay on the ground (and probably still alive) to ensure that she was dead. The killing had the appearance of a killing carried out as a matter of course.
>
> The murder was completely unjustified. Except as a witness Beverly St. George was no threat to Defendant. There was no resistance or provocation. There is no credible evidence to support Defendant's theory of accident. Defendant's statements and actions exhibit a heightened premeditation. Rogers v. State, 511 So.2d 526 (Fla. 1987); Bryan v. State, 533 So.2d 744 (Fla. 1988).
>
> The Court finds beyond a reasonable doubt that this murder was cold, calculated and premeditated; and without

> any pretense of moral or legal justification.

(R111)

The facts surrounding the death of St. George do not support a finding of Section 921.141(5)(i), Florida Statutes (1985). In Combs v. State, 403 So.2d 418 (Fla. 1981), this Court indicated that Section 921.141(5)(i), Florida Statutes, authorizes a finding in aggravation for premeditated murder where the premeditation is "cold, calculated and . . . without any pretense of moral or legal justification." Id. at 421. This Court indicated that "paragraph (i) in effect adds nothing new to the elements of the crime for which petitioner stands convicted, but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant." Id. (emphasis supplied). In Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982), this Court noted that:

> The level of premeditation needed to convict in the [guilt] phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor - "cold, calculated . . . and without any pretense of moral or legal justification."

Subsequently, in McCray v. State, 416 So.2d 804 (Fla. 1982), this Court noted that (5)(i) "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not meant to be all-inclusive." Id. at 807. The state has failed to prove this aggravating circumstance.

Testimony of Dr. Krop clearly proves that Robinson was intoxicated at the time of the murder. (R514-16,518,520,537-39) This certainly militates against the trial court's finding of heightened premeditation. Even the testimony of Bernard Fields indicates that Robinson decided to kill St. George only seconds before the actual shot was fired. (R300) Additionally, Robinson's character and psychosexual disorders belie the finding of this aggravating circumstance. This Court has previously recognized the relationship between mental disorders and aggravating circumstances. Huckaby v. State, 344 So.2d 29 (Fla. 1977). Robinson's psychosexual disorder (the product of his own sexual abuse as a child) resulted in his own inappropriate sexual behavior. Dr. Krop explained that, in Robinson's case, he was compelled to commit sexual batteries. In a way, Robinson felt justified, based on his own sexual abuse, to sexual abuse others. This forms a pretense of moral or legal justification, thereby rendering this particular aggravating circumstance inapplicable. The state has failed to establish this aggravating factor beyond a reasonable doubt. If this Court upholds the finding of this circumstance under the instant facts, any premeditated murder will support such a finding. This was not the legislature's intent, and this Court must not broaden the statute to allow such an unconstitutionally infirm result.

C. THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED IN ORDER TO AVOID ARREST.

In finding this aggravating circumstance, the trial court wrote:

> Defendant's accomplice testified that Defendant told him he had to kill Beverly St. George because she could identify him and his automobile. There was no other reason to kill her. The evidence clearly supports the State's contention that Defendant's dominant motive in killing Beverly St. George was to eliminate a witness. Harvey v. State, 529 So.2d 1083 (Fla. 1988). This aggravating circumstance was proved.

(R110)

As with all aggravating circumstances, this one must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). This aggravating circumstance is typically found where the evidence clearly demonstrates that the defendant killed a police officer who was attempting to apprehend the defendant. See e.g. Mikenas v. State, 367 So.2d 606 (Fla. 1978); Cooper v. State, 336 So.2d 1133 (Fla. 1976). However, the circumstance is not limited to those situations and has been found to exist where civilians have been killed. Riley v. State, 366 So.2d 19 (Fla. 1978). This Court in Riley, supra, held that an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses.

In Mendendez v. State, 368 So.2d 1278 (Fla. 1979), appeal after remand 419 So.2d 312 (Fla. 1982)(footnote 2), this Court rejected the application of this aggravating circumstance, despite the fact that the murder was committed with a pistol equipped with a silencer, the purpose of which may have logically been to avoid arrest and detection. In Armstrong v. State, 399 So.2d 953 (Fla. 1981), this Court rejected an application of this

circumstance despite a finding by the trial court based upon the pathologist's testimony that the victims, after the initial shooting, were laid out prone and then "finished off."

Appellant concedes that the state did present some evidence (through the testimony of the co-perpetrator, Bernard Fields) that the shooting occurred shortly after Appellant stated his intent to prevent his subsequent identification. However, close scrutiny of the trial court's written findings of fact reveals that the trial court engaged in impermissible doubling. The written findings supporting this aggravating circumstance are practically indistinguishable from the ones utilized by the trial court in support of its finding that the murder was cold, calculated and premeditated. (R110-111) In both of these written findings, the trial court focuses on the trial court's belief that the shooting was accomplished to eliminate a witness. This constitutes clearly impermissible doubling disapproved by this Court in Provence v. State, 337 So.2d 783 (Fla. 1976). As such, the trial court's finding of this circumstance must be stricken.

D. THE TRIAL COURT ERRED IN ITS CONSIDERATION OF THE MITIGATING EVIDENCE.

Appellant conceded that no statutory mitigating circumstances were applicable. In dealing with the evidence of non-statutory mitigating circumstances, the trial court wrote:

> Dr. Harry Krop, a clinical psychologist, spent approximately three (3) hours interviewing Defendant on one occasion and two and one-half (2½) hours on another occasions. He did not do any psychological testing. Most of what he learned about Defendant came from the Defendant.

Dr. Krop spoke to three individuals the night before he testified on February 14th, 1989. They were J.B. Robinson, Defendant's biological father, Coreen Smith, the mother of a school peer of Defendant and her son, Earl Smith, the school peer. No information of any significance was obtained from J.B. Robinson and minimal information was obtained from the Smiths.

According to Dr. Krop there are seven non-statutory mitigating factors:

(1) physical abuse as a child;

(2) emotional deprivation (being raised without a mother);

(3) sexual abuse as a child;

(4) being incarcerated in an adult facility as a child;

(5) intoxicated at time of offense;

(6) psychosexual disorder; and

(7) ability to function in prison without being a management problem.

There is some evidence that Defendant had a difficult childhood, however, the only source of that information was from the Defendant. That evidence is uncorroborated. Defendant told Dr. Krop and Dr. Krop told the jury and the Court. Despite the paucity of evidence the court accepts as true that Defendant had a difficult childhood. The court views physical abuse and sexual abuse on a child to constitute one mitigating factor. There is no evidence as to how the absence of a mother affected Defendant. Nevertheless, the Court assumes it did have an adverse affect upon Defendant.

Dr. Krop's opinion that Defendant was impaired by alcohol at the time of the offense is not supported by the evidence and the Court rejects that opinion.

There is no credible evidence that Defendant was incarcerated as a child in an adult prison. That is merely what Defendant told Dr. Krop. No details

> were furnished, nor was any documentary evidence produced. That mitigating factor is rejected as not proved.
>
> The Court accepts Dr. Krop's opinion that Defendant has a psychosexual disorder. According to Dr. Krop that diagnosis is given to an individual whose sexual behavior is inappropriate such as forced sex. That definition would apply to all rapists.
>
> There is no doubt Defendant functions well in prison better than he does in society. He is intelligent. He obviously knows how to stroke the system and it is no surprise he behaved in the Courtroom. He knows how to manipulate the system. The fact that he functions well in prison and is not a behavior problem in the Courtroom is not in mitigation of the crime.

(R111-113)(emphasis in the original). The trial court concluded that the aggravating circumstances outweighed the three mitigating circumstances. (R113) (Appellant thinks that the three mitigating circumstances found by the trial court are:

> (1) Johnny Robinson had a difficult childhood;
>
> (2) Robinson was the victim of both physical and sexual abuse as a child (the trial court stated that he considered both these to constitute one mitigating factor);
>
> (3) The emotional deprivation resulting from being raised without a mother.

(R112) There is some confusion as to whether or not the trial court found, in mitigation, that Robinson suffered from a psychosexual disorder. The trial court clearly accepted Dr. Krop's diagnosis which resulted in inappropriate sexual behavior such as forced sex. (R112) This might constitute a fourth mitigating circumstance, although the written findings are unclear. The trial court concludes that the definition of the disorder would

apply to all rapists. (R112) It is not clear if the trial court is thus dismissing this mitigating circumstance or giving it little or no weight.

In light of this confusion, Appellant contends that the trial court failed to follow the dictates of this Court set forth in Rogers v. State, 511 So.2d 526 (Fla. 1987). The trial court clearly accepted the diagnosis and thus, found this fact supported by the evidence. It is in the second prong set forth in Rogers that the trial court fails, i.e. a determination of whether the facts are of a kind capable of mitigating Robinson's punishment. Appellant submits that his psychosexual disorder should be considered as an extenuating circumstance that reduces his degree of moral culpability. Dr. Krop's testimony supports the conclusion that Robinson, as a result of his disorder, was doomed, without treatment, to commit the instant offense. His actions can be likened to an irresistable impulse over which he had no control. This Court has certainly recognized that type of mitigating factor in the past and should do so in Robinson's case.

The trial court's written findings of fact are peppered with references which express doubt where Robinson's evidence is uncorroborated. (R11-13) The court writes, "Most of what [Dr. Krop] learned about Defendant came from the Defendant." (R111) Later, the trial court wrote:

> There is some evidence that Defendant had a difficult childhood, however, the only source of that information was from the Defendant. That evidence is uncorroborated. Defendant told Dr. Krop and Dr. Krop told the jury and the Court. Despite the paucity of evidence. . . .

(R112) The trial court also wrote:

> There is no credible evidence that Defendant was incarcerated as a child in an adult prison. That is merely what Defendant told Dr. Krop. No details were furnished, nor was any documentary evidence produced. That mitigating factor is rejected as not proved.

(R112) Appellant contends that the trial court's disbelief and subsequent rejection of valid mitigating circumstances is completely inappropriate and unsupported in the law. Appellant submits that the trial court must accept uncontroverted and unrebutted mitigation evidence presented by a defendant. As the standard jury instructions state:

> A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

See also Floyd v. State, 497 So.2d 1211, 1216 (Fla. 1986).

Even more persuasive is this Court's decision in Cannady v. State, 427 So.2d 723, 730 (Fla. 1983) where the only direct evidence of the manner in which the murder was committed was Canady's own statements. Those statements established that the murder was not cold, calculated, and premeditated, and this Court thus held that the state had not established that aggravating factor beyond a reasonable doubt. That rationale should be even more applicable to uncontroverted mitigating evidence, since the defendant has a lesser burden of proof. Appellant therefore submits that the trial court erred when it concluded that Defendant had failed to prove that he had been incarcerated as a child in an adult prison. (R112) The trial court faults Robinson for failing to furnish details and failing

to produce documentary evidence. The trial court used an inappropriate standard in rejecting this evidence.

The trial court also erred in rejecting Dr. Krop's conclusion that Johnny Robinson was impaired by alcohol at the time of the offense. (R112) The trial court incorrectly stated that the Doctor's opinion was not supported by the evidence. Dr. Krop testified at great length about the vast quantities of alcohol that Robinson consumed throughout the afternoon and evening on the day of the offense. (R514-16) Dr. Krop also testified about the effect that alcohol had on Robinson, particularly pointing out the fact that he could be intoxicated yet exhibit none of the usual symptoms. (R514-15) Dr. Krop concluded that the amount of alcohol that Robinson consumed that night would most likely have impaired his judgment such that he would have engaged in atypical behavior. (R531,537-39) The only evidence offered by the state on this issue was the testimony of Bernard Fields. Fields testified that, although he did observe Robinson drinking throughout the evening, Robinson did not appear or act intoxicated. (R292-93) In reality, this evidence does not contradict the testimony of Dr. Krop who explained that Robinson's states of intoxication are not readily apparent. (R514-15) Appellant met his burden of proof in establishing this valid mitigating factor.

Appellant contends that the trial court also erred in concluding that Robinson's ability to function well in prison did not mitigate his crime. (R112-13) This Court has accepted as a mitigating factor that the defendant would be a model prisoner.

Valle v. State, 502 So.2d 1225 (Fla. 1987). Johnny Robinson obtained his GED while incarcerated and has been involved in prison tutoring. (R518-19) During his lengthy periods of incarceration, his Department of Corrections records reveal a clean slate (no disciplinary reports). (R518-20) Additionally, Robinson had been instrumental in quelling incidents of potential violence in the county jail on at least four occasions. (R546) Johnny Robinson is a model prisoner and, contrary to the trial court's conclusion, such a fact is a valid and probative mitigating factor in determining whether Johnny Robinson lives or dies.

The trial court totally ignored other valid mitigating evidence presented by the defendant and argued by defense counsel. One such factor was the uncontroverted evidence that Johnny Robinson had changed for the better since the commission of the offense. Krop testified that Robinson was much more responsible now, compared to when Krop first saw Robinson two years before. (R544-45) Krop believed that Robinson has a genuine desire to make changes in his life regardless of the outcome of this case. Krop expected Robinson's improvement to continue. (R548-50) Defense counsel also argued that where Fields, Robinson's co-perpetrator, received a life sentence, so should Robinson. (R685-86,707) This Court has approved this factor as a proper one to consider as mitigation. See e.g., Gafford v. State, 387 So.2d 333 (Fla. 1980). The trial court failed to even consider the aforementioned mitigating evidence. Lockett v. Ohio, 438 U.S. 586 (1978).

The trial court incorrectly applied the standards for consideration of mitigating evidence set forth by this Court in Rogers v. State, 511 So.2d 526 (Fla. 1987). The mitigating circumstances in this case outweigh the few valid aggravating circumstances. Murders with surrounding circumstances far more heinous and aggravating have resulted in life sentences. Since the trial court found three mitigating circumstances and the finding of several aggravating circumstances is infirm, this Court must at least remand for resentencing. See Oats v. State, 446 So.2d 90 (Fla. 1984). This Court should reduce Robinson's sentence to life or, in the alternative, remand for reconsideration of the sentence imposed.

POINT VI

IN CONTRAVENTION OF JOHNNY ROBINSON'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO PRECLUDE DEATH AS A POSSIBLE PENALTY AND IN FAILING TO GRANT AN EVIDENTIARY HEARING.

Johnny Robinson's original death sentence was vacated by this Court in Robinson v. State, 520 So.2d 1 (Fla. 1988). This Court's ruling was based upon the fact that, during the penalty phase, the prosecutor impermissibly argued a nonstatutory aggravating factor and injected evidence calculated to arouse racial bias. This Court pointed out that the prosecutor improperly argued during summation at the penalty phase that Johnny Robinson showed no remorse. This Court found "even more damaging" the prosecutor's cross-examination of Dr. Krop.

> MR. ALEXANDER (prosecutor): Would you say, Doctor, that it's a fair statement that the Defendant, Mr. Robinson, is prejudiced toward white people, specifically, women?
>
> DR. KROP: I don't know if he's prejudiced against them in the way we typically think of prejudice in terms of feelings like whites are worse than blacks or blacks are worse than whites. I think he has probably a lot of hostility built up. I don't know enough about his history in terms of whether there were racial prejudices which occurred substantially in his own background which would back that up, but I think he just has a lot of difficulty with women in general and I really can't say whether it's necessarily a racial hostility.

> MR. ALEXANDER: In regard to one of the answers you gave Mr. Pearl, you noted the Defendant had told you about several victims in the past in regard to sexual encounters. Are you familiar with the gender and the race of those particular victims?
>
> DR. KROP: I believe that Mr. Pearl indicated that they were white.
>
> MR. ALEXANDER: Do you know if they were male or female?
>
> DR. KROP: I probably don't know for sure. I presume they were white females.
>
> MR. ALEXANDER: And you know the victim in this case also was a white female, do you not?
>
> DR. KROP: Yes, I do.

Robinson, 520 So.2d at 6. This Court stated:

> We agree with Appellant that the prosecutor's examination of this witness was a deliberate attempt to insinuate that Appellant had a habit of preying on white women and thus constituted an impermissible appeal to bias and prejudice. (emphasis added).

Id.

Prior to the commencement of Robinson's second penalty phase ordered by this Court, Robinson filed a motion to preclude death as a possible penalty which was based on double jeopardy grounds. (R30-33) Robinson contended that a retrial which might result in the imposition of a second death sentence violated his constitutional rights guaranteed by the federal and state constitutions. After hearing argument, the trial court denied both the motion and as well as Appellant's request for an evidentiary hearing wherein the prosecutor's motives as to the improper

cross-examination and improper argument could be explored. (R151-155)

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects a criminal defendant from repeated prosecutions for the same offense. United States v. Dinitz, 424 U.S. 600, 606 (1976). Article I, Section 9 of the Florida Constitution states that no person shall be twice put in jeopardy for the same offense. It has been determined that a criminal defendant must be afforded a "valued right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 689 (1949) The prohibition against double jeopardy is a substantive right provided for in both our federal and state constitutions.

Double jeopardy generally is not a bar to a subsequent prosecution when a mistrial has been granted in the original trial on the defendant's own motion or with his consent or where circumstances clearly required a mistrial in the interest of justice. McClendon v. State 74 So.2d 656 (Fla. 1954); State v. Iglesias, 374 So.2d 1060 (Fla. 3d DCA 1979). The fact that this Court vacated Robinson's original death sentence on appeal should make no difference in the determination of this issue. This Court, in essence, belatedly granted Appellant's timely and specific motion for mistrial.

Until fairly recently, double jeopardy would preclude a second prosecution in Florida when the mistrial resulted from judicial or prosecutorial overreaching. State v. Kirk, 362 So.2d 352 (Fla. 1st DCA 1978). In 1982, the United States Supreme

Court rendered a landmark decision in Oregon v. Kennedy, 456 U.S. 667 (1982). That case held that a criminal defendant may invoke the bar of double jeopardy only if the conduct giving rise to the successful motion for mistrial was prosecutorial or judicial conduct intended to provoke the defendant into moving for a mistrial. In reaching this result, the Court specifically rejected the more general test of "overreaching" due to the lack of standard for its application.

Bell v. State 413 So.2d 1292 (Fla. 5th DCA 1982) appears to apply the same standards set forth in Oregon v. Kennedy. More recently in Keene v. State, 504 So.2d 396 (Fla. 1987), this Court also appeared to apply the Oregon v. Kennedy standard. This Court ordered a new trial for Keene where the prosecution improperly interjected evidence of prior bad acts. In ordering the new trial, this Court stated, in a footnote, that it found no double jeopardy problem with a retrial arising from prosecutorial misconduct. This Court opined that the prosecutor was simply trying to win his case, finding that he did not intentionally goad the defense into requesting a mistrial. Appellant contends that this particular footnote is pure obiter dictum, since the double jeopardy issue was not then pending before this Court. Additionally, Appellant points out that the Florida courts can apply a higher standard than the federal constitution under the Constitution of the State of Florida. Art. I, §9, Fla. Const.

Even under the standards set forth under Oregon v. Kennedy, Johnny Robinson was, at the very least, entitled to the

trial court's determination of the intent of the prosecutor at Robinson's 1986 trial. The trial court was required to conduct an evidentiary hearing Johnny Robinson should have been permitted to inquire of the prosecutor, while under oath, the intent of his misconduct at the previous trial. The trial court's refusal to grant the hearing is clearly reversible error. The trial court's ruling was tantamount to a denial of a proffer of evidence. Pender v. State, 432 So.2d 800 (Fla. 1st DCA 1983). The ruling denies Robinson his right to full and effective appellate review. Piccirrillo v. State, 329 So.2d 46 (Fla. 1st DCA 1976). This Court should vacate Robinson's death sentence and remand for the imposition of a life sentence. At the very least, this Court must remand to the trial court for an evidentiary hearing where the prosecutor's intent can be explored under oath.

POINT VII

IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN REFUSING TO GIVE PROPER, REQUESTED JURY INSTRUCTIONS.

Appellant filed a six-page packet of requested jury instructions. (R93-99) Several of the requested instructions had more than one version of the request with the Appellant stating a preference for the first paragraph. (R93-99,563) The trial court read all of the requested instructions and concluded that the requested instructions were slanted in favor of the defendant.

> THE COURT: You're supposed to have an equal presentation of both sides of the picture and this is not. . . .

(R563-64) Defense counsel pointed out that the presentation was not equal in that the state was required to prove aggravating circumstances beyond every reasonable doubt while an accused was held to a lesser standard in proving mitigating circumstances. (R564) Defense counsel also pointed out that the requested instructions contained no misstatements of law. (R563) Defense counsel argued:

> But everything else is further clarification regarding the burden of proof, balance and consideration, how the Jury should weigh the aggravating and mitigating, and they all reflect the accurate statements of law. And we think that the standard jury instructions are insufficient and we request these.
>
> THE COURT: The motion to give additional jury instructions is denied. I'm going to give the standard instructions.

(R565) The only modification of the standard jury instructions (other than those dealing with aggravating circumstances 921.141(5)(h) and (i) dealt with in Point X, infra) was the court agreeing to instruct the jury pursuant to Appellant's second specially requested jury instruction as follows:

> The fact that your recommendation is advisory does not relieve you of your solemn responsibility, for the Court is required to and will give great weight and serious consideration to your verdict in imposing sentence.

(R94,590-92,695) The trial court denied Robinson's requested modifications of the standard jury instructions, dealing with, inter alia, the burden of proof, the doubling of aggravating circumstances, the limitation to the statutory aggravating circumstances, and the burden of proof required to establish aggravating circumstances. (R93-99) Appellant contends that the trial court's refusal to accurately instruct the jury violated his constitutional rights under both the federal and state constitutions.

The first, sixth, and tenth requested jury instructions all dealt with the modification of the standard jury instruction which, Appellant contended, unconstitutionally shifted the burden of proof to the accused. (R93-94,96-98) The denial of these instructions is dealt with extensively in Point, IX, infra and will not be argued here. Similarly, Appellant's special requested jury instruction number seven dealt with the nonexclusiveness of the list of mitigating circumstances which the jury is allowed to consider. (R96-97) The denial of this instruction is connected

to the argument made in Point II, supra. Appellant will not further belabor the point.

The third specially requested jury instruction dealt with the impermissible "doubling" of aggravating circumstances, i.e., where the same aspect of the evidence gives rise to two or more listed aggravating circumstances. (R94-95) Appellant requested that the jury be instructed that where the same aspect of the evidence gave rise to two or more listed aggravating circumstances, they should only consider that aspect as one aggravating circumstance. This instruction correctly states the law as established by this Court in Provence v. State, 337 So.2d 738 (Fla. 1976) and its progeny. In the instant case, some of the evidence could arguably be construed to support both a finding that the murder was cold, calculated, and premeditated and, additionally, that the murder was committed to avoid lawful arrest. The jury should have been correctly instructed about this important aspect of the law.

Appellant's specially requested jury instruction number four specifically stated that the jury was permitted to consider only the aggravating circumstances listed by the trial court. (R95) The trial court did instruct the jury that, "The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. . . ." (R695) The specially requested instruction would have provided greater clarification of the exclusivity of the list of aggravating circumstances. The requested instruction correctly stated the law and should have been given.

Robinson's specially requested jury instruction numbers five and eleven essentially informed the jury that they could still recommend a life sentence even if they found that the state proved one or more aggravating circumstances and even in the absence of any mitigating circumstances. (R95-96) This Court in Alvord v. State, 322 So.2d 533 (Fla. 1975) recognized the inherent authority of a jury to recommend life imprisonment for no reason other than its desire to show mercy. Accord Downs v. State, 386 So.2d 788, 795 (Fla. 1980); Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978).

Requested jury instruction number eight suggested a modification of the standard jury instruction dealing with the proof of aggravating circumstances. (R97) The modification requested that the jury be instructed that they must unanimously find each aggravating circumstance established beyond a reasonable doubt before it could be considered. In the alternative, Appellant requested that the jury be instructed that they were to presume Robinson innocent of each aggravating circumstance until and unless the presumption was overcome by proof beyond and to the exclusion of every reasonable doubt. (R97)

Requested jury instruction number nine would have reminded the jury that the recommendation was the product of a "reasoned judgment" and "not a mere counting process of the number of aggravating circumstances and the number of mitigating circumstances." (R97) Both of these requested instructions mirrored correct applications of Florida law. The trial court's denial of the requested instructions denied Johnny Robinson his

right to due process and to a fair trial. Amends. V, VI, XIV, U.S. Const.; Art. I, §9,16, and 22, Fla. Const.

POINT VIII

IN CONTRAVENTION OF ROBINSON'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN OVERRULING ROBINSON'S TIMELY AND SPECIFIC OBJECTIONS THEREBY ALLOWING THE PROSECUTOR TO IMPROPERLY INTERJECT RACIAL PREJUDICE INTO THE PROCEEDINGS.

This Court must remember the reason that this Court vacated Robinson's original sentence and remanded for a new penalty phase. This Court found prosecutorial misconduct where the prosecutor argued lack of remorse but, more importantly deliberately attempted to insinuate that Robinson had a habit of preying on white woman. This Court found that the prosecutor's actions constituted an impermissible appeal to bias and prejudice. Robinson v. State, 520 So.2d 1, 6 (Fla. 1988). This Court pointed out that the situation presented, involving a black man charged with kidnapping, raping, and murdering a white woman, is "fertile soil for the seeds of racial prejudice." Robinson, 520 So.2d at 7. This Court found the risk that racial prejudice might have influenced the sentencing decision to be unacceptable. This Court emphasized that the risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital sentencing proceeding. Accord Turner v. Murray, 476 U.S. 1 (1986). This Court ordered a new penalty phase since it could not say beyond a reasonable doubt that the jury's recommendation was not motivated in part by racial considerations. Robinson, 520 So.2d at 8.

During final argument at Robinson's new penalty phase, the prosecutor was attempting to highlight portions of Robinson's written statement given to the police after his arrest. (R632-33) Before the prosecutor reached the portion of Robinson's statement that, "Then I shot her again. I had to. How do you tell someone I accidently shot a white woman." (R633-34)(emphasis added) At a side-bar conference, defense counsel suggested editing the statement to exclude the word "white" in an attempt to prevent any racial prejudice. (R633) The trial court ruled that the evidence was the statement of the defendant and overruled the objection. (R633) The prosecutor then read that statement to the jury and continued his argument thereon. (R633-34) Appellant contends that the trial court's ruling denied his constitutional right to a fair trial. The risk is too great, that racial prejudice may have influenced the sentencing decision. The trial court should have, at the very least, given a cautionary instruction after overruling Appellant's objection. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, §9, 16, 17, and 22, Fla. Const.

POINT IX

THE TRIAL COURT ERRED IN REFUSING TO MODIFY THE STANDARD JURY INSTRUCTIONS TO REFLECT THAT THE AGGRAVATING FACTORS MUST OUTWEIGH THE MITIGATING FACTORS FOR IMPOSITION OF THE DEATH PENALTY TO BE AUTHORIZED: THE STANDARD INSTRUCTIONS ARE ERRONEOUS AND VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

Defense counsel moved to have the trial court amend the standard jury instructions so that the jury would clearly be instructed that the burden of proof is on the state to prove beyond a reasonable doubt that the aggravating circumstances must outweigh the mitigating circumstances before a recommendation could be made for imposition of the death penalty. (R93-94,96-98, 190-1,197-98,599) Appellant made timely and specific objections to the standard instructions contending that they unconstitutionally shifted the burden of proof to the accused. The trial court overruled all objections and denied all requests to modify these standard jury instructions.

The standard preliminary jury instruction at issue reads:

> The state and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that [this evidence when considered with the evidence which you have already heard][this evidence] is presented in order that you might determine first, whether sufficient aggravating circumstances exist that would justify the imposition of the death
> penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking

> of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

Florida Standard Jury Instructions in Criminal Cases, page 77. That standard instruction was read to the jury over a timely and specific objection by defense counsel. (R190-91,197-98) At the conclusion of the penalty phase, the trial judge instructed the jury as follows:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be on of life imprisonment without possibility of parole for 25 years. <u>If you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances</u>.

(R698).

In this regard, the standard jury instructions violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by instructing the jury that the mitigating circumstances must "outweigh" the aggravating circumstance. Mitigating circumstances need not weigh "more" than aggravating circumstances. The mitigation must only be of such weight that imposition of the death penalty is unwarranted under the Eighth Amendment. By informing the jury that mitigation must "outweigh" (weigh "more" than) the aggravation, the jury is given an unworkably vague standard, the weighing process is distorted in favor of imposition of the death penalty, and the burden of persuasion is placed on the defendant in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. The standard jury instructions are

susceptible to being misunderstood by reasonable jurors and do not clearly define for the jury what is required to impose the death penalty. A death recommendation based on such instructions is fundamentally unreliable under the Eighth Amendment.

Taken literally, the standard instructions require that, for a life sentence to be recommended by the jury or imposed by the trial judge, the mitigation must weigh more than ("outweigh") the aggravating circumstances. If, under these instructions, the reasons to impose the death penalty weigh the same as the reasons not to impose the death penalty, the death penalty must be imposed because the mitigation does not outweigh the aggravation. A burden of persuasion rather than a burden of production exists under the standard instructions, and the presence of a presumption that death is the appropriate penalty when one aggravating factor is found results in the state bearing the burden of persuasion only until one statutory aggravating factor is established.

The jury is instructed that the State only has to prove beyond a reasonable doubt that the death penalty is appropriate before mitigation is shown. The standard instructions tell the jury that, when mitigation is shown, it must outweigh the aggravating circumstances in order for a recommendation of life imprisonment to be appropriate. This shifting standard violates the Due Process clause of the Fourteenth Amendment and renders the death penalty process unreliable under the Eighth Amendment.

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

Goodwin v. Balkcom, 684 F.2d 794, 801 (11th Cir. 1982).

A presumption which, although not conclusive, has the effect of shifting the burden of persuasion to the defendant, is constitutionally deficient. The threshold inquiry is to determine the nature of the presumption the jury instruction describes. "That determination of words requires careful attention to the words actually spoken to the jury (citations omitted), or whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom v. Montana, 442 U.S. 510, 514 (1979). The defective nature of the burden shifting instruction has been noted by this Court in Arrango v. State, 411 So.2d 172 (Fla.1982), where this Court held that the instructions given in that case, when considered as a whole, did not effectively shift the burden of persuasion to the defendant.

> A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances. These standard jury instructions taken as a whole show that no reversible error was committed.

Arrango, 411 So.2d at 174. This Court expressly recognized, however, that the death penalty can only properly be imposed when the state shows that the aggravating circumstances outweigh the mitigating circumstances. Arrango, 411 So.2d at 174.

It is respectfully but expressly submitted that the standard instructions given in this case, even when considered in their entirety, do not fairly apprise the jury of their function or the burden that rests upon the state. Further, in light of the timely and express request to have the standard instructions clarified so that they clearly and unambiguously state the law as this Court pronounced in Arrango, it is urged that reversible error has occurred. A defendant in a case with a penalty of this magnitude is absolutely entitled to unambiguous instructions upon timely request. Because the standard jury instruction is unconstitutionally vague and because it was timely objected to by defense counsel, this Court is asked to vacate the death penalty and to remand for a new sentencing proceeding.

POINT X

SECTION 921.141(5)(h) AND (i) FLORIDA STATUTES (1987) ARE UNCONSTITUTIONALLY VAGUE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 22 OF THE FLORIDA CONSTITUTION AND THE COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THE APPLICATION OF THESE TWO AGGRAVATING CIRCUMSTANCES.

In imposing Robinson's sentence, the trial court found inter alia that the murder was especially heinous, atrocious, and cruel [section 921.141(5)(h)] and that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification [section 921.141(5)(i)]. Prior to trial, Appellant filed a motion asking the trial court to declare Sections 921.141(5)(h) and (i) to be unconstitutional. (R44-63) Appellant contended that the aggravating circumstances relating to "heinous, atrocious and cruel" and "cold, calculated, and premeditated without any pretense of moral or legal justification" were unconstitutionally vague. Appellant based his argument on the contention that the circumstances were unconstitutionally vague and the instructions thereon provided no guidance for the jury. Appellant cited, inter alia, Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). The trial court agreed that neither jury instruction provided any guidance to the jury and asked defense counsel to draft a proposed jury instruction as to each of the aforementioned aggravating circumstances. (R164-67) The trial court assured defense counsel that Robinson would not be waiving any objections or constitutional attacks in complying with the trial court's request. (R166)

After much discussion and consternation (R553-58,565-70,572-73,581-89), the trial court instructed the jury as follows as to the aggravating circumstances at issue:

> The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel. To a lay person every first degree murder may appear to be heinous, atrocious and cruel, however the aggravating circumstance of an especially heinous, atrocious or cruel murder is, in Florida, intended to apply to those capital cases where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies, the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> As used in this aggravating factor, heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> This aggravating factor can be supported by evidence of actions of the offender preceding the actual killing.
>
> * * *
>
> 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.
>
> Florida law requires that before a murder can be deemed cold, calculated and premeditated, it must be committed without any pretense of moral or legal justification. The State must prove this last element beyond a reasonable doubt in addition to the other element of this particular aggravating factor.
>
> This aggravating circumstance is not to be utilized in every premeditated murder prosecution. Rather, this aggravating circumstance applies in those murders which are characterized as

> execution or contract murders or witness elimination murders.
>
> The cold, calculated, premeditated murder committed without any pretense of legal or moral justification can also be indicated by circumstances showing such fact as advance procurement of a weapon, lack of resistance or provocation and the appearance of a killing carried out as a matter of course.
>
> A pretense of legal or moral justification means any claim of justification or excuse that though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

(R696-98) The jury returned with a death recommendation and the trial court imposed a death sentence, finding both of these aggravating circumstances at issue in this argument. (R69,110-11)

Section 921.141(5)(h), Florida Statutes (1987), authorizes the jury and the trial court in a capital case to consider as an aggravating circumstance whether the killing was especially heinous , atrocious or cruel. The difficulty with this circumstance is that "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous,'" Maynard v. Cartwright, 100 L.Ed.2d at 382. See also State v. Dixon, supra at 8 ("To a layman, no capital crime might appear to be less than heinous. . . . ") Because this aggravating circumstance can characterize every first degree murder, especially to a jury, section (5)(h) is unconstitutionally vague. It "fails adequately to inform juries what they must find to impose the death penalty and, as a result, leaves them and appellate courts with the kind of open-end discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972)." Maynard v. Cartwright, 100 L.Ed.2d at 380.

Since Furman, the Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Id; Spaziano v. Florida, 468 U.S. 447 (1984). For example, in Godfrey v. Georgia, 446 U.S. 420 (1980), the jury sentenced the defendant to die, and the Georgia Supreme Court affirmed based solely on a finding that the murder was "outrageously or wantonly vile, horrible and inhuman." The United States Supreme Court, however, reversed, finding that:

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

446 U.S. at 428-29.

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

> [T]he language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no

> more guidance than the "outrageously or wantonly vile, horrible or inhuman language that the jury returned in its verdict in Godfrey... To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous."

Maynard v. Cartwright, 100 L.Ed.2d at 382. Appellant submits that the cited rationale is equally applicable to Section 921.141(5)(i), Florida Statutes (1987)(cold, calculated, and premeditated without any pretense of moral or legal justification).

In Smalley v. State, 14 FLW 342 (Fla. July 6, 1989), this Court, discussed the problem presented by Maynard v. Cartwright:

> It is true that both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious or cruel.

Smalley, 14 FLW at 342 (emphasis added). This Court's analysis in Smalley fails to address what effect the vague instruction may have had on the jury recommendation, which is also relied on (and supposedly relied on heavily) by the sentencer. See Riley v. Wainwright, 517 So.2d 656, 657 (Fla. 1987)(jury recommendation is "intergral part"); Fead v. State, 512 So.2d 176, 178 (Fla. 1987);

LeDuc v. State, 365 So.2d 149 (Fla. 1978); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975)(great weight); Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974)(jury recommendation is "critical factor"). See also Point XI, infra.

The defendant contends that the heinous, atrocious, or cruel instruction, even as modified, was unconstitutionally vague under the Eighth and Fourteenth Amendments because that instruction was inadequate to channel the broad discretion of the jury in making its recommendation and the sentencer who relies heavily on that recommendation, and to genuinely narrow the class of persons eligible for the death penalty. Godfrey v. Georgia, supra; Zant v. Stephens, 462 U.S. 862 (1983). As in Maynard v. Cartwright, the instruction did not limit the jury's or the trial court's discretion in any significant way. Accordingly, allowing Johnny Robinson to be sentenced to die under this unconstitutionally vague law is error. Amend. V, VIII, and XIV, U.S. Const.: Art. I, Sec. 2, 9, 16 and 22, Fla. Const.

POINT XI

JOHNNY ROBINSON'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM WHERE THE PROSECUTOR, THE TRIAL COURT, AND THE JURY INSTRUCTIONS DIMINISHED THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS CONTRARY TO CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985).

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> [An] uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 472 U.S. at 333.

Appellant recognizes that this Court has previously ruled that Caldwell is not applicable in Florida. Combs v. State, 525 So.2d 853 (Fla. 1988). However, the Eleventh Circuit Court of Appeal has ruled Caldwell to be applicable to Florida's capital sentencing procedure. Specifically, that Court has stated that jurors are not to be misled as to the applicable law on this issue. Stewart v. Dugger, 847 F.2d 1486, 1492 (11th Cir. 1988). The function of the jury and of the individual jurors must not be belittled by a misstatement of law. Id. A defendant is entitled to have a jury made fully aware that the results of

the sentencing deliberations will play an important part in the sentencing process. Id. A defendant's failure to raise this type of claim on direct review may result in subsequent procedural default. Dugger v. Adams, 489 U.S. __, 103 L.Ed.2d 435 (1989).

While Robinson's trial jury was informed that their recommendation would be given great weight, Appellant submits that some denigration of their critical role in the process occurred. (R196-197,213,589-92) As a result, Johnny Robinson's death sentence is constitutionally infirm. Amends. V, VIII, XIV, U.S. Const.; Caldwell v. Mississippi, 472 U.S. 320 (1985).

POINT XII

THE APPELLATE REVIEW PROVIDED BY THE SUPREME COURT OF FLORIDA RESULTS IN ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9, 16, AND 22 OF THE FLORIDA CONSTITUTION.

Three members of this Court have now recognized that the death penalty in Florida is being unconstitutionally applied. In Burch v. State, 522 So.2d 810 (Fla. 1988), in the context of what constitutional function the jury plays in capital cases in Florida, Justice Shaw stated the following in a dissenting opinion joined by Justices Ehrlich and Grimes:

> [O]ur decision to vacate the death sentence rests entirely on the advisory recommendation of the jury which has rendered no factual findings on which to base our review. This treatment of an advisory recommendation as virtually determinative cannot be reconciled with e.g., Combs and our death penalty statute. Moreover, the situation of largely unfettered jury discretion is disturbingly similar to that which led the Furman court to hold that the death penalty was being arbitrarily and capriciously imposed by a jury with no method of rationally distinguishing between those instances where death was the appropriate penalty and those where it was not. Absent factual findings in the advisory recommendation, any distinctions we might draw between cases where the jury reconmends (sic) death and those where it recommends life, must, of necessity, be based on pure speculation. This is not a rational system of imposing the death penalty as Furman requires.

Burch v. State, 522 So.2d at 815 (Fla. 1988)(Shaw, Ehrlich, and Grimes, JJ., dissenting)(emphasis added).

Defense counsel specifically requested that the trial court require the jury to make written findings of the aggravating factors which it found. (R28-29,167-71) The court denied this request. (R171) This failure as recognized by three justices of this Court, renders the capital sentencing process cruel and unusual as applied.

The United States Supreme Court has determined that the Sixth Amendment does not require that the jury find the presence of statutory aggravating circumstances. Hildwin v. Florida, 490 U.S. __, 109 S.Ct. __, 104 L.Ed.2d 728 (1989). In Spaziano v. Florida, 468 U.S. 447 (1984), the United States Supreme Court held that a trial judge's override of a jury recommendation of life does not in and of itself violate the Eighth Amendment. "The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws. 'Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment is violated by a challenged practice.' (citation omitted)" Spaziano, 468 U.S. at 464. Significantly, Spaziano challenged the authority of the trial judge to override the jury recommendation of life, contending specifically that because the majority of other states require that the jury be the sentencer, the Eighth Amendment required that the jury also be the ultimate sentencer in Florida. The Eighth Amendment challenge made in this issue on appeal is significantly different, in that this

issue challenges the consistency of imposition of the death penalty following appellate review by this Court.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court guaranteed that the same results in one case would occur based on the same facts. The guarantee has proved to have been hollow, in that this Court indulges in speculation and conjecture when faced with a jury recommendation of life in an attempt to glean anything in the record which may have supported the recommendation. However, when the jury recommends death, this Court simply presumes that death is the appropriate penalty. It is expressly submitted that the use of that presumption and this practice violates the Eighth and Fourteenth Amendments by skewing the appellate review process in favor of imposition of the death penalty. This procedure further injects arbitrariness and capriciousness into imposition of the death penalty, in that the reasons that constitute mitigation in cases where the jury recommends life are summarily rejected without consideration by this Court when the jury recommends death; the presumption that death is the appropriate penalty in the presence of one statutory aggravating factor and "nothing in mitigation" is the typical reference made by this Court in that situation. This practice violates the requirement that every death-sentenced defendant be focused upon as a "uniquely individual human bein[g]." Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

At issue here is not the severity of punishment contrasted against the moral culpability of the defendant, as was the case in Tyson v. Arizona, 481 U.S. 137, 157-58 (1987), but rather

the indiscriminate fashion in which the presence of mitigation is recognized or disregarded by this Court. The review by this Court does not provide a "principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, 446 U.S. 420 (1980)(opinion of Stewart, J., see also Skipper v. South Carolina, 476 U.S. 1, 14-15 (1986)(Powell, J., concurring). In reviewing a death sentence, this Court has only the written findings by the trial court. The failure of this Court to provide plenary review of the record in all instances for mitigation as a quasi question of fact and law and the use of the presumption that death is the appropriate sentence where there is one aggravating factor and nothing (found by the trial court) in mitigation violates the Eighth and Fourteenth Amendments. The review provided by this Court is arbitrary and capricious, based on the absence of any structured means by which to review in every case in which the death penalty is imposed the presence of valid mitigation. Accordingly, this Court is asked to reverse the death penalty and remand for imposition of a life sentence.

POINT XIII

APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BASED UPON THE CUMULATIVE EFFECT OF NUMEROUS ERRORS THAT OCCURRED BELOW.

Due to space and time constraints, Appellant includes this point as a type of catch-all point containing issues which either considered alone, in combination with another, or in combination with other points presented in this brief have the cumulative effect of denying Johnny Robinson his constitutional right to a fair trial. In presenting these points, Appellant is also mindful of the growing application of the doctrine of procedural bar in our state and federal court systems.

Appellant contends that error occurred when Detective West was allowed to testify over defense objection that, when asked why he armed himself before encountering the victim, Robinson allegedly replied, "A gun is a sign of power and authority." (R360-61) This quote was not contained in the statement that police obtained from Robinson which was ultimately reduced to writing. (R363) Defense counsel objected that the statement was vague and ambiguous and that any probative value was outweighed by the substantial prejudice. (R362-64) The trial court overruled the objection and Detective West was permitted to so testify. (R365,385-92,397-98) The prosecutor used the statement in his final summation to the jury. (R659-60)

The trial court allowed the prior testimony of Bernard Fields to be read to the jury over defense objections. Clinton Bernard Fields was the cornerstone of the state's case against

Johnny Robinson. See Point I, infra. He had testified at Robinson's first trial in 1986. (R287-89) At the time of Robinson's retrial, Fields was pursuing a claim in federal court that related to his conviction in the instant case. (R277) Outside the presence of the jury, Fields refused to testify, claiming his constitutional right relating to self-incrimination under the Fifth Amendment. (R277-79) The prosecutor pointed out that Fields had exhausted all of his state remedies, including direct appeal and post-conviction claims. (R279) The prosecutor reiterated that Fields still had use immunity against further prosecution. (R278-79) Fields' lawyer pointed out that his client had an intelligence quotient of approximately 62 as well as a failing memory. (R281) The trial court ordered Fields to testify, but he refused. (R281-82) After ordering Fields to show cause why he should not be held in contempt of court, the trial court adjudicated Fields guilty of contempt of court and stated its intention to impose sentence at a later time. (R282) Subsequently, approximately two weeks after Robinson's trial, the trial court dismissed the contempt citation stating that, "no useful purpose would be served by sentencing Clinton Bernard Fields." (R92) The trial court granted the state's request and found Fields to be unavailable under Section 90.804(1)(b) and allowed the prior testimony of Bernard Fields to be read to the jury. (R284-85,287-320) Prior to the reading of the testimony, Appellant objected on the grounds that the ruling violated Robinson's constitutional right to confront witnesses, to effective assistance of counsel, and his right to present matters in defense on cross-examination.

(R285) After the testimony was read to the jury, Appellant moved for a mistrial based on the same grounds. (R322) The burden of proof falls upon the party seeking to introduce the former testimony of an unavailable witness. Magna v. State, 350 So.2d 1088 (Fla. 4th DCA 1977). The mere reluctance of a witness to attend a trial, understandable or not, does not mean that the state is unable to procure his attendance so as to make such witness unavailable. McClain v. State, 411 So.2d 316 (Fla. 3d DCA 1982). The trial court's ruling violated Johnny Robinson's constitutional rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 16 of the Florida Constitution.

During the testimony of Bernard Fields, the trial court permitted the prosecutor, over a timely and specific objection, to ask, "Was she [the victim] scared to death?" (R304) Field's response was, "Yes." (R304) Defense counsel's objection that the question was grossly leading and subjective was overruled. The trial court's ruling was clearly erroneous as the question was in fact grossly leading and subjective. The prejudice of such an inflammatory question and answer is patently clear.

During the penalty phase, Appellant objected to the introduction of certain evidence, arguing that it was irrelevant or not properly authenticated. The trial court allowed the introduction of State's exhibit eight, a photograph of a .22 caliber bull barrel Ruger. The state admitted that the actual murder weapon had never been recovered yet, the state introduced a photograph of a similar gun. The evidence was admitted over

Appellant's relevance objection. (R308,374-76) The prosecutor used this evidence during his summation to the jury. (R66) Defense counsel also objected to the introduction of a videotape depicting the crime scene. Appellant contended that the evidence was irrelevant as to any of the aggravating and mitigating circumstances. His objections were overruled and the videotape was played to the jury. (R330-42) Finally, the trial court allowed the introduction of a purse strap that was found at the crime scene. The witness testified that the evidence looked like the victim's purse strap, but she could not be sure. (R456-58,461) Appellant contended that the evidence bore no relationship to any of the aggravating circumstances. The trial court admitted the evidence over Appellant's objection. (R461) Appellant contends that the introduction of these three items of objectionable evidence resulted in a deprivation of his constitutional rights to a fair trial. Amends. V, VI, XIV, U.S. Const. The evidence was irrelevant and should have been excluded.

During the charge conference, Appellant objected to the trial court instructing the jury on both Section 921.141(5)(a) and (b), Florida Statutes (1987). Appellant contended that this constituted improper doubling since, at the time of the offense, Robinson was on parole for a previous rape in Maryland (a felony involving the use or threat of violence to the person.) Appellant recognizes that this Court has held to the contrary in Waterhouse v. State, 429 So.2d 301 (Fla. 1983).

Appellant also objected to the trial court's instruction to the jury that, in their consideration of 921.141(5)(b),

Florida Statutes (1987), second-degree rape was, in fact, a crime involving the use or threat of violence to the person. (R599,696) Appellant contended that the instruction had the effect of directing a verdict for the state as to that particular aggravating circumstance. Appellant contends that the trial court's ruling resulted in a contravention of his constitutional right to due process and to a fair trial. The court's instruction is analogous to cases involving resisting arrest with violence, of which an essential element is that the police were acting in the lawful performance of their duty. §843.01, Fla. Stat. (1987). Where the trial judge takes the determination of this issue away from the jury, reversible error occurs. See e.g., Brannen v. State, 453 So.2d 428 (Fla. 1st DCA 1984).

The same argument can be made regarding the trial court's instructing the jury that Robinson had been previously been found guilty of robbery, kidnapping, and sexual battery. The trial court took this action over Appellant's objection. (R156-60,247-48,478-88,602-03,620,695) The trial court's instruction established prima facie evidence of at least one aggravating circumstance. This resulted in a denial of Robinson's constitutional rights relating to due process and to a fair trial. Appellant also objected on similar grounds to the trial court instructing the jury that Robinson had previously been "found guilty" of the murder. (R156-59,196) Defense counsel wanted the trial court to avoid any inference that another jury had previously concluded that Robinson was guilty of the murder. Defense counsel contended that the manner in which Robinson's murder

conviction arose was legally irrelevant and the trial court's language was prejudicial. The trial court overruled Appellant's timely and specific objections.

Appellant also objected to the trial proceeding without supplying the accused with a coat and tie. (R193-94) The trial court pointed out that, although he was not wearing a coat and tie, Robinson was not dressed inappropriately. The trial court overruled the objection and the trial proceeded. Appellant contends that the trial court's ruling violated his constitutional rights relating to due process, equal protection, and to a fair trial.

The due process clauses of the United States and the Florida Constitutions provide an accused the right to a fair trial. Although an accused is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error. See Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977). Appellant submits that he was denied his right to a fair trial and is entitled to a new trial. Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1979).

POINT XIV

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or implicitly rejected each of these challenges to the constitutionality of the Florida statute and that detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The death penalty is imposed in Florida in an arbitrary and capricious manner on the basis of factors which should play no part in the consideration of sentence. These factors include the following: race of the victim, race of the defendant, geography, occupation and economic status of the victim as well as the defendant, and gender of the defendant. (R800-825)

Section 921.141, Florida Statutes (1987) is unconstitutional on its face and as applied based upon the arbitrary and capricious manner in which various prosecutors decide to seek the ultimate sanction in any given case. An individual indicted for first-degree murder does not face the death penalty unless the prosecuting attorney makes a conscious decision to seek the ultimate sanction. Because of the lack of adequate guidelines, the decision to seek a death sentence will, to a great degree, depend upon the whim of the individual prosecutor. Florida's

death penalty statutory scheme contains no directions or guidelines to minimize this risk. The United States District Court, Central District of Illinois, recently vacated a death sentence and declared the Illinois death statute to be unconstitutional based upon this contention. United States of America, ex. rel. Charles Silagy v. Howard Peters, III, et. al., Case No. 88-2390 (April 29, 1989). In so ruling, the federal district judge pointed out that four justices of the Illinois Supreme Court have joined in writing that the statute violates the provisions of the Eighth Amendment of the Federal Constitution. In his order, the federal district judge adopts the rationale of Justice Ryan in People v. Cousins, 77 Ill. 2d 5531, 558-69 (1979)(Ryan, J. dissenting) cert. denied 445 U.S. 953 (1980).

The Florida statute is unconstitutional on its face, because the qualifying language describing the statutory mitigating circumstances places an unnecessary limitation on the reception and finding of such evidence by the jury in court. It thereby violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. Specifically, the language of three statutory mitigators require "extreme mental or emotional disturbance," "substantial" impairment of one's ability to appreciate the criminality of of his conduct or to conform his conduct to the requirements of the law, and "extreme" to describe the level of duress. §§921.141(6)(b)(e)(f), Fla. Stat. (1987). The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances

"outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (Fla. 1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980)(England, J. concurring). Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984)(Ehrlich, J. concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349 (1977); Argersinger v. Hamlin, 407 U.S. 25 (1972); Amend. VI and XIV, U.S. Const.; Art. 1, §§9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledge Rule [Elledge v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

Section 921.141(5)(d), Florida Statutes (1985)(the capital murder was committed during the commission of a felony), renders the statute unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because it results in arbitrary application of this circumstance and in death being automatic in felony murders unless the jury or trial court in their discretion find some mitigating circumstance

out of an infinite array of possibilities as to what may be mitigating.

Additionally, a disturbing trend has become apparent in this Court's decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895 (1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 834 (Fla. 1978) cert. denied 414 U.S. 956 (1979)(emphasis added).

In at least two decisions, this Court has recognized previous decisions were improperly decided. In Proffitt v. State, 510 So.2d 896 (Fla. 1987) this Court reduced a death sentence to life despite having previously affirmed it on three prior occasions in Proffitt v. State, 315 So.2d 461 (Fla. 1975) affirmed 428 U.S. 242 (1976); Proffitt v. State, 360 So.2d 771 (Fla. 1978); and Proffitt v. State, 372 So.2d 1111 (Fla. 1979). The basis of the holding was this Court's duty to conduct proportionality review. Similarly in King v. State, 514 So.2d 354 (Fla. 1987) this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having approved it in King's direct appeal in King v. State, 390 So.2d 315 (Fla. 1980). In so doing, this Court acknowledged that the factor had not been proven beyond a reasonable doubt. What these two cases clearly demonstrate is that the death penalty as applied in Florida leads to inconsistent and capricious results.

The Florida death penalty statute discriminates against capital defendants who murder whites and against black capital defendants in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 17 of the Florida Constitution. McClesky v. Kemp, 481 U.S. 279 (1987)-(dissenting opinion of Brennan, Marshall, Blackman and Stevens, JJ.)

In view of this Court's abandonment of its duty to make an independent determination of whether or not a death sentence is warranted, the constitutionality of the Florida death penalty

statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based upon the cases, authorities, and policies cited herein, the Appellant requests that this Honorable Court vacate the death sentence and grant the following relief:

As to Points I - IV and VII - XIII, remand for the imposition of a life sentence or, in the alternative, a new penalty phase;

As to Point V, remand for the imposition of a life sentence;

As to Point VI, remnand for the imposition of a life sentence or, in the alternative, for an evidentiary hearing;

As to Point XIV, remand for the imposition of a life sentence or, in the alternative, to declare Florida's Death Penalty Statute to be unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Fla. 32014 and to Mr. Johnny L. Robinson, #102767, P.O. Box 747, Starke, Fla. 32091 on this 5th day of October 1989.

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