IN THE SUPREME COURT OF FLORIDA

VICTOR KLOKOC,
Defendant/Appellant,

vs.

STATE OF FLORIDA,
Plaintiff/Appellee.

CASE NO. 74,146

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
Fla. Bar No. 353973
112-A Orange Avenue
Daytona Beach, Fla. 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (CONT.)

TABLE OF CITATIONS (CONT.)

TABLE OF CITATIONS (CONT.)

OTHER AUTHORITIES:

IN THE SUPREME COURT OF FLORIDA

VICTOR KLOKOC, Defendant/Appellant, vs. STATE OF FLORIDA, Plaintiff/Appellee.	)	CASE NO. 74,146

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

The State indicted Victor Klokoc for the first-degree murder of his daughter, Elizabeth Klokoc. (R518-19) [1/] Court appointed psychiatrists examined Mr. Klokoc and found him competent to stand trial. (R532-35) While represented by the Public Defender, Mr. Klokoc pled guilty to first-degree murder [2/] in the Circuit Court in and for Brevard County, the Honorable Edward M. Jackson presiding. (R279-317,539-43) At that time Mr. Klokoc waived a jury sentencing recommendation and told the Court that he did not wish to present mitigation. (R315-21)

The Public Defender orally moved to withdraw on December 2, 1988, due to Mr. Klokoc's refusal to participate in his own defense. (R678-714) The motion was denied and Mr. Klokoc was warned by the court that if he did not cooperate with the Public

---

[1/] (R) refers to the record on appeal; (SR) refers to the supplemental record.

[2/] Violation of Section 782.04(1)(a)1 Florida Statutes (1987)

Defender, private counsel would be appointed to present mitigation pursuant to Hamblen v. State, 527 So.2d 800 (Fla.1988). (R686-705)

The penalty phase commenced December 14, 1988. At the inception of the hearing, the Public Defender renewed the motion to withdraw, again based on lack of cooperation from Mr. Klokoc. (R537-538,335) The court denied the motion and ordered that special counsel would be appointed to present mitigation in Mr. Klokoc's behalf. (R555-560,680-712) Though the state indicated that to do so might jeopardize the result, the hearing continued in the absence of the specially appointed counsel when Mr. Klokoc agreed that it should go forward. (R348) Mr. Klokoc ratified the previous waiver of a jury sentencing recommendation as follows:

> The Court: Let me ask you this question, and pay attention, do you still want the Court to proceed as the trier of the facts on the penalty proceeding?
>
> Mr. Klokoc: Yes, I already waived that before and I'll stick with that, I keep that waived.
>
> The Court: The Court has received two additional supplemental reports by Doctor Wooten and Doctor Greenblum which has indicated that you're competent to make this decision.
>
> Mr. Klokoc: Right, you already have that and you have the PSI report, too, which that was dated back on the second.

(R348-49; SR 85-103)

Thereafter, the state presented the testimony of Dr. Greenblum, a psychiatrist who conducted a competency examination of Mr. Klokoc (R367-382), Detective Casey, a police officer who investigated the murder of Elizabeth Klokoc (R385-418), Deputy Walter, a deputy sheriff from Medina County, Ohio, who obtained a

statement from Mr. Klokoc after arresting him (R420-440), and Mrs. Klokoc, the defendant's wife, who described her marriage with Mr. Klokoc. (R441-478) Mr. Klokoc personally cross-examined each of these witnesses. Additionally, physical evidence was introduced, including tape cassette recordings made by Mr. Klokoc before and after the death of his daughter. State Exhibits 5-7.

The second evidentiary portion of the penalty phase, attended by the specially appointed counsel, occurred March 17, 1989. At the inception of that hearing Mr. Klokoc again declined active participation on his behalf by the Public Defender. (R6-9) The state presented the testimony of Victor and Jason Klokoc, Mr. Klokoc's sons, who both described life in the Klokoc household. (R15-49,50-76) Mr. Klokoc personally cross-examined his children, as did the special counsel.

Mr. Klokoc rested without presenting any evidence. (R77) Special counsel then moved for a sentence of life imprisonment, arguing that the state had failed to prove the existence of any statutory aggravating circumstance as a matter of law. (R77) The motion was denied. (R78) Special counsel then called Stephanie Rydzynski, Mr. Klokoc's sister, who described Mr. Klokoc's past and circumstances surrounding his apprehension. (R78-130,204-07); Betty Crosby, who was the records custodian for Circles of Care mental health facility (R131-142); Dr. Wickham, a forensic pathologist who reviewed the autopsy reports and concluded that Elizabeth Klokoc was asleep when killed instantly (R146-153); and, Dr. Wooten, the other psychiatrist who performed a competency examination of Mr. Klokoc and found him competent. (R154-197)

At the conclusion of the evidentiary proceeding, Mr. Klokoc ratified his waiver of a jury sentencing recommendation. (R223) Thereafter, concluding arguments were given by the prosecutor (R238-255), the defendant personally (R255-257), and the specially appointed counsel. (R257-275) The court deferred sentencing to allow review and due consideration of the evidence.

On April 21, 1989, the trial court adjudicated Mr. Klokoc guilty of first-degree murder (R566-567) and sentenced him to death. (R568-569) The court entered written findings of fact indicating that one statutory aggravating factor [3/] had been proved (a cold, calculated and premeditated murder with no pretense of moral or legal justification) and that several mitigating circumstances had been established, including; no significant history of prior criminal activity; under the influence of mental or emotional disturbance when the capital felony was committed; impaired capacity to conform conduct to the requirements of law; Mr. Klokoc was a good provider for his family, despite his mental condition, and; the murder involved a domestic situation. (R570- 574, Appendix A).

The Public Defender was appointed to represent Mr. Klokoc for the purpose of the automatic appeal. (R577) Mr. Klokoc's attempt to dismiss the appeal was denied by this Court on October 31, 1989, and the undersigned was ordered to submit a truly adversary brief advancing Mr. Klokoc's "best interest". Counsel moved for clarification of the order to determine whether a brief

3/ Section 921.141(5)(i), Fla.Stat. (1987)

opposing imposition of the death penalty must be submitted, even if Mr. Klokoc did not feel that life imprisonment with no parole for 25 years was in his best interest. Upon being ordered to file a brief opposing the death sentence irrespective of Mr. Klokoc's personal position, Mr. Klokoc filed a petition for writ of certiorari in the United States Supreme Court, contending that Mr. Klokoc was being denied meaningful assistance of counsel on appeal due to his indigency. A stay of these proceedings was denied by the Honorable Justice Anthony Kennedy December 28, 1989; Certiorari remains pending. This brief follows opposing imposition of the death penalty, as ordered by this Court.

STATEMENT OF THE FACTS

The Klokoc's came to America from Czechoslavokia. (R85) Victor Klokoc's grandmother, as part of an arranged marriage, was to have married one of the Klokoc boys; when she married the brother instead, her family disowned her. (R85-86) Her husband later died from a massive coronary when he was 36, which left her alone to care for seven children. (R86) She ultimately locked her children in a storage shed and committed suicide by hanging herself in a washroom. (R86) Victor Klokoc's father was one of those seven children. He, too, displayed mental infirmity during his life; he was hospitalized for eight months due to combat fatigue after World War II. (R83) The history of mental infirmity in the Klokoc family also includes a mongoloid child (R87) and a manic depressive schizophrenic who was taken to a Veteran's Administration mental health facility after having made death threats to Klokoc family members. (R83-84)

Victor Klokoc's life began July 19, 1945. (R615) His father, described as big and kindly but strict (R87), was also Victor's boy scout troop leader. While living in Cleveland, Victor and his father often went fishing and camping. (R87-88) Like most fathers, Victor's put a lot of pressure on Victor to succeed at everything. (R88) Victor's two younger sisters had no trouble in school, but Victor stuttered and had a hard time remembering. (R88) His father tutored Victored at night and he would yell at Victor when he mispelled homework words. He was referred to as a "slow learner." (R88) Ultimately, Victor failed a grade. (R88)

Victor was present when his father, also at the age of 36, suffered a massive heart attack and died. (89-91) Victor witnessed the efforts of the doctor trying to save his father, and Victor saw his mother become hysterical when the attempts to save his father failed. (R90-91) After kissing his father goodbye for the last time, Victor was told that he was now the man of the house, and he tried his best to take care of his mother and two younger sisters. (R91) Victor dropped out of school in the ninth grade. (R691) Victor began having unbearable headaches. (R97) He would cry and stay in his room, which was kept dark. (R97) He became extremely protective of his mother (R93), and got into fistfights with his mother's suitors because he felt they did not compare well with his father and were not good enough for his mother. (R92) On one occasion, Victor administered a beating to one suitor named "Frank" when Victor discovered Frank and his mother being intimate. (R93)

In 1960, Victor's mother married Joe Nemeck. (R93) Nemeck, an alcoholic, would become drunk and fight with Victor's mother. (R93-94) Victor's mother remained severely depressed over the death of Victor's father. (R80) One day Victor found his mother collapsed in the kitchen after she attempted suicide. Victor put her in a bedroom, called the paramedics, and then fought with Nemeck until the paramedics arrived. (R94) Victor's mother eventually committed suicide on Thanksgiving in 1973. (R80-81)

Victor Klokoc married in 1967. (R441) The marriage yielded three children, Victor, Jr., Elizabeth, and Jason

Raymond. (R442) The marriage was stormy. The children "got basically almost everything they wanted. They had go-carts and Mopeds and cars. He would buy them cars if that's what they wanted. As kids they didn't do without." (R99) Yet, Mrs. Klokoc (Peggy) was dissatisfied with Victor, and considered him mean; Victor felt that she drank too much and did not discipline the children adequately. (R99) Mrs. Klokoc related several instances of abuse by Victor. For instance, she claimed that on August 7, 1987, Victor allegedly kidnapped her and took her to a Holiday Inn, where she was tied to a bed and raped for three or four hours. (R440-45) Afterward. Victor was involuntarily committed to Circles of Care mental hospital for five days in March of 1988, and when Victor was released a restraining order prevented him from seeing his family. (R19,451,573,474)

After reconcilliation, another incident occurred where Victor allegedly kidnapped Peggy on April 7, 1988, and locked her in the tool box in the back of his pick-up truck. (R446-47) That incident resolved by the couple deciding to take a vacation and simply get away. (R447) When they returned from the vacation Peggy decided to leave Victor, feeling that she would hurt or kill Victor if she did not leave. (R457-58) She conspired with her son, Jason, to leave and go to Cleveland, Ohio, to stay at a friend's house. (R459,462)

Victor desperately tried to find his wife and talk to her, but he could not find her or communicate with her. The longer Peggy remained hidden, the more frantic Victor became. (R32) Victor began talking to himself, using a tape recorder to

preserve his thoughts during this period of time. (SR3-30) He intended that the tape be given to his daughter, Elizabeth ("Cia"). (SR3) The taped conversations start around July 9, 1988, where Victor talks of his efforts to find his wife, Peggy, by calling people in Alabama. (SR3-4) Rambling statements such as, "If Jason don't tell me where she's at, I'm afraid I might kill the kid and I'll have to live with that guilt the rest of my life and then she can live with it, too" run throughout these recordings. (SR 4)

As Victor's conversations with himself evolve, it is clear that Victor becomes more and more obsessed with speaking to Peggy, and Jason's refusal to tell him where Peggy was staying added to the intensity of Victor's frustration. For example, Victor states, "Well, I'm taking a ride over here to see Jason if he's at work or what and ask him just to tell me. If he's going to play games with me it's going to make me madder and madder. (SR8) After meeting with his son, Victor again voices his anger and belief that people are simply playing games with him:

> I just stopped to see my son Jason. He refuses to tell me where she's at. He says he's going to try to call her tonight when he gets off work but she don't, he don't know if she's going to call me or not. So I'm just supposed to go and sit at the house and wait and wait for nothing. If he does that and keeps playing that game, I'm going to put a gun to his head, I'm going to blow him away, then he can, then the whole family can live with that and especially her. And then if she don't call me and tell me where she's at so I can come and talk to her, I will blow my youngest son away and then I can live with that guilt and so can the rest of my family. But I

> hate to see him die, cause he's, he thinks it's a big joke, he thinks he's playing some type of funny game. But I don't want to see him go through life -- he has the wrong idea that I really hurt his mother and this and that there. I went through the same bullshit when I was a kid about it that I was so scared. I was scared that my mother was having affairs with this and that there I figured it was hurting her and this and that there. And he's going through the same thing that I hurt her constantly. That's what she puts into his head so she can -- and it's wrong what she does.

(SR8-9)

Victor is aware that he is becoming angrier and angrier, but he is unable to do anything about it; "I need something to take a little bit of the anger away from me. But the anger keeps building. I can't eat, I haven't eat nothing since yesterday. I mean, you know, it's -- if you have to live like this, it's terrible. Just from a seventeen year old kid that don't want to tell me something that he's scared of his mother. I don't understand it. So I don't know what else to do." (SR12) Victor's perception is that his family is deliberately tormenting him, "It's -- you like to be alone, you can be alone. I don't like to be alone. I love someone, and the more I look at her pictures and this and that there, the sicker I get about it, you know. You know, what are you supposed to do, just wipe someone out of your mind and try to start over? Where the hell do you start, you know, who, who do you love again? You know, you date somebody and you build a love. I thought we built a love for twenty years, twenty one years, I don't know. But she keeps playing funny games with it." (SR16-17)

Victor indicates that he loves his daughter (Elizabeth) and his older son, and that Elizabeth wants him to stay home with her, but he is unable to simply sit there and wait for his wife to call. (R18) A recording made on Monday, July 11, 1988, two weeks after Peggy left (SR18-19), reveals that Victor secretly "bugged" the house and telephone in an effort to catch Peggy talking to their children and perhaps reveal her whereabouts. (SR19)

Victor next travelled to Ft. Lauderdale to see if Peggy was staying with a friend she had known there in 1986, but the effort proves useless. (SR19-20) His taped conversation with himself is rambling: "I go nuts just looking around and thinking. If she'd just call me and let me know what she's going to do, what her intentions are and this and that there. I know what my intentions are. If I catch her I'll probably want to, want to kill her. But what's going to happen, she's going to aggravate me so bad I'm going to wind up hurting her or hurt her the rest of her life, I'm going to wind up killing her youngest son just for spite. And I hate to do it but I will do it to hurt her. 'Cause I can't, I can't live like this, it's bullshit. I got to go to work tommorrow to earn a few dollars. And I'll talk to you later." (SR20-21)

The next day, when going to Scotty's to purchase some paint, Victor lost over $100 from his pocket and was unable to pay for the merchandise he had gathered. (SR23-24) Victor's rambling conversation with himself continued; "Well, today's about the sixteenth or seventeenth day that I haven't talked to

her or nothing. I'm getting closer and closer. Her mother's going to finally try to get her to call me. If she don't, I'm afraid that I'm going to hurt myself and I'm going to take one of her kids with me for spite on her if she don't talk to me. And I'm getting very, very close to it now. And I think that's what I'm going to wind up doing is killing myself and take her. I'm going to take one of the kids with me. I don't know which one. That's all for now." (SR25)

By the thirteenth of July, Victor's thoughts turned to his daughter. He states, "Well, it's the thirteenth of July. It's about 4 o'clock. I just hooked up a fan in my daughter's room and that, but tonight that's it. What I'm going to do, Peggy's going to suffer for the rest of her life. If she don't call me by eleven o'clock tonight or twelve, what I'm going to do, I'm going to kill my daughter. I hate to do it, but the kid, she worries too much about money and this and that there and everything so I'm going to kill her." (SR25-26) The conversations with himself continued, even after the murder had been committed: "Well, I'm up north here driving over the east side now. Everybody knows what happened now, it's all over. I don't believe that my son Victor asked me if she suffered. She suffered, she didn't. It was over one, two, three. But everybody likes to tell me she was hurt really bad with it." (SR27)

Elizabeth's boyfriend discovered her body. (R388) She died from a single gunshot wound to the head just behind her right ear. (R152) Death was immediate. (R147-48) A psychiatrist

who examined Klokoc gave an account of what happened based on an he had with Victor:

> Q (By Mr. Braedyn): Okay. In talking to Mr. Klokoc, did you inquire of him regarding the circumstances of the crime of which he was charged?
>
> A: Yes, I did.
>
> Q: Was he able to relate to you the details of the murder?
>
> A. Yes.
>
> Q. Can you tell us what he told you in that regard?
>
> A. Again, it's been a long time and I don't take completely detailed notes, but I try to remember the principal and things like that which are important. And he indicated that he had had, been sitting at home and had drank several beers during the evening. When I say several, I believe he said three or four. And he was sitting there thinking about what a rough life his daughter was having and he didn't want her to go through what he had gone through. And he decided, and he used the term like, you know, if you've got a sick dog, I believe it was a dog, some kind of non-human animal, you know, and they're hurting, you don't leave them in their misery, you put them out of their misery. And he said he decided to put his daughter out of her misery because he didn't want her to have to go through anything. He went into the bedroom. He said that she was asleep. He said that he shot her in the head, went back in and sat down and was trying to get up the nerve to shoot himself and he said he sat there for quite some time but he was not able to do that.

(R181-182)

SUMMARY OF ARGUMENTS

POINT I: The death sentence must be reversed and a sentence of life imprisonment imposed because there is no valid statutory aggravating factor here upon which to base the death penalty. The factor found by the trial judge was that the murder was cold, calculated and premeditated, with no pretense of moral or legal justification. That factor is invalid for several reasons. The factor is unconstitutionally vague under the Eighth and Fourteenth Amendments. Assuming that sole factor to be constitutional, it is nonetheless unsupported by the evidence, in that at least a "pretense" of moral or legal justification exists, as that term has been defined by this Court. Finally, assuming that the factor is constitutional and assuming that it is supported by the evidence, imposition of the death sentence based on that one factor is disproportionate to the mitigation that exists. This Court has never before affirmed imposition of the death penalty based on this single statutory aggravating factor. The cases where the death sentence has been affirmed based on a single factor have all involved torture murders with little or no mitigation and the statutory aggravating factor of an especially heinous, atrocious or cruel murder. The mitigation that exists here, as found by the trial court, prevents this crime from being the most aggravated and unmitigated of serious crimes. The death penalty was not intended for this type crime. Accordingaly, the death sentence must be reversed and the matter remanded for imposition of a sentence of life imprisonment, with no parole for twenty-five years.

POINT II: The death penalty in Florida is unconstitutionally applied in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and the state constitutional counterparts. Statutory aggravating factors upon which imposition of the death penalty is based are unconstitutionally vague and overbroad, resulting in arbitrary, capricious and discriminatory recommendations of death penalties by jurors, imposition of the death penalties by trial courts, and affirmance of death penalties by this Court. Review by this Court cannot and does not cure the erroneous use of these factors below. Because the statutory scheme upon which imposition of the instant death sentence is constitutionally infirm, the death sentence must be reversed and the matter remanded for imposition of a life sentence, with no possibility of parole for twenty five years.

POINT I

THE DEATH PENALTY IN THIS CASE MUST BE REVERSED BECAUSE IT IS NOT SUPPORTED BY ANY VALID STATUTORY AGGRAVATING FACTOR(S), AND THE DEATH PENALTY HERE IS OTHERWISE DISPROPORTIONATE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court found the existence of one statutory aggravating factor, that being that the murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (R570-572, Appendix A) However, in doing so, the court concentrated solely on the premeditation aspect of this aggravating factor, and failed to consider the second prong concerning whether any moral or legal justification existed for the occurrence of the crime. The court's failure to consider the entire factor is amply demonstrated in the court's written findings concerning this aggravating factor:

> The evidence presented in this proceeding shows such a heightened premeditation on the part of the Defendant as to constitute this slaying a dispassionate and calm execution of the victim to achieve the emotional gain for Defendant in knowing he had and would hurt his estranged wife, the mother of the victim, when she would become aware of this tragedy.

(R572).

As argued in Point II, the use of an inconsistent standard to determine whether the first prong of this statutory aggravating factor applies renders this factor unconstitutionally vague and overbroad under the eighth and fourteenth amendments. See pp. 32-33, infra. That argument will not be developed here. Rather, the gist of the argument presented by this issue, which

should be dispositive of the appeal, is that a pretense of moral or legal justification was present for this criminal act. Because that pretense of moral or legal justification exists, Section 921.141(5)(i) Fla. Stat. (1987) does not apply. Since there are no valid statutory aggravating factors that apply, the death penalty cannot lawfully be imposed in this case. See Banda v. State, 536 So.2d 221, 225 (Fla. 1988)("The death penalty is not permissible under the law of Florida where, as here, no valid aggravating factors exist.") Finally, even assuming that this factor is valid and that it applies, uncontroverted mitigation exists which renders the death penalty unconstitutionally disproportionate under the eighth and fourteenth amendments.

PRETENSE OF MORAL OR LEGAL JUSTIFICATION

In Banda, this Court clarified the working definition of the term "pretense of moral or legal justification:"

> We conclude that, under the capital sentencing law of Florida, a "pretense of justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

Banda, 536 So.2d at 225 (emphasis added). This Court recognized self-defense as a "pretense" of justification based on a defendant's uncorroborated, albeit also unrefuted, self-serving testimony. See, Cannady v. State, 427 So.2d 723, 730-31 (Fla. 1983). In doing so, this Court applied the generally accepted definition of "pretense" found in Webster's Third International

Dictionary, p. 1797 (1981) as "something alleged or believed on slight grounds: an unwarranted assumption . . . ." See Banda, 536 So.2d at 225 (footnote 2). Using either definition previously used by this Court, and bearing in mind that the burden is on the state to prove each and every element of a statutory aggravating circumstance beyond a reasonable doubt, it cannot be said that a "pretense" of moral or legal justification does not exist in this case. There are "slight grounds" to question Klokoc's sanity, and insanity is as much a recognized moral and legal defense as is self-defense. That Klokoc is actually insane may be an unwarranted assumption, but even that fits the recognized definition of a "pretense" of moral or legal justification used in Cannady, supra, and Banda, supra.

Vastly more exists in this case than the uncorroborated word of a defendant that mental infirmity drove him to commit a crime. Klokoc's actions preceding the murder establish an intense state of anger (itself a pretense of moral justification) and irrationality. The anger was at first focused on Klokoc's wife for not communicating with him:

> Klokoc: But I don't want to hurt you. And I don't want to hurt Victor. Jason, all I want from him is to tell me where she's at. I want to talk to her.

(SR 3). Klokoc sincerely believed that his wife was simply playing games with his love for her:

> Klokoc: I'd rather have her, that's what I'd rather have. But I don't know, she plays stupid games with my head constantly, then she'll turn around and say, "Yes, I love you," this and that there. I don't know what to do with her.

(SR 7). Klokoc's hositilty was thereafter focused on Jason, who assisted his mother and refused to tell Victor where Mrs. Klokoc was. Again, this was perceived by Victor as people intentionally toying with his emotions:

> Klokoc: I just stopped to see my son Jason. He refuses to tell me where she's at. He says he's going to try to call her tonight when he gets off work but she don't, he don't know if she's going to call me or not. So I'm just supposed to go and sit at the house and wait and wait for nothing. If he does that and keeps playing that game, I'm going to put a gun to his head, I'm going to blow him away. Then he can -- then the whole family can live with that and especially her.

(SR 8-9). These are not rational thoughts.

However, Jason sensed the prudence of not exposing himself to his father's wrath and appreciated the sincerity of his father's unreasonable hostility which, even if irrational by normal standards, is undeniably an integral component of Victor Klokoc's make-up. This is fully illustrated in the telephone conversation occurring between Victor Klokoc and his son Jason sometime after July 11, 1988, after Victor "bugged" the telephones in his home in an effort to find out where his wife was hiding. (SR 18-19). Tellingly, Jason tried to get his father to appreciate that psychiatric help was desperately needed:

> Jason: Well, I really do think you need psychiatric help at least 3 days a week.
>
> Klokoc: Oh, okay. At least 3 days a week?
>
> Jason: Yes.
>
> Klokoc: Oh, okay. Who should I talk to, a person like you?

Jason: No. You'll talk to a trained professional.

Klokoc: Who trained this person, though?

Jason: College.

Klokoc: Oh, now you're telling me something different.

Jason: How do you get that?

Klokoc: So, this person went to college to learn this stuff, how to talk to other people?

Jason: Yes.

Klokoc: Alright. Where you going, David? Oh, alright. So, a person that went to college can come and tell me what I should do?

Jason: No, they help you with your problems that you have.

Klokoc: Oh, okay. Now, you're telling me something I just learned, Jason.

Jason: You just learned? Why, when you were down at that place in Melbourne at Circles of Care, why did you refuse to take any medication?

Klokoc: Because I don't take medication. I don't do drugs.

Jason: That's not drugs, Dad.

Klokoc: Yes, it is.

(SR74).

When Victor Klokoc could not reach the people who, he honestly believed, were intentionally tormenting him and making a mockery of his love for Peggy, he struck back at the only person exposed to him, and his motive for killing Elizabeth was not solely to inflict pain on his wife, but also to prevent

Elizabeth from experiencing the pain and suffering of growing up. Traces of this are found in his conversations with himself, where Victor recalls the fear he experienced as a child (SR 9), and the pain he felt when his father died. (SR 18) After bugging the telephone, Victor overheard that Elizabeth was hurt by the preferential treatment her mother, Victor's wife, bestowed on others. (SR 29) Just before the murder, Victor observed to himself that Elizabeth worried too much over money. (SR 26) This independently supports what Victor told the psychiatrist during the competency examination:

> Dr. Wooten: Client initially said that he killed his daughter because he didn't want her to have to go through the kind of pain and anguish that he went through. He indicates that she was under a great deal of stress and was very upset, and that he couldn't bare the pain of watching her try to cope with her problems. Client was never very clear as to what his daughter's problems were, except that her mother had left and they did not know where she was at this particular time.

(SR 92) Irrational? Yes. But it is at the very least a "pretense" of moral and legal justification, and it is based on much stronger evidence than that found in Cannady, supra.

Since a pretense of moral or legal justification exists, this statutory aggravating factor does not apply. Because there is no statutory aggravating factor which authorizes imposition of the death penalty, the sentence of death must be reversed and a sentence of life imprisonment with no possibility of parole for twenty-five years imposed.

PROPORTIONALITY OF DEATH PENALTY

This Court has NEVER affirmed a death sentence that has been imposed by a trial judge based on the one statutory aggravating circumstance of a cold, calculated and premeditated murder, with no pretense of moral or legal justification. Appendix "B." In fact, the only instances where this Court has affirmed a death sentence that has been imposed by a trial judge based on one statutory aggravating factor is where that factor was an especially heinous, atrocious or cruel murder, in the following cases; Arango v. State, 411 So.2d 172 (Fla. 1982); LeDuc v. State, 365 So.2d 149 (Fla. 1978); Douglas v. State, 328 So.2d 18 (Fla. 1976); and, Gardner v. State, 313 So.2d 675 (Fla. 1975). See, Appendix "B."

In each of the foregoing four cases where a death sentence based on one statutory aggravating factor was affirmed, the murder involved a torture murder. In Gardner, Douglas, and LeDuc nothing was found in mitigation by the trial court. In Arango, the only mitigating factor was that Arango had no significant prior criminal history, and this Court was greatly influenced by the presence of a jury recommendation for the death penalty. Arango, 411 So.2d at 174. See LeDuc, 365 So.2d 149, 151 (Fla. 1978)("The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered . . . ."). Here, there is no jury recommendation to influence the sentencing decision, and the imposition of the death penalty rests solely on the application of sound principles of law.

There exists in this case vastly more mitigation than existed in any of the cases where the death penalty has been affirmed based on one statutory aggravating factor. Not only did the trial judge find that Klokoc had no prior significant history of criminal activity, the trial judge also found that the murder was committed while Klokoc was under the influence of mental or emotional disturbance and that his capacity to conform his conduct to the requirements of law was impaired (which constitutes a recognized "pretense" of moral or legal justification), Klokoc was a good provider for his family despite his mental condition and the murder involved a domestic situation. (R570-74, Appendix "A"). These areas of mitigation have historically been accorded great weight, and consistency requires that the same weight be given here.

In Songer v. State, 544 So.2d 1010 (Fla. 1989), this Court was recently faced with a death penalty which had been imposed by a trial judge based on one statutory aggravating factor, viz, the murder of a highway patrolman committed while Songer was under sentence of imprisonment. Due to the presence of several mitigating factors that were found by the trial judge, this Court overturned the death sentence and remanded for imposition of a life sentence despite a jury recommendation for the death penalty. The reasoning of this Court is instructive here:

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950,

> 40 L.Ed.2d 295 (1974). To secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure the ultimate punishment is appropriate.
>
> Our customary process of finding similar cases for comparison is not necessary here because of the almost total lack of aggravation and the presence of significant mitigation. We have in the past affirmed death sentences that were supported by only one aggravating factor, (see, e.g., LeDuc v. State, 365 So.2d 149 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979)), but those cases involved either nothing or very little in mitigation. Indeed, this case may represent the least aggravated and most mitigated case to undergo proportionality analysis.
>
> Even the gravity of the one aggravating factor is somewhat diminished by the fact that Songer did not break out of prison but merely walked away from a work-release job. In contrast, several of the mitigating circumstances are particularly compelling. It was unrebutted that Songer's reasoning abilities were substantially impaired by his addiction to hard drugs. It is also apparent that his remorse is genuine.

Songer v. State, 544 So.2d at 1011. As in Songer, the mitigation found by the trial court explains the sole statutory aggravating factor that exists here, assuming that it does exist.

For instance, the murder of Klokoc's daughter was carried out in a manner that concededly falls within the bounds of a calculated and premeditated murder, but it must be viewed in context. Klokoc's anger and frustration kept building and building as his every attempt to discover his wife's location failed. The trip to Ft. Lauderdale proved useless. Jason had obtained a restraining order to keep his father away. (SR80-81) When a telephone number was finally obtained, it turned out to be

to an answering machine. Peggy still was not communicating with Klokoc, despite messages that had been left on the answering machine for her to call him. The murder, while "calculated", is so in an irrational way only.

In Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), this Court noted that "Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Despite the presence of five statutory aggravating factors and three mitigating factors, Fitzpatrick's death sentence was reversed and the case remanded for imposition of a life sentece on the premise that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." Fitzpatrick, 527 So.2d at 811 (emphasis in original). Fitzpatrick equates with the instant case; neither is the most aggravated and unmitigated of serious crimes.

A comparison of this case to those in which the death penalty has been affirmed leads to no other conclusion but that the death sentence must be reversed and the matter remanded form imposition of a life sentence. Never before has this Court affirmed the death penalty based solely on this aggravating factor. When compelling mitigation exists such as that existing in this case, as found by the trial judge, the death penalty is simply inappropriate under the standard previously set by this Court. That standard should be adhered to.

POINT II

THE FLORIDA DEATH PENALTY VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ART. 1, SEC. 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION BECAUSE THE AGGRAVATING AND MITIGATING CIRCUMSTANCES DO NOT GENUINELY LIMIT THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY; THE FACTORS ARE PRONE TO ARBITRARY AND CAPRICIOUS APPLICATION.

The bete noire of capital punishment is a procedure enabling arbitrary and capricious imposition of the death penalty. This occurs when too much discretion is afforded those who impose or affirm imposition of the death penalty. It was in response to the condemnation of arbitrary and capricious imposition of the death penalty in Furman v. Georgia, 408 U.S. 238 (1972) that the Florida Legislature enacted death penalty legislation embodying statutorily defined aggravating circumstances that must exist and "outweigh" mitigating factors before the death penalty is authorized. Sec. 921.141 Fla.Stat. (1987); See Banda v. State, 536 So.2d 221, 225 (Fla. 1988)("The death penalty is not permissible under the law of Florida where, as here, no valid aggravating factors exist.")

The aggravating/mitigating circumstance comparison procedure survived an Eighth Amendment challenge in Proffitt v. Florida, 428 U.S. 242 (1976). Subsequently, the United States Supreme Court explained why the required consideration of specific aggravating/mitigating circumstances by the sentencer affords adequate protection against arbitrary and capricious imposition of the death penalty:

> This conclusion rested, of course, on the fundamental requirement that each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of Furman itself. For a system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." 428 U.S. at 196, n.46, 49 L.Ed.2d 859, 96 S.Ct. 2909. To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 877 (1983)(footnote omitted) (emphasis added). Thus aggravating circumstances must be sufficiently definite to provide consistent application in the face of emotionally or politically compelling facts, and aggravating circumstances that are too subjective and non-specific to be applied even-handedly are unconstitutional. See Maynard v. Cartwright, 486 U.S.__, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)(aggravating circumstance of "especially heinous, atrocious or cruel" too indefinite); Godfrey v. Georgia, 446 U.S. 420 (1980)(aggravating circumstance of "outrageously or wantonly vile, horrible and inhuman" too indefinite).

Florida's death penalty system utilizes eleven statutory aggravating circumstances. It is respectfully submitted that when those circumstances are considered in pari materia the class of first-degree murderers who are eligible for the death

penalty is not sufficiently restricted to preclude capriciousness and arbitrariness in the imposition of the death penalty. Too much unbridled discretion is afforded the jury, the trial judge and the appellate court when the sentence is recommended, imposed and reviewed. Three justices of this Court have agreed that the current procedure defeats meaningful appellate review. See dissenting opinion in Burch v. State, 522 So.2d 810, 815-16 (Fla. 1988)(Shaw, Ehrlich, Grimes, JJ., dissenting).

The statutory aggravating circumstances used in Florida are replete with highly subjective language:

> (5) AGGRAVATING CIRCUMSTANCES - Aggravating circumstances shall be limited to the following:
> (a) The capital felony was committed by a person under sentence of imprisonment.
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
> (c) The defendant knowingly created a great risk of death to many persons.
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
> (f) The capital felony was committed for pecuniary gain
> (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
> (h) The capital felony was especially heinous, atrocious, or cruel.

> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
> (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.
> (k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or part, to the victim's official capacity.

§921.141(5), Fla.Stat. (1988 Supp.) The statutes provide no definition of the subjective terms found in either the aggravating or mitigating circumstances, so the courts and the juries are left to fend for themselves to determine when the factors exist.

The facial constitutionality of Florida's death penalty statute survived an Eighth Amendment challenge in Proffitt v. Florida, 428 U.S. 242, 253 (1976). The Court ruled that the statutes and procedures, as then applied, satisfied the Eighth Amendment. Proffitt, 428 U.S. at 927. Of the 21 death penalty cases reviewed at the time of Proffitt, this Court had reversed 7. It is respectfully submitted that more meaningful statistics now exist and that the definitions of the statutory aggravating and mitigating circumstances have proved to be too broad to comport with constitutional requirements of specificity and consistency in application. The vagaries of unbridled discretion, arbitraririness and capriciousness in imposition of the death penalty denounced in Furman v. Georgia, 408 U.S. 238 (1972) have returned in full force, as can be seen by impartial review of the cases involving these statutory factors.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), which is perhaps the one most important Florida case relied on by the United States Supreme Court in Proffitt, this Court rejected the contention that the statutory aggravating and mitigating circumstances were impermissibly vague, stating, "review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under circumstances in another case." Dixon at 10, (emphasis added). This language is cited by the United States Supreme Court when the death penalty system in Florida was at first approved. Proffitt at 251. The guarantee of consistency in Dixon is demonstrably a guarantee in word only.

It is respectfully submitted that juries, trial courts, and this Court have failed to consistently apply the statutory aggravating and mitigating factors. Since juries do not render factual findings, it is impossible to demonstrate the lack of consistency in application of the statutory factors by the jury, but it is similarly impossible for this or any other Court to meaningfully review the considerations of the jury. In Smalley v. State, 546 So.2d 720, 722 (Fla. 1989), this Court stated, "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." (emphasis added). Unless the trial judge specifies in his written findings what deference he afforded a jury recommendation and why, it is apparent that a blind spot still exists insofar as how the jury applied the aggravating and mitigating factors.

This Court has rendered decisions that are diametrically opposed to others containing virtually the same material facts. These decisions cannot be reconciled. Time and again this Court is belatedly acknowledging that prior approval of findings of aggravating factors were in fact improper, and that imposition of the death penalty was inappropriate. See, Songer v. State, 544 So.2d 1010 (Fla. 1989); King v. State, 514 So.2d 354 (Fla. 1987); Proffit v. State, 510 So.2d 896 (Fla. 1987). It is critical that the statutory aggravating factors be sufficiently specific so as to afford consistent application by this Court, which in turn provides the necessary guidance to the trial courts and the juries. This simply has not happened. The vacillation by this Court not only fails to provide sufficient guidance to the trial courts and the juries, it also demonstrates that the aggravating circumstances are too susceptible to interpretation to afford unerring application in the face of compelling facts with the procedure now being utilized. It is not just the application of a single vague factor that is the problem. Rather, recurrent changes in the definitions of the operative terms of most of the aggravating factors signals a procedure that is now too prone to error in an area where no errors can be allowed to occur.

COLD, CALCULATED OR PREMEDITATED MURDER, WITH NO PRETENSE OF MORAL OR LEGAL JUSTIFICATION

This Court's vacillation in its dealings with this statutory aggravating circumstance cannot help but breed confusion to those seeking to consistently apply it. For instance, in Caruthers v. State, 465 So.2d 496 (Fla. 1985) this Court

disallowed a finding of a cold, calculated and premeditated murder where a robber shot a store clerk three times. This Court stated "the cold, calculated and premeditated factor applies to a manner of killing characterized by heightened premeditation beyond that required to establish premeditated murder." Caruthers, 465 So.2d at 498 (emphasis added). Eight pages later, in the next reported decision, this Court approved the same factor, stating "this factor focuses more on the perpetrator's state of mind than on the method of killing. Johnson v. State, 465 So.2d 499, 507 (Fla. 1985)(emphasis added). Then, in Provenzano v. State, 497 So.2d 1177 (Fla. 1986), this Court reverted to the prior standard, stating ". . . as the statute indicates, if the murder was committed in a manner that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable." Provenzano, 497 So.2d at 1183. Recently, in Banda v. State, 536 So.2d 221 (Fla. 1988), this Court again returned the focus to the subjective intent of the murderer. Interestingly, it is only the subjective application that makes any sense, in light of the second prong of that factor which, until Banda, had largely been ignored. There is no room for such vacillation if this factor is to be consistently applied. Juries and/or trial courts cannot know which standard applies at any given time. The dicotomy renders the factor unconstitutionally vague and overbroad.

There is such patent inconsistency in application of the second prong of the cold calculated or premeditated, without any pretense of moral or legal justification factor that the factor can be found or refected almost without consequence. In

Banda, supra, this Court stated, "We conclude that, under the capital sentencing law of Florida, a 'pretense of justification is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." Banda, 536 So.2d at 225, (emphasis added). In Cannady v. State, 427 So.2d 723 (Fla. 1983), this Court disapproved the finding of a cold, calculated or premeditated murder because, according to the defendant, the victim rushed at him before he was shot five times. "During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own life." Cannady at 730. Yet, in Provenzano v. State, 497 So.2d 1177 (Fla. 1986), this Court approved that aggravating factor and rejected self defense as a pretense of moral justification where it was uncontroverted that the victim (a courtroom bailiff) was repeatedly firing a pistol at the Provenzano when the bailiff was shot.

In Turner v. State, 530 So.2d 51 (Fla. 1988), this Court rejected as a "pretense" of moral or legal justification the defendant's contention that the murders of his wife and her lesbian lover were committed because the Turner believed that the lesbian had seduced Turner's wife and taken his family. Turner, 530 So.2d at 51. In footnote 4, this Court stated, "We emphasize that these beliefs, as recounted to his examining psychiatrist and subsequently testified to by this doctor, are not supported by record evidence." Id. Yet, in Cannady v. State, 427 So.2d

723, 730-31 (Fla.1983), this Court found a pretense of justification existed based on Cannady's uncorroborated statement that the victim was shot five times because he jumped at Cannady. When read contemporaneously, the two footnotes demonstrate the arbitrariness which yet infects the death penalty in Florida.

Until now, the only recognized "pretense" of moral or legal justification is a "colorable claim" of self-defense:

> In Cannady v. State, 427 So.2d 723 (Fla. 1983), this Court addressed the issue of what constitutes a "pretense" of moral or legal justification. We found that Cannady had such a pretense because, during his confessions, he repeatedly stated that he never intended to harm the victim. The evidence corroborated these statements, since it showed that Cannady had shot the victim only after the victim jumped at him. There was no evidence to disprove these contentions.
>
> Similarly, in Banda v. State, 536 So.2d 221 (Fla. 1988), cert. denied, 109 S.Ct. 1548 (1989), we also found a pretense of justification. There, we were swayed by evidence of the victim's violent nature and apparent ability to harm Banda, which caused a plausible fear in Banda that the victim would try to kill him. We then concluded that a "pretense" of moral or legal justification could consist of any "colorable claim . . . that [the] murder was motivated out of self-defense, albeit in a form clearly insufficient to reduce the degree of crime. Id at 225.
>
> On the other hand, this Court has upheld a finding of no pretense of justification in a prison killing when the victim was attacked by surprise and repeatedly stabbed, when there was no evidence the victim had engaged in prior threatening acts. Williamson v. State, 511 So.2d 289 (Fla. 1987), cert. denied, 108 S.Ct. 1098 (1988).

Christian v. State, 14 FLW 466, 468 (Fla. Sept. 28, 1989).

The limitation of what constitutes a "pretense" of moral or legal justification only to self-defense is arbitrary, and even that limitation is selectively applied. See Provenzano, 497 So.2d 1177 (Fla. 1986). The vacillation in the application of this statutory aggravating factor shows that the operative terms are not sufficiently definite so as to adequately channel the discretion of the sentencing court, the jury, or this court. The factor is unconstitutionally vague and overbroad under the eighth and fourteenth amendments, as set forth in Maynard v. Cartwright, 486 U.S. __, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), Zant v. Stephens, 462 U.S. 862 (1983), and Godfrey v. Georgia, 446 U.S. 420 (1980), in that it fails to genuinely narrow the class of persons eligible for the death penalty.

As previously noted, this Court rejected the contention that the aggravating circumstances are impermissibly vague, stating "review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under circumstances in another case." Dixon at 10. The foregoing examples cannot rationally be reconciled with that guarantee and they demonstrate that this Court needs to reconsider whether the current procedure employed to find and review statutory aggravating circumstances is sufficiently consistent so as to comport with constitutional requirements. For these reasons, it is respectfully submitted that, as applied, the statutes governing imposition of the death penalty in Florida are impermissibly vague and are otherwise subject to unfair, capricious, arbitrary and discriminatory application.

Section 921.141 (5)(i) Fla.Stat. (1987) is vague and overbroad on its face. It is applied in an arbitrary and capricious manner in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9 and 16 of the Florida Constitution. By its terms, this circumstance is applies when:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Section 921.141(5)(i), Fla.Stat. (1987) This aggravating factor was added to Florida's death penalty statutes after the United States Supreme Court's decision in Proffitt v. Florida, 428 U.S. 242 (1976). This aggravating factor has not yet been reviewed, either on its face or as applied, by the United States Supreme Court or the Eleventh Circuit Court of Appeals.

The function of a statutory aggravating factor has been explained by the United States Supreme Court to be as follows:

> Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition, they circumscribe the class of person eligible for the death penalty.

Zant v. Stephens, 462 U.S. 862, 879, (1983). The Court in Zant went on the state that "An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty." Id. at 2742-2743. Thus, it is clear that a statutory aggravating factor can be so broad as to fail to satisfy Eighth and Fourteenth Amendment requirements and that even if it is narrow on its face, it can be so arbitrarily applied that it is rendered unconstitutional.

Concern over the severity and finality of the death penalty has mandated that any discretion in imposing the death penalty be narrowly limited. Gregg v. Georgia, 428 U.S. 153, 188-189 (1976); Furman v. Georgia, 408 U.S. 238 (1972). The Court in Gregg interpreted the mandate of Furman to impose these severe limits because of the uniqueness of the death penalty.

> Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.

Gregg v. Georgia, 428 U.S. 153, 188 (1976). The Court in Gregg went on to hold that:

> Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

428 U.S. at 189. Thus, it is clear that capital sentencing discretion must be strictly guided and narrowly limited, and that to be constitutional, a death penalty must be consistently applied or rejected upon substantially similar facts.

The manner by which Florida has attempted to guide sentencing discretion is through statutory aggravating factors. The United States Supreme Court has held that the such factors must genuinely channel sentencing discretion by clear and objective standards.

> [I]f the state wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and

> capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

In Godfrey, the Supreme Court held that capital sentencing discretion can be suitably directed and limited only if aggravating circumstances are sufficiently limited in their application to provide principled, objective bases for determining the presence of the circumstances in some cases and their absence in others. Although the state courts remain free to develop their own limiting constructions of aggravating circumstances, the limiting constructions must, as a matter of Eighth Amendment law, be both instructed to sentencing juries and consistently applied from case to case. Id. at 429-433. In Godfrey, the Court examined the use of one particular aggravating circumstance, found the jury instruction concerning this factor deficient for failing to limit the circumstance in any meaningful way, Id. at 428-429, and then examined the facts of the case and determined that, while the Georgia Supreme Court had developed three criteria limiting the application of this circumstance, "[T]he circumstances of this case . . . do not satisfy the criteria laid out by the Georgia Supreme Court itself. . . . " Id. at 432. Thus, an aggravating factor must be consistently applied in narrow fashion that is neither arbitrary nor capricious.

In Zant, supra, the United States Supreme Court reaffirmed that an aggravating circumstance can be so vague, or arbitrarily applied, that it would:

> [F]ail to adequately so channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur.

Zant, 462 U.S. at 877, 103 S.Ct. at 27869.

In McCleskey v. Kemp, 481 U.S. 279, (1987), the Supreme Court again emphasized the constitutional requirement that a statutory aggravating factor must genuinely narrow the class of persons eligible for the death penalty, according to rational criteria, which are rationally and consistently applied, while at the same time a statutory factor cannot prevent a sentencer from considering valid mitigation.

> In sum, our decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the state must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

McClesky v. Kemp, 481 U.S. at 305-306 (1987)(emphasis added).

It is well established that, although a state's death penalty statute is constitutional, a single aggravating factor may be unconstitutionally vague, arbitrary, or overbroad. State v. Chaplin, 437 A.2d 327, 330 (Del. Super. Ct. 1981); State v. White, 395 A.2d 1082 (Del. 1978); People v. Superior Court (Engert), 647 P.2d 76 (Cal. 1982); Arnold v. State, 224 S.E.2d 386 (Ga. 1976); Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987); Collins v. Lockhart, 754 F.2d 958 (8th Cir.), cert denied, 106 S.Ct. 546 (1985). It is here contended that § 921.141(5)(i), Fla.Stat. (1987), on its face and as applied, has failed to "genuinely narrow the class of persons eligible for the death penalty." First, the circumstance has been applied by this Court to virtually every type of first degree murder. This aggravating circumstance has become a "catch-all" aggravating circumstance, thereby violating the teachings of Furman, Gregg, Godfrey, and McCleskey. Second, even though principles for applying the (5)(i) circumstance have been established by this Court, those principles have not been consistently applied.

FACIAL OVERBREADTH AND VAGUENESS

Section 921.141(5)(i) is unconstitutionally vague on its face. The words of the aggravating circumstance give no real indication as to when it should be applied. This is the same flaw which led to the striking of aggravating circumstances in People v. Superior Court (Engert), supra, and Arnold v. State, supra. It is well established that a statute, especially a criminal statute, must be definite to be valid, and certainly a statutory aggravating factor must be held to this standard:

Definiteness is essential to the constitutionality of a statute. The danger of indefiniteness is not simply the lack of notice to the defendant, but also the possibility of arbitrary and discriminatory application of the statute:

> If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . .

Grayned v. City of Rockford, 407 U.S. 104, 109 (1972). The United States Supreme Court has recently re-emphasized that the danger of arbitrary enforcement, rather than actual notice, is actually the more important aspect of the vagueness doctrine. Kolender v. Lawson, 461 U.S. 356, 358-359, 103 S.Ct. 1855, 1858-1859 (1983); Smith v. Goguen, 415 U.S. 566, 574 (1974).

The need for definiteness is dramatically heightened in the context of capital sentencing. The United States Supreme Court has recognized that death is different from any other punishment which can be imposed and calls for a greater degree of reliability due to its severity and finality. E.g., Lockett v. Ohio, 438 U.S. 586, 605-606 (1978). The (5)(i) circumstance requires a finding that the homicide "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." The requirement of commission in a "cold, calculated, and premeditated manner" gives no real guidance as to when this factor exists. Some level of premeditation will exist in all first-degree, premeditated

murders and the adjectives "cold" and "calculated" are vague, subjective terms directed to the emotions. Webster's New Twentieth Century Unabridged Dictionary (Second Edition) defines "cold", as follows:

> 1. of a termperature much lower than that of the human body; very chilly, frigid.
>
> 2. lacking heat; having lost heat; of less heat than is required; as, this soup is cold.
>
> 3. having the sensation of cold; feeling chilled, shivering, as I am cold.
>
> 4. bland; lacking pungency or acridity. Cold plants have a quicker perception of the heat of the sun than the hot herbs. Bacon.
>
> 5. dead; lifeless. Ere the placid lips be cold. Tennyson.
>
> 6. without warmth of feeling; without enthusiasm, indifferent, as a cold personality.
>
> 7. not cordial; unfriendly; as a cold reception.
>
> 8. chilling; gloomy; dispiriting; as, they had a cold realization of their plight.
>
> 9. calm; detached; objective; as, cold logic.
>
> 10. designating colors that suggest cold, as, those of blue, green, or gray.
>
> 11. still far from what is being sought and of the seeker.
>
> 12. completely mastered; as, the actor has his lines down cold (Slang).
>
> 13. insensible; as, the boxer was knocked cold. (Slang).

> 14. in hunting, faint; not strong; said of a scent.
>
> cold comfort; little or no comfort at all; in cold blood; without the excuse of passion, with deliberation.
>
> to catch cold; to become ill with a cold; also to take cold.
>
> to throw cold water on; to discourage where support was expected; to introduce unlooked for objections.
>
> Syn. -- wintry, frosty, bleak, indifferent, unconcerned, passionless, apathetic, stoical, unfeeling, forbidding, distant, reserved, spiritless, lifeless.

Id. at 354. There are fourteen different definitions of this word. The five most common definitions are not helpful to the question here. However, definitions 6, 8 and 9 above all are arguably relevant. All of these meanings are highly subjective attempts to describe emotional states. It is clear that the word "cold" is subject to many different interpretations, all of which are highly subjective.

The word "calculated" is equally subjective. It is defined, as follows:

> 1. relating to something which may be or has been subjected to calculation; as, a calculated plot.
>
> 2. designed or suitable for; as, a machine calculated for rapid work. [Colloq.]

Websters, supra, at 255. The term calculate is defined as follows:

> 1. to ascertain by computation; to compute; to reckon; as, to calculate distance.

> 2. to ascertain or determine by reasoning; to estimate.
>
> 3. to fit or prepare by adaptation of means to an end; to make suitable; generally in the past participle.
>
> This letter was admirably calculated to work on those to whom it was addressed. McCauley.
>
> 4. to intend; to plan; used in the passive.
>
> 5. to think; to suppose; to guess; as, I calculate it will rain. (Colloq.)
>
> Syn. -- compute, estimate, reckon, count.

Websters, supra at 255. Thus, this word is also subject to differing meanings, which are highly subjective. The terms "cold" and "calculated" suffer from the same deficiency as terms held vague in People v. Superior Court (Engert), supra.

Here, as in (Engert), "The terms address the emotions and subjective, idiosyncratic values. While they stimulate feelings of repugnance, they have no direct content." 647 P.2d at 78. Here, as in Arnold v. State, supra, the terms are "highly subjective." 224 S.E.2d at 392. The finding of this aggravating circumstance depends on a finding that the homicide is "cold, calculated, and premeditated." The terms cold and calculated are unduly vague and subjective. This is especially true when considered in the context of the special need for reliability in capital sentencing.

The requirement that the homicide be committed "without any pretense of moral or legal justification is also very vague and subjective. It is clear that no person convicted of first

degree murder has a true legal justification; otherwise the conviction would be invalid. Although a true moral justification is theoretically possible; it is highly unlikely. Thus the essence of this phrase depends on the existence of a "pretense" of moral or legal justification. The word "pretense" is defined as follows:

> 1. a claim, as to some distinction or accomplishment; pretension; as, he made no pretense to being infallible.
> 2. a false claim or profession; as, under the pretense of friendship.
>
> e. a false show of something.
>
> 4. something said or done for show.
>
> 5. a pretend, as, at play; make-believe.
>
> 6. a false reason or plea; a pretext.
>
> 7. aim, intention (Rare.)
>
> 8. pretentiousness.
>
> 9. a pretentious act or remark.
>
> false pretenses; in law, deliberate misrepresentation of fact in speech or action in order to defraud someone of the title to a certain property or money.
>
> Syn. -- pretext, mask, appearance, color, show, excuse.

The word pretense has several definitions. This phrase is also vague, because it involves the highly subjective attempt to ascertain the attitudes, thoughts, and reasoning of the offender. Determining whether there is a "pretense of moral justification" is highly subjective because personal morality is necessarily highly individualized and subjective. Thus, there is the problem of ascertaining the offender's personal attitudes, as well as the

problem of qualifying what level of justification rises to a "pretense" of justification. The problem of applying this aggravating circumstance is further compounded where, as here, the offender has a psychiatric disturbance, either temporary or permanent. This additionally complicates the problem of ascertaining and understanding thoughts, feelings, attitudes, and motivations. The danger of the arbitrary application of this circumstance, by juries, is magnified by the fact that none of the terms in this circumstance are defined in the Standard Jury Instructions. Florida Standard Jury Instructions (Crim.) at p.79. This Court has failed to apply the factor under substantially the same facts, and the recognition of what constitutes a pretense of justification has likewise vacillated. This demonstrates that the terms of this factor are unconstitutionally overbroad and vague.

ARBITRARY AND CAPRICIOUS APPLICATION

As previously stated, a statute, or a portion of a statute, may be constitutional on its face, but applied in an unconstitutional fashion. McCleskey, at 1773. The (5)(i) aggravating factor is unconstitutional as applied by juries in recommending penalties, trial courts in imposing sentences, and this court in reviewing death sentences. It has been applied in such a way as to allow it to be applied to any premeditated murder, and the original limiting principles developed by this Court have been applied in such an inconsistent manner as to render this circumstance arbitrary and capricious.

This Court has attempted to limit the application of this circumstance. Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982); McCray v. State, 416 So.2d 804, 807 (Fla. 1982); Combs v. State, 402 So.2d 418 (Fla. 1981).

> The level of premeditation needed to convict in the penalty 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."

Jent, 408 So.2d at 1032. In McCray, this Court stated:

> That aggravating circumstance [(5)(i)] ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive.

416 So.2d at 807. Thus, the announced principle for application of this factor is that this aggravating circumstance requires more than simple premeditation, whatever that is. However, this Court has never explicitly defined how much more premeditation is required. This circumstance has subsequently been applied in an arbitrary and capricious manner. In Herring v. State, 441 So.2d 1049 (Fla. 1984), this aggravating circumstance was upheld where the Herring robbed a store and then fired a shot in response to "what he believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor." 441 So.2d at 1057. Thus, this aggravating circumstance was upheld where the shooting began in response to a perceived threat to the defendant. However, in McCray v. State, 416 So.2d

804 (Fla. 1982), this aggravating circumstance was disallowed in a robbery-murder situation where the killing had far less provocation than in Herring, supra. McCray had stolen several boxes of guns from the victim's van, and was able to get away. 416 So.2d at 805. He then returned to the victim's van and yelled, "This is for you, mother-fucker," and shot the victim three times in the abdomen. Id. McCray did not involve any threat or perceived threat, and three shots, designed to kill, were fired. Indeed, McCray had escaped from all danger and returned to kill the victim, yet the factor was struck. Herring involved a perceived threat, yet the factor was upheld in a similar robbery-murder. This apparent inconsistency was addressed in Rogers v. State, 511 So.2d 526 (Fla. 1987) wherein the holding in Herring was receded from, and a new principle announced for application of the (5)(i) was stated, that being that "calculation" consists of a careful plan or prearranged design. 511 So.2d at 533.

This factor has also been inconsistently applied in burglary-murder situations. In Harris v. State, 438 So.2d 787 (Fla. 1983), the Court struck this circumstance in a burglary-murder of a 73 year old woman who knew the defendant. She died from "multiple stab wounds and wounds inflicted by a blunt instrument." 438 So.2d at 789. This Court described the scene as follows:

> . . . a knife, a bloody rock, and a blood-covered wooden chair were found in the house. The autopsy revealed that the victim had suffered numerous defensive wounds on her arms, hands, and shoulders. Blood was spattered over the

> walls and furnishings of the bedroom, living room and kitchen, indicating that the victim had tried to escape her assailant while she was being stabbed and beaten.

Id. Despite the prolonged stabbing and beating of a 73 year old woman, the (5)(i) factor was disallowed; "In this instance the state presented no evidence that this murder was planned, and, in fact, the instruments of the death were all from the victim's premises." 438 So.2d at 798. Thus, application of this factor rested on the fact that the weapons were from the deceased's premises in striking this factor.

In Mason v. State, 438 So.2d 374 (Fla. 1973)(decided the same day as Harris, supra), the (5)(i) circumstance was upheld by this Court in a burglary-murder, where the weapon was taken from the victim's premises, and there was no evidence of prior planning of the homicide. Mason burglarized the victim's home, obtained a knife there, and killed the victim by stabbing her. 438 So.2d at 376-377, 379. The fact that Mason did not carry a weapon, but obtained it, at the burglary site, was relied on the negate this factor in Harris, but not in Mason.

This circumstance has also been arbitrarily applied in cases where the victim was abducted, taken to a remote area, and then killed. In three cases, this Court has relied upon abduction in upholding the application of this aggravating factor. Hill v. State, 422 So.2d 816 (Fla. 1982); Smith v. State, 424 So.2d 726 (Fla. 1983); Justus v. State, 438 So.2d 358 (Fla. 1983). In three other cases, this aspect of the offense was present, yet this aggravating factor was disallowed. Mann v.

State, 420 So.2d 578 (Fla. 1982); Cannady v. State, 427 So.2d 723 (Fla. 1983); Preston v. State, 444 So.2d 939 (Fla. 1984). In Preston, supra, the victim had been abducted from a convenience store, and money was missing from the store. 444 So.2d at 941. Her nude body was found in a field with multiple stab wounds and her throat slit. Id. Pubic hairs, consistent with the victim's were found on Preston. Id. This Court held that these facts were insufficient to support this circumstance. 444 So.2d at 947. However, in Smith, supra, this circumstance was upheld in a very similar case. Smith also involved the robbery of a convenience store, abduction of the clerk, taking her to a secluded area and killing her. 424 So.2d at 728, 733.

This factor has also been arbitrarily applied in cases involving unexpected confrontations with police. In Washington v. State, 432 So.2d 44 (Fla. 1983), the circumstance was disallowed. Washington had been attempting to sell stolen guns when he was confronted by a deputy sheriff. 432 So.2d at 46. Washington drew a pistol on the deputy and ordered him to freeze. Id. This evidence was insufficient to support this circumstance. 432 So.2d at 48. Yet, in Johnson v. State, 438 So.2d 774 (Fla. 1983), this aggravating factor was upheld where a murder occurred during an unexpected confrontation with a police officer while Johnson was fleeing from an offense. 438 So.2d at 775-776. Two deputies responded to the call. 438 So.2d at 776. The rest of the events as follows:

> In the meantime another deputy, Theron Burnham, radioed that he had seen a suspect on the road in question. On arriving in the area Allison and

> Darrington stopped their car facing Burnham's patrol car. A white male walked rapidly from a drainage ditch at the side of the road and crossed in front of the deputies' car. He fired two shots at the deputies and escaped across an open field. Allison and Darrington then found Burnham's body in the drainage ditch; he had been shot three times.

Id. Thus, there was absolutely no evidence as to what preceded the shooting of the officer. There was no evidence to exclude the possibility of a confrontation with the deputy. Indeed, that is the most logical inference. There was absolutely no evidence of any prior plan to kill the deputy. Indeed, the defendant could not have known he was going to confront a deputy. However, the (5)(i) circumstance was applied. 438 So.2d at 778-779. This finding appears totally arbitrary and capricious.

The arbitrariness of this aggravating circumstance is further compounded by the interpretation of the phrase "without pretense of moral or legal justification." In Cannady, 427 So.2d 723 (Fla. 1983), the defendant had abducted the night auditor at a hotel and drove him to a remote area and shot him. 427 So.2d at 725. The second prong of the (5)(i) factor was analyzed as follows:

> We find that the state failed to prove beyond a reasonable doubt that this murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The only direct evidence of the manner in which the murder was committed was appellant's own statements. When he first began incriminating himself, he repeatedly denied that he meant to kill Carrier. During his confession appellant explained that he shot Carrier because Carrier jumped at

> him. These statements establish that appellant had at least a pretense of moral or legal justification, protecting his own life. The trial judge expressed disbelief in appellant's statements because the victim was a quiet, unassuming minister and because appellant shot him not once but five times. Though these factors may cause one to disbelieve appellant's version of what happened, they are not sufficient by themselves to prove beyond a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. . . Thus, the unlikelihood that the victim threatened or jumped appellant and the appellant's shooting the victim five times are insufficient facts to prove premeditation beyond that necessary to sutain a conviction for premeditated murder. We therefore find that the court erred in finding tht the murder was committed n a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

427 So.2d at 730-731. This Court in Cannady seemingly gave a very broad reading to this phrase, and stated that it can be based on an uncorroborated statement of a defendant, of questionable credibility, that a robbery victim jumped at him. It is important to note that this case involved an abduction of a robbery victim, followed by five separate shots.

It seems, however, that Cannady is an isolated instance, which is another way of stating an arbitrary application of this factor. In Johnson v. State, 442 So.2d 193 (Fla. 1984), this factor was upheld:

> On December 4, 1979, Terrell Johnson went to Lola's Tavern in Orange County to redeem a pistol he had pawned to James Dodson, the bartender/owner of the tavern. Although Dodson had given

> Johnson fifty dollars when the gun was pawned, he demanded one hundred dollars to return it. Before paying for the gun, Johnson asked to be allowed to test fire it and took the gun to an open field across the road from the bar where he fired several shots. While returning to the bar, Johnson, irate at what he considered to be Dodson's unreasonable demand, decided to rob the tavern. Johnson told police that he took Dodson and a customer, Charles Himes, into the mens' room at the end of the bar, intending to tie them up with an electrical cord. The customer lunged at Johnson and he began firing wildly, shooting both men. He then returned to the bar and cleaned out the cash drawer, also taking Dodson's gun which was kept under the bar. As he was wiping the bar surfaces to remove fingerprints, Johnson heard movement from the back room and returned to find the customer still alive. Johnson shot him again, not according to Johnson, "to see him dead," but, to "stop his suffering."

442 So.2d at 194-195. Thus, in Johnson, there was certainly a pretense of moral justification for the original robbery (anger at being cheated over the pawning). He also had the identical motivation for the shooting as in Cannady; the victim lunged at him. Additionally, Johnson did not involve the additional heightened premeditation of abducting the victim. Yet, the (5)(i) aggravating factor was upheld with the following analysis:

> In the instant case, the evidence does not reflect that appellant first shot the store clerk in response to what appellant believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor. The facts of this case are sufficient to show the heightened premeditation required for the application of this aggravating circumstance.

446 So.2d at 1057. Thus, just as in Cannady, the shooting was prompted by a robbery victim making a threatening movement. Additionally, there was no abduction of the victim in Herring, supra. However, the Court upheld this circumstance. See also O'Callaghan v. State, 429 So.2d 691 (Fla. 1983); Jones v. State, 440 So.2d 570 (Fla. 1983).

This circumstance is also unconstitutional as applied, based on the inablility of this Court to meaningfully review the use of this factor by the jury that recommends what penalty should be imposed. The original principles for application of this factor have vacillated so greatly that trial courts have erroneously instructed juries to consider this factor when, as a matter of law, it can not apply. This danger has been noted by Justice Ehrlich:

> We have, since McCray and Combs, gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated in Section 921.141(5)(i), Florida Statutes (1981). Loss of that distinction would bring into question the constitutionality of that aggravating factor, and, perhaps, the constitutionality, as applied, of Florida's death penalty statute.

Herring v. State, 446 So.2d at 105 (opinion of Ehrlich, J.). See also, Burch v. State, 522 So.2d 810, 816-817 (Fla. 1988)(Shaw, Ehrlich, Grimes, JJ., dissenting)

The failure of this aggravating circumstance to genuinely narrow the class of persons eligible for the death penalty, threatens the entire statute, as Justice Ehrlich points out. Section 921.141(5)(d) creates an aggravating circumstance

in all felony murders. The vague wording of (5)(i) and its arbitrary application allows for its application in all premeditated murders. Thus, the court and jury in the State of Florida now have the unbridled and uncontrolled discretion to apply the death penalty in any first degree murder case, whether it is based upon a theory of premeditated murder or felony murder. Because of the inclusion of subparagraph (d) and the addition of subparagraph (i) to said section, at the penalty phase of a first degree murder case, the burden is shifted to the defendant to establish that a life sentence is proper. Even if the state puts on no evidence, whatsoever, in phase two, the defendant will begin with one aggravating circumstance in all cases, either in subparagraph (d) or subparagraph (i) of said section. This shifts the burden of proof to the defendant in the penalty phase of the capital trial. State v. Dixon, 283 So.2d 1 (Fla. 1973). The combination of the above subsections of said section creates a presumption that death is a proper sentence. This results in the unconstitutional shifting of the burden of proof in a criminal case. Mullaney v. Wilbur, 421 U.S. 684 (1975).

This Court has held that an Eighth Amendment challenge must be raised on direct appeal, even when not raised previously. See Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987). As further noted by this Court, at least one valid statutory aggravating factor must exist before imposition of the death penalty is warranted. See, Banda v. State, 536 So.2d 221, 225 (Fla. 1988). Section 921.141 (3) Fla.Stat. (1987). The sole

statutory aggravating factor found by the trial court to exist is, as has been demonstrated, unconstitutionally vague and overbroad under the eighth and fourteenth amendments. That factor also lacks record support, in that the second prong of the factor, a pretense of moral or legal justification, exists which effectively prevents this aggravating factor from applying. Thus there remains no valid basis upon which to impose a death sentence, and the death sentence must accordingly be vacated and a life sentence imposed.

CONCLUSION

Because the single statutory aggravating factor found to exist by the trial court is unconstitutionally vague under the eighth and fourteenth amendments and because that aggravating factor otherwise does not apply here since there is a pretense of legal or moral justification, the death penalty must be reversed and a sentence of life imprisonment imposed. Alternatively, because the death penalty is disproportionate to the facts of this offense, the death penalty must be reversed and a sentence of life imprisonment imposed.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
Fla. Bar No. 353973
112-A Orange Avenue
Daytona Beach, Fla. 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, with appendix, has been mailed to the Honorable Robert Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida, 32114, this 3rd day of January, 1990.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
FLA. BAR NO. 353973
112-A Orange Avenue
Daytona Beach, Fla. 32114
(904) 252-3367

ATTORNEY FOR APPELLANT