IN THE SUPREME COURT OF FLORIDA

GEORGE M. HODGES,

Appellant,

vs. Case No. 74,671

STATE OF FLORIDA,

Appellee. :

_____.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

The Hillsborough County Grand Jury indicted the Appellant, George Michael Hodges, for the premeditated murder of Betty Ricks, which occurred an January 8 and 9, 1987. (R806-807, 815-816)[1]

Appellant was tried by jury before the Honorable John P. Griffin on July 10-14, 1989. (R1, 854) The jury found Appellant guilty of murder in the first degree (R883) and recommended the death penalty. (R885) The court adjudicated Appellant guilty and sentenced him to death on August 10, 1989. (R901-908)

Appellant filed his notice of appeal on August 23, 1989. (R910) The court appointed the public defender to represent Appellant on this appeal.

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[1] References to the record on appeal are designated by "R" and the page number.

STATEMENT OF THE FACTS

A. APPELLANT'S MOTION IN LIMINE

Prior to trial, the State gave notice that it intended to present evidence of Appellant's arrest for indecent exposure, The alleged offense occurred at the Beverage Barn in Plant City on November 10, 1986, and Betty Ricks was the victim. (R853)

Defense counsel filed a motion in limine to exclude evidence of the indecent exposure incident on the following grounds: The evidence was relevant solely to prove Appellant's bad character or propensity. The victim's statements were hearsay. Admission of the statements would violate Appellant's Sixth Amendment right to confrontation. Statements concerning the victim's state of mind were not relevant. Any probative value of such statements was substantially outweighed by their prejudicial effect. (R842-843)

The court heard argument on the motion on July 6, 1989. (R752,759-780) On July 7, the court ruled that evidence of the indecent exposure, including Ricks' statement that she was adamant about prosecuting, was admissible. The court excluded evidence of statements by Ricks concerning any subsequent acts by Appellant. (R938,940-941)

B. THE STATE'S CASE

Plant City Police Officer Mark Holsts was dispatched to the Beverage Barn on John Redmond Parkway in Plant City on January

8, 1987.[2] (R255-256) He arrived around 6:00 a.m. (R256) Holste found the woman who worked there lying next to her car. He observed an injury to her neck and blood. (R257) Emergency medical personnel arrived in a few minutes and transported the woman to the hospital. (R257-258) Holste also found a woman's purse and a bank bag lying near the body. Both bags were closed. (R258)

Holste identified photographs showing the victim's vehicle parked beside the Beverage Barn, the purse, and the bank bag. (R260-265,917-922) Another phota showed a shopping center across the street from the Beverage Barn. (R265,923) A Zayrs Department Store was across the street, but it was not included in the photo. (R266) Holste displayed a diagram of the scene which showed the limited number of exit routes from the Beverage Barn. (R267-272)

Jerry Howell was riding to work with Mack Joiner on the morning of January 8, 1987. (R274-275) They drove past the Beverage Barn around seven minutes after six. Howell saw Betty Ricks' car with the door open. (R275-276) They turned around and pulled up behind Ricks' car. They found Ricks lying on her side by the car. (R277-278) Howell told Mack ta call the police. (R278) Howell saw Ricks' open purse lying on the ground. (R278-279) Two other men approached before the police arrived. One of them moved Ricks' head. (R280,282) Holste was the first police officer to arrive. (R280) Howell did not see any vehicles approaching or

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[2] According to the transcript, the prosecutor stated that the date was January 8, 1989. (R256) This was either an inadvertent misstatement or a typographical error.

leaving the Beverage Barn. He did not see any trucks in the area. (R281)

The parties stipulated that the victim was Betty Ricks, she was twenty years old, and she died on January 9, 1987. (R283)

The medical examiner, Dr. Lee Miller, conducted an autopsy on Betty Ricks on January 10, 1987. (R284-287) He found two gunshot wounds, one to the head and one to the neck. Either wound could have been the fatal injury. (R287-289) He could not determine which gunshot occurred first. (R291) Ricks probably lost consciousness almost immediately after being struck by either bullet. She never regained consciousness and died the following day. (R290-291) Dr. Miller recovered bullet fragments from the neck wound and the projectile from the head wound. He turned them over to Plant City Police Detective Smith. (R288-290)

Plant City Police Detective Rick Orsechowski testified that he interviewed Betty Ricks in November, 1986. (R295-296) The court overruled defense counsel's renewed objection and permitted the officer to testify that Ricks was given a request for prosecution form concerning an act af indecent exposure committed by Appellant. (R296-297) She said she wanted to press charges and was adamant about it. (R297)

Orzechowski interviewed Appellant about this incident on November 11, 1986, at the Zayre Department Store across the street from the Beverage Barn. (R297, 321) Appellant was driving a two-tone brown or gold pickup truck. (R298) The court overruled defense counsel's relevancy objection and allowed the police

officer to testify that Appellant said he was unaware that his zipper was open and that he exposed himself when he went through the Beverage Barn. He said it was an accident. (R298-300)

Orzechowski first became involved in the homicide investigation in 1988. (R301) He was aware that Betty Ricks' stepfather, Mr. Tucker, ran for a seat on the city commission baaed in part upon his desire to discharge the police chief because of the prior investigation of this case. (R302)

Detective Craig Horn testified that he had a conversation with Betty Ricks in November, 1986, regarding the prosecution of Appellant for indecent exposure. (R304-305) She said she was adamant about prosecuting him. (R305)

Janetta Hansen worked with Appellant on a maintenance crew at the Zayre store. (R306-307) Their shift worked from 6:00 to 2:00. Hansen normally arrived about twenty minutes early and parked in the front parking area. (R308) Appellant drove a truck and usually parked next to her or nearby. (R309-310) Hansen parked in front of Zayre around twenty minutes before six an January 8, 1987. (R310) She remained in her vehicle drinking coffee for about twenty minutes. Although it was dark, she could see the Beverage Barn. (R301-311) Around fifteen minutes before six she saw a truck, which looked like Appellant's, pull in behind the Beverage Barn and turn its lights off. (R311-314) She could not identify a photo of the truck. (R314) She did not see the truck leave. (R313) She did not see the victim's vehicle. (R312-314) Appellant did not come to work that day. (R314)

When Hansen learned that a crime had occurred at the Beverage Barn, she told her boss and the police about the truck. She told Detective Boydston she was not sure, but it looked like Appellant's truck. (R314-315) She did not see who was driving the truck because it was too dark. (R319)

Plant City Police Detective Roosevelt Miller arrived at the Beverage Barn around 7:15 a.m. on January 8, 1987. (R322-323) Miller found and photographed two .22 caliber shell casings lying on the ground near the victim's vehicle. One was between the car and the building. The other was about six feet from the back tire. (R323-327,925-926)

Miller went to Appellant's home in Mulberry shortly after noon on January 8. He was accompanied by Sgt. Cosper and two Polk County deputies. (R327-328) Appellant's house was a fifteen minute drive away from the Beverage Barn. (R328-329)

Appellant told Miller ha had been at home since 5:00 p.m. on January 7. He had not driven his truck on January 8. (R329,332) He said his stepson, Jessie Watson, had driven the truck *to* Mulberry High School around 6:30 a.m. (R333-334) Watson called home around 9:30 and said he was sick. He came home about fifteen minutes later. (R334)

Appellant gave Miller a live round from some bullets in his truck and a Marlin .22 caliber rifle, State's exhibit 12. (R329-331,334, 337) Appellant test-fired the rifle and gave Miller a bullet to compare. (R337-338) He allowed Miller to take a photo of his truck, State's exhibit 13. (R331-332,927)

Hiller also interviewed Jessie Watson. Watson said he left for school around 6:30 and came home sick at 8:20. (R333,338, 340)

Miller processed Ms. Rick's vehicle for fingerprints at the station but found nothing to link Appellant to the vehicle. (R335,336) Miller "took" some tire tracks at the Beverage Barn but was unable to match them with Appellant's truck. (R336) He also took dirt samples from the scene and Appellant's truck, but the samples were never sent to the lab. (R336)

Edward Leuandowski was a detective for the Zayra store and Appellant's neighbor in Mulberry. (R341-343) Between six and seven o'clock on the morning of January 8, 1987, Leuandowski called his wife at home and asked her to see whether Appellant's truck was on his property. (R343-344)

Peggy Lewandowski testified that her husband's call woke her up on the morning of January 8, 1987. (R345-347) While she was talking to her husband, she saw a man drive Appellant's truck into his front yard. She could not identify the man. She saw the truck leave about ten minutes later. She did not see who was driving. (R349-352) She thought this occurred between seven and eight o'clock, although it could have been earlier. (R351) Two and a half years prior to trial she told Detective Boydston that she saw the truck pull in between 7:45 and 8:00 a.m. and that she was positive of the time. (R353) In 1989, she told Detective Orzechowski the truck pulled in around 7:55 and left fifteen minutes later.

She told the detective she was positive of the time, but she said at trial that she was not. (R354)

Sixteen-year-old Vickie Boatwright began dating her boyfriend, Jessie Watson, in April, 1988. (R362-363) One day in July or August, 1988, she went ta Watson's house to return a jacket. Watson wasn't home. Only Appellant and two-year-old Jennifer were there. (R366,370-371) Appellant was cleaning a gun at the dining room table. Boatwright asked Appellant if he had ever been shot. He answered, "No." (R367,371) She then asked if he ever shot anyone. Appellant looked at her for a couple of minutes, then said, "Yeah." (R367-368) He said he killed a girl. He said nothing happened to him as a result of shooting the girl. When the police came to his house, he gave them one of Watson's guns. (R368) Appellant said he got rid of the gun he used to shoot the girl. He did not tell Boatwright who the girl was, where the shooting took place, nor why he shot her. Boatwright did not believe him. She thought he was kidding. (R369,372)

Boatwright asked Watson whether the police had one of his guns. He said they had it because they thought Appellant killed a girl. When she asked if he did, Watson told her not to worry about it, that it was "just bullshit." (R369,372-373)

Harriet Hodges worked at a phosphate mine. (R378) She lived at 4363 Ramblewood Place. She owned the mobile home and the property. (R379) Mrs. Hodges married Appellant on January 5, 1984. (R379-380) They had a three-year-old daughter named Jennifer. She had two children from prior marriages, nineteen-year-old Jessie and

ten-year-old Star. (R380-381) Appellant drove a 1986 Ford pickup. (R381) Mrs. Hodges drove a 1984 Ford station wagon. (R382)

On the night of January 7, 1987, Mrs. Hodges' brother and his wife came over to play cards with her and Appellant. They left sometime after midnight. Appellant and Mrs. Hodges went to bed in the early morning hours. (R382)

On the morning of January 8, Mrs. Hodges heard Jessie talking to someone in the living room. (R383) She was not sure whether Appellant was still in bed before or after this conversation. (R386) Jessie drove Appellant's truck to schaol that morning. He had never driven the truck before. (R386) Mrs. Hodges told Det. Boydston that she got up at 6:10 a.m. to give Jessie lunch money. (R393) At trial, she could not remember whether she talked to Jessie about driving the car or truck to school that morning. (R393-395) She told Det. Orzechowski that Jessie usually drove the car to school and asked her for permission to drive the truck that day. (R398) She did not remember telling Boydston Jessie had trouble starting the truck because it sat all night. (R395)

Mrs. Hodges testified that she remained in bed until about the time the police arrived. (R384-385) She told the police Appellant was in bed with her all morning. (R388) She did not actually know whether he was there because she was asleep. She was trying to protect Appellant when she talked to the police. (R390) She did not yet know Appellant had been charged with indecent exposure. (R387)

Both Jessie and Appellant owned .22 Marlin rifles exactly like State's exhibit 12. (R387-388,396-397) The police took one of the rifles the day they came to the house. (R397) Mrs. Hodges could not remember who removed the rifle from the gun cabinet. (R400-402) In a deposition, she told defense counsel the police took the rifle from the gun cabinet. (R400-402) She did not know whether the police had Jessie's gun or Appellant's gun. Jessie sometimes loaned his gun to another boy. (R402-403) After Appellant's arrest in 1989, Mrs. Hodges took two .22 rifles to the police. One was a Marlin; the other was not. (R397,405-406,408-410)

Jessie Watson testified that he got along well with his stepfather, the Appellant. (R413-414) They hunted together and had seven rifles in the gun cabinet. State's exhibit 12 was Watson's Marlin .22. (R414) He could identify it by scratches on the stock. (R416) Appellant also had a rifle like exhibit 12 in January, 1987. (R415) State's exhibit 13 was a photo of Appellant's truck. (R416)

On January 8, 1987, Watson woke up a little after 5:30 a.m. He heard a truck bumping through the yard, then footsteps. (R416-417) When Watson entered the kitchen he saw Appellant coming in the back door carrying a .22 rifle. He could not tell whether it was his gun or Appellant's. Appellant placed it by the drier. (R418) Watson told Appellant he was not feeling well. Appellant told him to drive the truck to school and gave him the keys. Watson got dressed and departed in the truck ten or fifteen minutes

later. He had never driven it before. (R419-421) Watson did not talk to his mother before leaving for school. He arrived at the school around 6:20. (R421) Classes started at 7:00. Watson remained at school for 45 minutes *to* an hour, then returned home. It was about a fifteen minute drive. (R421-422) Watson went to bed and remained in his room when the police were there. (R423)

The next day, Appellant told Watson to tell the police he drove the truck to school. (R423-424) Watson talked *to* the police a few times over the next several months. He never told them he saw Appellant with a rifle that morning. He lied to the police because he was scared and wanted to protect Appellant. (R424,446) In his deposition, Watson denied trying to protect Appellant. (R446) Appellant continued to live at home until his arrest in 1989. (R424-425)

About two months after January 8, 1987, Watson saw one of the .22 rifles in a dirty plastic bag in the back of Appellant's truck. He also observed a hole which had been dug near the tool shed. (R425-426,447-448) In a deposition, Watson said he was not sure the gun he saw was Appellant's. (R448-449)

About five months after January, 1987, Appellant told Watson he walked up behind the girl at the Beverage Barn, put the gun to her head, said, "Sorry about this," and shot her four or five times. (R428-429) Watson did not want to believe this story and did not go to the police. (R431) He still does not believe it. (R432)

After Appellant's arrest, Watson wrote letters telling Appellant that he loved him, he had lied to the police, and the prosecutor and the police were putting pressure on him to testify. (R430-431,457-458,464-468,472-473,928-934) Watson readilyadmitted writing some of the letters, but he attempted to deny writing two of them, even when told hand-writing experts had determined that he did write them. (R451-455,459-461,468-469, 472)

On January 29, 1987, Watson told Det. Boydston that his mother told him to take the truck and he never spoke to Appellant about it. He also said he had trouble starting the truck because it had bean sitting there all night. (R433-434) On February 2, 1987, Watson told Boydston that he went into Appellant's room to ask him for the keys. Appellant was home in bed. (R434)

At the time of trial, Watson was receiving treatment for cocaine abuse. He claimed he had the drug problem for five or six months. It began after Appellant's arrest. (R434-435,463)

Plant City Police Officer Bryan Davis testified that Mrs. Hodges brought two .22 rifles to the police department on February 14, 1989. The first rifle, State's exhibit 14, was a Marlin. The second, State's exhibit 15, was a Savage. (R476-479) The difference between the two Marlin rifles was that exhibit 14 had a safety feature which was absent from exhibit 12. The safety features were added to later models of the rifle. (R479-480)

Jessie Watson identified exhibit 12 as his own .22 Marlin. Appellant had a gun exactly like it. (R481-482) Exhibit 15 was a gun which belonged to Appellant's father. (R482) Watson

said exhibit 14 was not the gun Appellant owned when Watson bought exhibit 12. The difference between exhibit 14 and Appellant's original gun was the safety feature. Exhibit 14 was not the gun Watson saw in the truck. (R482-484) The officers in the hallway at trial showed Watson the safety feature on exhibit 14. (R485)

Kim Diaz was an arbitrator for the criminal diversion program. (R486) She testified that Appellant's indecent exposure charge was scheduled for an arbitration hearing on January 8, 1987. (R488) On January 8, Appellant called and said there was no reason for him to go through the diversion program. He wanted his case returned to the State Attorney's Office. (R489) This call may have been made in the early afternoon. Diaz could not recall. (R490)

Officer Daniel Smith testified that he went to the hospital shortly after Ms. Ricks arrived on January 8, 1987. She died the next day without regaining consciousness. Smith attended the autopsy on January 10. (R492-493) The medical examiner removed bullet fragments during the autopsy. They appeared to be .22 caliber. (R493)

Det. Orzechowski testified that he arrested Appellant on February 10, 1989, for the murder of Betty Hicks. (R497-498) After being advised of his rights, Appellant said he did not awn any other .22 caliber rifle on January 8, 1987, except for the one he turned in to the police. (R498-499)

Det. Thomas Cosper testified that he went to the Beverage Barn around 7:00 a.m. on January 8, 1987. The victim was in an ambulance. Her car was parked just south of the building, with the

door open, and blood on the outside of the window. (R507-509) Cosper saw some tire tracks behind a nearby furniture store. He did not know if Miller photographed them. (R512-513)

Cosper accompanied Miller and two Polk County deputies to Appellant's residence shortly after noon on January 8. (R509-510) Appellant said he *got* home between 5:00 and 6:00 p.m. on January 7 and did not drive the truck again. Watson borrowed the truck and drove it to school around 6:30 a.m. on January 8. Watson called and said he was sick around 9:30 or 10:00. Be came home around fifteen minutes later. Watson was the only person who drove the truck that morning. (R510-511)

Appellant brought a .22 caliber Marlin rifle into the yard. He test fired it, gave them the shell casing, and told them they could take the rifle. He also gave them .22 caliber cartridges from his truck. (R511-512) Det. Miller interviewed Watson at the house that day. Watson got the gun out of the gun cabinet. (R513-514)

C. DEFENSE WITNESSES

Det. Orzechowski spoke to Vickie Boatwright on January 30, 1989, at her home. He told her he was looking for Jessie Watson and that Appellant was a suspect in a homicide. (R520-522) He asked Boatwright if she had any information about the shooting of Betty Ricks. She did not give him any information that she had any knowledge relating to the shooting. (R523)

Det. Orzechowski also interviewed Jessie Watson on January 30, 1989. Watson said he drove the truck to school on January

8, 1987, because he was not feeling well. (R523-524) Watson said he was going to drive the car, but his mother told him to ask Appellant far the truck. He also said the gun confiscated by the police was the only gun in the house on the day of the shooting. (R524) On February 10, 1989, Watson said he did not know what happened to the gun he allegedly saw Appellant with on the day of the shooting. (R524) Watson said nothing about seeing the gun in the back of the truck nor about Appellant digging it up from the back yard. (R524-525)

On February 9, Mrs. Hodges told Orzechowski there were two .22 caliber rifles at the house. She told him there was a second .22 caliber rifle exactly like the other one at home in the gun cabinet. Orzechowski asked her to bring him the second gun. (R525-527) She turned the gun over to Officer Davis. (R527-528)

Det. Sid Boydston interviewed Mrs. Hodges on January 29, 1987. (R529-530,534-535) She said Appellant was in bed when she woke up around 6:10 a.m. on January 8, 1987. Watson spoke to her about driving the car to school, but she told him to ask Appellant for use of the truck because the car was low on gas. Watson left for school around 6:30 a.m. (R530) Watson had trouble starting the truck. (R531) She said Appellant got out of bed around 9:00 a.m., then laid down on the couch until the police came. (R531) Mrs. Hodges indicated that she was aware of the indecent exposure incident before January 8, 1987, but she could have learned about it between January 8 and January 29. (R531, 535)

Det. Boydston interviewed Jessie Watson on January 29, 1987. Watson said he got up around six o'clock on January 8, 1987. (R531) He said he was preparing to leave in the station wagon when his mother told him to take the truck. (R532) He left the trailer at 6:31 a.m. He had difficulty starting the truck, so the truck appeared to have been sitting all night. (R532) Boydston again spoke to Watson on February 2, 1987. Watson said he went into Appellant's room to ask for the truck keys and that Appellant was home in bed. (R532)

Det. Boydston also interviewed Janetta Hansen. She said she believed she saw Appellant's truck the morning of the shooting, but she could not swear to it. (R532-533)

Det. Boydston was present when Assistant State Attorney Benito interviewed Jessie Watson at the State Attorney's Office. (R533-534) On cross-examination, Boydston testified that he and Benito made it clear to Watson that they did not believe him. Boydston did nat believe Watson from "Day One." (R535) The court overruled defense counsel's objection that this was irrelevant. (R535) Both Boydston and Benito told Watson they felt he was hiding something, but he stuck to his story. (R535) They both told Watson they felt his dad wanted him in the truck, so he could point his finger at his son, but Watson stuck to his story. (R535-536) Watson was scared. (R536)

Det. Miller testified that he talked to Jessie Watson at his home on January 8, 1987. (R536-537) Watson said he usually got up around 6:00. He left at 6:31 that morning. (R537) Watson drove

the truck to school and came home sick around 8:20. He said no one else drove the truck before he did. (R538) Miller confiscated a .22 caliber Marlin rifle that morning to have it tested at the lab. (R538)

Larry Smith testified that he was in the vicinity of the Beverage Barn between 5:55 and 6:10 or 6:20 on the morning of January 8, 1987. (R539-540,543) He saw a small black or brown truck with its lights on parked right in front of the Beverage Barn. (R540,542-543) He did not see anyone sitting in the truck. (R541) The truck shown in State's exhibit 13 was not the truck he saw. (R541,543) He may have told Det. Miller he saw a white male get out and walk around in front of the truck. (R543) He denied telling Miller the time was 6:25 or 6:30 a.m. (R544) He did not see Betty Ricks' vehicle, but his view may have been obscured by the truck. (R541,544)

John Willingham, a Taco Bell manager, testified that he was in the vicinity of the Beverage Barn around 6:00 a.m. on January 8, 1987. (R545,546) He saw the young lady's car in the parking lot with its lights on and the door open. Someone rode a bicycle across the street in front of him and into the Zayre parking lot. He called the police because he thought there might have been a robbery. (R548-553)

Two handwriting experts, Ray Green and James Outland of the FDLE, compared known writing samples from Jessie Watson with the letters sent to Appellant in jail and concluded that they were all written by the same person. (R555-564)

Appellant followed defense counsel's advice and waived the right to testify. (R567-568)

D. PENALTY PHASE

The prosecutor argued that the court should allow the State to present hearsay evidence of Betty Ricks' statements concerning Appellant harassing her shortly before her death in support of the disrupt or hinder law enforcement aggravating circumstance. (R662-665,672-673) Defense counsel objected and argued that such evidence was hearsay and would violate the right to confrontation, there was no way ta adequately rebut the statements, the statements were irrelevant, the disrupt or hinder law enforcement aggravating circumstance did not apply because the indecent exposure case had gone to arbitration, the hearsay was unreliable, and it would violate the Eighth and Fourteenth Amendments. (R665-667,674-677) The prosecutor responded that the statements were reliable because they were made to three, four, or five different witnesses, and defense counsel could rebut the statements by impeaching the witnesses or by calling Appellant to refute them. (R677) The court overruled defense counsel's objections and allowed admission of the statements. (R678)

Det. Orzechowski testified for the State, over defense counsel's renewed hearsay objection, that Betty Ricks told him she was adamant about prosecuting Appellant for indecent exposure. (R681-682) Over defense counsel's continuing hearsay objection, Orzechowski said Ricks told him Appellant kept coming into the Beverage Barn harassing her and trying to get her to drop the

charges. It was scaring her. (R682-683) Orzechowski last spoke to Ricks just prior to her death. (R683)

Det. Craig Horn testified that he spoke to Ricks about her contacts with Appellant after the indecent exposure incident two or three times. (R684) Again, the court overruled defense counsel's continuing hearsay objection. (R684) Ricks told him that the guy who flashed her had come in several times and tried to get her to drop the charges. But Ricks was adamant about pursuing it. Horn's last conversation with Ricks was about three weeks prior to her death. (R685) Ricks never indicated that Appellant had threatened her in any way. She was not afraid of Appellant. She was mad. (R687)

Betty Ricks' sister, Debra Ricks testified she was aware that her sister had charged Appellant with indecent exposure. (R688) Defense counsel then objected and asked the court to admonish the witness or the jury that crying or showing emotion relating to the victim or the impact on the family was improper. He argued that her conduct was prejudicial and inflammatory and that if she continued to cry the prejudicial impact would outweigh the probative value. (R688-689) The court refused to admonish either the witness or the jury and noted that the jurors would know the family would be upset. The court said it would consider a proposed instruction "to be given during deliberations." (R689)

Again over defense counsel's continuing hearsay objection, Debra Ricks testified that one morning her sister called and said Appellant had come and asked her to drop the charges. He said

he did not know what he was daing, that he had a family, job, and reputation to protect, Betty Ricks told him he should have thought of that before he did it. She refused to drop the charges. (R689-690)

Appellant's mother, Lula Hodges testified for the defense that Appellant grew up in West Virginia. (R693) He was the youngest of five children, born in 1957. (R693,694) Appellant had a close relationship with one of his older brothers who drowned. The brother's death seemed to change Appellant completely. (R694) They moved frequently. Appellant was not able to establish any long term friendships except with his brothers. (R694) Appellant was a good father. His children and stepchildren loved him. In addition to Jessie, Star, and Jennifer, Appellant had another child from a prior marriage. (R695-696) Appellant did not finish high school because they moved to another state, but he did get his GED. (R695) Mrs. Hodges had a close relationship with Appellant. (R696)

Harold Stewart was Appellant's brother-in-law and worked with Appellant. Appellant was a good worker. (R697) He never had any problems with Appellant on the job. (R697-698) Appellant was a good father, He loved his stepchildren and his children. (R698) Appellant got along well with his wife's parents and helped them any way he could. (R698) Appellant loved fishing. Stewart often fished with him. Sometimes Jessie went with them, (R698-699) Stewart still considered Appellant to be his friend. (R699)

Defense counsel Perry informed the court that Appellant was upset with his counsel and had indicated he did not care what

they did. Appellant did not want them to "put the second phase on" and did not want to testify. (R696) Defense counsel Conrad requested an opportunity to confer with Appellant. (R700) After a short recess, Appellant waived the right to testify. (R701, 702)

The court decided to instruct the jury on two aggravating circumstances: the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, and the crime was committed in a cold, calculated, and premeditated manner. (R703) Defense counsel objected that the State had not proven either circumstance beyond a reasonable doubt. (R704-705) Defense counsel further objected that the cold, calculated, and premeditated circumstance was unconstitutionally vague. (R705-706) The court overruled the objections. (R706)

During closing argument the prosecutor urged the jurors to consider what a living person can do in prison and whether Betty Ricks would have chosen "life in prison or lying on that pavement in her own blood,.,," (R717) Defense counsel did not object. (R717-718)

The court instructed the jury on both aggravating circumstances requested by the State. (R726)

Within fifteen minutes after the jury retired to deliberate, Appellant attempted suicide in the holding cell. (R730-731, 735) At about the same time, the jury submitted a request for a list of "the ten conditions of mitigating and aggravating circumstances." (R731) Defense counsel Perry objected to providing such a list, especially since the court had instructed on only two

aggravators. (R731,732) The court indicated it would reread the aggravating and mitigating circumstance instructions. (R732) Defense counsel Conrad asked the court to delay the proceedings so Appellant could be removed by the paramedics. (R732,733)

When the court decided to bring the jury in to respond to their request, defense counsel noted for the record that he was not waiving Appellant's presence for any further proceedings. (R734) The court noted that Appellant had been treated by EMS and taken to the hospital. The court found that it was physically impossible for Appellant to be present and proceeded without him. (R735)

The court instructed the jury on the aggravating and mitigating circumstances. (R736-737) When the jury returned with its sentencing recommendation, the court told the jurors Appellant was absent because of a medical emergency. (R739-741) The jury recommended the death penalty, and the court polled the jurors. (R742-743)

After the jury was released, the court determined that Appellant had left a note addressed to defense counsel. The court found that the contents of the note were nat privileged and made it a part of the record, (R745-750,886-887) Appellant's note thanked defense counsel, asserted that Watson lied, declared Appellant's innocence, thanked the bailiffs, and apologized to Mr. Perry far not giving him a chance to help Appellant during the penalty phase. (R886-887)

E. POST-TRIAL PROCEEDINGS

On July 21, 1989, defense counsel filed a motion for new trial. (R888-889) The final ground for relief in the motion asserted that the court erred by proceeding with the penalty phase of the trial after Appellant attempted suicide. (R889)

At a hearing on July 24, 1990, defense counsel questioned Appellant's competency to proceed with sentencing and asked the court to appoint two doctors to examine him to determine his competency. (R944-947) The court granted the request and appointed doctors Merin and Saa to conduct the examination and report to the court. (R890-893,947)

Dr. Sidney Merin, a clinical psychologist, prepared his report on August 3, 1989. (R897-900) He concluded that Appellant was competent to appear in court for sentencing but cautioned that Appellant might again attempt suicide. (R899) Appellant continued to proclaim his innocence during Dr. Merin's examination and explained that he attempted suicide because he refused to spend time in jail for something he did not do. (R897-898) Dr. Merin also found that Appellant had no memory of the suicide attempt, which was planned the night before. He was suffering from psychogenic amnesia probably generated in part by his emotional visit with his parents following his conviction. (R898)

The court attempted to hold a competency hearing on August 7, 1990. The hearing was continued because Dr. Saa had not yet examined Appellant. (R951-958) Dr. Saa examined Appellant on August 7 and reported that ha was competent to be sentenced.

Appellant continued to assert his innocence and that he preferred suicide ta imprisonment or the death penalty. (R895-896)

The court conducted another hearing on August 8, 1989, and found Appellant competent to proceed with sentencing based upon the doctors' reports. (R782,784) The court also heard and denied defense counsel's motion for new trial. (R785-791) Defense counsel argued, inter alia, that the court erred in proceeding with the penalty phase after Appellant attempted suicide. (R787) Counsel pointed out that Dr. Merin reported Appellant's lack of memory of the day of the penalty phase of trial, and that this was caused in part by Appellant's visit with his parents following his conviction the day before. (R787-788) Counsel argued that he had serious doubts about Appellant's competency during the penalty phase. (R788) Counsel also asked the court to consider a Public Defender's Office polygraph examiner's report that Appellant was not lying when he denied committing the murder. (R788-789,894)

The court heard sentencing arguments on August 9, 1990. (R960-977) The prosecutor called the court's attention to the presence of the victim's mother and stepfather with the following remarks:

> Mr. Tucker, the victim's stepfather, and Mrs. Tucker, the victim's mother, are seated in the courtroom. They would certainly like to get up here and tell yau about their daughter. I have told them about the line of cases from the Supreme Court regarding victims' impact statements in front of juries and how the Supreme Court has reversed cases in which family members have gotten up in second phase and told the jury

> about what impact the victim's death has had on the family. I don't think the same wauld apply to a Court because you are going to determine whether this man lives or dies based on aggravating and mitigating circumstances.
>
> But I told them to, if the Court does impose the death penalty, I don't want to run the risk of the Supreme Court three years down the road saying you shouldn't have heard any statements made by the family regarding victim impact.
>
> Suffice it to say, they lowed their daughter very much. Mr. Tucker wanted me to tall you that he promised his daughter as she lay dying in the hospital that he would make sure justice was done. Mr. Tucker feels that the death penalty is the only way he can keep that promise. (R968)

Defense counsel failed to object. (R968-969)

On August 10, 1989, the court adjudicated Appellant guilty of first degree murder and sentenced him *to* death. (R893-799,902-908) The court found two aggravating circumstances: (1) The crime was cammitted to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. (R796, 906) (2) The crime was committed in a cold, calculated, and premeditated manner. (R797, 907) The court "attempted to find" mitigating circumstances based upon the family members' testimony regarding his character and dedication to his family. The court considered the loyalty between Appellant and his wife and the loving relationship between Appellant and his stepson. (R798,907-908) The court determined that the aggravating circumstances outweighed the only statu-

tory mitigating circumstance found by the court, i.e., Appellant's character. (R799,908) The court concluded that the jury's recommendation of death was "not unreasonable in this case." (R799)

SUMMARY OF THE ARGUMENT

I. The trial court violated Appellant's right to confront and cross-examine the witnesses against him when it permitted the State to present hearsay evidence of Betty Ricks' statements to the police and her sister during the guilt and penalty phases of the trial. Ms. Ricks' statements could not be used to prove her state of mind because her state of mind was irrelevant. Nor could they be used to prove Appellant's state of mind. Moreover, the confrontation clause required the State to establish the reliability of the statements, yet the State made no showing of reliability. Finally, state law was violated because Appellant had no fair opportunity to rebut Ms. Ricks's statements. The judgment and sentence must be reversed, and the case remanded for a new trial.

II. The trial court violated Appellant's right to due process by allowing the prosecutor to elicit a police officer's opinion testimony that neither he nor the prosecutor believed Jessie Watson's prior inconsistent statement which exculpated Appellant. The credibility of Watson's trial testimony inculpating Appellant was crucial to the State's case. The prosecutor was not entitled to inform the jury of his personal opinion regarding Watson's credibility. The officer's opinion of Watson's credibility was bath incompetent and an invasion of the sole province of the jury. The State's use of this evidence violated both the presumption of innocence and the State's burden to prove Appellant's guilt by probative evidence and beyond a reasonable doubt. The judgment and sentence must be reversed for a new trial.

III. Due process of law required that Appellant be both mentally competent and physically present during the penalty phase of trial. The trial court violated these rights when it proceeded with the remainder of the penalty phase of trial in Appellant's absence after his suicide attempt. The court was required to suspend the proceedings and conduct a competency evaluation upon learning of Appellant's attempted suicide. Moreover, the abviously irrational act of attempting suicide cannot be deemed a voluntary and intelligent waiver of Appellant's right to be present when the court responded to the jury's question during deliberations and when the jury returned its verdict recommending death. Since competence cannot be retroactively determined, the subsequent competency hearing did not suffice to cure the error. The sentence must be vacated and the cause remanded for a new competency determination and a new penalty phase trial if Appellant is found competent.

IV. The Eighth Amendment prohibits the State from introducing evidence of or presenting argument about the personal characteristics of the victim, the emotional impact of the offense upon her family, and the family's characterizations and opinions of the offense and the defendant. The State repeatedly violated this prohibition during the penalty phase of Appellant's trial. First, the State presented evidence of the emotional impact of Appellant's acts upon Betty Ricks. Second, the State called Ms. Ricks' sister Debra as a witness, and she broke down crying on the stand, dramatically displaying the impact of the offense an the family. Third, the State urged the jury to consider the impact of the murder upon

Ms. Ricks by comparing her death with a life prison sentence. Finally, the State urged the court to consider the emotional impact of the offense upon Ms. Ricks' mother and stepfather and the stepfather's promise to seek the death penalty. The cumulative effect of these violations deprived Appellant of his right to a fair penalty phase trial and requires reversal for a new penalty phase trial.

V. The standard jury instruction on the cold, calculated, and premeditated aggravating circumstance is unconstitutionally vague and overbroad under the Eighth Amendment because it fails to channel the jury's discretion by clear and objective standards which provide specific and detailed guidance in determining the apprapriate penalty. Although the jury does not make the final sentencing decision, the jury's recommendation is entitled ta great weight and must be properly guided and channeled under the Eighth Amendment. The death sentence must be vacated, and the case remanded for a new penalty phase trial.

VI. The State is required to prove aggravating circumstances beyond a reasonable doubt. In this case, neither of the aggravating circumstances found by the court was sufficiently proved. The court found the offense was committed to disrupt or hinder law enforcement on the ground that Appellant killed Ms. Ricks to prevent her from prosecuting him for indecent exposure. While the State presented evidence that Appellant approached Ms. Ricks to attempt to persuade her to drop the charge, there was no evidence that he ever threatened her with physical harm, and no

direct evidence of the motive for killing Ms. Ricks. The court's finding of cold, calculated, and premeditated was substantially based on the same unproven motive together with unproven inferences that Appellant acted with the calculation of a professional killer and displayed no emotion when Ms. Ricks was shot. Aggravating circumstances cannot be based on nothing more than speculation. The death sentence must be vacated and the case remanded for imposition of a life sentence.

VII. It was improper for the trial court to find two separate aggravating circumstances, disrupt or hinder law enforcement and cold, calculated and premeditated, on the basis of the same essential feature of the offense -- that Appellant killed Ms. Ricks to prevent her from prosecuting him for indecent exposure.

VIII. The Eighth Amendment required the court to find and consider all nonstatutory mitigating circumstances reasonably established by the evidence. The court found and considered only Appellant's dedication to his family as shown by his relatianships with his wife and stepson. The court failed to consider uncontroverted evidence of traumatic childhood experiences, Appellant's deprived educational background, his close family relationships with numerous other family members, and his good work record. The death sentence must be vacated, and the case remanded for resentencing.

IX. The Eighth Amendment requires the punishment imposed to be directly related to the personal culpability of the defendant. In this case the death sentence was disproportionate because

the numerous, uncontroverted mitigating circumstances outweighed the weak evidence of aggravating circumstances.

ARGUMENT

ISSUE I

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS-EXAMINE HIS ACCUSER BY ERRONEOUSLY ADMITTING HEARSAY EVIDENCE OF BETTY RICKS' STATEMENTS TO THE POLICE AND HER SISTER.

Appellant had the fundamental right under bath the state and federal constitutions to confront and cross-examine the witnesses against him. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); Coxwell v. State, 361 So.2d 148 (Fla. 1978); U.S. Const. amends. VI and XIV; Art. I, § 16, Fla. Const. The right to confront and cross-examine adverse witnesses applies during both the guilt and penalty phases of a capital trial. Engle v. State, 438 So.2d 803, 813-814 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984). The trial court violated this right when it permitted the State to present hearsay evidence of Betty Ricks' statements to the police and her sister during the guilt and penalty phases of Appellant's trial.

The State gave notice that it intended to present evidence of Appellant's arrest for indecent exposure, alleging that the offense occurred at the Beverage Barn on November 10, 1986, and that Betty Ricks was the victim. (R853) Defense counsel moved to exclude this evidence because it was hearsay, its admission would violate the right to confrontation, and it was irrelevant evidence of the victim's state of mind impermissibly offered to prove Appellant's state of mind. (R759-766,775-780,842-843) The prosecutor

urged the court to admit the evidence an the theory that it was admissible to prove Appellant's alleged motive to eliminate Ms. Ricks as the witness to the indecent exposure. (R766-775) The court ruled that evidence of the indecent exposure, including Ms. Ricks' statements that she was adamant about prosecuting Appellant, was admissible. The court excluded evidence of Ms. Ricks' statements concerning Appellant's subsequent acts from the guilt phase of trial. (R938,940-941)

During the guilt phase of trial, the court overruled defense counsel's renewed objection to the admission of Ms. Ricks' Statements. (R296) Det. Orzechowski testified that Ms. Ricks said she wanted to press charges on Appellant for the indecent exposure offense and that Ms. Ricks was adamant about it. (R297) Dst. Horn testified that Ms. Ricks told him she was adamant about prosecuting Appellant for the indecent exposure. (R305) During closing argumerit, the prosecutor relied upon Ms. Ricks' statements to the police in arguing that Appellant was motivated to kill her because she was adamant about prosecuting him for indecent exposure. (R576, 578,627)

Ms. Ricks' statements to the police officers were hearsay -- out of court statements offered to prove the truth of the matter asserted. Correll v. State, 523 So.2d 562, 565 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 152 (1988); Hunt v. State, 429 So.2d 811, 813 (Fla. 2d DCA 1983); § 90.801, Fla. Stat. (1989). Hearsay evidence is inadmissible at trial unless a statutary exception applies. Correll v. State; Hunt v. State;

§ 90.802, Fla. Stat. (1989).

The only statutory exception which could possibly apply to Ms. Ricks' statements is the state of mind exception provided by section 90.803(3)(a), Florida Statutes (1989). However, the state of mind exception applies only when the declarant's state of mind is at issue. Correll v. State; Kelley v. State, 543 So.2d 286, 288 (Fla. 1st DCA 1989).

When the declarant is the victim of a homicide, her state of mind is not at issue and is not probative of any material issue unless the defendant claims self-defense, that the victim committed suicide, or that the victim accidentally killed herself. Kelley v. State; Kingery v. State, 523 So.2d 1199, 1202 (Fla. 1st DCA 1988); Hunt v. State. The homicide victim's statements cannot be used to prove the defendant's state of mind. Correll v. State, Kelley v. State; Hunt v. State. In particular, the victim's statements cannot be used to prove the defendant's motive for killing the victim. Kelley v. State.

In Kelley, the defendant was accused of murdering her husband. The trial court admitted evidence that the husband had told a third person he was hawing an affair and hoped to divorce his wife. The prosecutor used this hearsay evidence to prove the defendant's motive for the killing. The district court held that the improper admission and use of such hearsay required reversal for a new trial. 543 So.2d at 288. There is no material difference between this case and Kelley.

The trial court's error in allowing the prosecutor to use Ms. Ricks' statements to prove Appellant's alleged motive for killing her not only violated the Florida Evidence Code, it also violated Appellant's constitutional right to confront and cross-examine adverse witnesses. Rhodes v. State, 547 So.2d 1201, 1204-1205 (Fla. 1989); Gardner v. State, 480 So.2d 91, 94 (Fla. 1985); Engle v. State, 438 So.2d at 813-814. When a hearsay declarant is not present for cross-examination, the Sixth Amendment confrontation clause requires the government to show both that the declarant is unavailable and adequate indicia of reliability before the hearsay can be admitted. Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597, 608 (1980). Reliability can be inferred when the evidence falls within a firmly rooted hearsay exception. Id.

Since Ms. Ricks' statements did not fall within a recognized exception to the hearsay rule, the confrontation clause required the State to demonstrate the reliability of the hearsay. But the State made no effort to demonstrate the reliability of the hearsay evidence of Ms. Ricks' statements during the guilt phase of trial. In the absence of any showing of reliability, the admission of the hearsay evidence violated Appellant's constitutional right to confrontation.

The trial court compounded its errors during the penalty phase of the trial. The prosecutor argued that the court should allow hearsay evidence of Betty Ricks' statements concerning Appellant harassing her shortly before her death in support of the disrupt or hinder law enforcement aggravating circumstance. (R662-665,

672-673) Defense counsel objected that such evidence was hearsay and would violate the right to confrontation, there was no way to adequately rebut the statements, the statements were irrelevant, the disrupt or hinder law enforcement aggravating circumstance did not apply because the indecent exposure case had gone to arbitration, the hearsay was unreliable, and it would violate the Eighth and Faurteenth Amendments. (R665-667, 674-677) The prosecutor argued that the statements were reliable because they were made to three, four, or five different witnesses, and the defense could rebut them by impeaching the witnesses or by calling Appellant to refute them. (R677) The court overruled defense counsel's objections and admitted the statements. (R678)

Over defense counsel's renewed hearsay objection, Det. Orzechowski again testified that Betty Ricks told him she was adamant about prosecuting Appellant far indecent exposure. (R681-682) Over defense counsel's continuing hearsay objection, Orzechowski said Ricks told him Appellant repeatedly came into the Beverage Barn to harass her and to try to persuade hew to drop the charges. His actions scared her. (R682-683) Orzechowski last spoke to Ricks shortly before her death. (R683)

Det. Horn testified that he spoke to Ricks two or three times about her contacts with Appellant after the indecent exposure incident. (R684) The court again overruled defense counsel's continuing hearsay objection. (R684) Ms. Ricks told Horn that Appellant had come in several times to try to get her to drop the charge, but she remained adamant about pursuing it. Horn's last

conversation with Ms. Ricks was about three weeks prior to her death. (R685 She never incicated that Appellant had threatened her. She was not frightened; she was angry. (R687)

Again, over defense counsel's continuing hearsay objection, Debra Ricks testified that her sister Betty Ricks called her and said Appellant had come and asked her to drop the charges. He said he did not know what he was doing and that he had a family, jab, and reputation to protect. Betty Ricks told Appellant he should have thought of that before ha did it. She refused to drop the charges. (R689-690)

The prosecutor relied on Ms. Ricks' statements to support the disrupt or hinder law enforcement circumstance in both his closing argument to the jury (R714) and his sentencing argument to the court. (R963,967) The court relied upon Ms. Ricks' statements to support both of the aggravating circumstances in the final sententing order -- cold, calculated, and premeditated as well as disrupt or hinder law enforcement. (R906-907)

Both the Sixth Amendment and section 921.141(1), Florida Statutes (1989), allow the consideration of relevant hearsay evidence under certain circumstances during a capital sentencing proceeding. Green w. Georgia, 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738, 741 (1979); Rhodes v. State, 547 So.2d at 1204. But the Sixth Amendment confrontation clause requires a showing of reliability. Ohio v. Roberts,, 448 U.S. at 66; 65 L.Ed.2d at 608; Green v. Georgia. Sectian 921.141(1) requires a fair opportunity for the defendant to rebut any hearsay evidence. Rhodes w. State.

In this case, the State made no showing of the reliability of Ms. Ricks' statements. The prosecutor claimed they were reliable because similar statements were made to three, four, or five different witnesses. (R677) He proved that statements were made to only three witnesses -- Orzechowski, Horn, and Debra Ricks. Regardless of the number of witnesses to whom Betty Ricks made her statements, the fact that she made similar Statements to different people proves nothing about the reliability of the content of her statements, i.e., that Appellant was harassing her to drop the indecent exposure charge. Ms. Ricks cauld just as easily have misrepresented the facts to three people as to one. Reliability cannot be inferred from repetition. A lie would remain false no matter how often it was reiterated.

Moreover, Appellant did not have a fair opportunity to rebut Ms. Ricks' hearsay statements. The prosecutor claimed he could impeach the witnesses to the statements or take the stand to refute them. (R677) The opportunity to impeach the witnesses who heard Ms. Ricks' hearsay statements was meaningless. Appellant's right to confrontation entitled him to test the reliability and credibility of the content of Ms. Ricks' statements, not just the credibility of the witnesses who heard them. Appellant's only real opportunity to refute the statements was to take the stand and testify. This was a choice he could not be compelled to make. Rhodes v. State,, 547 So.2d at 1204.

Finally, the hearsay evidence was not relevant to prove that Appellant intended to disrupt or hinder law enforcement. Once

again, Ms. Ricks' statements could not be used to prove Appellant's state of mind. Correll v. State, 523 So.2d at 565; Kelley v. State, 543 So.2d at 288; Hunt v. State, 429 So.2d at 813.

These repeated violations of Florida evidentiary law and Appellant's constitutional right to confront adverse witnesses deprived Appellant of his right to a fair trial. The right to confrontation is an essential and fundamental requirement of a fair trial; its denial or significant diminution calls into question the accuracy and ultimate integrity of the fact-finding process. Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297, 309 (1973). When such statutory and constitutional violations are used by the State, as they were in this case, to establish a defendant's alleged motive to commit homicide and an aggravating circumstance in support of a death sentence, the violations cannot be deemed harmless. The errors in this case necessarily affected the jury's verdict of guilt, the jury's recommendation of death, and the court's decision to impose the death sentence. The judgment and sentence must be reversed, and Appellant's case must be remanded for a new trial.

ISSUE II

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY ALLOWING THE PROSECUTOR TO ELICIT A POLICE OFFICER'S TESTIMONY THAT NEITHER HE NOR THE PROSECUTOR BELIEVED A KEY STATE WITNESS'S PRIOR INCONSISTENT STATEMENT WHICH EXCULPATED APPELLANT.

Due process of law requires the prosecution to establish guilt by probative evidence and beyond a reasonable doubt. Taylor v. Kentucky, 436 U.S. 478, 485-486, 96 S.Ct. 1930, 56 L.Ed.2d 468, 475 (1978); U.S. Const. amend. XIV; Art. I, § 9, Fla. Const. Due process requires the court to instruct the jury to presume the accused is innocent until the prosecution satisfies its burden of proof. Taylor v. Kentucky, 436 U.S. at 490, 56 L.Ed.2d at 478. Both the presumption of innocence and the State's burden of proof were violated when the court allowed the prosecutor *to* elicit Det. Boydston's opinion that neither he nor the prosecutor believed Jessie Watson's original statements exculpating Appellant. (R535-536)

Jessie Watson is Appellant's stepson. (R413-414) He was the State's most important witness at trial. He testified that he awakened after 5:30 a.m. on the morning of January 8, 1987. He heard a truck in the yard, then footsteps. (R416-417) When Watson entered the kitchen, he saw Appellant entering the back door carrying a .22 rifle. (R418) Appellant told him to drive the truck to school that morning. (R419-421) This was the only direct evidence at trial that Appellant drove his truck and carried a .22 rifle an the morning Betty Ricks was shot.

Watson further testified that two months later he saw a .22 rifle in a dirty plastic bag in the back of Appellant's truck and a hole which had been dug near the tool shed. (R425-426,447-448) This was the State's only evidence of what may have happened to the possible murder weapon.

Mast importantly, Watson testified that five months after the shooting, Appellant admitted that he shot the girl at the Beverage Barn. (R428-429) This admission was the most incriminating evidence against Appellant.

Defense counsel impeached Watson's testimony with his prior inconsistent statements to Det. Orzechowski (R523-525) and Det. Boydston. (R531-532) On January 29, 1987, Watson told Boydston he got up around six o'clock on January 8, 1987. He was preparing to leave in the station wagon when his mother told him to take the truck. (R532) Watson left at 6:31 a.m. He concluded that the truck had been sitting there all night because he had trouble starting it. (R532) On February 2, 1987, Watson told Boydston that he went into Appellant's roam to ask for the truck keys and that Appellant was home in bed on the morning of January 8. (R532)

Det. Boydston was present when the prosecutor, Assistant State Attorney Benito, interviewed Watson at the State Attorney's Office. (R533-534) Upon cross-examination by Mr. Benito, Boydston testified that he and Benito made it clear to Watson that they did not believe him. Boydston did not believe Watson from "Day One." (R535) The court then overruled defense counsel's objection that this testimony was not relevant. (R535) Boydston then testified

that both he and Benito told Watson they felt he was hiding something, they thought Appellant wanted him in the truck so he could point his finger at Watson. (R535-536)

This testimony was not relevant because it was not probative of Appellant's guilt or innocence. Instead, it conveyed the opinions of the detective and the prosecutor that Watson's original statements, which exculpated Appellant, were not believable. This in turn implied that Watson's testimony at trial, which inculpated Appellant, was believable.

It is plainly improper for a prosecutor to state his personal belief in the guilt of the accused. Bass v. State, 547 So.2d 680 (Fla. 1st DCA), rev.denied, 533 So.2d 1166 (Fla. 1989). Here, the prosecutor did indirectly what he could not do directly -- he presented evidence to the jury conveying his personal belief, together with the investigating officer's personal belief, that Watson's prior inconsistent statements exculpating Appellant were not worthy of belief and that Watson's inculpatory trial testimony was credible.

"No legal principle is more firmly established in our system of justice than that which makes the jury sole arbiter of the credibility of witnesses...." Bowles v. State, 381 So.2d 326, 328 (Fla. 5th DCA 1980). "The credibility of a witness and the weight ta be given his testimony is a matter to be determined by the trier of fact." Johnson v. State, 380 So.2d 1024, 1026 (Fla. 1979). "Thus, it is an invasion of the jury's exclusive province for one witness to offer his personal view on the credibility of a

fellow witness." Boatwright v. State, 452 So.2d 666, 668 (Fla. 4th DCA 1984).

Det. Boydston's testimony that he and the prosecutor did not believe Watson's prior statements exculpating Appellant not only invaded the exclusive province of the jury, it was not competent evidence. "'Absent some evidence showing that the witness is privy to the thought process of the other, the first witness is not competent to pass an the other's state of mind." Boatwright v. State, 452 So.2d at 668.

The courts of this State have repeatedly found reversible error when the prosecutor asked a witness to vouch for or attack the credibility of another witness. E.g., Whitfield v. State, 549 So.2d 1202 (Fla. 3d DCA 1989); Fuller v. State, 540 So.2d 182 (Fla. 5th DCA 1989); Boatwright v. State; Bowles v. State. Because law enforcement officers are held in high esteem and are believed to be particularly credible, it is especially harmful to use a prosecutor's or police officer's testimony to bolster the credibility of a witness for the State. Quiles v. State, 523 So.2d 1261, 1264 (Fla. 2d DCA 1988); Rodrisuez v. State, 433 So.2d 1273, 1275 (Fla. 3d DCA 1983); Perez v. State, 371 So.2d 714, 717 (Fla. 2d DCA 1979).

Det. Boydston's testimony about Jessie Watson's credibility violated Appellant's due process right to be presumed innocent. Taylor v. Kentucky.. Boydston's testimony implicitly conveyed to the jury the presumption that Appellant must be guilty and Watson must be lying if he said anything exculpating Appellant. Moreover,

this incompetent, irrelevant opinion testimony violated the fundamental due process requirement that the State must prove Appellant's guilt by probative evidence and beyond a reasonable doubt. Id.

Because Watson's credibility was both critical to the State's case and highly questionable in light of the prior inconsistent, exculpatory statements, the court's error in allowing the State to elicit Det. Boydston's testimony about his own and the prosecutor's personal beliefs that the prior statements were untrue cannot be deemed harmless. The State cannot show that Boydston's improper testimony did not affect the jury's verdict in this case. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The judgment and sentence must be reversed for a new trial.

ISSUE III

THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS TO BE MENTALLY COMPETENT TO STAND TRIAL AND TO BE PRESENT WHEN IT PROCEEDED WITH THE PENALTY PHASE TRIAL FOLLOWING APPELLANT'S SUICIDE ATTEMPT WITHOUT FIRST CONDUCTING A COMPETENCY HEARING.

Due process of law under the United States and Florida Constitutions requires that the accused has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and a rational as well as a factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); Pridgen v. State, 531 So.2d 951, 954 (Fla. 1988); U.S. Const. amend XIV; Art. I, § 9, Fla. Const. Due process also requires the presence of the accused during all stages of the trial where fundamental fairness might be thwarted by his absence. Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934); Francis — v. State, 413 So.2d 1175, 1177 (Fla. 1982). The trial court violated these rights when it proceeded to the conclusion of the penalty phase trial without suspending the proceedings to conduct a competency evaluation following Appellant's suicide attempt. (R730-735)

Even when the accused is competent at the beginning of trial, the court must be alert to circumstances suggesting a change in his mental condition which would render him unable to meet the standard of competence to stand trial. Drope v. Missouri, 420 U.S. 162, 181, 95 S.Ct. 896, 43 L.Ed.2d 103, 119 (1975). One such circumstance requiring a new competency evaluation is the defendant's

attempted suicide during the course of the trial. Id. In this case, Appellant attempted suicide by hanging himself in the holding cell within fifteen minutes after the jury retired to deliberate in the penalty phase of the trial. (R730-731,735,897-898)

Appellant's suicide attempt triggered the trial court's duty to conduct a competency evaluation on its own motion. "Where the evidence raises a 'bonafide doubt' as to a defendant's competence to stand trial, the judge on his own motion ...must conduct a sanity hearing...." Pate v. Robinson, 383 U.S. 375, *385*, 86 S.Ct. 836, 15 L.Ed.2d 815, 822 (1966); Holmes v. State, 494 So.2d 230, 232-233 (Fla. 3d DCA 1986); Fla.R.Crim.P. 3.210. Where, as in this case, there were reasonable grounds to believe the defendant was not mentally competent to continue to stand trial during the penalty phase, the trial court's failure to stay the proceedings to have the defendant reexamined by experts and to hold a new competency hearing is reversible error. Nowitzke v. State, No. 71,729 (Fla. Dec. 6, 1990)[15 F.L.W. S645]; Pridgen V. State, 531 So.2d at 954-955.

The court's error in failing to conduct a competency evaluation was not waived by Appellant's failure to request one. Even when the defendant is represented by counsel, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Pate v. Robinson, 383 U.S. at 384, 15 L.Ed.2d at 821.

The court's failure to immediately stay the proceedings and order a Competency evaluation upon learning of the suicide attempt was not cured by the subsequent determination that Appellant was competent to be sentenced after he recovered from the suicide attempt. (R784) As a matter of fact, the doctors who examined Appellant did not attempt to determine his competency to stand trial on the day of the suicide attempt. Their reports addressed Appellant's competency to be sentenced after he recovered, (R893-899) Moreover, Dr. Merin's report indicated that Appellant was probably not competent on the day of the penalty phase trial. Dr. Merin found that Appellant was suffering from psychogenic amnesia generated in part by his emotional visit with his parents following his conviction the day before. (R898) As a matter of law, competency to stand trial cannot be determined retrospectively. Drope v. Missouri, 420 U.S. at 183, 43 L.Ed.2d at 119-120; Pate v. Robinson, 383 U.S. at 386-387; 15 L.Ed.2d at 822-823; Pridgen v. State, 531 So.2d at 955.

Furthermore, the record in this case demonstrates that there was a substantial likelihood that Appellant's defense was impaired during the penalty phase of trial by Appellant's incompetence. After consulting with counsel, Appellant waived his right to testify during the penalty phase trial. (R696,700-702) Appellant's suicide note indicated that he felt counsel could have been more effective in representing him and in seeking a life sentence but for his own refusal to cooperate with counsel during the penalty phase. (R887) If Appellant was in fact incompetent during the

penalty phase of trial, his tactical decision not to cooperate with counsel and not to testify cannot be allowed to stand, Pridsen v. State, 531 So.2d at 955.

The court's failure to stay the proceedings following the suicide attempt also violated Appellant's right to be present during the critical stages of his trial. Appellant had the right to be present when the court responded to the jury's request for a list of aggravating and mitigating circumstances. Savino v. State, 555 So.2d 1237 (Fla. 4th DCA 1989); Fla.R.Crim.P. 3.180(5). He also had the right ta be present when the jury rendered its verdict recommending the death penalty. Fla.R.Crim.P. 3.180(8).

While the right to be present may be waived, the waiver must be knowing, intelligent, and voluntary. Turner v. State, 530 So.2d 45, 49 (Fla. 1987), cert.denied, __U.S.__, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989). In this case, neither Appellant nor his counsel waived the right to be present. In fact, defense counsel objected to the court's action in proceeding with the remainder of the penalty phase of trial and told the court he was nat waiving Appellant's presence. (R734)

Under some circumstances, a defendant may waive his right to be present by voluntarily absenting himself. Chandler v. State, 534 So.2d 701, 704 (Fla. 1988), cert.denied, __U.S.__, 109 S.Ct. 2089, 104 L.Ed.2d 652 (1989). But Chandler involved a personal waiver by the defendant on the record. In the absence of such a personal waiver, the defendant's suicide attempt alone does not constitute a waiver of the right to be present. See Drope v.

Missouri, 420 U.S. at 182, 43 L.Ed.2d at 119. In Drope, the Supreme Court declined to decide whether its was permissible to conduct the remainder of a capital trial in the defendant's absence caused by his suicide attempt because the trial court made an insufficient inquiry to decide the issue. No further inquiry would have been needed if attempted suicide was a sufficient basis to find a voluntary waiver.

Appellant's absence when the court responded to the jury's request and when the jury returned its penalty recommendation verdict cannot be presumed harmless. The State must show beyond a reasonable doubt that Appellant's absence was harmless. Garcia v. State, 492 So.2d 360, 364 (Fla.), cert.denied, 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986). Since Appellant's physical absence was caused by his suicide attempt, which in turn demonstrated his incompetence to stand trial, Appellant's absence cannot be shown to be harmless.

The trial court's violation of Appellant's due process rights to be both mentally competent and physically present to stand trial requires reversal and remand for a new penalty phase trial before a new jury.

ISSUE IV

THE TRIAL COURT VIOLATED APPELLANT'S EIGHTH AMENDMENT RIGHT TO A FAIR PENALTY PHASE TRIAL AND SENTENCING HEARING BY ALLOWING EVIDENCE, AN EMOTIONAL DISPLAY, AND PROSECUTORIAL REMARKS ABOUT THE IMPACT OF THE OFFENSES UPON THE VICTIM AND HER FAMILY.

In Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the United States Supreme Court held that the introduction of a victim impact statement containing information about the personal characteristics of the victims, the emotional impact of the crimes on the family, and the family members' opinions and characterizations of the crimes and the defendant violated the Eighth Amendment to the United States Constitution. [3] The Court ruled that such information is irrelevant to the capital sentencing decision, and its admission creates an unacceptable risk that the death penalty may be imposed in an arbitrary and capricious manner. 482 U.S. at 502-503, 96 L.Ed.2d at 448. The Court reasoned that there is no justification for the capital sentencing decision to depend upon information about the victim of which the defendant may be unaware, the ability of the family members to express their grief, or the perception that the victim was a sterling member of the community rather than someone of questianable character. 482 U.S. at 505-506, 96 L.Ed.2d at 450.

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[3] The Eighth Amendment is applicable to the states through the Fourteenth Amendment to the Constitution. 482 U.S. at 501 n.5; 96 L.Ed.2d at 447 n.5.

In South Carolina v. Gathers, 490 U.S. __, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), the Court applied the principles of Booth to prohibit prasecutorial remarks about the victim's character. The Court affirmed the reversal of the death sentence because the prosecutor violated the Eighth Amendment by making extensive remarks about the victim's character, i.e., that he was religious and a registered voter, during closing argument,

The principles of Booth and Gathers were repeatedly violated during Appellant's penalty phase trial and sentencing hearing, First, the trial court improperly admitted hearsay evidence of Betty Ricks' statements concerning the impact of Appellant's behavior upon her. [4] The prosecutor argued that the trial court should allow this evidence in support of the disrupt or hinder law enforcement aggravating circumstance. (R662-665,672-673) In addition to arguing that the evidence was hearsay which would violate the right to confrontation, defense counsel objected that it was irrelevant, unreliable, and would violate the Eighth and Fourteenth Amendments. (R665-667,674-677) The court overruled defense counsel's objections. (R678)

Over defense counsel's repeated objections, the court allowed Det. Orzechowski to testify that Betty Ricks was adamant about prosecuting Appellant, she said Appellant repeatedly came to the Beverage Barn to harass her and to try to persuade her to drop the charges, and she was frightened by Appellant's actions. (R681-

[4] The impropriety of allowing such hearsay evidence in violation of the right to confrontation is addressed under Issue I, supra.

683) Det. Horn testified that Ms. Ricks said Appellant had come in several times to try to get her to drop the charges, but she was adamant about prosecuting and angry. (R684-685,687) To the extent that this testimony concerned the emotional impact of Appellant's actions upon Ms. Ricks, i.e., that she was frightened, angry, and adamant about prosecuting Appellant, it was irrelevant to the questions of Appellant's personal culpability and the appropriate punishment for the homicide. The evidence was prejudicial to Appellant and violated the Eighth Amendment under Booth v. Maryland,.

Betty Ricks' sister, Debra Ricks, broke down crying when she began to testify. Defense counsel objected to her prejudicial and inflammatory conduct and asked the court to admonish the witness or the jury that such emotional displays relating to the victim or the impact of the offense on the family were improper. (R688-689) The court refused to admonish either the witness or the jury and noted that the jurors would know the family would be upset. The court said it would consider a proposed instruction "to be given during deliberations." (R689)

There is no record of any subsequent request for a jury instruction concerning Ms. Ricks' emotional outburst. However, a jury instruction at the close of the penalty phase trial would not have alleviated the prejudicial impact of Ms. Ricks' crying episode. Instead, such an instruction would have served primarily to remind the jury of the crying episode and call their attention to it. This would have aggravated the prejudicial effect of Ms.

Ricks' emotional display. If there was any hope at all of reducing the impact of the crying episode, it could only have been accomplished by the court sternly admonishing the jury to disregard it at the time it occurred, as requested by defense counsel.

Debra Ricks' loss of composure on the witness stand and the court's refusal to take immediate corrective action violated the principles of Booth v. Maryland more dramatically than the introduction of a written victim impact report. Such emotional displays convey the family's anguish and arouse the passions of the jury more certainly than the calm and orderly presentation of testimony and other evidence. Ms. Ricks' emotional outburst "necessarily engendered sympathy for her plight, and antagonism for [Appellant], depriving him of a fair trial." Rodriguez v. State, 433 So.2d 1273, 1276 (Fla. 3d DCA 1983). Regardless of the crime charged, Appellant was entitled to a fair and impartial trial free from the exhibition of prejudicial emotions. Stewart v. State, 51 So.2d 494 (Fla. 1957).

The prosecutor in this case, Mr. Benito, was not satisfied that the jurors' sympathies and passions had been sufficiently aroused by the presentation of victim impact evidence and Debra Ricks' emotional display of anguish over the loss of her sister. He climaxed his closing argument by asking the jury to compare the impact of a life sentence with the impact of the offense upon Betty Ricks:

> What about life imprisonment? What can a person do in jail for life? You can cry. You can read, You can watch TV. You can listen to the radio. You can talk to people. In

> short, you are alive. People want to live. You are living. All right? If Betty Ricks had had a choice between spending life in prison or lying on that pavement in her own blood, what choice would Betty Ricks have made? But, you see, Betty Ricks didn't have that choice. Now why? Because George Michael Hodges decided for himself, for himself, that Betty Ricks should die. And for making that decisian, for making that decision, he, too, deserves ta die. (R717)

This same argument was used by another Assistant State Attorney of the Thirteenth Circuit in Jackson v. State, 522 So.2d 802, 808-809 (Fla.), cert.denied, 488 U.S. 871, 109 S.Ct. 183, 102 L.Ed.2d 153 (1988). In Jackson, the Court found this argument to be '"improper because it urged consideration of factors outside the scope of the jury's deliberations." 522 So.2d at 809. This Court referred to the argument as "misconduct" and said the trial court should have sustained defense counsel's objection and given a curative instruction. Id. However, this Court concluded that the misconduct was not sufficiently egregious to require reversal for a new penalty phase trial in Jackson's case. Id.

This Court's finding of harmless error in Jackson and the summary rejection of a similar issue in Hudson v. State, 538 So.2d 829, 832 n.6 (Fla. 1989), apparently misled the Assistant State Attorneys in Hillsborough County to believe that the argument was permissible. Counsel for Appellant is aware of two other pending capital appeals from Hillsborough County in which this issue has been raised by the appellants in their initial briefs, Perry Alexander Taylor v. State, Case No. 74,260, and Michael Tyrone Crump v. State, Case No. 74,230.

Subsequent decisions have made it clear that the improper conduct found harmless in Jackson cannot be condoned. In South Carolina v. Gathers, the Supreme Court prohibited prosecutorial remarks which violate the Eighth Amendment prohibition of victim impact evidence. This Court found similar "golden rule" arguments taken together with other improper remarks sufficiently egregious to require reversal in both Rhodes v. State, 547 So.2d 1201, 1205 (Fla. 1989), and Garron v. State, 528 So.2d 353, 359 n.6 (Fla. 1988). In Garron, this Court declared:

> When comments in clasing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument. These statements when taken as a whole and fully considered demonstrate the classic case of an attorney who has overstepped the bounds of zealous advocacy and entered into the forbidden zone af prosecutorial misconduct ....
>
> ...Such violations of the prosecutor's duty to seek justice and not merely "win" a death recommendation cannot be condoned by this Court. ABA Standards for Criminal Justice 3-5.8 (1980); [ertolotti v. State,] 476 So.2d at 133.

528 So.2d at 359.

Appellant concedes that defense counsel's failure to object to the prosecutor's improper argument would ordinarily foreclose appellate review. Daughtery v. State, 533 So.2d 287, 289 (Fla.), cert.denied, 488 U.S. 959, 109 S.Ct. 402, 102 L.Ed.2d 390 (1988). However, Florida courts "have long recognized that improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence,

and a new trial should be granted despite the absence of an objection below. . . ." Robinson v. State, 520 So.2d 1, 7 (Fla. 1988); Pait v. State, 112 So.2d 380, 385 (Fla. 1959). Moreover, the cumulative effect of repeated instances of improper evidence or inflammatory argument may be considered in determining their impact upon the defendant's basic right to a fair trial despite defense counsel's failure to object to each instance of misconduct. Fuller v. State, 540 So.2d 182, 184 (Fla. 5th DCA 1989); Rosso v. State, 505 So.2d 611, 613 (Pla. 3d DCA 1987).

Perhaps the most egregious instance of prosecutorial misconduct in violation of the Eighth Amendment prohibition of victim impact evidence and argument occurred during the prosecutor's final sentencing argument before the court:

> Mr. Tucker, the victim's stepfather, and Mrs. Tucker, the victim's mother, are seated in the courtroom. They would certainly like to get up here and tell you about their daughter. I have told them about the line of cases from the Supreme Court regarding victims' impact statements in front of juries and how the Supreme Court has reversed cases in which family members have gotten up in second phase and told the jury about what impact the victim's death has had on the family. I don't think the same would apply to a Court because you are going to determine whether this man lives or dies based on aggravating and mitigating circumstances.
>
> But I told them to, if the Court does impose the death penalty, I don't want to run the risk of the Supreme Court three years down the road saying you shouldn't have heard any statements made by the family regarding victim impact.
>
> Suffice it to say, they loved their daughter very much. Mr. Tucker wanted me to tell you that he promised his daughter as she lay dying in the hospital that he would make sure justice was done. Mr. Tucker feels that the

> death penalty is the only way he can keep that promise. (R968)

Here, the prosecutor's own remarks show that he was aware of the Eighth Amendment prohibition of victim impact evidence under the Booth v. Maryland rule. No objection should have been necessary because the prosecutor himself called the court's attention to the impropriety of his own remarks.

The prosecutor sought ta excuse his flagrant misconduct on two grounds: (1) he was presenting the victim impact remarks to the court alone and not before the jury, and (2) he was summarizing the statements by the mother and stepfather of the victim rather than presenting their testimony. The prosecutor was wrong in both instances. First, the presentation of victim impact statements solely to the sentencing judge does violate the Eighth Amendment under Booth v. Maryland. Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987). Second, victim impact statements by the prosecutor rather than the victim's survivors also violate the Eighth Amendment. South Carolina v. Gathers, 104 L.Ed.2d at 883. Furthermore, the prosecutor compounded the error by violating one of the most basic principles governing argument of counsel -- he was arguing facts which were not in evidence. Huff v. State, 437 So.2d 1087, 1090 (Fla. 1983); Duque v. State, 460 So.2d 416, 417 (Fla. 2d DCA 1984), rev.denied, 467 So.2d 1000 (Fla. 1985).

The cumulative effect of the evidence of the emotional impact of Appellant's behavior upon Ms. Ricks before her death, her sister's emotional display of anguish while testifying before the jury, and the prosecutor's misconduct in making victim impact argu-

ments to both the jury and the sentencing judge deprived Appellant of his right to a fair penalty phase trial under the Eighth Amendment. This Court has an obligation to insure that the death penalty be imposed fairly or not at all. See Eddinss v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1, 9 (1982). The death sentence must be vacated, and the case must be remanded for a new penalty phase trial before a new jury.

ISSUE V

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY GIVING THE JURY THE STANDARD INSTRUCTION ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WITHOUT INFORMING THE JURY OF THIS COURT'S LIMITING CONSTRUCTON OF THAT CIRCUMSTANCE.

Appellant is aware that this Court rejected claims that the standard jury instruction on the cold, calculated, and premeditated aggravating circumstance [5] violates the Eighth Amendment to the United States Constitution in Brown v. State, 565 So.2d 304, 308 (Fla. 1990), and Jones v. Dugger, 533 So.2d 290, 292-293 (Fla. 1988). Appellant respectfully requests this Court to reconsider its ruling in those decisions.

Defense counsel objected to the standard jury instruction on the cold, calculated, and premeditated aggravating circumstance on the ground that it was unconstitutionally vague and failed to limit the types of capital felonies which are eligible for the death penalty. (R705-706) The court overruled the objection (R706) and gave the standard instruction. (R726)

In Godfrey v. Georgia, 446 U.S. 420, 427, 100 S.Ct. 1759, 64 L.Ed.2d 398, 406 (1980), the Supreme Court ruled that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in

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[5] Fla.Std. Jury Inst. (Crim.), p. 79. As given by the court in this case, the instruction provides: "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." (R726)

an arbitrary and capricious manner." Thus, the state is required to channel the sentencer's discretion by clear and objective standards which provide specific and detailed guidance and make the process of imposing a death sentence rationally reviewable. 446 U.S. at 428, 64 L.Ed.2d at 406. "[T]he 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." Maynard v. Cartwright, 486 U.S. 356, 362, 108 S.Ct. 1853, 100 L.Ed.2d 372, 380 (1988).

Both in Maynard and in Shell v. Mississippi, 498 U.S. 111 S.Ct. __, 112 L.Ed.2d 1 (1990), the Supreme Court found that heinous, atrocious, or cruel aggravating circumstances were too vague and overbroad to satisfy the Eighth Amendment requirement that the sentencing jury's discretion be sufficiently guided and channeled. In Maynard, the Court held that the vagueness of the instruction on the aggravating circumstance could not be cured by the appellate court's finding that specific facts supported the Circumstance. 486 U.S. at 363-364, 100 L.Ed.2d at 382. In Shell, the Court found that a limiting instruction defining heinous, atrocious, or cruel was not constitutionally sufficient to cure the defect. 112 L.Ed.2d at 4.

Both Maynard and Shell involved sentencing statutes which vested the sentencing decision in the jury's determination. In contrast, the Court rejected a Maynard and Godfrey based argument in Walton v. Arizona, 497 U.S. __, 110 S.Ct. __, 111 L.Ed.2d 511,

528 (1990), because "the logic of those cases has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions." Similarly, this Court has ruled that Maynard does not apply in Florida because the judge is the sentencer and makes findings of fact which are reviewed by this Court and subjected to a narrowing construction. Smalley v. State, 546 So.2d 720, 722 (Fla. 1989).

While it is obviously true that the final sentencing decision in Florida is made by the trial judge, the Walton exception to the Maynard rule cannot be constitutionally applied to the Florida capital sentencing process. The Arizona sentencing process upheld in Walton does not involve the jury at all and places the sole responsibility for the sentencing decision in the hands of the judge. But the jury plays a very significant role in determining the appropriate sentence under Florida law. In Florida, "a jury recommendation of death is entitled to great weight...." Smith v. State, 515 So.2d 182, 185 (Fla. 1987), cert.denied, 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988).

Because of the great weight accorded the jury's sentencing recommendation, the Eighth and Fourteenth Amendments require channeling of the jury's discretion by clear and objective standards which provide specific and detailed guidance to the jury in making its recommendation. See Maynard v. Cartwright; Godfrey v. Georgia; U.S. Const. amends. VIII and XIV.

In Maynard, the Supreme Court found that the heinous, atrocious, or cruel aggravating circumstance instruction was too

vague and overbroad because an ordinary person cauld honestly believe every murder is especially heinous. 486 U.S. at 364, 100 L.Ed.2d at 382. Florida's cold, calculated, and premeditated aggravating circumstance instruction suffers from the same defect. It fails to guide and channel the jury's discretion because the ordinary person could honestly believe every first degree murder to be cold, calculated, and premeditated.

This Court has implicitly recognized that the statutory language of the cold, calculated, and premeditated aggravating circumstance is vague and overbroad by applying limiting constructions to the circumstance. This Court has required proof of a heightened level of premeditation beyond that normally sufficient to prove premeditated murder, as in cases of contract or execution style murders. E.g., Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988); Perry v. State, 522 So.2d 817, 820 (Fla. 1988). However, this Court has not limited the application of this circumstance solely to contract or execution killings. A finding of cold, calculated, and premeditated can appropriately be made whenever there is sufficient evidence of calculation, i.e., a careful plan or prearranged design. Rutherford v. State, 545 So.2d 853, 856 (Fla.), cert.denied, __U.S.__, 110 S.Ct. 353, 107 L.Ed.2d 341 (1989). When there is no evidence of prior calculation or prearranged plan or design, the circumstance does nat apply. Rivera v. State, 545 So. 2d 864, 865 (Fla. 1989); Schafer v. State, 537 So.2d 988, 991 (Fla. 1989). Furthermore, the circumstance does not apply if the defendant makes any colorable claim of a pretense of justification for

the killing. Banda v. state, 536 So.2d 221, 225 (Fla. 1988), cert.denied, __U.S.__, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989).

While these limiting constructions af the cold, calculated, and premeditated circumstance may satisfy the constitutional requirements for judicial sentencing, see Waltan v. Arizona, they fail to guide and channel the jury's discretion in recommending life or death because the jury is never instructed that these limiting constructions exist. Because Florida fails to guide and channel the jury's discretion in determining whether a particular homicide legally qualifies as cold, calculated, and Premeditated, there is a substantial danger that the sentencing process will be contaminated by arbitrary and capricious action by the jury. Because of the great weight accorded jury recommendations, this Court's review of the trial judge's written findings cannot alleviate the danger that the jury will arbitrarily and capriciously recommend death on the basis of a misunderstanding of the proper application of the cold, calculated, and premeditated circumstance. In the absence of any limiting jury instructions, a jury might very well recommend death on the basis of an improper finding of cold, calculated, and premeditated. Such a mistake by the jury would be both undetectable and uncorrectable.

It is impossible to know whether Appellant's jury would have recommended death if the court had given limiting instructions on the cold, calculated, and premeditated aggravating circumstance. It is also impossible to know whether the trial judge would have followed the jury's recommendation if it had been life instead of

death. Therefore, it is equally impossible to determine beyond a reasonable doubt that the court's error in giving a vague and over-broad jury instruction on cold, calculated, and premeditated did not affect the court's sentencing decision. See State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). The death sentence must be vacated, and the case remanded for a new penalty trial before a new jury.

ISSUE VI

THE TRIAL COURT ERRED BY FINDING THAT THE OFFENSE WAS COMMITTED TO DISRUPT OR HINDER LAW ENFORCEMENT AND WAS COLD, CALCULATED, AND PREMEDITATED BECAUSE THE STATE'S EVIDENCE FAILED TO PROVE EITHER CIRCUMSTANCE BEYOND A REASONABLE DOUBT.

It is well established that the State has the burden of proving aggravating circumstances beyond a reasonable doubt. Reed v. State, 560 So.2d 203, 207 (Fla. 1990); Hamilton v. State, 547 So.2d 630, 633-634 (Fla. 1989); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert.denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). In this case, defense counsel objected to both aggravating circumstances proposed by the State on the ground that they were not proven beyond a reasonable doubt. (R704-705) The court overruled the objection (R706) and ultimately found that the offense was committed to disrupt or hinder law enforcement and that it was committed in a cold, calculated, and premeditated manner. (R906-907) See §§ 921.141(5)(g) and (i), Fla. Stat. (1989).

The Eighth Amendment requires this Court to conduct a "meaningful appellate review" of both the record on appeal and the trial court's findings in aggravation and mitigation of the sentence. Parker v. Dugger, No. 89-5961 (U.S. Jan. 22, 1991)[48 Cr.L. 2084, 2087]. This Court is required to conduct an independent review of the record to determine whether it fairly supports the trial court's findings. Id.

The trial court first found that the offense was committed to disrupt or hinder the lawful exercise of any governmental

function or the enforcement of laws. (R906) The court based this aggravating circumstance upon the following factual analysis:

> The evidence shows that the Defendant, GEORGE MICHAEL HODGES, had been accused by the victim, BETTY RICKS, of an act of indecent exposure sometime prior to January 8, 1987, that the victim was persisting in a prosecution of formal criminal charges against the defendant for said exposure act, and that the Defendant had approached the victim on occasion, prior to the murder of the victim, attempting to talk the victim out of continuing with the prosecution against him. It is apparent that the Defendant had told the victim he was very concerned about his family, his reputation and his jab security if the victim was to persist in her prosecution.
>
> The Court finds that the sole purpose for the killing of BETTY RICKS was to disrupt or hinder the lawful prosecution of GEORGE MICHAEL HODGES for the indecent exposure charges filed by the victim. (R906-907)

The facts stated in the first paragraph of this analysis were supported by the testimony of Det. Orzechowski, Det. Horn, and Debra Ricks.[6] (R681-690) However, the court's conclusion that the sole purpose for killing Betty Ricks was to disrupt or hinder Appellant's prosecution for indecent exposure was not supported by any evidence at trial and is nothing more than speculation. Ms. Ricks did not tell the police officers or her sister that Appellant had threatened her with any form of physical violence. (R681-690) Both Jessie Watson and Vickie Boatwright claimed that Appellant admitted that he shot Ms. Ricks, but neither of them testified that Appellant gave any reason for doing so. (R367-369,428-429)

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[6] Appellant's arguments that this testimony should not have been admitted because it was unreliable hearsay which violated the Sixth Amendment and victim impact evidence which violated the Eighth Amendment are presented under Issues I and IV, supra,.

In Francis v. State, 473 So.2d 672 (Fla. 1985), cert.denied, 474 U.S. 1094, 106 S.Ct. 870, 88 L.Ed.2d 908 (1986), this Court approved the trial court's finding that Francis killed a confidential informant to disrupt or hinder law enforcement where the evidence showed that the informant provided information leading to Francis's arrest, and Francis had twice threatened to kill the informant. This case is different from Francis because here there was no evidence that Appellant threatened to harm Ms. Ricks.

When the State claims that the murder of someone who was not a law enforcement officer was committed to avoid arrest, this Court has required very strong evidence that the elimination of the witness was the dominant or only motive for the murder. Scull v. State, 533 So.2d 1137, 1141-1142 (Fla. 1988); Perry v. State, 522 So.2d 817, 820 (Fla. 1988); Rogers v. State, 511 So.2d at 533. the same standard should apply when the State claims that a murder was committed to eliminate a witness to disrupt or hinder law enforcement. Aggravating circumstances cannot be based upon speculation by the State or the court. Hamilton v. State, 547 So.2d at 633-634; Scull v. State, 533 So.2d at 1141-1142.

The court's second finding, that the offense was committed in a cold, calculated, and premeditated manner, (R907) was based upon the following analysis:

> The evidence presented by the State convinces the Court that the Defendant, GEORGE MICHAEL NODGES, having been accused by the victim of indecent exposure, sought to have the victim drop those charges against him and that upon her refusal to do so, the Defendant stalked the victim in the early morning hours of January 8, 1987, ambushed her as she ap-

> proached her place of employment and then with the calculation of a professional killer, the Defendant walked up to her and with virtually no emotion, shot her down in cold blood.
>
> The killing of BETTY RICKS by GEORGE MICHAEL HODGES did not occur in a moment of domestic anger as is so often the case. Nor was it done in a moment of passion or desperation or under the pressure of any exigent circumstances. The killing of BETTY RICKS was simply an execution performed by the Defendant in a cold, calculated and premeditated manner in order to prevent his prosecution for a simple misdemeanor charge. (R907)

Once again, the court's analysis is based more upon speculation than on proven facts. There was no evidence that Appellant "stalked" Ms. Ricks in the early morning hours of January 8, 1987. There was no evidence that he acted "with the calculation of a professional killer." There was no evidence that Appellant displayed "virtually no emotion" at the time Ms. Ricks was shot. Nor was there any evidence to establish the absence of any "passion or desperation." In fact, the court's logic is inconsistent and self-contradictory. Murdering a witness to an alleged misdemeanor to avoid prosecution could only be characterized as an act of desperation. Had Appellant acted with the calculation of a professional killer it is extraordinarily unlikely that he would have killed Ms. Ricks for what the court itself found to be "such an insignificant purpose." (R907)

To sustain a finding of cold, calculated, and premeditated the law requires proof beyond a reasonable doubt of "heightened" premeditation. Reed v. State, 560 So.2d 203, 207 (Fla. 1990). This aggravating circumstance requires premeditation beyond that normally sufficient to prove premeditated murder and emphasizes

cold calculation before the murder. Perry v. State, 522 So.2d at 820. In the absence of evidence of calculation, i.e., a careful plan or prearranged design, the evidence is insufficient to sustain a finding of cold, calculated, and premeditated. Rivera v. State, 545 So.2d 864, *865* (Fla. 1989); Schafer v. State, 537 So.2d 988, 991 (Fla. 1989); Rogers v. State, 511 So.2d at 533.

Since neither of the aggravating circumstances relied upon by the State and the trial court were proven beyond a reasonable doubt, this Court must vacate the death sentence and remand far imposition of a life sentence. Banda v. State, 536 So.2d 221, 225 (Fla. 1988), cert.denied, __U.S.__, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989).

ISSUE VII

THE TRIAL COURT ERRED BY FINDING TWO SEPARATE AGGRAVATING CIRCUMSTANCES BASED UPON THE SAME ESSENTIAL FEATURE OF THE OFFENSE.

The trial court found both aggravating circumstances, disrupt or hinder law enforcement and cold, calculated, and premeditated, based upon the same essential feature of the offense -- that Appellant killed Betty Ricks to prevent her from prosecuting him for indecent exposure, (R906,907) This Court has repeatedly ruled that it is impermissible to find two separate aggravating factors on the basis of the same essential feature of the offense. Bello v. State, 547 So.2d 914, 917 (Fla. 1989); Cherry v. State, 544 So.2d 184, 187 (Fla. 1989), cert.denied, __U.S.__, 110 S.Ct. 1835, 108 L.Ed.2d 963 (1990). The death sentence must be vacated, and the case remanded for a new sentencing hearing. Bello v. State, 547 So.2d at 918.

ISSUE VIII

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY FAILING TO PROPERLY CONSIDER APPELLANT'S EVIDENCE OF MITIGATING CIRCUMSTANCES.

The Eighth Amendment prohibits the State from precluding the sentencer in a capital case from considering any relevant mitigating factor, and it prohibits the sentencer from refusing to consider, as a matter of law, any relevant mitigating evidence. Eddinqs v. Oklahoma, 455 U.S. 104, 113-114, 102 S.Ct. 869, 71 L.Ed.2d 1, 10-11 (1982); U.S. Const. amends. VIII and XIV. The sentencer must be allowed to consider and give effect to mitigating evidence relevant to the defendant's background and character precisely because the punishment should be directly related to the personal culpability of the defendant. Penry v. Lynaugh, 492 U.S. __, 109 S.Ct. __, 106 L.Ed.2d 256, 284 (1989).

Moreover, the Eighth Amendment requires that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings v. Oklahoma,, 455 U.S. at 112, 71 L.Ed.2d at 9. To insure fairness and consistency, this Court must conduct a meaningful independent review of the defendant's actual record. Parker v. Dugger, No. 89-5961 (U.S. Jan. 22, 1991)[48 Cr.L. 2084, 2087]. In conducting the requisite appellate review, this Court cannot ignore the evidence of mitigating circumstances in the record. Id.

In Campbell v. State, No. 72,622 (Fla. Dec. 3, 1990)[16 F.L.W. S1, S2], and Rogers v. State, 511 So.2d 526, 534 (Fla.

1987), cert.denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed. 681 (1988), this Court developed a three-step procedure for trial judges to use in evaluating mitigating circumstances to insure greater consistency and to facilitate appellate review in capital cases. First, the trial court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence, and if it is a nonstatutory mitigating circumstance, whether it is truly mitigating in nature. Second, the court must find as a mitigating circumstance each factor reasonably established by the greater weight of the evidence and mitigating in nature. Third, the court must weigh the aggravating circumstances against the mitigating, expressly considering each established mitigating circumstance.

The trial court's evaluation of the mitigating evidence in this case failed to satisfy the requirements of Campbell and Rogers. The court stated:

> Mr. Hodges' family has spoken as to his character and dedication to his family. The Court has considered especially the loyalty that apparently existed between Mr. Hodges and his wife in her expressions of disbelief that he could perform such an act as the killing of BETTY RICKS, and her attempts to protect him in her initial statements to investigating officers after January 8, 1987. The Court has especially considered the relationship of love as apparently existed between the Defendant and his step-son [sic] and the true companionship they have apparently shared before the tragic events of January 8, 1987.
>
> However, in balancing all aspects of the Defendant's character, which is the only statutorily enumerated mitigating circumstance the Court has found in the facts of this case against the aforesaid aggravating circumstances, the Court finds that the aggravating cir-

> cumstances far outweigh any mitigating circumstances and that the killing of BETTY RICKS by GEORGE MICHAEL HODGES requires the ultimate sanction. (R908)

The court's analysis of the mitigating circumstances in this case is fatally flawed. First, the court seems to have restricted itself to the consideration of statutory mitigating circumstances -- "the only statutorily enumerated mitigating circumstance the Court has found....." (R908) Since the Eighth Amendment prohibits the court from refusing to consider any relevant mitigating evidence under Eddings v. Oklahoma, this defect alone requires reversal of the death sentence and a new sentencing hearing. See Campbell v. State, 16 F.L.W. at S2 (failure to consider nonstatutory mitigating circumstances reversible error); Nibert v. State, No. 71,980 (Fla. Dec. 3, 1990)[16 F.L.W. S3, S4] (same).

Second, the court's written sentencing order fails to expressly evaluate most of the mitigating evidence offered by Appellant. In addition to his loving relationship with his wife and stepson, Appellant presented uncontroverted evidence of the following circumstances:

A. Traumatic childhood experiences -- Appellant's family moved frequently, so he was not able to establish any long term friendships except with his brothers. (R694) More significantly, Appellant had a very close relationship with an older brother who drowned. The brother's death seemed to change Appellant completely. (R694) Traumatic childhood experiences are mitigating as a matter of law. Eddings v. Oklahoma, 455 U.S. at 115, 71 L.Ed.2d at 11; Campbell v. State, 16 F.L.W. at S2 n.4; Stevens v. State, 552

So.2d 1082, 1085-1086 (Fla. 1989); Brown v. State, 526 So.2d 903, 908 (Fla.), cert.denied, __U.S.__, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988).

B. Deprived educational background -- Appellant did not finish high school because his family moved to another state, but he later obtained his GED. (R695) A deprived educational background is also mitigating as a matter of law. Cochran v. State, 547 So.2d 928, 932 (Fla. 1989); Brown v. State, 526 So.2d at 908.

C. Close family relationships -- Appellant was a good father to all four of his children and stepchildren, not just Jessie Watson. (R695-696,698) He had close and loving relationships with his mother (R696), his brothers (R694), his wife's parents, whom Appellant helped in any way he could (R698), and his brother-in-law Harold Stewart, with whom he worked and fished. (R697,699) Evidence of being a good father and supportive family member is mitigating in nature. Campbell v. State, 16 F.L.W. at S2 n.4; Stevens v. State, 552 So.2d at 1085-1086; Rogers v. State, 511 So.2d at 535.

D. Employment history -- Appellant was a good worker who never had any problems on the job. (R697-698) Having a good work record is mitigating because it demonstrates the potential for rehabilitation. Stevens v. State, 552 So.2d at 1086; Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988); Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987).

In Nibert v. State, 16 F.L.W. at S4, this Court ruled that "when a reasonable quantum of competent, uncontroverted

evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." In this case, Appellant presented a reasonable quantum of competent, uncontroverted evidence of four nonstatutory mitigating circumstances. The trial court's error in failing to expressly consider, find, and weigh these circumstances violated the Eighth Amendment as interpreted by both this Court and the United States Supreme Court. The death sentence must therefore be vacated, and the case remanded far resentencing.

ISSUE IX

THE DEATH SENTENCE IS DISPROPORTIONATE TO THE PERSONAL CULPABILITY OF APPELLANT AND THE CIRCUMSTANCES OF THE OFFENSE.

Under the Eighth Amendment, the sentencing court is required to give effect to the mitigating evidence relevant to the defendant's character or record or to the circumstances of the offense because punishment must be directly related to the personal culpability of the defendant. Penry v. Lynaugh, 492 U.S. __, 109 S.Ct. __, 106 L.Ed.2d 256, 284 (1989); U.S. Const. amend. VIII. This Court's independent appellate review of death sentences is crucial to insure that the death penalty is not imposed arbitrarily or irrationally. Parker v. Dugger, No. 89-5961 (U.S. Jan. 22, 1991)[48 Cr.L. 2084, 20871. This requires an individualized determination of the appropriate sentence on the basis of the character of the defendant and the circumstances of the offense. Id.

As argued under Issue VI, supra, the State failed to prove beyond a reasonable doubt either of the aggravating circumstances relied upon by the trial court -- disrupt or hinder law enforcement and cold, calculated, and premeditated. (R906-907) In the absence of any valid aggravating circumstance, the death penalty is disproportionate to the offense and must be vacated. Banda v. State, 536 So.2d 221, 225 (Fla. 1988), cert.denied, __U.S. __, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989).

If this Court rejects Appellant's argument that neither aggravating circumstance was proved beyond a reasonable doubt, it

should find that there was only one valid aggravating circumstance. As argued under Issue VII, supra, both circumstances found by the court were based upon the same essential feature of the offense -- that Appellant killed Ms. Ricks to prevent his prosecution for indecent exposure. (R906-907) "[T]his Court has affirmed death sentences supported by one aggravating circumstance only in cases involving 'either nothing or very little in mitigation.'" Nibert v. State, No. 71,980 (Fla. Dec. 3, 1990)[16 F.L.W. S3, S4]; Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989).

As argued under Issue VIII, supra, Appellant presented substantial, uncontroverted evidence of four nonstatutory mitigating circumstances which must be weighed against the single aggravating circumstance. Appellant's traumatic childhood experiences, his deprived educational background, his close family relationships, and his good work record, see Issue VIII, supra, substantially outweigh the State's weak, circumstantial evidence that Appellant killed Ms. Ricks to prevent her from prosecuting him for indecent exposure. See Nibert v. State, 16 F.L.W. at S4 (death sentence disproportionate because substantial mitigation outweighed heinous, atrocious, or cruel aggravating circumstance); Blakely v. State, ~~561~~ 561 So.2d 560, 561 (Fla. 1990)(death sentence disproportionate because fact that killing resulted from ongoing domestic dispute outweighed findings of heinous, atrocious, or cruel and cold, calculated, and premeditated); Smalley v. State, 546 So.2d 720, 723 (Fla. 1989)(same as Nibert); Lloyd v. State, 524 So.2d 396, 403 (Fla. 1988)(death sentence disproportionate because no significant

history of criminal activity outweighed murder committed during attempted robbery); Rembert v. State, 445 So.2d 337 (Fla. 1984) (death sentence disproportionate for murder committed during robbery although court found no mitigating circumstances).

The death penalty must be reserved for only the least mitigated and most aggravated murders. Songer v. State, 544 So.2d at 1011; State v. Dixon, 283 So.2d 1 (Fla. 1973), cert.denied sub nom., Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Appellant's case quite simply does not belong in that category. The death sentence must be vacated, and the case remanded for imposition of a life sentence.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse the judgment, vacate the death sentence, and remand this case to the trial court far appropriate relief: a new trial (Issues I and 11); determination of Appellant's competency to be sentenced, followed by a new penalty phase trial before a new jury, if he is competent (Issue 111); a new penalty phase trial before a new jury (Issues IV and V); resentencing by the trial court (Issues VII and VIII); or imposition of a life sentence (Issues VI and IX).

CERTIFICATE OF -SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 14th day of February, 1991.

Respectfully submitted,

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