* served 1 Day late

IN THE SUPREME COURT OF FLORIDA

JEREMY LYNN SCOTT,	:	
Appellant,	:	
vs.	:	Case No. 75,036
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On November 17, 1988, the Polk County Grand Jury indicted the Appellant Jeremy Lynn Scott and his co-defendant Larry Brian Hall for the first degree premeditated murder and robbery of Donald Moorehead on November 1, 1988. (R29-30)[1] The State subsequently filed an information charging Appellant and Hall with the robbery of Donald Moorehead with a deadly weapon and nolle prosequied the robbery count of the indictment. (R76,2092-2093) The court granted the State's motion to consolidate the murder and robbery charges for trial. (R77-79) The court also granted Appellant's motion to sever his trial from Hall's trial. (R47-48,1923)

At the time he was indicted, Appellant was on probation for burglary, grand theft, and battery on a law enforcement officer. (R23) On November 7, 1988, a probation officer filed an affidavit and warrant alleging that Appellant had violated his probation on August 15, 1988, by trespassing at the home of a female acquaintance. (R26,27)

Appellant was tried by jury before the Honorable J. Dale Durrance, Circuit Judge, on August 17 to 25, 1989. (R165,167) The court granted the State's request to consider the violation of probation issues while hearing the guilt phase of the murder trial. Defense counsel did not object. (R179,180)

The court denied Appellant's motion for judgment of acquittal. (R1421-1424,1433-1434) The jury found Appellant guilty of first

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

degree murder and robbery with a deadly weapon. (R1603,1950-1951) Based upon the verdict, the court revoked Appellant's probation. (R1608-1609,2040) The court also adjudicated Appellant guilty of the robbery. (R1609)

In the penalty phase of the trial, the jury recommended a sentence of life imprisonment. (R1914,1955) The court adjudicated Appellant guilty of first degree murder and ordered a presentence investigation. (R1918,1956)

Defense counsel filed a motion for new trial (R1958-1959) and a renewed motion for judgment of acquittal. (R1960) The court heard and denied these motions on September 15, 1989. (R1972-1987)

The court conducted a sentencing hearing on October 4, 1989. (R2002-2015) The court sentenced Appellant to death for first degree murder, a consecutive term of life imprisonment for robbery with a deadly weapon, and consecutive terms of fifteen years for burglary, five years for grand theft, and five years for battery on a law enforcement officer. (R2012-2013,2017-1021,2026-2030)

Appellant filed a timely notice of appeal on October 18, 1989. (R2031) The court appointed the public defender to represent Appellant on this appeal. (R2039)

STATEMENT OF THE FACTS

A. The State's Case

Mike Lashley met Donald Moorehead at the Fantasy 2000, a gay bar in Lakeland. Moorehead hired Lashley to paint his mobile home. (R977-979,994-995) Appellant occasionally stayed with Moorehead. Lashley saw him at the trailer three times in two weeks. (R985-986, 991-992)

On November 1, 1988, Lashley went to Moorehead's trailer to paint. (R980) Moorehead's car, a 1988 Baretta, was not there. (R981) Lashley found a note on the back door of the trailer. (R982) The note stated that Moorehead had gone to Orlando to help a friend, and he would return in a few days. (R984) While Lashley was painting, he bumped the front door and found that it was not locked. (R984-985) When Lashley looked inside, he found Moorehead's nude body on the living room floor with a cord around his neck and blood coming from his head. (R980,985) Lashley ran to a neighbor's home to call the police. (R985) It had been four or five days since Lashley had last seen Appellant at the trailer. (R992-993)

Virgil Halderman lived in a trailer two doors down from Moorehead. (R997) He suspected Moorehead was gay. (R1002) Halderman left for work around 6:30 a.m. on the day he learned of Moorehead's death. At that time, Moorehead's lights were on and his car was there. (R998-999)

Halderman's wife, Ramona, saw eight or ten people, including Lashley, up the street. She went out, and Lashley told her what

happened. She looked inside the front door, saw Moorehead, then called the police. (R1003-1006)

Lakeland Police Office Bobby McNatt was dispatched to Moorehead's trailer in a park on Beacon Road at 1:16 p.m. on November 1, 1988. (R1007-1009) Several people were in the road. McNatt spoke to Lashley, then called the dispatcher to find out if his supervisor was coming. (R1010) When Sergeant Knowles arrived, they went inside. McNatt saw Moorehead's nude body lying on its side. There was white matter on top of his head and a cord around his neck. (R1011-1012) Lashley showed McNatt the note on the back door, and McNatt collected it. (R1013-1014)

The parties stipulated: (1) that the victim was Donald Moorehead; (2) Appellant's fingerprints and palm prints were found in Moorehead's car after it was seized from Jami Allen; (3) the parties agreed to the introduction of State's exhibits 47 and 48; and (4) the State was not required to call as a witness the person who drew blood from Appellant for serological analysis. (R1020-1021)

State's exhibit 47 was a handwriting analysis report by James Outland finding a strong probability that Larry Hall wrote the note found on Moorehead's door. (R1140)

Exhibit 48 was a shoe print comparison report from Edward Guenther finding that the shoe prints on Moorehead's floor could have been made by Hall's shoes. (R1141)

Lakeland Police Officer Daniel Shamrock helped to process the crime scene and collect evidence. He identified photographs and

diagrams of the scene, photographs of the body at both the scene and during the autopsy, and photographs of Moorehead's car. (R1022-1045) On cross-examination by the defense, he testified that there were no signs of forced entry to the trailer. (R1046) The trailer was neat and orderly with no indication it had been ransacked. There was a television in the living room and a stereo in the den. (R1048-1049) No money or wallet was found while Shamrock was there, but someone else found some money later. (R1049-1050) Shamrock found a driver's license issued to Lester Decker, an electric bill in the name of Mark Robert Miller for another address, and beer cans in the garbage. (R1050-1051) He found a small wooden pile of the type commonly used to smoke marijuana on a table in the living room. (R1051) He also found a plastic bag or some indication of marijuana being present on the table. (R1052)

David Battles, a medical laboratory technician, testified that he knew Donald Moorehead from seeing him in two gay bars, the Fantasy 2000 and the Green Parrot, and at the home of a mutual friend, Bruce Tipton. (R1056-1060) Battles assumed Moorehead was gay. (R1060) He last saw Moorehead at the Fantasy 2000 on the night of October 30, 1988. (R1057)

In response to Appellant's call, his friend Brent Norman went to Moorehead's trailer to pick Appellant up around 5:00 p.m. on October 31, 1988. (R1062-1065,1077-1078) Appellant said his uncle lived there. (R1064) They picked up Norman's girlfriend Kelly around 8:00 p.m. (R1065,1079-1080) They ate dinner at a Burger King. As they were leaving, Appellant yelled something to Larry

Brian Hall. (R1069-1070,1084) Appellant had around $40 and purchased beer, alcohol, and gas for the car. (R1081) They drove around and drank. (R1065,1073,1081-1083) Appellant became intoxicated and acted crazy. (R1073,1085-1087) Norman and Kelly dropped him off near a picnic shelter by Lake Morton between 2:00 and 3:00 a.m. (R1066-1069,1074,1087) Norman saw another man sitting in the shelter. (R1069,1088)

On November 2, 1988, Peter Buchan lived in the Springlake Trailer Park in Davenport. (R1091-1092) He heard on the morning news that the Lakeland Police were looking for a brown Baretta. The report included the license number. Within an hour he saw the Baretta turn into the Shady Oaks Trailer Park across the street. He called the police and reported what he had seen to Sergeant Boatner. (R1093-1094)

Bruce Tipton met Donald Moorehead at the Green Parrot, a gay bar, about two years before the trial. (R1096,1104) Both Tipton and Moorehead were gay. (R1104) They became drinking buddies. (R1097,1105) Tipton saw Appellant with Moorehead four or five times. (R1097) Tipton and Appellant became friends. (R1107)

Moorehead came to Tipton's house around 8:00 p.m. on Halloween. (R1098) Appellant also stopped by Tipton's house that night to ask if he had seen Moorehead. Tipton told him Moorehead had gone home. (R1110-1111) Appellant did not appear to be either angry or intoxicated. (R1111)

Tipton went to Moorehead's trailer around 8:30 a.m. the following day. Moorehead's car was gone, and he did not answer the

door. (R1099) Tipton found a note on the ground by the back door. It said Moorehead had gone to Orlando to help a friend. Tipton put the note in the door. (R1100)

Paul Smith lived with Tipton. (R1113,1121-1122) Smith met Appellant through Moorehead. (R1114-1115) Smith was familiar with places where gay people congregate in Lakeland--the Green Parrot, the Fantasy 2000, and Lake Morton. (R1119,1122,1128) Young guys go to Lake Morton to pick up older men or men with money. (R1119-1120) He had seen Appellant there three or four times. (R1120) Moorehead appeared to like and respect Appellant. (R1120) Smith did not like Appellant; he felt Appellant was a "street person" who was sometimes loud and obnoxious. (R1115,1124-1125) Moorehead appeared to have a sexual relationship with Appellant. (R1126) Smith last saw Moorehead the night before his body was found. He did not recall seeing Appellant that night. (R1120)

Jennifer Stone was Jami Allen's friend. (R1141-1142) Stone met Appellant at a birthday party. He was Allen's boyfriend. (R1142) On November 1, 1988, Stone talked to Allen two or three times. Their conversations included something Allen said about Donald Moorehead, who was the subject of a newspaper article about a man found dead in his home. Stone's father called the police, and Stone told them what Allen said. (R1143-1144)

Lakeland Police Detective Mark Kirksey was a crime scene investigator called to Moorehead's trailer on November 1, 1988. (R1145-1149) He identified State's exhibit 2 as a photograph of the victim's body. (R1150) Kirksey examined the body for wounds

and prepared it to be transported. He remained at the scene collecting evidence, dusting for latent prints, and searching for blood spatters. (R1151) Kirksey identified a number of photos taken at the scene: Exhibit 23 showed the dining table, chairs, and a pair of pants on the table. (R1152-1153) Exhibit 24 showed a telephone cord on the floor under the table. (R1153) Exhibit 25 showed a living room curtain on which blood was found. (R1153-1154) Exhibit 26 showed a bar and more curtains. (R1154-1155) Exhibits 39 and 37 showed the blood spatter on the curtain. (R1155-1156) Exhibit 39 also showed an area where the carpet had been removed from where the victim's head had been lying. (R1156)

When Det. Kirksey first observed the body it was cold, rigor had set in, and lividity was present. (R1157) The lividity, as shown in exhibit 2, showed that the body had been lying on his left side. (R1158-1161) Ordinarily, rigor comes in eight hours, stays in eight, and leaves in eight. (R1161)

Exhibit 40 showed a blood stain on the mat beneath the section of carpet which was removed. (R1164) Exhibits 28 and 29 showed a blood stain on the chair. (R1162,1165-1166) Exhibit 33 showed a blood stain in the bathroom sink. (R1168) Exhibit 30 showed the hallway. (R1168-1169) Exhibit 31 showed the master bedroom with papers strewn on the floor. (R1172)

In the kitchen, Det. Kirksey found two blood stains resembling shoe prints. The stained linoleum was removed and sent to the lab. (R1171-1172) Exhibit 35 showed a clean grape juice bottle in the refrigerator. (R1174) Exhibit 78 was the bottle. It was unopened

and full, and it had been processed for prints. (R1174-1176) Kirksey also searched the house for money without success. (R1177)

On November 2, Kirksey attended the autopsy and obtained blood samples from the victim. He then returned to the scene. (R1177-1178) He found drug paraphernalia in a garbage can on the patio. (R1178) There were pipes for smoking cocaine and marijuana, a marijuana cigarette butt, and rolling papers. (R1191) He found a hammer, exhibit 71, in a kitchen drawer. The hammer was shown in exhibit 34. (R1178-1179) Exhibit 41 showed two one dollar bills in the air conditioning vent in the kitchen floor. (R1179-1180) Exhibit 42 showed eight $50 bills found in the drip pan of the refrigerator. (R1180)

Exhibit 60 was a torn piece of paper found in the bedroom which appeared to match the note on the door. (R1181-1182) Exhibit 43 showed a wallet found on the mattress of the sleeper sofa in the living room. (R1183) Exhibit 57 was the telephone cord found around the victim's neck. (R1184-1185) Exhibit 61 was another piece of telephone cord. (R1186)

Kathy Guenther was a serologist for the Florida Department of Law Enforcement. (R1197-1199) She found a human blood stain on a pair of blue jeans, exhibit 83, but was not able to determine the blood type. (R1200-1202) From blood samples provided by the police, she determined that Moorehead had blood type O, Larry Hall had blood type A, and Appellant had blood type B. (R1203) She found another human blood stain on a T-shirt, exhibit 82, but was unable to determine the blood type. (R1204-1205) She also found

human blood on the grape juice bottle, exhibit 78. (R1205-1206) Her lab report, exhibit 79, indicated that she also examined some tennis shoes and another pair of jeans but did not find any blood on them. (R1206-1207)

Jami Allen, Appellant's nineteen-year-old girlfriend, lived with her grandmother on Crystal Lake in Lakeland. (R1208,1210) She was pregnant. (R1228) She never met Donald Moorehead, but Appellant and Hall talked about him. (R1209) Appellant was living with Moorehead on Halloween in 1988. (R1228) Allen and Appellant had been talking for a few days about going to Texas to visit her uncle. (R1230)

On November 1, 1988, Appellant called around 8:45 a.m., then picked her up around 9:00. He was driving a Baretta and said it belonged to Moorehead. (R1210-1211) Brian Hall was in the backseat. (R1213) Appellant and Hall told her they found Moorehead with a little boy, beat him up, and left him unconscious. (R1213-1214) Appellant was upset and started crying. (R1231) They dropped her off after driving around for about twenty minutes. (R1214-1215) Appellant said he was going to see his grandmother in Davenport. (R1215) In a telephone conversation that night, Allen told Jennifer Stone that Appellant and Hall said they had a fight with Moorehead. (R1216)

Appellant called Allen around 11:00 p.m. that night. (R1215) He wanted her to go to Kissimmee with him for a couple of days. They also talked about going to her uncle's house in Texas with Hall in Moorehead's car. (R1217,1230,1232) Appellant and his

brother Dean picked her up in the car. They went to Appellant's mother's trailer in Davenport. (R1218) Appellant bought gas for the car with change from the console. (R1218,1232-1233) Hall was at Appellant's mother's trailer in Davenport. (R1220) Appellant, Hall, and Allen went to Appellant's aunt's trailer. Allen went to sleep. Hall went to sleep after she got up the next morning. (R1221) Allen and Appellant went to his mother's trailer. (R1222)

Allen took Moorehead's car to drive to the store, but she was stopped by the police a block or two away. (R1223,1233-1234) The police arrested her, put her in a patrol car, and told her they were looking for two guys for murdering Moorehead. Allen told them she had nothing to do with it. (R1224) She also told them Appellant gave her the car and that he was at his mother's trailer. One of the officers stayed with her while the others went to the trailer. Allen was taken to the trailer 15 or 20 minutes later. (R1225)

A few minutes later, Appellant approached one of the officers and was taken into custody. Appellant led them to his aunt's trailer and woke up Hall. The police took Allen to Lakeland. (R1226,1235-1236)

Polk County Deputy Earl Alexander was dispatched to the Springlake Mobile Home Park just north of Davenport on November 2, 1988, to look for a Chevy Baretta. He was the first officer to arrive. (R1236-1240) He found the Baretta parked by one of the trailers. Three men and two women were standing around the car. (R1241) Jami Allen got into the car and drove away. He followed and stopped her about a mile away. (R1241-1243)

Alexander and two other deputies returned to the trailer park. They detained the people they found there. One man went into the woods. They called for a police dog and helicopter. (R1244) Appellant's mother told then she would go into the woods to get him. Appellant them came out of the woods and identified himself. Lakeland Police detectives arrested him. (R1245) Appellant told them Hall was in a trailer asleep. He went to the trailer and woke up Hall. (R1246)

Lakeland Police Detective Joseph Louden testified that he was called to Donald Moorehead's trailer at 1:30 p.m. on November 1, 1988. (R1250-1252) He identified State's exhibit 21 as a photo of Moorehead's body. (R1253-1254) On November 2, Louden accompanied Sgt. Boatner to Davenport after a witness reported seeing Moorehead's car. Lt. Barlow and Det. Harrison drove to Davenport in another car. (R1255-1257) By the time they arrived, Deputy Alexander had already stopped Jami Allen. (R1257-1258) While the police were preparing to search for him with a dog and a helicopter, Appellant came out of a wooded area and approached Louden and Harrison. He asked whether they were looking for him and identified himself. (R1258-1259) Appellant showed them where to find Hall in another trailer. Barlow and Harrison drove Hall to the Lakeland police station. (R1259) Boatner and Louden transported Appellant to the station. (R1260)

On the way to Lakeland, Sgt. Boatner advised Appellant of his Miranda rights. (R1262,1263) When Det. Louden asked whether Appel-

lant knew what was going on, he answered, "Yeah, it's about that faggot, Don, and his car." (R1264)

Appellant told the officer he went out with his friends Brent and Kelly, then met Hall at Lake Morton around 2:30 a.m. (R1264-1265) They walked to Florida Southern College and called Moorehead from a pay phone. Moorehead picked them up and took them to his trailer. (R1265,1266) Appellant went to sleep in the back bedroom. (R1266-1267) Moorehead woke him up. Moorehead was naked. Appellant pushed Moorehead away, and they began fighting in the hall. Moorehead was winning the struggle, so Appellant called Hall for help. (R1267) Hall hit Moorehead with a bottle. Appellant cleaned the bottle and put it in the refrigerator. (R1268) Hall wrote the note saying Moorehead had gone to help a friend in Orlando. (R1269) Appellant told Jami Allen they caught Moorehead molesting a child, beat him up, and did not know whether he was still alive. (R1269-1270) Appellant told his family that Allen's grandmother helped them buy the Baretta. (R1270-1271)

Det. Louden took Appellant to an interview room when they arrived at the police station. Louden searched Appellant and found a piece of paper with dollar amounts written on it, $29,878.38 minus $300. Appellant explained that it was Moorehead's bank balance after a recent withdrawal. (R1260,1271) Appellant remained in the interview room until Det. Harrison took his taped statement. (R1271-1272)

Dr. Alexander Melamude, an associate medical examiner, performed an autopsy on Donald Moorehead on November 2, 1988. (R1280-

1285) He found two oval lacerations on the top of the head, as shown in State's exhibit 12. The skull was fractured. The injuries were caused by blunt trauma. (R1286-1290) There were internal hemorrhages and brain damage. (R1290-1291) There were two more, linear lacerations on the left side of the head and another skull fracture. (R1292-1293) Death could have been caused by any one of the three head injuries. (R1294-1295) State's exhibit 9 was a photograph showing a point of pressure under the jaw and two furrows on the neck caused by strangulation. State's exhibit 7 showed a wire around Moorehead's neck at the scene. (R1295-1297) The strangulation could have contributed to the death, or it could have occurred after death. Dr. Melamude could not determine whether it occurred before or after the blows on the head. (R1297-1298,1304-1307) Any of the blows to the head would have rendered Moorehead unconscious. (R1298-1299,1304) The blows to the head could have been caused by the grape juice bottle, State's exhibit 78. (R1299, 1303)

Larry Brian Hall testified that he was working at Burger King on Halloween. Appellant came there with a couple of friends. Appellant and Hall talked about meeting later. (R1337-1339) Hall had previously encountered Donald Moorehead with Appellant two or three times. (R1339-1340) Hall met with Appellant and his friends around 3:00 a.m. at a restaurant on Palmetto Street. (R1340-1341) Hall walked to a picnic shelter by Lake Morton and met Appellant again. (R1341-1342) They went to a convenience store on Palmetto to buy cigarettes, then walked to the college to call Moorehead.

(R1342) Appellant had been drinking, but he had no difficulty walking or talking. (R1343) Appellant told Hall that Moorehead owed him some money for work he had done. (R1348,1349)

Moorehead picked them up near Lake Hollingsworth about twenty minutes later. Moorehead was driving a Baretta. (R1345-1347) He took them to his trailer. (R1348) They sat around talking and drinking beer. While it was obvious Appellant had been drinking, he could still "function okay." (R1349-1350) They also smoked marijuana, (R1354-1355)

After about an hour, Appellant went to bed in the back room. (R1350-1351) Hall and Moorehead continued to talk for 30 to 45 minutes. (R1351-1352) Moorehead went to the back room. Hall believed he was making sexual advances to Appellant, but Appellant passed out. Moorehead then came back to the living room and attempted to talk Hall into having sex, but Hall refused. (R1352-1353) Moorehead went to the back room again for about fifteen minutes, then returned to the living room and fell asleep in a chair. Hall slept on the couch. (R1353-1355)

Appellant woke Hall up around 5:00 a.m. Appellant was looking for Moorehead's pants. Moorehead was sleeping naked on the chair. Appellant found the pants on the table and looked through them without finding anything. (R1356-1358) Appellant and Hall looked through the trailer for money. Appellant said he knew Moorehead had withdrawn some money from the bank. (R1359) They could not find any money, so they decided to take Moorehead's car to pick up

Jami Allen. They found the keys on the table. Appellant wanted money for Allen because she was pregnant. (R1360-1361)

Appellant wanted to kill Moorehead to prevent him from turning them in. (R1361-1362) Hall picked up a hammer in the kitchen. Appellant unsuccessfully attempted to persuade Hall to hit Moorehead with the hammer. (R1362-1365) Appellant got the grape juice bottle from the refrigerator and said they would both hit Moorehead at the same time. Hall still refused. (R1365-1367)

Appellant then hit Moorehead with the bottle three times. (R1367-1368) Moorehead slid out of the chair to the floor. (R1369) Moorehead was asleep as he was struck. He did not wake up, cry out, or say anything. He laid on the floor making choking sounds. (R1370) Appellant handed the bottle to Hall and told him to hit Moorehead. Hall complied and hit Moorehead one or two times. (R1370-1373)

While Hall and Appellant resumed their search for money, Moorehead continued to make sounds. Appellant choked him with the telephone cord. (R1373-1375) They found some change in Moorehead's room. (R1375-1376) Appellant wiped the bottle with a towel and put the bottle in the refrigerator. (R1376) Hall wrote the note, State's exhibit 59, and put it on the front door because Appellant said it would throw off suspicion by causing people to think Moorehead was out of town. (R1377-1379)

Before they left the trailer, Appellant told Hall to plug in the telephone because anyone who called might wonder if the phone kept ringing busy or disconnected. (R1380) When they left, they

took the car keys, the change, and the towel. (R1375-1377) Appellant drove Moorehead's car because people had seen him in the trailer park before and it would look suspicious for Hall to be driving. (R1379)

Appellant called Jami Allen. They picked her up near her grandparents' house. (R1381-1382) Appellant and Hall told Allen that Moorehead molested a boy, so they beat him up and took his car. (R1382) They also discussed driving to Texas with Allen. She had been planning to fly there to join her family. (R1385) They dropped off Allen near her grandparents' house and drove to Appellant's mother's trailer in Davenport. (R1383-1384) Hall went to sleep. When he woke up he found that Appellant had picked up Allen and brought her to Davenport. (R1384) It was around midnight. Appellant, Allen, and Hall went to Appellant's Aunt Judy's trailer, talked awhile, and went to sleep. (R1386) When Hall woke up again, Appellant was calling him out of the trailer because the police were there. (R1386) The police arrested them and took them to the Lakeland Police Department. (R1387)

Lakeland Police Detective William Harrison went to Moorehead's trailer and observed the body around 2:00 p.m. on November 1, 1988. (R1390-1394) Harrison determined that Moorehead was a homosexual. (R1398) Lashley told him he had seen Moorehead in the company of someone named Scott. (R1398-1399)

On November 2, Harrison interviewed Jennifer Stone after her father called the police. She told him her friend Jami Allen was Appellant's girlfriend and that Allen had made statements to her

about the homicide. Appellant and Hall were seen in Moorehead's car. (R1400-1402) This interview was interrupted by Sgt. Boatner's report that Moorehead's car had been seen in Davenport. (R1401) Harrison accompanied Lt. Barlow to Davenport. (R1402-1403) They were notified that the deputies had stopped Jami Allen in Moorehead's car and that two people were seen running from the area. (R1404)

A few minutes after the police arrived in Davenport and began searching for the two men, Appellant approached Harrison, identified himself, and asked if they were looking for him. (R1405-1406) After being told that he was a suspect in the Moorehead homicide, Appellant agreed to accompany the police to Lakeland. He also directed them to the trailer where Hall was sleeping. (R1406-1407)

Upon returning the to Lakeland Police Department, Harrison interviewed Allen, Hall, and then Appellant. (R1407-1408) Harrison talked informally with Appellant for about twenty minutes. He did not appear to be under the influence of alcohol or drugs. (R1410-1411) Harrison advised Appellant of his Miranda rights. Appellant understood and signed a waiver form. (R1411-1414) Appellant said, "Yeah, we killed the guy but he was a faggot and Brian was just trying to help me when he hit the guy." (R1415)

Appellant explained that when he and Hall went to Moorehead's trailer on Halloween, they caught Moorehead molesting a young boy. Hall and Moorehead fought in the kitchen. Hall hit Moorehead several times in the head with the wine bottle. (R1415-1416)

When Harrison told him that there was no evidence of a fight in the kitchen, Appellant said he would tell the truth, that he and Hall beat Moorehead in the living room. (R1416-1417) Harrison then tape recorded an interview with Appellant. The tape, State's exhibit 80, was played for the jury. (R1417-1419,2044-2083)

Appellant told Harrison he first met Donald Moorehead at the Fantasy 2000 bar about three weeks before he was arrested. Appellant asked Moorehead to sell him some marijuana. Moorehead gave it to him. (R2046-2047) Moorehead was bisexual. (R2047) Appellant went home with him. (R2048) Moorehead sometimes gave Appellant dinner, marijuana, cocaine, and a place to spend the night. He hired Appellant to paint his trailer. (R2048-2050)

On Halloween, Appellant went out drinking with Brent and Kelly. He drank a bottle of wine. (R2050-2054) Later that night Appellant met Hall, they called Moorehead, and he took them to his trailer. (R2053-2055) They smoked marijuana. Hall and Moorehead drank beer. (R2055-2056) Appellant passed out in the bedroom. Three or four hours later Moorehead came into the bedroom naked and touched Appellant. Appellant told him to leave him alone. (R2057-2058) Moorehead returned to the living room and went to sleep. Hall came into the bedroom and told Appellant he wanted to "do it" to Moorehead. (R2058-2059) Hall had a hammer. Appellant did not want to hit Moorehead with the hammer because "that would have really killed him." (R2060) Appellant hit Moorehead once on the back of the head with a wine bottle. Moorehead fell out of the chair to the floor unconscious. (R2060-2063) Appellant told Hall

to hit him. Hall hit Moorehead with the bottle four times. (R2060-2064) Appellant said they did not intend to rob Moorehead but to "teach him a lesson" because he was homosexual and a child molester. (R2062-2063)

Fifteen or twenty minutes later, Appellant turned Moorehead over and felt his pulse. He used a piece of phone cord to turn Moorehead over and to try to carry him to the couch. (R2064-2065, 2067) They searched for money and found about eight dollars in change in the car. (R2066-2067) Appellant put the bottle back in the refrigerator. (2068) Hall wrote the note about Moorehead going to Orlando. (R2071,2072) Appellant drove when they left. He picked up Allen. They told her they found Moorehead doing something with a kid and got in a fight with him. (R2069-2070) They went to Appellant's mother's house in Kissimmee. When the police came, Appellant watched from the woods. He turned himself in because he thought they would blame Allen. (R2071)

At the end of the interview, Appellant said he hit Moorehead from behind because he had said he had a black belt. (R2075-2076) Appellant denied hitting Moorehead to take his money, but he admitted that he and Hall has discussed beating Moorehead because Moorehead owed him money for painting the trailer. (R2077-2081)

The defense rested without presenting any evidence. The court inquired to determine that Appellant waived his right to testify. (R1428-1430)

B. Closing Argument

During closing argument, the prosecutor commented,

> The defense in every case argues the defendant's not guilty. That's his job. He's up here to try and put your attention on something besides the facts . . . . [H]e told you he wasn't going to be emotional and that I was. I am emotional. I don't like murderers. That's why I'm emotional --
>
> * * *
>
> -- that's my job. (R1490-1491)

Defense counsel objected to the prosecutor's improper argument concerning his personal feelings in the case during which he raised his voice and intentionally tried to inflame and prejudice the jury. Defense counsel moved to strike and for a mistrial. The court sustained the objection, but it denied the motions. (R1491-1493)

The prosecutor continued to criticize defense counsel in his closing argument, accusing defense counsel of trying to divert the jury's attention to matters not in evidence. (R1493-1495) The prosecutor vouched for Hall's credibility: "Why did Mr. Hall confess under oath to first degree murder? Because he's telling the truth." (R1495) The prosecutor attacked both defense counsel and Appellant:

> The whole argument about judging the actions, whatever actions that either Mr. Scott or Mr. Hall by a reasonable man's standard, what a reasonable person would do is hog wash. Don't you ever believe that you can go back in that jury room and judge a criminal by a reasonable man's standard. You can not figure out why people bash people's heads in. If you try to do that, if you try to come up with a

> rational explanation as to why somebody would take this bottle and crush in somebody's skull, you're going to be back there until the day you die. There is not a first degree murder case that has a rational explanation. There's not any criminal case that has a rational explanation. Why do crooks act like they do? Why do they go and try to get out of the state? Why to they hide from the police and come out of the woods? There's no reasonable explanation for that kind of stuff. The man's mind isn't right or he wouldn't have crushed somebody's skull in.
>
> He even indicated to you that illegal activities were involved such as homosexuality. I don't think homosexuality is illegal in this state. I've never prosecuted anybody for it. He tells that Don. When Jeremy approached him at the Fantasy 2000, looked like a cop. Now, where, search your collective minds in this evidence, is this any indication that Donald Moorehead looked like a police officer? He said, well -- where is that coming from? That's coming out of Mr. Maslanik's mind. He made that up. He says the house wasn't ransacked. You want to talk about TV? Ransacked is something that comes from Starskey and Hutch. It comes from McCloud and Baretta and all those sorts of TV shows. Ransacked. These guy looked all over that house. (R1496-1497)

During the next recess, defense counsel objected that the prosecutor attempted to shift the burden of proof to the defense, asserted his personal opinions that Hall was telling the truth and criminals can't be judged by a reasonable man's standard, referred to Appellant as a crook, attempted to inflame and prejudice the jury, and misled the jury regarding the legality of homosexuality. Defense counsel moved to strike the improper comments, requested a curative instruction to the jury, and moved for a mistrial. Defense counsel also asked the court to instruct the prosecutor not to engage in further misconduct and to refrain from theatrics.

(R1502,1506-1508) The court denied the motions and noted defense counsel's objections for the record. (R1508)

The prosecutor explained why he called several witnesses, (R1508-1511) then remarked,

> This would have been an attack. The reason attacks are made on the State's case no matter how good it is -- if there was a fingerprint in the case, the Defense would attack as the fingerprint expert. They have to do something, so that's what they attack. (R1511)

Defense counsel objected that the prosecutor was again trying to shift the burden of proof and that his remarks about what could have been attacked were irrelevant. The court overruled the objections. (R1511-1512)

The prosecutor told the jury, "Because that boy [Appellant] is a hustler. He was hustling queers. That's whey he was out there at that point." (R1515) Defense counsel objected that there was no evidence to support the allegation. The court overruled the objection. (R1515)

The prosecutor stated, "Now, if you're going to apply the same rules to each witness, apply those rules to Mr. Scott's taped statement" (R1529) The court sustained defense counsel's objection that this was a misstatement of the law, but it denied defense counsel's motion to strike the remark. (R1529)

At the conclusion of the prosecutor's closing argument, defense counsel renewed his prior objections and motions concerning prosecutorial misconduct and again moved for mistrial. (R1541-1542) The court denied the motion. (R1542) During his own closing argument, defense counsel asserted that he timed the prosecutor and

found he spent seventeen minutes attacking defense counsel and his tactics. (R1545)

C. The Penalty Phase

The State introduced exhibit 87, Appellant's May 2, 1986, judgment of guilt and sentence for attempted arson, and exhibit 88, Appellant's December 29, 1987, judgment of guilt and sentence for battery on a law enforcement officer. (R1622-1623)

Lt. Michael Pol was the jail officer for the Polk County Sheriff's Department who initiated the attempted arson charge in 1985 when Appellant set fire to his jail clothes and mattress. (R1623-1626) Pol testified for the defense that Appellant was an immature, emotionally unstable fifteen-year-old in 1985. Appellant was kept in an isolation cell and sometimes restrained to his bed because he had cut himself fifteen times to get attention. (R1625-1631,1634,1637) Appellant would also "scream and yell and holler and bang his head on the cell." (R1630) When Appellant was upset, he threatened "to go off on one of my officers or throw urine or fecal matter." (R1635) Whenever he did not get his way, Appellant threatened or threw urine on the jail officers and medical personnel. If he was in a populated cell with a television, Appellant "might destroy the television, rant and rave, throw his stuff out in the hallway." (R1636)

During his incarceration for the murder charge in 1988 and 1989, Appellant remained immature and unstable. He continued to throw temper tantrums, to threaten people, and to throw urine on

the medical staff. (R1628-1629,1637-1638) Lt. Pol felt that Appellant's behavior was not as bad as before because he was being given psychiatric medication. (R1629,1640-1641) However, Appellant cut himself again shortly before the murder trial. (R1629,1638-1639)

Appellant's aunt, Deborah Cruise, testified that she was fourteen and Appellant's mother, Linda Scott, was fifteen when Appellant was born. They lived in Michigan. Linda left Appellant with her parents, Stacey and Erlene Scott, and went to live with a man. Since Stacey was a disabled alcoholic and Erlene worked, Deborah had primary responsibility for Appellant until she married and moved out when he was five. (R1641-1644,1647,1650)

Appellant was mentally very slow. He had problems with toilet training and speech. Neither Erlene nor Linda would take him for help. (R1645) Appellant thought Erlene and Stacey were his parents. (R1649)

Erlene left Stacey because of his drinking. Deborah then had responsibility for Appellant, her twelve-year-old brother Mark and her eight-year-old sister Judy. The family had not money for several months. Erlene returned to take Judy. Then Deborah's older brother Tom and his wife moved in with them. (R1645-1647) Deborah married and moved out. Tom began beating Appellant. (R1647-1648) Deborah divorced, remarried, and moved to Perry, Florida. Linda also moved to Perry with her boyfriend Bobby Allen, Appellant, and her other son Dean. Linda beat Appellant with belts and sticks. (R1648-1649) Appellant and Dean were removed from Linda's home for a few months when their school reported the beatings. (R1652)

Deborah asked Linda to let her raise Appellant, but she refused. Instead, she sent him back to live with Tom in Michigan. (R1648-1649,1652)

Appellant was very upset when his grandfather died because they were very close. He was also upset when he learned that Linda was his mother instead of Erlene. (R1649)

Appellant grew physically, but not mentally. He thinks like a nine-year-old child. (R1650-1651,1654) He cannot read or can read very little. He never received a proper education because he never had a home and was "tossed around back and forth." (R1651) He is very immature. (R1654-1655)

Appellant's Aunt Shirley Yinocich, Deborah and Linda's older sister, also testified that Appellant was abused both mentally and physically by his mother and his Uncle Tom. (R1655-1661) They beat him and called him names. (R1658) Linda did not care for Appellant. The day she brought him home from the hospital, she refused to change his diaper and said she wanted nothing to do with him. (R1657) Appellant loved his mother and wanted her to love him in return. (R1660-1661) Appellant was very nervous and afraid that he would be "knocked down" unless he told people what he thought they should hear. (R1660)

Judy Phillips testified that April 29, 1989, was Appellant's twentieth birthday. (R1664) Judy was Appellant's aunt, but she was only three years older than him, they grew up together, and she thought of him as her brother. (R1664-1666) Appellant called her parents Mom and Dad. Judy did not know where Linda was when they

were children. Debbie took care of them while Judy's mother worked. (R1666) Judy moved to Mulberry, Florida, with her mother and stepfather Bill Sandage about ten years before the trial. (R1666-1667) When Judy was thirteen to fifteen years old, Appellant lived mostly on the street. Linda lived in Willow Oak, but she said she did not have time or money for Appellant. (R1667) Linda treated Appellant's brother Dean Scott like a king. She treated Appellant like dirt. She did not want Appellant. (R1667-1668) When Judy was sixteen, she worked right across the street from where Appellant lived. (R1668-1669) Appellant came to her asking for money, food, and clothes. Judy became Appellant's legal guardian and took care of him until his mother talked him into living with her. (R1669) But Linda would only stay with Appellant for a few weeks, then she would leave without telling him where she was going. This happened frequently. (R1669-1670)

Appellant attended school regularly when he was living with any member of the family except Linda. His mother did not care whether he went to school and never got him up for school. (R1671)

Appellant loved his grandparents. He told Judy he did not believe Linda was his mother because she did not care for him when he was a baby. (R1671-1672) When they were very young, Judy's mother moved to California with her stepfather. She returned to get Judy and her brother Mark, but not Appellant. Judy's stepfather did not like Appellant and did not want to have responsibility for him. (R1672-1673)

Appellant's grandmother, Erlene Sandage, testified that her daughter, Linda Glover, gave birth to Appellant on April 29, 1969. Linda left Appellant to be raised by Erlene. (R1674-1676) Three of Erlene's seven children remained at home, Judy, Mark, and Debbie. Debbie helped care for Appellant. (R1676) Erlene's first husband, Stacey, was a disabled alcoholic. One day, when Appellant was two or three, Stacey got drunk and failed to supervise the children. A neighbor backed over Appellant in his car. (R1677,1680)

This incident caused Erlene to move out. She left the younger children with Debbie at first, then took Judy and Mark. She married Bill Sandage, who felt that Appellant was Linda's responsibility, so Appellant remained with Stacey, his Uncle Tom, and Debbie. (R1678-1680) Linda had another son, Dean, who always stayed with Linda. (R1678-1679) Appellant loved his grandparents and called them Mom and Dad. (R1679)

Debbie moved out and left Appellant with Stacey and Tom. Tom married, and his wife loved and cared for Appellant. Tom and his wife separated. Linda was appointed guardian. Appellant was sent to Florida to live with her. (R1681)

Appellant did not go to school regularly because he was "shoved here and there from home to home." (R1682) He was slow in learning speech and did not read very well. (R1682) Erlene moved to Lakeland, Florida, when Appellant was eight or nine. (R1682) Appellant lived in Kissimmee, Florida, with Linda and Stacey. Linda left Appellant with Stacey and went away with another man. Stacey was drinking. Linda returned to Lakeland, so Appellant

moved in with her. (R1683) Then Linda took Dean and moved to Perry for five or six years. Appellant then lived with Erlene part of the time and Erlene's youngest daughter part of the time. (R1683-1687)

Jami Allen testified that she met Appellant in April, 1987. They fell in love. (R1688-1689) They lived together about two years. (R1690) They planned to get married and have children. (R1691) Appellant worked off and on. He could read a little. (R1692) Appellant and Jami had a son, Justin. Appellant called her frequently from the jail to ask about Justin. (R1692-1693) Appellant's mother was present when Appellant was arrested. Jami tried without success to contact her after the arrest. (R1693-1695) Appellant's mother now lives in Alabama with her boyfriend and Dean. (R1695)

Appellant was very upset, crying, and frightened when Jami saw him on the morning of the offense. (R1695) It was her idea to go to Texas. She had been planning to fly there to visit her uncle. Appellant did not want her to go by herself because she was pregnant. (R1696-1698) She loved Appellant, and he loved her. (R1697) Appellant had a bad temper and frequently argued with people. (R1698)

Virgil Carr is an expert in psychological evaluations and addiction employed by Tri-County Addictions Rehabilitative Services. (R1702-1708) He did a drug evaluation of Appellant in 1985.(R1708- 1709) He determined that Appellant read at a second or third grade level. (R1709) Appellant was very deficient in

developing social relationships, problem solving, and responsibility. (R1710) "His view of the world around him was very narrow and rigid and not defined in terms of values . . . ." (R1710) Appellant was a "throw-away kid" who was emotionally and socially impoverished. (R1711) Carr estimated Appellant's intelligence to be "between mildly retarded and below normal." (R1712) Appellant was impulsive and acted without thinking about consequences partly because he was socially and emotionally immature and partly because he had not been taught traditional values. (R1712-1713)

Appellant began using alcohol and marijuana when he was around twelve. He minimalized the amount he used, but Carr concluded that he had used more than he admitted. (R1715-1716) Appellant also admitted that he "huffed" or inhaled gasoline and whiteout. (R1716-1717) Gasoline is extremely toxic and can cause brain damage when used over a period of time. Whiteout contains a chemical which produces some toxicity and intoxication. (R1717)

When Carr conducted the evaluation in 1985, Appellant was oriented in all spheres and was not psychotic. (R1719-1720) Appellant had poor frustration tolerance, a history of fighting and antisocial acts, and weak conscience development. (R1720-1721) Carr concluded that Appellant would not benefit from treatment and needed incarceration and closely supervised probation. (R1723-1724)

Dr. William Kremper, a clinical and forensic psychologist, testified that he examined Appellant on August 11, 1989, to determine his competence to stand trial. Dr. Kremper found that he was competent. (R1729-1732) He also diagnosed Appellant as suffering

from adjustment disorder with mixed disturbance of emotions, attention deficit disorder, alcohol abuse, and cocaine abuse. (R1732-1733,1749) Appellant admitted using cocaine one time, smoking a $10 bag of marijuana each night, and drinking more than a case of beer each night. (R1733-1734) Attention deficit disorder is characterized by inattention, impulsivity, and hyperactivity. (R1734) Adjustment disorder with mixed disturbance of emotions and conduct means the person is depressed, anxious, and acting in antisocial, inappropriate ways, usually due to some identifiable pressure within the past six months. (R1735-1736)

Appellant's disorder was precipitated by the upcoming trial. Appellant manifested his disorder by anxiousness, depression, ripping out stitches, making frequent complaints to nurses, and inappropriate behavior. (R1736) Appellant was taking Mellaril, a drug used for people who engage in acting out behavior, are very impulsive, and have trouble controlling their actions. (R1736) The jail nurses reported that Appellant was manipulative and demanding and became hostile if his demands weren't met. (R1737) Appellant's actions were not always consistent with his intent. For example, he would do something suicidal, then laugh and joke with the nurse about trying to be found incompetent. (R1738-1739)

A nine-year-old who exhibited Appellant's behavior would need medication and ongoing therapy because of his inability to pay attention and to react appropriately to other. (R1740-1741) This could lead to the development of an antisocial personality. (R1742)

Appellant might be diagnosed as having an antisocial personality if he had been more thoroughly tested. (R1744,1748)

Appellant could not read. He could not fill out a simple questionnaire asking for his name, age, and birthdate. He was very immature. (R1739) He was functioning at less than an average intellectual level, and there were suggestions of learning disability and compromised intellectual ability. (R1742-1743) His judgment suggested that he was functioning at a nine-year-old level. (R1744)

Defense counsel and the prosecutor stipulated that Appellant had not been convicted of a prior capital felony and was not under sentence of imprisonment at the time of this offense. (R1771-1774) However, the court denied defense counsel's request to present this stipulation to the jury. (R1774-1775)

Dr. Henry Dee, a clinical psychologist with subspecialties in clinical neuropsychology, gave Appellant tests to determine his intellectual ability. (R1782-1784) A reading test showed that Appellant's "performance was at roughly the third grade level in terms of reading recognition, but he did not possess truly functional reading skills." (R1785) Using the Wechsler Adult Intelligence Scale, Dr. Dee determined that Appellant's full scale IQ was 81, which was the tenth percentile, and that 89 percent of the people tested score higher. His verbal IQ was 73, and his performance IQ was 94. The significant difference between verbal and nonverbal functioning reflected an impairment in brain functioning. (R1786-1787) An IQ of 70 to 80 is borderline, just above retarded, 80 to 90 is dull normal, and 90 to 110 is average. (R1788)

The Denman Neuropsychological Memory Scale measures memory on the same scale as the IQ test. Appellant's full scale memory quotient was 35, which was below the first percentile and grossly defective. His verbal memory quotient was 39, and his nonverbal memory quotient was 37. Both scores were defective. (R1789) These results mean that Appellant's memory is more profoundly impaired than his general mental function. (R1790) Again, the tests indicated that Appellant suffered from some sort of brain dysfunction or injury. (R1790) Dr. Dee could not determine the cause of impairment. (R1794) Dr. Dee believed that Appellant was competent to stand trial and that his brain damage did not interfere with his ability to know right from wrong. (R1795)

Defense counsel objected to the State's request to instruct the jury on the heinous, atrocious, and cruel aggravating circumstance on the grounds that section 921.141(5)(h), Florida Statutes is unconstitutional and that the evidence did not support the circumstance because there was no torture and no awareness of impending death, and the medical examiner testified that any one of the blows would have been fatal and would have rendered him unconscious right away. (R1809-1814) The court overruled the objections. (R1813-1814)

Defense counsel objected to the State's request to instruct the jury on the cold, calculated, and premeditated aggravating circumstance because the evidence did not prove heightened premeditation, deliberation, or planning. (R1814-1817) The court overruled the objection. (R1818)

Defense counsel objected to the State's request to instruct the jury on the avoiding arrest aggravating circumstance because the evidence did not prove beyond a reasonable doubt that this was the dominant motive for the killing. (R1818) Again, the court overruled the objection. (R1819)

D. Sentencing Hearing

The court found five aggravating circumstances: (1) The offense was committed while Appellant was engaged in the commission of robbery with a deadly weapon. [2] (R2009,2017-2018) (2) The offense was especially heinous, atrocious, or cruel. [3] (R2008,-2018) (3) The offense was committed in a cold, calculated, and premeditated manner without pretence of legal or moral justification. [4] (4) Appellant had previously been convicted of two felonies involving the use or threat of violence -- attempted arson and battery on a law enforcement officer. [5] (R2009-2010,2018) (5) The offense was committed for the purpose of avoiding or preventing a lawful arrest. [6](R2010,2018,2017-2019)

The court found one statutory mitigating circumstance: Appellant was 19 years old at the time of the offense. [7] (R2011-2012,

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[2] § 921.141(5)(d), Fla.Stat. (1988 Supp.).

[3] § 921.141(5)(h), Fla. Stat. (1988 Supp.).

[4] § 921.141(5)(i), Fla. Stat. (1988 Supp.).

[5] § 921.141(5)(d), Fla. Stat. (1988 Supp.).

[6] § 921.141(5)(e), Fla. Stat. (1988 Supp.).

[7] § 921.141(6)(g), Fla. Stat. (1988 Supp.).

2019-2020) The court expressly found no evidence of extreme mental or emotional disturbance or impaired capacity. (R2011, 2019) With regard to non-statutory mitigating circumstances, the court found:

> In considering the non-statutory mitigating circumstances and all other circumstances of mitigation, the Court has reviewed and considered all of them; however, these do not outweigh the aggravating circumstances in this case. (R2012,2020)

For the non-capital offenses, the sentencing guidelines recommended a sentencing range of nine to twelve years. (R1094) The court found three reasons to depart from the guidelines: (1) The crimes were committed during the course of a capital first degree murder which was not scoreable under the sentencing guidelines. (R2012-2013,2020) (2) Appellant had a substantial juvenile record which was not scoreable. (R2013,2020) (3) Appellant exhibited an escalating pattern of criminal conduct. (R2013,2020)

SUMMARY OF THE ARGUMENT

The prosecutor violated Appellant's constitutional right to a fair trial by indulging in inflammatory, prejudicial and improper closing argument to the jury. The prosecutor not only attempted to sway the jury with a display of his personal emotions and feelings about the case, he personally attacked the Appellant, defense counsel, and the theory of defense, he misstated the law and attempted to mislead the jury, he sought to shift the burden of proof to the defendant, and he argued matters which were not in evidence. The prosecutor's improper argument cannot be found harmless because there is a reasonable possibility that it affected the verdict by persuading the jury to reject the theory of defense. The trial court's error in denying Appellant's repeated motions for mistrial requires reversal for a new trial.

The trial court erred by rejecting the jury's recommendation of life imprisonment and sentencing Appellant to death. The jury's life recommendation was reasonably supported by evidence of eight mitigating circumstances: (1) Appellant's youth; (2) Appellant's immaturity and emotional disturbance; (3) Appellant's brain damage and impaired mental capacity; (4) Appellant's alcohol and drug abuse; (5) Appellant's abused and disadvantaged childhood; (6) Appellant's loving relationships with his grandparents, his aunt, and his girlfriend, and his concern for his son; (7) the victim's improper sexual advances; and (8) the co-defendant's life sentence. These mitigating circumstances required the court to concur with

the jury's life recommendation and rendered the death penalty disproportionate to the offense.

The trial court applied the wrong standard of proof when it found that the aggravating circumstances were established by clear and convincing evidence. The State was required to prove aggravating circumstances beyond a reasonable doubt. The court further erred by finding three aggravating circumstances which were not proved beyond a reasonable doubt: heinous, atrocious or cruel; cold, calculated, and premeditated; and avoid arrest.

Finally, the trial court violated the Eighth Amendment by failing to expressly evaluate and consider each of the eight mitigating circumstances established by the evidence. The court's blanket statement that it considered nonstatutory mitigating circumstances failed to satisfy the constitutional and procedural requirements for the consideration of mitigating evidence in a capital case.

The death sentence must be reversed and the case remanded for imposition of a life sentence, or in the alternative, for resentencing by the trial court.

ARGUMENT

ISSUE I

THE PROSECUTOR VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY INDULGING IN INFLAMMATORY, ABUSIVE, AND EMOTIONAL ARGUMENT, ATTACKING DEFENSE COUNSEL, MISLEADING THE JURY, AND SUGGESTING THAT THE DEFENSE HAD THE BURDEN OF PROOF.

It is well established that counsel has the duty to refrain from inflammatory and abusive argument. Stewart v. State, 51 So.2d 494 (Fla. 1951). Prosecutors in particular have a duty to seek justice in a fair trial:

> Under our system of jurisprudence, prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.

Id., at 495.

More recently, this Court ruled,

> When comments in closing 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.

Garron v. State, 528 So.2d 353, 359 (Fla. 1988). Moreover, the Court declared, "Such violations of the prosecutor's duty to seek justice and not merely `win' a death recommendation cannot be condoned by this Court." Id.

Unfortunately, the prosecutor in the present case failed to heed this Court admonitions about his duty to seek justice in a

fair trial. During his guilt phase closing argument, the prosecutor staged an emotional outburst before the jury:

> The defense in every case argues the defendant's not guilty. That's his job. He's up here to try and put your attention on something beside the facts. . . . [H]e told you he wasn't going to be emotional and that I was. I am emotional. I don't like murderers. That's why I'm emotional --
>
> * * *
>
> -- that's my job. (R1490-1491)

Defense counsel immediately objected to the prosecutor's improper argument concerning his personal feelings in the case. Counsel noted that the prosecutor raised his voice and intentionally tried to inflame and prejudice the jury. Counsel moved to strike and for a mistrial. The court sustained the objection, but it denied the motions. (R1491-1493)

The prosecutor's argument was unacceptable because it violated this Court's prohibition of prejudicial emotions and vindictive exhibitions of temperament. Stewart v. State, 51 So.2d at 495. It was also improper because it belittled the role of defense counsel at trial and accused defense counsel of behaving improperly. "Resorting to personal attacks on the defense counsel is an improper trial tactic which can poison the minds of the jury." Ryan v. State, 457 So.2d 1084, 1089 (Fla. 4th DCA 1984), rev. denied, 462 So.2d 1108 (Fla. 1985). Accord Jenkins v. State, 563 So.2d 791 (Fla. 1st DCA 1990); Tarrant v. State, 537 So.2d 150, 152 (Fla. 2d DCA), rev.denied, 544 So.2d 201 (Fla. 1989). Furthermore, the comments improperly conveyed the prosecutor's personal belief in

Appellant's guilt on the basis of his personal feelings rather than the evidence before the jury. Riley v. State, 560 So.2d 279, 280 (Fla. 3d DCA 1990); Singletary v. State, 483 So.2d 8, 10 (Fla. 2d DCA 1985); Ryan v. State, 457 So.2d at 1090; Jones v. State, 449 So.2d 313, 314-315 (Fla. 5th DCA 1984).

Not only did the prosecutor violate his duty by seeking to inflame the jury with his emotion, the trial court failed to perform its own duty to put an end to such misconduct. In Stewart v. State, 51 So.2d at 494, this Court ruled that "it is the duty of the trial court on his own motion to restrain and rebuke counsel from indulging in such argument." In Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985), this Court instructed,

> Moreover, we commend to trial judges the vigilant exercise of their responsibility to insure a fair trial. Where, as here, prosecutorial misconduct is properly raised on objection, the judge should sustain the objection, give any curative instruction that may be proper and admonish the prosecutor and call to his attention his professional duty and standards of behavior.

In this case, the court mildly sustained defense counsel's objection while denying his motion to strike the remarks and his motion for mistrial. The court did not restrain, rebuke, or admonish the prosecutor, nor give any curative instruction to inform the jury that the prosecutor's conduct was improper.

As a consequence of the court's lackadaisical response to the prosecutor's flagrant misconduct, the prosecutor resumed his improper tactics as he continued to argue. He continued to criticize defense counsel, accusing counsel of trying to divert the jury's

attention to matters not in evidence. (R1493-1495) Again, personal attacks on defense counsel were improper. "It is improper and unethical for counsel to attack the personal integrity and credibility of opposing counsel instead of trying the factual and legal issues." Tarrant v. State, 537 So.2d at 152.

Next the prosecutor vouched for the credibility of his principal witness: "Why did Mr. Hall confess under oath to first degree murder? Because he's telling the truth." (R1495) Prosecutors are not permitted to vouch for the credibility of State witnesses. Jones v. State, 449 So.2d at 314-315. "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 to 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, the prosecutor's statement of his personal opinion of the veracity of his own witness invaded the exclusive province of the jury.

The prosecutor then resumed his vituperative attack on the defense:

> The whole argument about judging the actions, whatever actions that either Mr. Scott or Mr. Hall by a reasonable man's standard, what a reasonable person would do is hog wash. Don't you ever believe that you can go back in the jury room and judge a criminal by a reasonable man's standard. You can not figure out why people bash people's heads in. If you try to do that, if you try to come up with a rational explanation as to why somebody would take this bottle and crush in somebody's skull, you're going to be back there until the

> day you die. There is not a first degree murder case that has a rational explanation. There's not any criminal case that has a rational explanation. Why do crooks act like they do? Why do they go and try to get out of the state? Whey do they hide from the police and come out of the woods? There's no reasonable explanation for that kind of stuff. The man's mind isn't right or he wouldn't have crushed somebody's skull in.
>
> He even indicated to you that illegal activities were involved such as homosexuality. I don't think homosexuality is illegal in this state. I've never prosecuted anybody for it. He tells that Don. [sic] When Jeremy approached him at the Fantasy 2000, looked like a cop. Now, where, search your collective minds in this evidence, is this any indication that Donald Moorehead looked like a police officer? He said, well -- where is that coming from? That's coming out of Mr. Maslanik's mind. He made that up. He says the house wasn't ransacked. You want to talk about TV? Ransacked is something that comes from Starsky and Hutch. It comes from McCloud and Baretta and all those sorts of TV shows. Ransacked. These guys looked all over that house. (R1496-1497)

Appellant reiterates that personal attacks on the defendant, his theory of defense, and defense counsel are improper. "A prosecutor may not ridicule a defendant or his theory of defense. . . ." Riley v. State, 560 So.2d at 280. "Such remarks constitute a personal attack on opposing counsel and are clearly improper." Jenkins v. State, 563 So.2d at 791.

Moreover, the prosecutor was guilty of seeking to mislead the jury about the legality of homosexual acts. While it is true that people are seldom prosecuted for the commission of such acts in private, the Florida Statutes still proscribe sodomy: "Whoever commits any unnatural and lascivious act with another person shall be guilty of a misdemeanor of the second degree. . . ." §800.02, Fla.

Stat. (1989). The United States Supreme Court recently reaffirmed the constitutionality of state sodomy statutes, even when applied to private, consensual acts. Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). It is impermissible for the prosecutor to misstate the law and mislead the jury in closing argument. Rhodes v. State, 547 So.2d 1201, 1205-1206 (Fla. 1989); Eberhardt v. State, 550 So.2d 102, 107 (Fla. 1st DCA 1989), rev. denied, 560 So.2d 234 (Fla. 1990).

Notwithstanding the flagrant impropriety of the prosecutor's conduct, the trial court denied defense counsel's motion to strike, request for a curative instruction, motion for mistrial, and request to admonish the prosecutor. (R1502,1506-1508)

The prosecutor resumed his attack upon Appellant's right to a fair trial:

> This could have been an attack. The reason attacks are made on the State's case no matter how good it is -- if there was a fingerprint in the case, the Defense would attack as [sic] the fingerprint expert. They have to do something, so that's what they attack. (R1511)

Defense counsel objected that the prosecutor was trying to shift the burden of proof and that his remarks about what could have been attacked were irrelevant. Yet the court overruled the objections. (R1511-1512)

It is axiomatic that the State has the burden of proof beyond a reasonable doubt under the due process clause of the Fourteenth Amendment. Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); U.S. Const. amend. XIV. "Accordingly, the state cannot comment on a defendant's failure to produce evidence

to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence." Jackson v. State, 575 So.2d 181, 188 (Fla. 1991).

Burden-shifting arguments by the prosecutor which are susceptible of being interpreted by the jury as comments upon the defendant's failure to produce witnesses or his failure to testify have been held to constitute reversible error. Crowley v. State, 558 So.2d 529 (Fla. 4th DCA 1990); Stone v. State, 548 So.2d 307 (Fla. 2d DCA 1989). Here, the prosecutor plainly asserted that Appellant and his counsel "have to do something" so they attack the State's case. (R1511) Since Appellant did not present any evidence or testimony during the guilt phase of trial and chose not to testify himself, (R1428-1430) the prosecutor's remarks were susceptible of being interpreted by the jury as comments upon the failure to present witnesses or Appellant's exercise of his right to remain silent.

Next, the prosecutor resumed his personal attack on Appellant by asserting facts not in evidence concerning other crimes which he allegedly committed: "Because that boy is a hustler. He was hustling queers. That's why he was out there at that point." (R515) Defense counsel correctly objected that there was not evidence to support the allegation, but the court again overruled the objection. (R1515) Again, the court's ruling was erroneous. Shorter v. State, 532 So.2d 1110 (Fla. 3d DCA 1988).

> It is improper to refer to extra-testimonial facts during a final argument. Unsubstantiated

> statements which concern references to other crimes committed by a defendant are particularly condemned by the Florida courts.

Ryan v. State, 457 So.2d at 1090. The prosecutor's "zeal must be curbed when it pushes the argument into speculation and innuendo." Holton v. State, 573 So.2d 284, 288-289 (Fla. 1991).

Finally, the prosecutor again misstated the law when he urged the jury, "Now, if you're going to apply the same rules to each witness, apply those rules to Mr. Scott's taped statement." (R1529) The law does not impose the same standards upon the jury's consideration of a defendant's out-of-court confession or admission to the police as upon the jury's consideration of witness testimony at trial. Before ever reaching the question of credibility, the jury must determine whether the defendant's statement to the police was voluntary. Donovan v. State, 417 So.2d 674, 676 (Fla. 1982); Whitfield v. State, 479 So.2d 208, 213 (Fla. 4th DCA 1985). As argued above, it is improper for the prosecutor to misstate the law and mislead the jury. Rhodes v. State, 547 So.2d at 1205-1206.

At the conclusion of the prosecutor's closing argument, defense counsel renewed his objections and motions concerning prosecutorial misconduct and again moved for a mistrial. (R1542-1542) The court denied the motion. (R1542)

Appellant anticipates that Appellee will answer this brief by arguing that the legal sufficiency and/or overwhelming nature of the State's evidence established Appellant's guilt beyond a reasonable doubt so that any error in the court's rulings on defense counsel's objections and motions for mistrial was harmless. But

the prosecutor's misconduct is an issue in this case only because the evidence was legally sufficient to convict. Had the State failed to prove Appellant's guilt, this Court would be obligated to order his discharge. Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978); McArthur v. Nourse, 369 So.2d 578 (Fla. 1979).

Furthermore, this Court has firmly rejected the notion that error can be deemed harmless on the basis of sufficient or even overwhelming evidence. State v. Lee, 531 So.2d 133, 136-137 (Fla. 1988); State v. DiGuilio, 491 So.2d 1129, 1136 (Fla. 1986). The proper test for harmless error places the burden on the State to prove beyond a reasonable doubt that the error did not contribute to the verdict, or that there is no reasonable possibility that the error contributed to the conviction. State v. Lee, 531 So.2d at 136; State v. DiGuilio, 491 So.2d at 1135.

In this case, the State cannot prove beyond a reasonable doubt that the prosecutor's misconduct in closing argument did not contribute to the verdicts of guilt of first degree murder and robbery. As the sole arbiters of the credibility of the witnesses, Bowles v. State, 381 So.2d at 328, the jury could have refused to believe Hall's assertions that Appellant wanted to rob Moorehead for his money and car and that he wanted to kill Moorehead to prevent him from turning them in. (R1356-1362) Instead, the jury could have accepted Appellant's theory of defense, i.e., that Appellant and Hall were upset because of Moorehead's sexual advances (R1267,1352-1353,1472,2057-2059) and because Moorehead owed

Appellant money for painting his trailer, (R1348-1349,1473,1550-1551,2077-2081) so they decided to beat him up to teach him a lesson, (R1474,1483,1547,2062-2063) that Appellant did not plan or intend to kill Moorehead, (R1459,1472-1473,1478,1483,1553,2060) and that taking Moorehead's car was not planned but was an after thought to the violence, a means of leaving the scene. (R1473,1477-1478,1481,1553) In other words, the jury reasonably could have found Appellant guilty of second degree murder [8]and grand theft.[9]

In determining whether there is a reasonable possibility that the prosecutor's misconduct contributed to the verdict, this Court should consider the prosecutor's motivation for making such an inflammatory and abusive argument. This Court has so often condemned such misconduct that the prosecutor must have believed it necessary to persuade the jury not to accept the theory of defense. This Court must not condone the prosecutor's misconduct in this case. The cumulative effect of the prosecutor's improper remarks during closing argument violated Appellant's constitutional right to a fair trial. Nowitzke v. State, 572 So.2d 1346, 1350, 1356 (Fla. 1990); Garron v. State, 528 So.2d at 358-359; U.S. Const. amend. XIV; Art. I, §9, Fla.Const. The convictions must be reversed, and the case must be remanded for a new trial.

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[8] An unlawful killing perpetrated by an act imminently dangerous to another and evincing a depraved mind regardless of human life. §782.04(2), Fla.Sat. (1989).

[9] The use of another person's automobile with the intent to temporarily or permanently deprive him of his right to the property. §812.014(1) and (2)(c), Fla.Stat. (1989).

ISSUE II

THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO DEATH BECAUSE THE JURY'S LIFE SENTENCE RECOMMENDATION WAS SUPPORTED BY EXTENSIVE EVIDENCE OF MITIGATING CIRCUMSTANCES.

The jury recommended that Appellant should be sentenced to life imprisonment. (R1914,1955) The trial court was required to follow the jury's life recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). This Court has repeatedly determined that "Tedder means precisely what it says. . . ." Cochran v. State, 547 So.2d 928, 933 (Fla. 1989). The Tedder standard "has been consistently interpreted by this Court to mean that when there is a reasonable basis in the record to support a jury's recommendation of life, an override is improper." Harmon v. State, 527 So.2d 182, 188-190 (Fla. 1988).

In this case, there was ample evidence of mitigating circumstances to support the jury's life recommendation. First, Appellant was only nineteen years old at the time of the offense. The trial court found this to be a statutory mitigating circumstance under section 921.141(6)(g), Florida Statutes (1988 Supp.). (R2011-2012,2019-2020)

Second, there was extensive evidence that Appellant was very immature and emotionally disturbed. Lt. Michael Pol of the Polk County Sheriff's Department testified that Appellant was immature and emotionally unstable during his incarceration in 1985. Appel-

lant was kept in an isolation cell and sometimes restrained to his bed because he cut himself to get attention fifteen times. (R1625-1631,1634,1637) Appellant would also "scream and yell and holler and bang his head on the cell." (R1630) When Appellant was upset, he threatened "to go off on one of my officers or throw urine or fecal matter." (R1635) When he did not get his way, Appellant threatened or threw urine on the jail officers and medical personnel. When placed in a cell with other prisoners and a television, Appellant "might destroy the television, rant and rave, throw his stuff out in the hallway." (R1636)

Lt. Pol further testified that Appellant remained immature and unstable during his incarceration for this offense in 1988 and 1989. He continued to throw temper tantrums, to threaten people, and to throw urine on the medical staff. (R1628-1629,1637-1638) Lt. Pol felt that Appellant's behavior had improved because he was being given psychiatric medication, but Appellant cut himself again shortly before the murder trial. (R1629,1638-1641)

Appellant's aunt, Deborah Cruise, testified that Appellant grew physically, but not mentally. He thinks like a nine-year-old child. (R1650-1651,1654) He is very immature. (R1654-1655)

Virgil Carr conducted a drug evaluation of Appellant for Tri-County Addictions Rehabilitative Services in 1985. (R1702-1708) He determined that Appellant was very deficient in developing social relationships, problem solving, and responsibility. (R1710) "His view of the world around him was very narrow and rigid and not defined in terms of values. . . ." (R1710) Appellant was a "throw-

away kid" who was emotionally and socially impoverished. (R1711) He was impulsive and acted without thinking about consequences because he was immature and had not been taught traditional values. (R1712-1713) Appellant had poor frustration tolerance, a history of fighting and antisocial acts, and weak conscience development. (R1720-1721)

Dr. William Kremper, a clinical and forensic psychologist, testified that he examined Appellant on August 11, 1989. (R1729-1732) He diagnosed Appellant as suffering from adjustment disorder with mixed disturbance of emotions and attention deficit disorder. (R1732-1733,1749) Attention deficit disorder is characterized by inattention, impulsivity, and hyperactivity. (R1734) Adjustment disorder with mixed disturbance of emotions and conduct means the person is depressed, anxious, and acting in antisocial, inappropriate ways, usually due to some identifiable pressure within the past six months. (R1735-1736) Appellant's disorder was manifested by anxiousness, depression, ripping out stitches, making frequent complaints to nurses, and inappropriate behavior. (R1736) Appellant was taking Mellaril, a drug prescribed for people who engage in acting-out behavior, are very impulsive, and have trouble controlling their actions. (R1736) Jail nurses reported that Appellant was manipulative, demanding, and became hostile when his demands weren't met. (R1737) His actions were not consistent with his intent. He would commit a suicidal act, then laugh and joke with nurses about trying to be found incompetent. (R1738-1739)

Appellant was very immature. (R1739) His judgment suggested that he was functioning at a nine-year-old level. (R1744) A nine-year-old who exhibited Appellant's behavior would need medication and ongoing therapy because of his inability to pay attention and to react appropriately to others. (R1740-1741) This could lead to the development of an antisocial personality. (R1742) More thorough testing might have resulted in a diagnosis of antisocial personality disorder. (R1744,1748)

Third, there was also extensive evidence that Appellant was brain damaged and mentally impaired. His aunt, Deborah Cruise, testified that Appellant was very slow mentally. He had problems with toilet training and speech. (R1645) Appellant could not read or could read very little. (R1651)

Erlene Sandage, Appellant's grandmother, testified that he was slow in learning speech and could not read very well. (R1674,1682) Jami Allen, Appellant's girlfriend, testified that Appellant could only read a little. (R1688-1689,1692)

Virgil Carr determined that Appellant read at a second or third grade level when he was evaluated in 1985. (R1708-1709) Carr estimated Appellant's intelligence to be "between mildly retarded and below normal." (R1712)

Dr. Kremper found that Appellant could not read or fill out a simple questionnaire asking for his name, age, and birthdate. (R1739) He was functioning at less than an average intellectual level, and there were suggestions of learning disability and compromised intellectual ability. (R1742-1743)

Dr. Henry Dee, a clinical psychologist with subspecialties in clinical neuropsychology and child psychology tested Appellant's intellectual ability. (R1782-1784) Appellant's "performance was at roughly the third grade level in terms of reading recognition, but he did not possess truly functional reading skills." (R1785) Appellant's full scale IQ was only 81, which is only in the tenth percentile and means that 89 percent of the people tested score higher. His verbal IQ was only 73, and his performance IQ was 94. The significant difference between verbal and nonverbal functioning reflected an impairment in brain functioning. (R1786-1787) An IQ of 70 to 80 is borderline, just above retarded, 80 to 90 is dull normal, and 90 to 110 is average. (R1788)

Dr. Dee also tested Appellant's memory using a scale which is the same as the IQ scale. Appellant's full scale memory quotient was 35, which was below the first percentile and grossly defective. His verbal memory quotient was 39, and his nonverbal memory quotient was 37. Both scores were defective. (R1789) Appellant's memory is more profoundly impaired than his general mental function. (R1790) The tests indicated that Appellant suffered from some sort of brain dysfunction or injury, (R1790) but Dr. Dee could not determine the cause of the impairment. (R1794)

Fourth, there was evidence that Appellant was intoxicated on alcohol and marijuana the night before the offense and of Appellant's chronic alcohol and drug abuse. Appellant's friend Brent Norman testified that he, his girlfriend Kelly, and Appellant went

out drinking on October 31, 1988. (R1062-1065,1073,1077-1083) Appellant became intoxicated and acted crazy. (R1073,1085-1087)

Larry Hall testified that he joined Appellant around 3:00 a.m. on Halloween night. (R1337-1342) Appellant had been drinking, but he had no difficulty walking or talking. (R1343) When they went to Moorehead's trailer, they sat around talking, drinking beer, and smoking marijuana. It was obvious that Appellant had been drinking, but he could still "function okay." (R1348-1350,1354-1355)

Appellant told Detective Harrison that he first met Moorehead at the Fantasy 2000 bar about three weeks before his arrest. Appellant asked Moorehead to sell him some marijuana, but Moorehead gave it to him. (R2046-2047) Moorehead gave Appellant marijuana or cocaine on other occasions. (R2048-2050)

Appellant told Harrison he went out drinking with Brent and Kelly on Halloween. He drank a bottle of wine. (R2050-2054) Later, he smoked marijuana with Hall and Moorehead. (R2055-2056)

Officer Shamrock testified that when he processed the crime scene he found beer cans in the garbage, a marijuana pipe on a table in the living room, and a plastic bag or some indication of marijuana being present on the table. (R1050-1052)

Virgil Carr testified that Appellant began using alcohol and marijuana when he was around twelve. He minimalized the amount he used, but Carr concluded that he used more than he admitted. (R1715-1716) Appellant also admitted that he inhaled gasoline and whiteout. Both are toxic, and gasoline can cause brain damage. (R1716-1717)

Fifth, there was extensive evidence of Appellant's abused and disadvantaged childhood. Appellant's aunt, Deborah Cruise, testified that her older sister, Linda Scott, was only fifteen when she gave birth to Appellant. Linda abandoned Appellant to her parents, Stacey and Erlene Scott. Stacey was a disabled alcoholic and Erlene worked, so Deborah, who was only fourteen when Appellant was born, had primary responsibility for Appellant until she married and moved out when he was five. (R1641-1644,1647,1650) When Appellant developed problems with toilet training and speech, neither Erlene nor Linda would take him for help. (R1645) When Erlene left Stacey, the family had no money for several months. Deborah's older brother Tom and his wife moved in with them. (R1645-1647) After Deborah moved out, Tom began beating Appellant. (R2647-1648)

When Deborah moved to Perry, Florida, Linda also moved there with Appellant, her other son Dean, and her boyfriend. Linda beat Appellant with belts and sticks. (R1648-1649) Appellant and Dean were removed from Linda's home for a few months when their school reported the beatings. (R1652) Linda refused to let Deborah raise Appellant. Instead, she sent Appellant back to live with Tom in Michigan. (R1648-1649,1652)

Appellant was very close to his grandfather and very upset when he died. He was also very upset when he learned that Linda was his mother instead of Erlene. (R1649)

Appellant's aunt, Shirley Yinocich, also testified that Appellant was mentally and physically abused by both his mother and his Uncle Tom. (R1655-1661) They beat him and called him names.

(R1658) Appellant's mother refused to change his diaper and said she wanted nothing to do with him the day she brought him home from the hospital. (R1657) Yet Appellant loved his mother and wanted her to love him in return. (R1660-1661)

Appellant's aunt, Judy Phillips, was only three years older than Appellant. (R1664-1666) Judy moved to Mulberry, Florida with her mother and stepfather. When she was thirteen to fifteen years old, Appellant lived mostly on the street. Appellant's mother Linda lived nearby in Willow Oak, but she did not have time or money for Appellant. Linda treated Appellant's brother Dean like a king, but she treated Appellant like dirt. (R1667-1668) When Judy was sixteen and working, Appellant came to her asking for money, food, and clothes. Judy became his guardian and took care of him except when Linda would talk him into living with her. (R1669) Linda would stay with Appellant for a few weeks, then she would leave without telling him where she was going. This happened frequently. (R1669-1670) Appellant attended school except when he lived with Linda. His mother did not care whether he went to school and did not get him up in the mornings to go to school. (R1671)

Appellant loved his grandparents, but he told Judy he did not believe Linda was his mother because she had not cared for him when he was a baby. (R1671-1672) When they were young, Judy's mother moved to California with her stepfather. She returned for Judy and her brother Mark, but not Appellant. Judy's stepfather did not

like Appellant and did not want responsibility for him. (R1672-1673)

Appellant's grandmother, Erlene Sandage, testified that her daughter Linda gave birth to Appellant on April 29, 1969. Linda left him to be raised by Erlene. (R1674-1676) Three of Erlene's children, Judy, Mark, and Debbie, remained at home. Debbie helped care for Appellant. (R1675-1676) Appellant's grandfather, Stacey, was a disabled alcoholic. When Appellant was two or three years old, a neighbor backed over Appellant in his car while Stacey was drunk. (R1677,1680)

Erlene moved out and married Bill Sandage. She took Judy and Mark with her, but Appellant was left with Stacey, Tom, and Debbie. (R1678-1680) Debbie moved out and left Appellant with Stacey and Tom. Tom got married. His wife loved and cared for Appellant. But Tom and his wife separated, and Appellant was sent to Florida to live with his mother. (R1681) Appellant did not go to school regularly because he was "shoved here and there from home to home." (R1682)

Erlene moved to Lakeland, Florida, when Appellant was eight or nine years old. (R1682) Appellant lived with Linda and Stacey in Kissimmee, Florida. Linda left Appellant with Stacey and went away with a man. Stacey was drinking. Linda returned to Lakeland, and Appellant moved in with her. (R1683) Linda took Dean and moved to Perry for five or six years. Appellant stayed with Erlene part of the time and Judy part of the time. (R1683-1687)

Sixth, there was evidence that Appellant had close and loving relationships with some members of his family and his girlfriend. Appellant's Aunt Judy testified that they grew up together, and she thought of him as her brother. (R1664-1666) Both Judy and Appellant's grandmother said Appellant loved his grandparents and called them Mom and Dad. (R1666,1671-1672,1979) Erlene testified that Tom's wife loved and cared for Appellant for awhile. (R1681)

Jami Allen testified that she met Appellant in April, 1987. They fell in love and lived together for about two years. (R1688-1690) They planned to get married and have children. (R1691) They had a son named Justin. Appellant called her frequently from jail to ask about Justin. (R1692-1693) Jami and Appellant still loved each other. (R1697)

Seventh, the jury may have found the relationship between Donald Moorehead and Appellant to be mitigating. The State's evidence at trial established that Moorehead was a homosexual who frequented the local gay bars. (R977-979,994-995,1056-1060,1096,-1104,1114,1119,1122) Moorehead befriended Appellant by offering him drugs, food, and a place to spend the night. (R2046-2050,2053-2056) In return, Moorehead expected to receive sexual favors from Appellant and made advances to both Appellant and Hall the night before the homicide. (R1267,1352-1353-1355,2057-2058)

Finally, while both Hall and Appellant tried to minimize their own roles, both admitted participating in the homicide by striking Moorehead with the grape juice bottle. (R1362-1373,2058-2064) However, Hall received more lenient treatment from the State in

exchange for his testimony. Hall received a life sentence upon his guilty plea to first degree murder, and the State nolle prosequied the robbery charge against Hall. (R1992-1993,1997-2000) At the time of Appellant's trial Hall had not yet been sentenced, so this information was not available to the jury. Nonetheless, it is now a mitigating circumstance which provides a reasonable basis for the jury's life recommendation. Pentecost v. State, 545 So.2d 861, 863 (Fla. 1989).

In summary, the jury's life recommendation was reasonably supported by eight mitigating circumstances:

(1) Appellant's youth, Freeman v. State, 547 So.2d 125, 129 (Fla. 1989); Brown v. State, 526 So.2d 903, 907-908 (Fla.), cert.denied, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988); Amazon v. State, 487 So.2d 8, 13-14 (Fla.), cert.denied, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986);

(2) Appellant's immaturity and emotional disturbance, Downs v. State, 574 So.2d 1095, 1099 (Fla. 1991); Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990); Carter v. State, 560 So.2d 1166, 1168-1169 (Fla. 1990); Brown v. State, 526 So.2d at 907-908;

(3) Appellant's brain damage and impaired mental capacity, Downs v. State, 574 So.2d at 1099; Carter v. State, 560 So.2d at 1168-1169; Cochran v. State, 547 So.2d 928, 932-933 (Fla. 1989); Fitzpatrick v. State, 527 So.2d 809, 811-812 (Fla. 1988);

(4) Appellant's alcohol and drug abuse, Downs v. State; 574 So.2d at 1099; Cheshire v. State, 568 So.2d at 910-912; Carter v. State, 560 So.2d at 1168-1169; Pentecost v. State, 545 So.2d at 863; Holsworth v. State, 522 So.2d 348, 353-355 (Fla. 1988);

(5) Appellant's abused and disadvantaged childhood, Carter v. State, 560 So.2d at 1168-1169; Freeman v. State, 547 So.2d at 129; Brown v. State, 526 So.2d at 907-908; Holsworth v. State, 522 So.2d at 353-355; Amazon v. State, 487 So.2d at 13-14;

(6) Appellant's loving relationships with his grandparents, his Aunt Judy, and Jami Allen and his concern for his son, Harmon v. State, 527 So.2d 182, 188-190 (Fla. 1988); Fead v. State, 512 So.2d 176, 178-179 (Fla. 1987); Wasko v. State, 505 So.2d 1314, 1318 (Fla. 1987);

(7) Donald Moorehead's actions in seeking homosexual relations with Appellant, Gilvin v. State, 418 So.2d 996 (Fla. 1982); and

(8) co-defendant Hall's life sentence, Pentecost v. State, 545 So.2d at 863; Harmon v. State, 527 So.2d at 188-190; Caillier v. State, 523 So.2d 158, 160-161 (Fla. 1988).

The factual circumstances of Appellant's offense are similar to the circumstances in Gilvin v. State, 418 So.2d 996 (Fla. 1982). In Gilvin, the victim was a homosexual priest who offered a ride, money, food, lodging, alcohol, and drugs to the defendant, a hitch-

hiker, and then made unwelcome sexual advances to the defendant. The defendant responded by beating the victim to death and stealing his money, credit cards, and car. The jury recommended a life sentence, but the trial court imposed a death sentence upon finding numerous aggravating circumstances and no mitigating circumstances. This Court reversed and remanded for imposition of a life sentence because it found evidence of nonstatutory mitigating circumstances to support the jury's life recommendation. The present case involves the same type of offense but presents far more mitigating evidence than Gilvin, so the reasons for reversing the death sentence and remanding for a life sentence in accordance with the jury's life recommendation are much more compelling here.

In Brown v. State, 526 So.2d 903 (Fla.), cert.denied, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988), an eighteen-year-old defendant shot and killed a deputy who stopped his car after he and a co-defendant robbed a convenience store. The jury recommended life, but the court imposed a death sentence. This Court found that several mitigating circumstances similar to those in the present case supported the life recommendation. The defendant was 18, he had an IQ of 70 to 75, he was emotionally handicapped, his mental capacity was impaired, and he had suffered a disadvantaged childhood with abusive parents and a lack of education and training. This Court found the mitigating evidence to be "particularly significant" because "the defendant at the time of the crime was a borderline defective eighteen-year-old functioning emotionally as a disturbed child." Id., 526 So.2d at 908. So, too, Appellant was

a mentally and emotionally defective nineteen-year-old, functioning emotionally as a disturbed nine-year-old, with a history of drug and alcohol abuse, and a disadvantaged childhood in which he suffered both physical and emotional abuse without receiving proper education and training. As in Brown, the mitigating circumstances provided ample support for the jury's life recommendation.

The trial judge in this case, the Honorable J. Dale Durrance, imposed death sentences over jury recommendations of life in two other recent cases, Hallman v. State, 560 So.2d 223 (Fla. 1990), and Carter v. State, 560 So.2d 1166 (Fla. 1990). In both cases, this Court reversed and remanded for the imposition of life sentences because the jury recommendations were supported by the mitigating circumstances.

Carter v. State is particularly instructive. Carter and a fifteen-year-old co-defendant were hitchhiking when they were picked up by an elderly woman who took them to her home. A few days later her body was found in an abandoned house. She died of asphyxiation caused by strangulation or a cloth stuffed in her mouth. Carter and his co-defendant stole the victim's car and used her credit cards. Each defendant blamed the other for the victim's death. In mitigation, Carter presented testimony by Dr. Dee, the psychologist who also testified in the present case, that Carter suffered from brain damage, a personality disorder, and the effects of drug abuse. A psychiatrist found that Carter was emotionally disturbed, drug-intoxicated, and had diminished mental capacity. The jury recommended life, but Judge Durrance imposed a death

sentence upon finding five aggravating factors and no mitigating factors. This Court found that the jury's life recommendation was reasonably supported by the evidence of the defendant's mental capacity, psychological state, and childhood abuse. The Court reversed and remanded for a life sentence.

The present case presents even more mitigating circumstances to support the jury's life recommendation than Carter, Brown, or Gilvin. The jury's recommendation is entitled to great weight because it reflects the conscience of the community. Holsworth v. State, 522 So.2d 354. Furthermore, a comparison of the circumstances in this case with those in Carter, Brown, and Gilvin compels the conclusion that the death sentence here is disproportionate. Fead v. State, 512 So.2d at 179. See also Fitzpatrick v. State, 527 So.2d 809, 811-812 (Fla. 1988), in which this Court held that death was disproportionate because the defendant suffered from a mental or emotional disturbance, impaired mental capacity, an emotional age of nine to twelve years, and brain damage. Thus, since there was a reasonable basis for the jury's life recommendation, the Tedder standard compels reversal of the death sentence and remand for imposition of a life sentence.

ISSUE III

THE TRIAL COURT ERRED BY APPLYING A CLEAR AND CONVINCING EVIDENCE STANDARD OF PROOF IN FINDING AGGRAVATING CIRCUMSTANCES.

The trial court sentenced Appellant to death upon finding five aggravating circumstances which were "established by clear and convincing evidence." (R2008-2010,2017-2019) Aggravating circumstances must be proven beyond a reasonable doubt. Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989); 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).

In Carter v. State, 560 So.2d 1166 (Fla. 1990), the same trial judge, the Honorable J. Dale Durrance, rejected a jury recommendation of life and imposed a death sentence on the basis of aggravating circumstances established by clear and convincing evidence. This Court reversed and remanded for imposition of a life sentence. In a footnote, the Court addressed Judge Durrance's standard of proof for aggravating circumstances:

> [T]he trial court's order imposing the death penalty was fatally defective in that it found each aggravating factor to be established only by "clear and convincing" evidence. Aggravating factors must be established beyond a reasonable doubt.

In this case, as in Carter, Judge Durrance's sentencing order is fatally defective because the court applied a deficient standard of proof in finding aggravating circumstances. The death sentence must be reversed, and the case must be remanded for resentencing.

ISSUE IV

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY FINDING THAT THE OFFENSE WAS HEINOUS, ATROCIOUS, OR CRUEL WHEN THE STATE FAILED TO PROVE THAT THE OFFENSE WAS UNNECESSARILY TORTUROUS TO THE VICTIM.

The trial court found as an aggravating circumstance that the offense was "especially heinous, wicked, evil, atrocious, or cruel." [10] (R2008,2018) The court previously overruled defense counsel's objections to the State's requested instruction on this circumstance on the grounds that it was unconstitutional, there was no evidence of torture to the victim, and the victim was unconscious and not aware of impending death. (R1809-1813)

"The words `especially heinous, atrocious or cruel' can mean nearly anything." Wilson v. State, 751 S.W.2d 734, 738 (Ark.), modified on rehearing, 752 S.W.2d 762 (Ark. 1988). This statutory aggravating circumstance would be too vague and overbroad to satisfy the Eighth and Fourteenth Amendments in the absence of an authoritative, limiting construction by this Court. Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Wilson v. State; U.S. Const. amends. VIII and XIV. The United States Supreme Court upheld the heinous, atrocious, or cruel aggravating circumstance in Proffitt v. Florida, 428 U.S. 242, 255-256, 96 S.Ct. 2960, 49 L.Ed.2d 913, 924-925 (1976), because this

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[10] The statutory aggravating circumstance is, "The capital felony was especially heinous, atrocious, or cruel." § 921.141(h), Fla. Stat. (1988 Supp.).

Court had construed it to apply only to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert.denied sub. nom. Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

In this case the trial court found,

> This circumstance is established by clear and convincing evidence that [Appellant] knew that the victim, Donald Moorehead, was completely defenseless and posed no threat to [him] or any other persons, that the victim Donald Moorehead, lay helplessly asleep in a recliner chair and posed no harm to [him] or any other persons, but [Appellant] used a full glass wine bottle to bash and crush the skull of the victim, Donald Moorehead. (R2008,2018)

The facts found by the court were established by the testimony of Larry Brian Hall and the medical examiner and by Appellant's taped statement to the police. Hall testified that Moorehead was asleep in the chair when Appellant struck him in the head three times with the grape juice bottle from the refrigerator. (R1365-1370) Moorehead fell to the floor without waking up, crying out, or saying anything. (R1369-1370) Hall then hit Moorehead in the head with the bottle one or two more times. (R1370-1373) Moorehead was lying on the floor making choking sounds. Appellant choked him with a telephone cord. (R1370,1373-1375)

Dr. Melamude, the medical examiner who performed the autopsy, (R1280-1285) testified that he found three head injuries, two oval lacerations on top of the head accompanied by skull fractures, internal hemorrhages, and brain damage, (R1286-1292) and a pair of linear lacerations and a skull fracture on the left side of the

head. (R1292-1293) Death could have been caused by any one of the head injuries. (R1294-1295) Any of these blows could have rendered Moorehead unconscious. (R1298-1299,1304) While Dr. Melamude also found evidence of strangulation, he could not determine whether it occurred before or after death or the blows to the head. (R1297-1298,1304-1307)

In his taped statement, Appellant admitted striking the initial blow to Moorehead's head with a wine bottle while Moorehead slept in the chair. Moorehead fell out of the chair unconscious. (R2058-2063) Hall then hit Moorehead with the bottle four times. (R2060-2064) Appellant used a telephone cord to attempt to move Moorehead about fifteen or twenty minutes later. (R2064-2065,1067)

While the evidence at trial plainly supported the court's determination that Appellant struck the sleeping victim with the bottle, these facts were not legally sufficient to sustain the court's finding that the offense was heinous, atrocious, or cruel as construed in Dixon and approved in Proffitt. "This aggravating factor generally is appropriate when the victim is tortured, either physically or emotionally, by the killer." Cook v. State, 542 So.2d 964, 970 (Fla. 1989). For example, the heinous, atrocious, or cruel aggravating factor has been upheld by this Court when the medical examiner testified that the victim remained conscious for six minutes while being repeatedly stabbed, shot, and beaten, Hardwick v. State, 521 So.2d 1071, 1076 (Fla.), cert.denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988); when the victim remained conscious while being stabbed 17 times, Nibert v. State,

508 So.2d 1, 6 (Fla. 1987); and when the evidence showed that the victim remained conscious and was struggling and fighting to get away while being strangled. Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986), cert.denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987).

In contrast, this Court has ruled that when death was caused by a single blow to the head with a baseball bat, the heinous, atrocious, or cruel aggravating factor did not apply. Scull v. State, 533 So.2d 1137, 1142 (Fla. 1988), cert.denied, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989). Moreover, this aggravating factor cannot by supported by the defendant's acts committed after the victim has been rendered unconscious. Cochran v. State, 547 So.2d 928, 930-931 (Fla. 1989). Thus, when the defendant said the victim was knocked out or drunk when he strangled her and other evidence supported the defendant's statement that she may have been semiconscious at the time of death, "we cannot find that the aggravating circumstance of heinous, atrocious, or cruel has been proven beyond a reasonable doubt." Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989).

In this case, the State's evidence established that Moorehead was asleep when Appellant struck the first blow to the head, that Moorehead fell to the floor unconscious, and that the additional blows to the head as well as the strangulation occurred after Moorehead was rendered unconscious. Thus, the State failed to prove "such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which

is unnecessarily torturous to the victim." Hallman v. State, 560 So.2d 233, 225 (Fla. 1990), quoting, State v. Dixon, 283 So.2d at 9.

In the complete absence of proof of physical or emotional torture inflicted upon the victim, the heinous, atrocious, or cruel aggravating factor cannot be found. To apply that factor under the facts of this case would render the statutory aggravating circumstance unconstitutionally vague or overbroad as applied and would violate the Eighth and Fourteenth Amendments. Therefore, the death sentence must be reversed and the case remanded for resentencing. Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977).

ISSUE V

THE TRIAL COURT ERRED BY FINDING THE OFFENSE COLD, CALCULATED, AND PREMEDITATED BECAUSE THE STATE FAILED TO PROVE HEIGHTENED PREMEDITATION, PRIOR CALCULATION, OR A PREARRANGED PLAN OR DESIGN.

Defense counsel objected to the State's request to instruct the jury on the cold, calculated, and premeditated aggravating circumstance [11] because the evidence did not prove heightened premeditation, deliberation, or planning. (R1814-1817) The court overruled the objection. (R1818)

The court found that the cold, calculated, and premeditated aggravating factor was established by

> clear and convincing evidence that you, [Appellant], met with your codefendant, Larry Hall, and planned and prepared to go to the home of the victim, Donald Moorehead, and while at said victim's residence you suggested to your codefendant that you would rob the victim of moneys that you knew the victim had and further you, [Appellant], directed your codefendant in the search for those moneys and the killing of the victim Donald Moorehead.
>
> Further, you, [Appellant], attempted to coach your codefendant in the killing of the victim, Donald Moorehead, several times. However, you then became aggravated when your codefendant could not execute and you, [Appellant], executed the fatal blows to the victim, Donald Moorehead, for the purpose of eliminating him as a witness or reporting the matter to the police authorities. [sic.] (R2009,2018)

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[11] Section 921.141(5)(i), Florida Statutes (1988 Supp.), provides, "The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification."

It is well established that aggravating circumstances must be proven beyond a reasonable doubt and cannot be based upon speculation. Hamilton v. State, 547 So.2d 630, 633-634 (Fla. 1989). The cold, calculated, and premeditated factor requires proof of heightened premeditation. Reed v. State, 560 So.2d 203, 207 (Fla. 1990); Garron v. State, 528 So.2d 353, 360-361 (Fla. 1988); Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988). It also requires proof of calculation, which means a careful plan or prearranged design to kill. 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 526, 533 (Fla. 1987), cert.denied, 484 U.S. 1020, 108 S.Ct.733, 98 L.Ed.2d 681 (1988).

In this case, the State's evidence failed to establish heightened premeditation, careful plan, or a prearranged design to kill beyond a reasonable doubt. There was no evidence that Appellant and Hall plotted to rob or kill Donald Moorehead before he took them to his trailer Halloween night. (R1337-1348) Hall testified only that Appellant had told him Moorehead owed him some money for work that he had done. (R1348-1349) The three men sat around talking, drinking beer, and smoking marijuana. (R1349-1350,1354-1355) Moorehead made unsuccessful sexual advances to both Appellant and Hall, but Appellant passed out, Hall refused, and Moorehead fell asleep. (R1350-1355)

According to Hall, Appellant woke him up around 5:00 a.m. Appellant was looking for Moorehead's pants. Moorehead was sleeping naked on the chair. Appellant found the pants on the table and

looked through them without finding anything. (R1356-1358) Both Appellant and Hall searched the trailer for money. Appellant said he knew Moorehead had made a withdrawal from the bank. (R1359) When their search for money failed, Hall and Appellant decided to take Moorehead's car to pick up Appellant's girlfriend, Jami Allen. They found the keys on the table. Appellant wanted money for Allen because she was pregnant. (R1360-1361)

Hall testified that Appellant suggested killing Moorehead to prevent him from turning them in. (R13611-1362) Hall picked up a hammer. Appellant unsuccessfully attempted to persuade hall to hit Moorehead with it. (R1362-1365) Appellant then obtained the grape juice bottle and said they would both hit Moorehead at the same time, but Hall again refused. (R1365-1367) Appellant then struck Moorehead with the bottle three times. (R1367-1368) Appellant handed the bottle to Hall and instructed him to hit Moorehead. Hall complied and struck Moorehead once or twice. (R1370-1373) Appellant choked Moorehead with the telephone cord because he continued to make choking noises while lying unconscious on the floor. (R1369-1370,1373-1375)

In Appellant's original statement to the police, he said Moorehead woke him up after he had gone to sleep in the bedroom. Moorehead was naked. Appellant pushed him away, and they began fighting in the hall. Appellant called Hall for help because Moorehead was winning the struggle. (R1266-1267) Hall hit Moorehead with a bottle. Appellant cleaned the bottle and put it in the refrigerator. (R1268)

In a subsequent interview, Appellant told Det. Harrison, "Yeah, we killed the guy but he was a faggot and Bryan [sic.] was just trying to help me when he hit the guy." (R1415) Appellant explained that he and Hall caught Moorehead molesting a young boy. Hall and Moorehead fought in the kitchen, and Hall struck Moorehead several times with the wine bottle. (R1415-1416) When Harrison responded that there was no evidence of a fight in the kitchen, Appellant said Hall beat Moorehead in the living room. (R1416-1470)

In his tape recorded statement to Harrison, Appellant said Moorehead came into the bedroom naked and touched him. He told Moorehead to leave him alone. (R2057-2058) Moorehead returned to the living room and went to sleep. Hall came into the bedroom and told Appellant he wanted to "do it" to Moorehead. (R2058-2059) Hall had a hammer. Appellant did not want to hit Moorehead with the hammer because "that would have really killed him." (R2060) Appellant hit Moorehead once on the back of the head with a wine bottle. Moorehead was rendered unconscious and fell to the floor. (R2060-2063) Appellant told Hall to hit him, and Hall struck Moorehead with the bottle four times. (R2060-2064) Appellant said they did not intend to rob Moorehead but to "teach him a lesson" because he was a homosexual and a child molester. (R2062-2063) Appellant subsequently used a piece of phone cord to turn Moorehead over and to attempt to move him to the couch. (R2064-2065,2067) At the end of the taped statement, Appellant admitted that he and Hall discussed beating up Moorehead because he owed Appellant money for painting his trailer. (R2077-2081)

No matter which version of the homicide was closest to the truth, none of them supported the trial court's finding of cold, calculated, and premeditated. While Hall's version of the events would support a finding of premeditation, even his story fails to prove heightened premeditation, calculation, a careful plan, or a prearranged design to kill beyond a reasonable doubt. At most, Hall's version of the facts established an unplanned, improvised robbery with a spontaneous decision to kill Moorehead. Appellant's statements described an even more unplanned and spontaneous sequence of events in which he expressly disavowed any intent to kill Moorehead. There was no evidence that Hall and Appellant planned to rob or kill Moorehead before he took them to his trailer, that they armed themselves with weapons, nor that they planned in advance of the event to use whatever weapons or household implements they could find to kill Moorehead.

In the complete absence of proof of heightened premeditation, prior calculation, a careful plan, or a prearranged design to kill, the trial court erred by finding the offense to be cold, calculated, and premeditated. Schafer v. State, 537 So.2d at 991; Garron v. State, 528 So.2d at 360-361; Rogers v. State, 511 So.2d at 533. The sentence must be reversed and the case remanded for resentencing. Schafer v. State, 537 So.2d at 992; Elledge v. State, 346 So.2d 988, 1003 (Fla. 1977).

ISSUE VI

THE TRIAL COURT ERRED BY FINDING THAT THE OFFENSE WAS COMMITTED TO AVOID ARREST BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT WITNESS ELIMINATION WAS THE SOLE OR DOMINANT MOTIVE FOR THE HOMICIDE.

Defense counsel objected to the State's request to instruct the jury on the avoiding arrest aggravating circumstance [12] because the evidence did not prove beyond a reasonable doubt that this was the dominant motive for the homicide. (R1818) The court overruled the objection. (R1819)

This Court has ruled that when the victim was not a law enforcement officer, the avoiding arrest aggravating factor "requires clear proof beyond a reasonable doubt that the killing's dominant or only motive was the elimination of a witness." 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 Rogers, evidence that the defendant shot a man attempting to leave the scene of an attempted robbery and told his accomplice that he shot the victim for trying to be a hero was found to be insufficient to establish that avoiding or preventing a lawful arrest was the dominant motive.

In Garron v. State, 528 So.2d 353, 360 (Fla. 1988), evidence that the defendant shot and killed his 14-year-old stepdaughter when she ran to the telephone, called the operator, and asked for

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[12] Section 921.141(5)(e), Florida Statutes (1988 Supp.), provides, "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."

the police after witnessing the defendant kill her mother was held insufficient to establish that witness elimination was the dominant motive for the murder.

In Perry v. State, 522 So.2d 817 (Fla. 1988), the defendant killed a former neighbor during a failed robbery attempt in her home. This Court reversed the trial court's finding that the murder was committed to avoid arrest because there was no direct evidence of motive, and there was some evidence that the defendant panicked or blacked out. The Court noted, "We have also held that the mere fact that the victim knew and could have identified his assailant is insufficient to prove intent to kill or avoid lawful arrest." 522 So.2d at 820.

In Dufour v. State, 495 So.2d 154 (Fla. 1986), cert.denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987), the defendant told his girlfriend he was going to find a homosexual, rob him, and kill him. The defendant met the victim in a bar, rode with him to an orange grove, robbed him, and shot him. This Court held that this evidence failed to show that witness elimination was the dominant or sole motive for the murder, so the trial court erred by finding the avoiding arrest aggravating circumstance. 495 So.2d at 163.

In this case there was conflicting evidence regarding the motive for the murder. Hall testified that Appellant wanted to kill Moorehead to prevent him from turning them in when they decided to take his car. (R1360-1362) But Hall also testified that Moorehead had made sexual advances to both him and Appellant. (R1352-1353)

Both Hall and Appellant told Jami Allen they beat up Moorehead and took his car because they caught him molesting a boy. (R1213-1214, 1269-1270,1382) Appellant initially told Det. Harrison, "Yeah, we killed the guy but he was a faggot and Bryan [sic.] was just trying to help me when he hit the guy." (R1415) Appellant explained that they caught Moorehead molesting a young boy and that Hall fought with Moorehead and hit him with the wine bottle. (R1415- 1416) In his taped statement, Appellant said Moorehead made a sexual advance to him--he came into the bedroom naked and touched Appellant. Appellant refused the advance. (R2057-2058) When Moorehead went to sleep, Hall came into the bedroom and said he wanted to "do it" to Moorehead. (R2058-2059) Appellant said they intended to teach Moorehead a lesson because he was a homosexual and a child molester. (R2062-2063) Appellant then said he and Hall had discussed beating up Moorehead because he owed Appellant some money for painting the trailer. (R2077-2081)

Thus, the State's own evidence at trial showed three possible motives for the homicide.: (1) to prevent Moorehead from calling the police after they took his car, (2) because Moorehead was homosexual and had either molested a boy or made sexual advances to Appellant and Hall, and (3) to punish Moorehead for failing to pay Appellant for his work. Since the State failed to prove beyond a reasonable doubt that the dominant or only motive for killing Moorehead was to eliminate a witness, the court erred by finding avoiding arrest to be an aggravating circumstance. Rogers v. State, 511 So.2d at 533; Garron v. State, 528 So.2d at 360; Perry

v. State, 522 So.2d at 820; Dufour v. State, 495 So.2d at 163. The death sentence must be reversed, and the case must be remanded for resentencing. Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977).

ISSUE VII

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. Eddings 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. 302, 327-328, 109 S.Ct. 2934, 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 114, 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, 408 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 812, 826 (1991). In conducting the requisite appellate review, this Court cannot ignore the evidence of mitigating circumstances in the record. Id.

In Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 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:

> Mindful of these admonitions, we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

In this case, Appellant presented evidence of eight mitigating circumstances for the trial court's consideration: (1) Appellant's age of nineteen; (2) Appellant's immaturity and emotional disturbance; (3) Appellant's brain damage and impaired mental capacity; (4) Appellant's alcohol and drug abuse; (5) Appellant's abused and disadvantaged childhood; (6) Appellant's loving relationships with his grandparents, his Aunt Judy, and Jami Allen, and his concern for his son; (7) Donald Moorehead's improper sexual advances; and (8) Larry Hall's life sentence. The evidence and case law supporting each of these circumstances is fully set forth in the argument under Issue II, supra.

Neither the court's oral pronouncements at the sentencing hearing nor the written sentencing order reveal whether the trial court conducted the thoughtful analysis of each of these mitigating factors as required by Rogers. The only mitigating circumstance

expressly found and considered by the court was Appellant's age. (R2011-2012,2019-2020)

The court expressly found no evidence of extreme mental or emotional disturbance nor substantially impaired mental capacity. (R2011,2019) "However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to `extreme' emotional disturbances." Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990). Thus, the court was required to consider and give effect to Appellant's emotional disturbance and impaired mental capacity despite having found that these mitigating circumstances were not shown to be extreme. Id..

The court's pronouncements reveal that it did in fact find and consider some nonstatutory mitigating circumstances:

> In considering the nonstatutory mitigating circumstances and all other circumstances of mitigation, the Court has reviewed and considered all of them; however, these do not outweigh the aggravating circumstances in this case. (R2012,2020)

The trial court's blanket statement does not satisfy the requirements of Rogers because it does not reveal which mitigating factors the court found to be supported by the evidence, nor which factors the court found to be truly mitigating in nature.

The trial court's failure to follow the procedure required by Rogers makes it impossible to determine whether the trial court abided by the Eighth Amendment requirement that it consider and give effect to all mitigating evidence relevant to Appellant's background, character, and the circumstances of the offense as mandated by Eddings v. Oklahoma and Penry v. Lynaugh. The court's

failure to clearly set forth the mitigating factors it considered also makes this Court's task of conducting a meaningful appellate review of the mitigating circumstances as required by Parker v. Dugger more difficult.

This Court has applied Rogers and found reversible error in the trial court's failure to properly evaluate and consider mitigating evidence in Nibert v. State, 574 So.2d 1059, 1061-1063 (Fla. 1990), and Campbell v. State, 571 So.2d 415, 419-420 (Fla. 1990). In Campbell, this Court found that the error required reversal of the death sentence and remand for resentencing so the trial court could reevaluate and reweigh the aggravating and mitigating circumstances. In Nibert, this Court conducted its own independent review of the aggravating and mitigating circumstances, found that the death penalty was disproportionate, and remanded for imposition of a life sentence.

In Gilliam v. State, No. 73,144 (Fla. May 2, 1991)[16 F.L.W. S292, 293], this Court said "Campbell is not a fundamental change of law requiring retroactive application." The Court cited Witt v. State, 387 So.2d 922, 929 (Fla. 1980), as authority for this proposition. With all due respect, his Court's reasoning in Gilliam is incorrect. The retroactivity rule in Witt applies only to post-conviction proceedings initiated after the judgment and sentence have been reviewed and affirmed on appeal.

It is well established that the Appellant is entitled to application of the law in effect at the time his appeal is decided. Dougan v. State, 470 So.2d 697, 701 n.2 (Fla. 1985), cert.denied,

475 U.S. 1098, 106 S.Ct. 1499, 89 L.Ed.2d 900 (1986). "Decisional law and rules in effect at the time an appeal is decided govern the case even if there has been a change since the time of trial." Lowe v. Price, 437 So.2d 142, 144 (Fla. 1983). To deny Appellant the benefit of the decisional law accorded to Campbell and Nibert would violate the equal protection and due process provisions of the Fourteenth Amendment to the United States Constitution and Article I, sections 2 and 9, Florida Constitution.

Appellant's argument that he is entitled to reversal and remand for a life sentence because the mitigating circumstances reasonably support the jury's recommendation of life and render the death penalty disproportionate to the circumstances of the offense is set forth under Issue II, supra. If this Court rejects that argument, Appellant remains entitled to reversal of the death sentence and remand for reevaluation and reweighing of the aggravating and mitigating circumstances by the trial court in a resentencing proceeding pursuant to this Court's application of the Eddings and Rogers rules in Campbell.

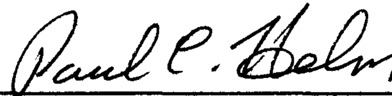
CONCLUSION

Appellant respectfully requests this Honorable Court to grant him the following relief: Issue I, reverse the judgments and sentences for first degree murder and robbery and remand for a new trial; Issue II, reverse the death sentence and remand for imposition of a life sentence; Issues III, IV, V, VI, and VII, reverse the death sentence and remand for resentencing by the trial court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 30th day of August, 1991.

Respectfully submitted,



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