IN THE

SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 28 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

DWAYNE IRWIN PARKER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 76,172

INITIAL BRIEF OF APPELLANT

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

GARY CALDWELL
Assistant Public Defender
Florida Bar No. 256919

Counsel for Appellant

SERVED 64 DAYS LATE

IN THE

SUPREME COURT OF FLORIDA

DWAYNE IRWIN PARKER, Appellant, vs. STATE OF FLORIDA Respondent.	)	CASE NO. 76,172

INITIAL BRIEF OF APPELLANT

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

GARY CALDWELL
Assistant Public Defender
Florida Bar No. 256919

Counsel for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURE

OTHER AUTHORITIES

STATEMENT OF THE CASE

Dwayne Irwin Parker appeals convictions of first degree murder in the death of William Nicholson, aggravated assault, attempted second degree murder, and twelve counts of armed robbery and his death sentence for the murder.

A. Pre-trial matters.

When the case came up for trial, the defense protested that the state had given notice of two witnesses (one out of state) two weeks before the April 30, 1990 trial date, and sought a continuance. R 360-61.[1] Admitting tardiness, the state said one witness had been mentioned in some depositions and the other (the decedent's son) would only be used "to identify a pair of sandals." R 362. Without explaining its lateness, the state as much as conceded that it was purposeful: "there is no prejudice, Your Honor, there is no Brady, or we would have provided it earlier. We will give him every opportunity to depose these witnesses if he wants to." R 362-63 (e.s.). The court said: "All right. With that provision, the motion to delay is denied." R 363.

On April 25, 1990, the state had an ex parte hearing in which it obtained a court order for the arrest of a supposedly recalcitrant witness. Third sup. rec., 21-24.

Shortly before trial, the medical examiner recanted his deposition testimony, as discussed below regarding the trial

---

[1] The transcript of a hearing on April 23, 1990, contained in the third supplemental record, shows that, two days after receiving notice of these witnesses, defense counsel was called away by the death of his father in Minnesota, and was away for approximately a week (he left on a Thursday and would not return until the middle of the next week). Third sup. rec. 13-18.

evidence. At a hearing, Mr. Parker addressed the court, saying that he had urged counsel to investigate the matter, and that defense counsel had not. R 385-89. Replying that these remarks were on the record, the court advised sending a letter "to whoever you think would help you out." When he repeated that counsel had done nothing, the court told him to write to his attorney. Id.

B. Jury selection.

Venirewoman Nehiley said anyone convicted of premeditated first degree murder should automatically be sentenced to death. R 585. Potential jurors Silverman, Weisberg, Linares, Herzog, Scheril, Bonvicin, Diggs, Koeffler, and Miller agreed. R 605-606. After denying cause challenges to the foregoing, R 608-609, the court addressed the venire on this matter:

> All right. Now, earlier there was a question asked on voir dire as to whether or not you would automatically give somebody the death penalty, whether it was premeditated murder and whether or not it was felony murder. Some of you raised your hands about that and some of you didn't.
>
> You remember how the trial will be conducted? First of all, it will be on the merits. That's where you determine whether or not the defendant is guilty or not guilty of the charges pending against him. After that, if you find the defendant guilty of murder in the first degree, there will be another phase of the trial, where you will perhaps receive evidence and be instructed on the law relating to mitigating and/or aggravating circumstances. And then, based on the evidence and the law, on those factors, you will return to the jury room, and then come back with a recommendation as to whether or not he should get the death penalty or life in prison without parole for 25 years.
>
> Now, is there anybody on the jury panel who will not follow the law and base their recommendation on the evidence and the law in the

> penalty phase of the trial, if we get that far?
>
> All right. Let the record reflect that nobody said they would not follow the law. ....

R 621-23. The state questioned Mr. Miller whether he would automatically vote for death in a case of felony murder (he said he would not), R 630-31, and then addressed the jury panel:

> Okay, fine. And that would hold true with everyone no matter how they feel about the death penalty, as Judge Moe articulately put, that you hear the facts and circumstances? And he is going to instruct you as to the law. And I think some of you raised your hands and said you would automatically vote for the death penalty if it was first degree murder. But before you do that, is everybody in agreement, as you agreed with Judge Moe, that you will wait and hear the evidence, and you will follow the law and all circumstances and facts before you make up your mind no matter that your verdict is? Does everybody agree with that? Everybody's shaking their head.
>
> Thank you very much, Your Honor.

R 631-32. Answering defense questions, Mr. Miller said that, while he had "stipulated on premeditated," he would not automatically vote for death in felony murder cases. R 632. Ms. Gorman had like views: "I would say for a felony crime, possibly, it would vary on the evidence and the circumstances.... Premeditated, I feel they should if the evidence is there for it." R 633. In a premeditated murder case, Mr. Koeffler "would say yes" to death. Id. Ms. Herzog agreed death was appropriate in every first degree murder case "because life imprisonment, I don't believe that people stay in prison for life if they commit murder." Id. Mr. Boncivin also agreed that "the death penalty is appropriate in every first

degree murder case". R 634. Ms. Nehiley considered death proper in every case in which first degree murder was proven. R 634-35.

The trial court then addressed Ms. Herzog:

> THE COURT: ... So, despite your feelings, Mrs. Herzog, will you follow the law and the evidence in this case and base your verdict and possibly any recommendation as to death or life on the evidence and law that I will tell you?
>
> MS. HERZOG: I would try.
>
> THE COURT: Well, trying's not good enough. Are you telling me you're not going to follow the law?
>
> MS. HERZOG: No, sir, I would follow the law. I would listen to what you say, yes.
>
> THE COURT: Is there any question about that?
>
> MS. HERZOG: No.
>
> THE COURT: Is there any question of any of you jurors as to whether or not you will follow the law and base your verdict and/or any recommendation as to the penalty on the law and the evidence in this case?
>
> Will anybody not do that? All right. Let the record reflect they all said they would.

R 635-36. The defense unsuccessfully renewed its cause challenges. R 637-38.[2]

Ms. Anderson told the state she would automatically vote for death for first degree murder. R 673. She agreed "that every murder someone shouldn't receive the death penalty", and would

---

[2] The court granted the state's cause challenge to another juror, Mr. Petiya, because he "said the magic words." R 638. (Asked by the state whether he could be fair and impartial, Mr. Petiya replied: "You said it, for this particular case, right, I don't think --". R 629-30.)

listen to the facts and circumstances before rendering a decision. R 674. She told the defense she thought death would be appropriate for first degree murder. R 708-09. The trial court denied a defense cause challenge. R 735-36. In response to later leading by the state, she said she would automatically vote for death as she interpreted the law, but would not vote for the death penalty for "every murder," her vote would depend on the facts and circumstances and law as instructed by the judge. R 748-49.

Ms. Geair, an FBI file clerk, R 647, said that, while many close friends were police officers and FBI agents, she "could try to be impartial and fair." R 647. The state questioned her:

> MR. SATZ: ... Miss Geair, the fact that you work with the FBI, would that interfere with your ability to be fair and impartial?
>
> MS. GEAIR: It might. I work on a criminal squad. I take care of their files.
>
> MR. SATZ: When you answered this sheet, it said, could you be fair and impartial. You indicated that you could.
>
> MS. GEAIR: I said I could try. I can try.
>
> MR. SATZ: And will you try?
>
> MS. GEAIR: I could, yeah.

R 682. She later said that the fact that the victim in one attempted murder count would definitely affect her against the defendant. R 715. The court denied a cause challenge to her. R 738-39.

It denied a cause challenge to Ms. Bogle, R 754, who did not think it completely fair that the burden of proof was entirely on the state: she felt the defense should do something. R 751-52.

It also denied defense cause challenges to other jurors.[3] After exhausting its peremptory challenges,[4] the defense moved for six additional peremptory challenges; the court granted two. R 825. After using those challenges on jurors Koeffler and Mindich,[5] R 826, the defense unsuccessfully renewed cause challenges to Gorman, Anderson, Miller and Bogle. R 827. They sat on the jury.

In voir dire the court sua sponte said of the penalty verdict:

> ... The penalty for murder in the first degree, as you probably know by now, is either life in prison without parole for 25 years or death in the electric chair. If you find the defendant guilty of murder in the first degree, and after listening to any testimony or evidence on aggravating or mitigating circumstances, then you go back to the jury room, you take another vote, and you will make a recommendation to the Judge - that's me - as to whether or not you recommend death in the electric chair or life in prison. And that vote doesn't have to be unanimous, it can be nine to three, ten to two, six to six. Whatever recommendation you come up with is your recommendation. The final decision on the penalty is up to me, the Judge. I can override your recommendation or I can follow it. And by saying that, I don't in any way, shape or form mean to imply or infer that your recommendation isn't very, very, very important, because I will give it great, great weight. And I will never use the term it's just a recommendation. It's much more serious than that.
>
> But, again, in a first degree murder trial, we have what's called a bifurcated system. Bifurcated indicates two, and for what it's worth, actually we have a trifurcated system, because we have guilt or innocence, recommen-

---

[3] R 505-506, 527 (Reno), 824 (Mindich).

[4] The defense struck many of the foregoing persons as well as other jurors to whom it had objection.

[5] The defense had sought to strike both Koeffler and Mindich for cause. R 621-23, 824-25.

> dation as to death or life, and then the final decision by me. That's three stages. You're only involved in two of them. You determine guilt or innocence. If you find him guilty of murder in the first degree, then you listen to testimony and evidence and make a recommendation to me as to whether or not you recommend death in the electric chair or life in prison.
>
> If you understand all that, nod your heads. If you don't -- That's good. Like I say, I would never be condescending or patronizing to you, you're intelligent people, and I'm not going to try to talk down to you at all, but I have to get these basic principles across to you.
>
> ...

R 580-81. The defense unsuccessfully objected and moved that the court strike the panel. R 581-83.

The trial court refused to allow the exercise of peremptory challenges by the parties in turn. R 527.

C. Evidence at trial.

1. The following was undisputed at trial:

Mr. Parker and Ladson Preston robbed the manager and patrons of a Pizza Hut at gun point, as alleged in the indictment.[6] Mr. Parker shot into the floor,[7] and two patrons suffered leg wounds from ricochets. Outside, he encountered Deputy Robert Killen. After shooting at the deputy, who returned fire, he ran into a street, where Keith Mallow was driving his car with his family.

---

[6] The defense conceded guilt as to the robbery charges. R 1921 (final argument of defense counsel to jury).

[7] The witnesses in the Pizza Hut said it was an automatic weapon, but the state's weapons expert testified that it was semi-automatic. State's witnesses Peter O'Rourke and Deborah Kaminski said the shots were fired into the floor. R 1022-1023, R 1144. State's witness Frances Dubroka got fragments in her foot. R 1129.

Mr. Parker fired one shot,[8] trying to stop the car, which swerved into some parked cars.[9] He ran off, with Deputy Killen pursuing on foot and at least two deputies giving chase in patrol cars. At this point Mr. Nicholson was shot. He died of a single shot to the abdomen. The jury heard no eyewitness to the shooting.

2. Tammy Duncan heard a gunshot while watching television at home. R 1183. Going outside, she saw Mr. Parker running with a gun in his hand. R 1184-85. The following occurred:

> Well, I seen him [Mr. Parker] running. He got out of my view from the fence, by the house on 28th Court -- And I seen Mr. Nicholson running behind him. Mr. Nicholson got into my view, and the other guy was already out. I heard a shot.
>
> Mr. Nicholson was in the middle of the street, almost in the middle. He might have been a little more to one side than the other. He was in the middle of the street, and I heard a shot. I heard -- I seen Mr. Nicholson grab his stomach and double over. He didn't fall instantly but he did end up falling. And that's when cops, police, came from everywhere and that's where everything happened.

R 1186. The officers arrived a minute or two after the shot; one of them got out of a car and picked up Mr. Nicholson. R 1188-89.

Deputy Kevin McNesby came upon Mr. Nicholson staggering in the intersection. R 1246-47. He stopped his car, and Mr. Nicholson collapsed on the trunk. R 1247. He saw no officers around. R 1247-48. He and his police dog helped arrest Mr. Parker. R 1250-

---

[8] The bullet entered the car's roof.

[9] The second and third counts of the indictment charged attempted first degree murder of Deputy Killen and Mr. Mallow respectively. R 2400. The jury found Mr. Parker guilty of aggravated assault as to Count II and of attempted second degree murder as to Count III. R 2726-27.

54. Nearby was a semi-automatic machine pistol. R 1254. On direct examination, Deputy McNesby denied shooting Mr. Nicholson. R 1260. On cross, the defense contended that Deputy McNesby had been involved in past acts of violence on civilians, and in covering up such acts, seeking to make the point that he had shot Mr. Nicholson or had been involved in covering up his being shot by another deputy. R 1266-76. On redirect, the state produced a "Grand Jury report" purporting to "deal with the matter that Mr. Hitchcock was asking you about". R 1277-78. The defense objected that it had not been provided the document in discovery, but the trial court let the state put it into evidence. R 1278.

Deputy Killen rounded a corner and saw Mr. Nicholson sitting bleeding in the road. Mr. Nicholson pointed in the direction in which Mr. Parker had fled, and the deputy continued the chase. R 1498-99. He and other officers found Mr. Parker lying near a house. R 1498.

Sgt. Edward Baker, in a squad car, saw two men running. R 1526. Turning a corner, he saw Deputy Killen running. Once around the corner, he saw Mr. Nicholson on the ground, and Mr. Parker "a little bit southwest" of him "running in a southwesterly mode, but he was facing northeast." R 1527. His arm was extended; he seemed to be looking at Baker or Nicholson. 1527-28. Mr. Parker was 10 or 15 feet from Mr. Nicholson, and Sgt. Baker did not see anything in Mr. Parker's hand. R 1529. He did not see any cars. R 1532.

3. The big issue at trial pertained to the fatal bullet's color. Broward deputies use silver-colored bullets. R 1266. The bullets supposedly used by Mr. Parker were yellow.

In his autopsy report, Dr. Michael Bell said of the bullet taken from the body: "A large caliber silver-colored bullet is recovered with very little deformation." R 1643. At trial, he said the contemporaneous report was wrong because he "didn't look at the bullet properly." R 1643-44. At his first deposition, he swore the bullet was a "silver colored bullet with no deformation," R 1644, and he did not think that he had nicked the bullet with a saw. R 1664-65. A handwritten report made before the deposition said it was silver with very little deformation. R 1661-62.

A telephone call from the prosecutor prompted a recantation:

> And you [the prosecutor] called me up, and you said, Mike, why don't you project your slide of the bullet, and kind of hemmed and hawed and, Mike kept saying project the bullet, and so I did, and at that point, as we just saw, I realized that I had made a mistake, that I had incorrectly described it on my protocol, and continued to make the same mistake in that first deposition.

R 1645 (testimony of Dr. Bell).

> Well, first I recognized that there was a cut in the bullet, and I went back, I - and Mike [Michael Satz, the prosecutor] was still on the phone. I said, you know, I see a cut in the bullet, and then he asked me, well, what color is the bullet, and again I went back to the photograph, and while for the most part, again, you know, I saw the white portion of the overexposed photo, but around the edge of it, it was gold, and again I realized, you know, it wasn't silver colored, it was actually gold. So, I went back, told Mike, and at that point then, I think a couple of weeks later we had the second deposition.

R 1646 (same).

At the autopsy, Det. Robert Cerat received the fatal bullet from Dr. Bell, photographed it, and put it in an envelope sealed with a single piece of tape. R 1560, 1566. He photographed the

bullet while still in the bone, R 1561, and the photograph was introduced as State's Exhibit 115. R 1561-63. State's Exhibit 116 was a photograph of a yellow bullet, which Det. Cerat identified as the bullet put in the sealed envelope. R 1563-65. He explained the fact that Exhibit 115 showed a white bullet as the result of lighting in the autopsy room and the strobe light used to take the picture. R 1565. Det. Cerat did not note any stippling around the wound. R 1581.

Dr. Bell, on the other hand, did see stippling around the wound, R 1627, indicating the shot was fired from between two inches and two feet. R 1632.

Firearms expert Patrick Garland examined Exhibits 92 (the gun found near Mr. Parker) and 121 (the projectile Dr. Bell said was found in the body), and concluded that Exhibit 92 had fired Exhibit 121. R 1776. Mr. Nicholson's shirt had "a very few particles of partially burned gunpowder, but these were not in a pattern that I felt was sufficient to determine the distance that the gun was from the target at the time it was fired." R 1790. The shirt did not have the pattern of density of residue associated with a shooting from close range. Id.

In a sworn statement to police Mr. Parker admitted robbing Pizza Hut, firing at Deputy Killen, and shooting into the Mallow car. R 1331-37. He denied shooting Mr. Nicholson, R 1340, but agreed that the fatal bullet may have been a ricochet from the shot at the car. R 1340-41.

After an hour's search, crime scene officers found a shell casing of the sort used by Mr. Parker's gun about 20 feet from

blood where Mr. Nicholson was apparently shot. R 1449, 1450. The casing was not in photographs of the area taken shortly after the shooting, but was in pictures taken two hours later. R 1458-59.

Well into the trial, the state gave notice of a newly-retained expert in forensic pathology, Dr. Besant-Matthews. R 1426-28. After argument and proffer, id., 1552-53, 1610-12,[10] 1710-54, the court ruled that it would not let him testify in the state's case-in-chief, but would let him testify "on rebuttal if there's any defense." R 1754. It did allow into evidence two photographic prints which the state had not provided in discovery, R 1749, and photographs of the bullet used during Mr. Garland's testimony, which also were not provided in discovery. R 1750-52, 1793-98.

C. Argument and instructions to jury; jury deliberations.

The court refused a defense request to instruct on jury unanimity as to felony murder or premeditated murder. R 1842-43, 2714. After much argument, it denied a defense objection, under Hoffert v. State, 559 So.2d 1246 (Fla. 4th DCA 1990), to instruction on "sudden combat" as part of excusable homicide. R 1858-61.

The prosecutor argued to the jury:

> Now, you know, Mr. Hitchcock says they. Who is they? Who's they? They want to do this and they want to do that. Now, in order to believe that theory or fantasy that Mr. Hitchcock told you about, about the Stans and this --

[10] At these pages, there was argument regarding the admission of a photographic prints which were "a whole different color rendition" from prints provided in discovery (unlike the discovery prints, the objected-to prints made the fatal bullet look yellow). The prints were to be used in Dr. Besant-Matthews' testimony. The trial court allowed them into evidence subject to further defense argument that they were not provided in discovery.

> MR. HITCHCOCK [defense counsel]: I would like to reserve a motion, Your Honor, please.

R 1897. The following occurred at the end of the state's argument:

> MR. HITCHCOCK; Okay. I just would move for a mistrial, Your Honor, based on the comment by Mr. Satz during his closing argument characterizing the defense as fantasy. I think it's improper, it's precluded - those kind of comments are precluded in the case law, and the only remedy is a mistrial.
>
> THE COURT: What says the State?
>
> MR. SATZ: Your Honor, I didn't say the defense was a fantasy. I said that talking about fanciful doubt. I said Mr. Hitchcock's theory or fantasy -- In other words, what I was referring to was fanciful doubt, not the defense was fantasy.
>
> THE COURT: I consider it a fair comment, perhaps invited by the closing argument by the defense.
>
> At any rate, the motion for mistrial is denied.

R 1915.

The court prefaced the instruction on reasonable doubt and presumption of innocence thus:

> Now, this part of the instruction is commonly called the boiler plates. These are the general instructions that go with this case and indeed most criminal cases tried here in the State of Florida.

R 1961. It then instructed on reasonable doubt as follows:

> You have heard the term reasonable doubt used throughout the trial. Of course there is no precise, exact definition about what reasonable doubt is or is not, because that's up to you to decide. but whenever you hear the term reasonable doubt, you must consider the following: A reasonable doubt is not a speculative doubt, not a forced doubt, not an imaginary doubt, and not a possible doubt. Such a doubt, as I just mentioned, should not influence you to return a verdict of not guilty if

> you have an abiding conviction of guilt. In other words, the State doesn't have to prove it beyond a possible doubt, beyond a speculative doubt, beyond an imaginary doubt, or beyond a forced doubt. The State has to prove the charge beyond a reasonable doubt.
>
> On the other hand, if after carefully considering, comparing and weighing all the evidence in the case, there's not an abiding conviction of guilt, or if having a conviction, it is one that is not stable but waivers and vacillates, then the charge is not proved beyond a reasonable doubt and you must find the defendant not guilty because that doubt is reasonable.
>
> Again, it is to the evidence introduced here at the trial and to it alone that you are to look for the proof in the case.
>
> A reasonable doubt as to his guilt or innocence may arise from the evidence, lack of evidence or conflict in the evidence, but of course it all has to do with the evidence in the case. If you do have a reasonable doubt as to whether or not he is guilty or not guilty, then you should find him not guilty. And if you have no reasonable doubt as to whether or not he is guilty or not guilty, then you should find him guilty.

R 1963-64 (e.s.).

While deliberating, the jury asked how to render a verdict of guilt of "first degree murder felony." R 2018. After a confused curt talk with counsel, the court told the jury: "If you want to find the defendant guilty of first degree murder felony, you check box A, put a date on it, and have the foreman sign it." R 2021.

D. The motion for new trial.

Mr. Parker sought a new trial on the ground, inter alia, of newly discovered evidence. Brent Kissenger testified on the motion that: He saw a deputy chasing Mr. Parker. R 2050-5. The deputy, who was over six feet tall and weighed over 200 pounds, R 2051,

drew a shiny object and shouted that he would shoot if Mr. Parker did not stop. R 2053. The deputy took a firing position, and Mr. Kissenger heard a shot. Id. Going along, he saw a body in the road. Id. The shot fired by the deputy was the only one he heard. R 2054. A woman deputy arrived, and the two officers told him to leave because there was another person on the loose. R 2065-66. At home he told his wife what happened. R 2068. He contacted defense counsel after reading about the conviction. R 2047-48.

Denying the motion, the court said Mr. Kissenger's testimony was "inconsistent, incredible, uncredible, and unworthy of belief." R. 2084. It also ruled that "it was not previously discoverable in the exercise of due diligence because, quite frankly, I think Kissinger made it up. The evidence I don't think was material to the issue in question, and, certainly, cumulative to something or impeaching to something and would definitely have been such as to produce a different result." Id.

E. Penalty proceedings.

1. The state presented the jury additional evidence, over relevancy objection, going to its claim that Mr. Parker fired the fatal bullet. R 2114-2144. (Dr. Besant-Matthews was one of the witnesses on this issue.) It also presented evidence that he committed an aggravated assault and aggravated battery in a 1979 fight at a Jacksonville pool hall, R 2145-64, and was twice convicted of armed robbery in 1988.

The defense presented the following mitigation:

Marion Sanders, Mr. Parker's mother, testified: Mr. Parker's father abandoned the family when Dwayne was two months old. R

2185. Ms. Sanders was committed to a mental institution when the boy was six years old, R 2185, and he was separated from his siblings and put in a series of foster homes, from which he would run away. R 2186-87. He was the victim of beatings during this time. R 2188. When he grew up, Dwayne and his wife took Ms. Sanders in when she could not pay her rent. R 2189. The state did not cross-examine Ms. Sanders or otherwise rebut her testimony.

Howard Finkelstein, an investigator[11] for the public defender at the time of Mr. Parker's arrest, testified: He and another investigator, Carlton Moore, spoke with Mr. Parker, his mother, his sister, Princess, his brother, and his father. R 2203-2204. Ms. Sanders had frequent periodic mental breakdowns with extremely bizarre and threatening behaviors: she would run naked through the house or even down the street, speaking and yelling to God; she once made as if to throw the boy out of the house from the second story. Id. When the mother was committed, the family would care for the sister because she was more attractive, but would send young Dwayne into a series of unscrupulous foster homes, where he was beaten with an electrical cord and would lie under a bed and scream for hours at a time. R 2205. This went on for years and years: he was in 17 different schools by the time of his high school graduation. R 2206. Moved around so much, he never had friends and never fit into a social group. Id. The only constants in his childhood were "the lack of any home, the lack of any family, the lack of any nurturing, the lack of any love." R 2207.

[11] Mr. Finkelstein subsequently became an assistant public defender.

He was sexually assaulted frequently starting when he was seven, and people in the neighborhood knew he engaged in homosexual acts. R 2208. When he would escape foster care, he would be forced to stay with people who demanded sexual favors: "he was abused, sexually, mentally and physically on a constant basis by both people he loved, and people he didn't know." Id. His contact with his father was communication from the father that "you're different, you're not part of us." R 2209. When seen by Mr. Finkelstein shortly after his arrest, he was disoriented and showed latent effects of having been highly intoxicated. R 2215-16.

Ladson Preston, the co-defendant, testified that Mr. Parker was intoxicated the night of the Pizza Hut robbery. R 2220-21.

Dr. Glenn Ross Cady, a psychologist who interviewed Mr. Parker and his mother and reviewed his and Mr. Preston's statements to the police, R 2237-38, testified: Because of his unstable childhood, Mr. Parker had very poor social skills and no sense of his own worth. R 2241. He has below normal intelligence, and was put in special education classes because of his disruptive behavior as a child. R 2242. He was sexually and physically abused as a child. R 2243. In school he was ostracized as a "cocksucker." Id. In adolescence he began to abuse narcotics and alcohol. R 2245. He has a major alcohol abuse problem. R 2246. He is not well modulated emotionally and can dramatically overreact; he has a very low self worth. R 2248. He is very close to his two children and wife. R 2249. He was under the influence of alcohol and emotionally impaired, although not extremely impaired, at the time of the murder. R 2262. His capacity to appreciate the criminality of his

conduct or to conform it to the requirements of law was "mildly impaired," in that it "did not prevent him from being able to make the judgment that what he was doing was criminal." R 2271.

Carlton Moore, the other investigator, testified that his investigation of Mr. Parker's Jacksonville childhood bore out his accounts to Mr. Finkelstein and Dr. Cady. R 2278-83.

2. The trial court denied many defense requested jury instructions. R 2783-2818.

In jury argument on the "great risk" circumstance, the state emphasized that people in the Pizza Hut, in the Mallow car, in the street, and in the neighborhood generally were endangered. R 2295-96, 2304. As to mitigation, it urged that a bad childhood and alcohol abuse were not "excuses" for murder, and were "no license to go in to a Pizza Hut and terrorize patrons and steal and shoot at deputies, and shoot at passing cars, and shoot down anybody whether they've been in prison before for a burglary or two, or not." R 2301.

The jury voted 8-4 for a death sentence. R 2862.

3. After the penalty verdict, but before imposition of sentence, the defense sought a continuance because it had found an expert to rebut the state's penalty-phase testimony about the color of the bullet found in the body. R 2334-35. The state successfully opposed, saying the defense could have obtained the expert earlier. R 2335-37. The defense next unsuccessfully moved for leave to interview the jury. R 2336-45.

Mr. Finkelstein testified that almost everything he learned in investigating Mr. Parker was corroborated by at least one or

more persons. R 2357-58. Mr. Parker was the victim of significant emotional abuse and psychological abuse from his mother. In addition to threatening to throw him from a second story window, she would run around the house talking to God and threatening to harm Dwayne. R 2358. Various persons confirmed that Mr. Parker was abandoned and abused. Id. He was beaten and raped by numerous neighbors; he would be locked inside and forced to stay under a bed; he would scream for hours and hours. R 2359. Because of his treatment, he would run away, and would have to seek shelter from persons who demanded sexual favors of him; these sexual predators would give him no shelter after using his body. Id. As an adult, he would drink upward of a fifth a day. Id.

Dr. DeWayne Bontrager, a psychotherapist at the jail, testified that Mr. Parker always was very alert and aware and sensitive to the people in group with him. R 2363. He would make a significant contribution to many people in prison, and would be a model prisoner. Id.

Mr. Moore testified that shortly after the penalty verdict he saw one of the jurors who said the initial vote was for life, and the juror had been in a hurry to render the penalty verdict. R 2354. Ms. Sanders and Mr. Parker made pleas for mercy.

The court found four aggravating circumstances: Mr. Parker had a prior robbery conviction; he created a great risk of death to many persons; the murder occurred during flight from a robbery; the murder was committed to avoid or prevent a lawful arrest. R 2384-88. It found no mitigating circumstance. R 2391.

In pronouncing sentence, the judge said:

> I do know he has a lot of good qualities. Certainly, he is interested in his family, and certainly, he has some redeeming qualities that should be recognized. There is no question about that.

R 2384. He also said:

> Again, I'm not discounting the fact that the Defendant is vitally interested in his own children and has probably made every attempt to be a good father. I would never discount that, and I believe that I just wish that he would have showed as much understanding, compassion and respect for the Mallow family with their three children.

R 2387.

After discussing the evidence of the chase, he said:

> ... What happened then I think was proved beyond a reasonable doubt, although there are reasons for it may never be known, too.
>
> The Defendant shot him in the stomach, abandoned him and left him lying on the street alone in the dark with blood gushing from a bullet hole until he bled to death, despite the heroic effort of the people that came to try to save him.
>
> I think the jury correctly found that and reflected that in their verdict; that aggravating factor was proved beyond a reasonable doubt. That's probably the one significance that I have been considering.

R 2388. He said regarding the mitigation:

> I have considered all the testimony and evidence introduced, and as in any decision in a case like this, not only given it considerable thought, consideration, but, of course, pray that the answer would be grounds for appealment [sic] knowing full well the final responsibility is always mine at this level.
>
> I recognize any knowledge of the fact that Dwayne Parker had a lousy, rotten childhood, for which he is not responsible, and the chiche [sic] of the day in this country is it's never too late to overcome a lousy childhood is not applicable and I wouldn't demean

> it by saying that; I certainly have simpathy [sic] for him in that regard. But I find that's a [sic] not applicable as the mitigating circumstances in this case.

R 2390-91.

SUMMARY OF ARGUMENT

The court erred by denying cause challenges to jurors who were prejudiced on guilt and penalty issues. It erred in making the parties use peremptory challenges together rather than seriatim.

The court erred by failing to inquire into or to make findings as to, and by denying various discovery objections.

When Mr. Parker complained about counsel's inaction on a crucial matter in the case, the trial court failed to conduct an appropriate inquiry.

The jury instructions incorrectly defined an element of the offense (unlawfulness of the killing), failed to require a jury finding as to whether the killing was premeditated or was felony murder, and incorrectly defined reasonable doubt and diminished the importance of reasonable doubt and the presumption of innocence.

The court should not have conducted an ex parte hearing shortly before trial to benefit the state.

It was error not to grant a new trial where the defense presented new material evidence refuting the state's theory of the case.

The court should have given requested defense penalty instructions supported by law and not covered by the standard instructions. The instructions on two aggravating circumstances were unconstitutional. The court should not have sua sponte instructed the jury that its sentencing decision was not final. The state's penalty argument to the jury was improper: it urged unconstitutional disregard of mitigation, and set out improper theories of aggravation.

The court improperly placed major reliance on a nonstatutory aggravating circumstance, and unconstitutionally relied on the jury's penalty verdict. It was error to instruct on and find the avoid arrest and great risk circumstance, and the felony murder circumstance is unconstitutional.

The court unconstitutionally failed to consider or weigh mitigation.

Section 921.141, Florida Statutes, is unconstitutional.

ARGUMENT

I. JURY SELECTION

A. DENIAL OF CAUSE CHALLENGES

The trial court erred in denying defense cause challenges to jurors Geair, Nehiley, Silverman, Weisberg, Linares, Herzog, Scheril, Bonvicin, Diggs, Koeffler, Miller, Anderson, Bogle, Gorman, Reno, and Mindich.

One partial juror is too many. Morgan v. Illinois, 112 S.Ct. 2222 (1992). Doubts as to jurors' partiality must be resolved in favor of excusing them. Walsingham v. State, 61 Fla. 67, 56 So. 195, 198 (1911). Singer v. State, 109 So. 2d 7, 24 (Fla. 1959) states:

> Too, a juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which enable him to do so.

Under Singer, "rehabilitation" by leading questions by judge or prosecutor does not remove the presumption favoring excusing the juror. Club West v. Tropigas of Florida, Inc., 514 So. 2d 426, 427-28 (Fla. 3d DCA 1987) (error to deny challenge to juror who said husband's owning stock in corporate defendant might enter into decision, but later assured court it would not affect verdict).

In Price v. State, 538 So. 2d 486 (Fla. 3d DCA 1989), a juror said, when asked if her husband's friendship with the decedent might make some difference in the case: "Just a little. I think it would be there." Id. at 488. Answering the court's leading questions, she said she could be fair, would have no prejudice, and

would base her verdict on the law and evidence. The district court reversed for failure to grant a cause challenge:

> We have no doubt but that a juror who is being asked leading questions is more likely to "please the judge and give the rather obvious answers indicated by the leading questions, and as such these responses alone must never be determinative of a juror's capacity to impartially decide the cause to be presented. Grappling with similar circumstances, the court in Johnson v. Reynolds, 97 Fla. 591, 121 So. 793, 796 (1929), observed:
>
> > It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias of prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?

Id. at 489.

The trial court's error in denying the defense cause challenges was prejudicial both as to guilt and penalty. Ms. Geair said she would be prejudiced because Mr. Parker was charged with attempted murder of a deputy; Herzog and Reno found the state's burden of proof unacceptable. Many jurors had prejudices regarding the death penalty. This Court should order a new trial.

B. METHOD OF HEARING PEREMPTORY CHALLENGES

The trial court erred by refusing to allow the parties to exercise peremptory challenges in turn. R 527. Ter Keurst v. Miami Elevator Co., 486 So. 2d 547 (Fla. 1986).

II. DISCOVERY VIOLATIONS

The court erred in denying a continuance when apprised of the state's discovery violation shortly before trial. Where the court is aware of the state's tardiness in disclosing witnesses, a new trial is required unless it conducts in inquiry sufficient to establish on the record whether the discovery violation was willful or inadvertent, trivial or substantial, and whether it was prejudicial, and fashions a remedy. Richardson v. State, 246 So. 2d 771 (Fla. 1971). The court did not comply with Richardson.

The court also failed to comply with Richardson when the prosecution produced a "Grand Jury report" not disclosed in discovery and put it into evidence during the redirect examination of Deputy McNesby. R 1276-78. Smith v. State, 500 So. 2d 125 (Fla. 1986) (no impeachment or rebuttal exception to duty to disclose).

It also erred in admission of photographic prints making the fatal bullet look yellow, and photographs used in Patrick Garland's testimony in seeking to establish the identity of the bullet. R 1610-12, 1746-49, 1752, 1793-98. These items, not disclosed in evidence, went directly contrary to the defense theory, and the defense was unable to develop testimony to rebut them until after the jury sentencing phase.

This Court should order a new trial.

III. FAILURE TO INQUIRE ABOUT COUNSEL

The lack of inquiry and indifferent response ("send a letter to whoever") to the complaints about counsel requires reversal.

When a defendant complains of incompetency of court-appointed counsel, the court must inquire of the defendant and counsel to see if reasonable cause exists to believe counsel is not rendering effective assistance. Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973), approved Hardwick v. State, 521 So. 2d 1071 (Fla. 1988); Watts v. State, 593 So. 2d 198, 203 (Fla. 1992); Hunt v. State, 18 Fla. L. Weekly S188 (Fla. March 18, 1993).

Mr. Parker made sufficient complaints to require inquiry. Kearse v. State, 605 So. 2d 534 (Fla. 1st DCA 1992) (defendant said attorney did nothing on his behalf at bail hearing and did not file appeal). The court erred in not determining the nature and sufficiency of trial preparation. Hardwick.

IV. JURY INSTRUCTIONS AND ARGUMENT TO JURY

A. JURY INSTRUCTIONS

The court must instruct on the law. Fla. R. Crim. P. 3.390 (a). Due process requires instructions as to what the state must prove to obtain a conviction. See Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (willfully depriving person of civil rights; jury not instructed as to meaning of "willfully": "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial."). It is fundamental error to instruct the jury incorrectly as to what the state must prove to obtain a conviction. State v. Delva, 575 So. 2d 643 (Fla. 1991) (error in instruction on element not fundamental where element not in dispute).

The federal and state constitutional rights to trial by jury carry with them the right to accurate instructions. Sullivan v. Louisiana, 7 Fla. Law Weekly Fed. S341 (U.S. Sup.Ct. June 1, 1993). In Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945), the court reversed where there was an incorrect instruction on self-defense:

> There is much at stake and the right of trial by jury contemplates trial by due course of law. See Section 12, Declaration of Rights, Florida Constitution.... We have said that where the court attempts to define the crime, for which the accused is being tried, it is the duty of the court to define each and every element, and failure to do so, the charge is necessarily prejudicial to the accused and misleading. [Cit.] The same would necessari-

> ly be true when the same character of error is committed while charging on the law relative to the defense.

"Amid a sea of facts and inferences, instructions are the jury's only compass." U.S. v. Walters, 913 F.2d 388, 392 (7th Cir. 1990) (refusal to give theory of defense instruction required reversal of conviction). Arguments of counsel cannot substitute for instructions by the court. Taylor v. Kentucky, 436 U.S. 478, 488-489, 92 S.Ct. 1930, 56 L.Ed.2d 468 (1978), Mellins v. State, 395 So. 2d 1207, 1209 (Fla. 4th DCA 1981).

1. Excusable homicide.

The instruction on excusable homicide was erroneous. It incorrectly communicated that a homicide committed with a firearm was never excusable. Hoffert v. State, 559 So. 2d 1246 (Fla. 4th DCA 1990); State v. Smith, 573 So. 2d 306 (Fla. 1990). The court should have sustained the defense objection to this instruction.

2. Instruction on theory of guilt.

The court erred in denying a proposed defense instruction on jury unanimity as to felony or premeditated murder. R 2714.

In Schad v. Arizona, 111 S.Ct. 2491 (1991), the Court ruled that, "on the facts of this case," due process did not require special verdicts as to the theory of first degree murder accepted by the jury. It specifically did not decide the effect of a lack of a special verdict on the penalty determination. (Schad did not receive a death sentence.) The plurality wrote at footnote 9: "... Moreover, the dissent's concern that a general verdict does not provide the sentencing judge with sufficient information about the jury's findings to provide a proper premise for the decision

whether or not to impose the death penalty ... goes only to the permissibility of a death sentence imposed in such circumstances, not to the issue currently before us, which is the permissibility of the conviction." At footnote 4 of his dissent, Justice White noted that "the disparate intent requirements of premeditated murder and felony murder have life-or-death consequences at sentencing." See also U.S. v. McNeese, 901 F.2d 585, 605-606 (7th Cir. 1990) (approving use of special verdicts where information sought is relevant to sentencing).

The life-or-death import of the jury's findings of the theory of guilt require special verdicts. We require special verdict findings whether an armed robber carried a firearm, or as to whether a burglar was armed, because of the effect of that finding at sentencing:

> The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

State v. Overfelt, 457 So. 2d 1385, 1387 (Fla. 1984).

The error at bar violated the Equal Protection, Due Process, Jury Trial, and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

3. Reasonable doubt instruction.

An improper instruction on reasonable doubt violates due process and is a structural defect whose use can never be harmless. Sullivan v. Louisiana, 7 Fla. Law Weekly Fed. S341 (U.S. Sup.Ct. June 1, 1993), Cage v. Louisiana, 111 S.Ct. 328 (1990).

The reasonable doubt instruction improperly diluted the standard by which the jury weighed the case. It told the jury that the presumption of innocence and the requirement of proof beyond reasonable doubt was "boilerplate." R 1961. It emphasized that "the State doesn't have to prove it beyond a possible doubt, beyond a speculative doubt, beyond an imaginary doubt, or beyond a forced doubt." It stated that reasonable doubts have "to do with the evidence in the case."

The Supreme Court has long disliked instructions defining "reasonable doubt." Miles v. United States, 103 U.S. 304, 312 (1881). It has approved but one definition: in Holland v. United States, 348 U.S. 121, 140 (1954), disapproving one instruction, it wrote that "the instruction should have been in terms of the kind of doubt that would make a person hesitate to act". Hence, the instruction approved in United States v. Turk, 526 F.2d 654, 669 (5th Cir. 1976):

> A reasonable doubt is a doubt based upon reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would not hesitate to act upon it in the most important of your own affairs.

Speculation and imagination come into play when one determes to act in the most important of one's affairs. A doubt founded on

speculation or an imaginary or forced doubt will cause one to hesitate to act.[12] The court's instruction was unconstitutional.

Compounding the error were instructions that the constitutional burden and standard of proof were mere "boilerplate" and that the jury was to look only to the evidence in determining whether there was reasonable doubt as to Mr. Parker's guilt.

In making this argument, Mr. Parker is aware that Woods v. State, 596 So. 2d 156 (Fla. 4th DCA 1992) rejected a similar argument. Woods was wrongly decided because it used an incorrect

---

[12] Thus, in Haager v. State, 83 Fla. 41, 90 So. 812, 816 (1922), this Court disapproved of an instruction that a reasonable doubt could not be "a mere shadowy, flimsy doubt," writing:

> Attempts to explain and define what is meant by "reasonable doubt" often leave the subject more confused and involved than if no explanation were attempted. The instruction may be given in such a manner, and with such an inflection of voice, as to incline the jury to believe that there is sufficient doubt to almost require an acquittal, and, in other instances, may be so given as to make the jury feel that they would be guilty of a dereliction of duty if they entertained any doubt of the prisoner's guilt.
>
> In the charge complained of, the court undertook to differentiate between "a mere shadowy, flimsy doubt" and "a substantial doubt." The jury may have understood the distinction, but we are unable to grasp its significance. Every doubt, whether it be reasonable or not, is "shadowy" and "flimsy," and it would be better if judges would give the usual charge on the subject of reasonable doubt without attempting to define, explain, modify, or qualify the words "reasonable doubt."

legal standard[13] and is contrary to United States v. Holland, Cage and Sullivan.

The instruction violated article 1, sections 9 (due process), 16 (rights of accused; notice; right to present defense), 21 (access to courts), and 22 (trial by jury) of the Florida Constitution, and the fifth (due process), sixth (notice; right to present defense; jury trial), and fourteenth (due process and incorporation) amendments to the United States Constitution.

The improper reasonable doubt instruction was independently prejudicial as to penalty, because the jury was told to apply the same standard to the aggravating circumstances.

B. PROSECUTION ARGUMENT TO JURY

The court erred in finding proper the state's jury argument that the theory of defense was a "fantasy." The state may not make such derogatory arguments. Waters v. State, 486 So. 2d 614 (Fla. 5th DCA 1986).

---

[13] Discussing Cage, the court wrote: "Nothing in the Cage opinion, however, causes us to question a reasonable juror's ability to properly interpret the Florida instruction as requiring that the jury find the defendant not guilty if there is a reasonable doubt as to guilt. Nor does Cage place in doubt the effort in the Florida instruction to assist a juror in evaluating the circumstances in which a doubt may not be reasonable." 596 So.2d at 158. This uses an incorrect legal standard for the adequacy of a jury instruction. The correct standard is whether there is "a reasonable likelihood" the jury applied the instruction unconstitutionally. Wilhelm v. State, 568 So. 2d 1, 3 (Fla. 1990); Estelle v. McGuire, 112 S.Ct. 475, 482 (1991). Further, the significant question is not whether a juror could understand that the law requires acquittal when there is a reasonable doubt, but whether the definition of reasonable doubt was improper.

V. EX PARTE PROCEEDING

The trial court improperly conducted an ex parte proceeding shortly before trial in which it assisted the state in dealing with a reluctant witness. State v. Smith, 547 So. 2d 131 (Fla.1989). The absence of Mr. Parker from this hearing operated to his detriment: had he been aware of the state's problems with the witness, it would have suggested that the witness might be favorable to the defense, and lead to investigation of the matter.

VI. FIRST DEGREE MURDER DURING FLIGHT FROM A FELONY

Section 782.04(1)(a) defines first degree felony murder as an unlawful killing of a human being when "committed by a person engaged in the perpetration of, or in the attempt to perpetrate" an enumerated felony. As written, it does not permit conviction for first degree felony murder during flight from the felony.

Section 775.021(1) provides:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This principle, the "rule of lenity," is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112 (1979) (rule of lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Cit.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not '"plainly and unmistakably"' proscribed. [Cit.]"). Bifulco v. United States, 447 U.S. 381 (1980); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990).

Application of these principles to section 782.04(1)(a) forces the conclusion that a killing during flight is not felony murder. To be sure, there are contrary cases, e.g. Mills v. State, 407 So. 2d 218, 221 (Fla. 3rd DCA 1981) (collecting cases), but they ignore and statutory and constitutional rules of strict construction.

VII. MOTION FOR NEW TRIAL

Seeking a new trial, the defense presented newly found eyewitness testimony that, consistent with the original autopsy report and the medical examiner's first deposition, a deputy fired the fatal shot. The court ruled that, while the defense could not have found it through due diligence, the evidence was incredible.

Rule 3.600, Florida Rules of Criminal Procedure (Grounds for New Trial) provides in pertinent part:

> **(a) Grounds for Granting:** The Court shall grant a new trial if any of the following grounds is established.
>
> ....
>
> (3) New and material evidence, which, if introduced at the trial would probably have changed the verdict or finding of the court, and which the defendant could not with reasonable diligence have discovered and produced at the trial, has been discovered.

While a court may have discretion to deny a motion based on new evidence, it abuses that discretion if the new evidence is highly material in that it goes to the merits of the case (as opposed to serving only as impeachment evidence). McCallum v. State, 559 So. 2d 233 (Fla. 1st DCA 1990) (citing cases). The evidence here would probably have resulted in a contrary verdict: it was direct evidence supporting the defense theory, and was the only eyewitness testimony in the case. It was not impossible and was supported by the autopsy findings and the medical examiner's first deposition. This Court should order a new trial.

VIII. JURY PENALTY PROCEEDINGS

A. PROPOSED DEFENSE PENALTY INSTRUCTIONS

The trial court judge must instruct the jury on the law. Fla. R. Crim. Proc. 3.390(a). Improper penalty instructions violate the Cruel and Unusual Punishment Clauses of the state and federal constitutions. Espinosa v. Florida, 112 S.Ct. 2926 (1992). Due process requires instructions as to what the state must prove in order to obtain a conviction. Screws v. United States, 325 U.S. 91, 107 1495 (1945). It is fundamental error to instruct the jury incorrectly as to what the state must prove in order to obtain a conviction. State v. Delva, 575 So. 2d 643 (Fla. 1991) (error in instruction on element not fundamental where element not in dispute).

The same principle applies to instructions on defensive issues. Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945) ("The same would necessarily be true when the same character of error is committed while charging on the law relative to the defense."). Arguments of counsel do not substitute for instructions by the court. Taylor v. Kentucky, 436 U.S. 478, 488-489 (1978); Mellins v. State, 395 So. 2d 1207, 1209 (Fla. 4th DCA 1981).

1. Consideration of mitigation by individual jurors.

The court denied a defense proposed jury instruction, pursuant to Mills v. Maryland, 108 S.Ct. 1860 (1988), that individual jurors

must each consider the mitigation.[14] The trial court erred. The proposed instruction was a correct statement of law under Mills and McKoy v. North Carolina, 110 S.Ct. 1227, 1233 (1990), where the Court explained: "Mills requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." Noting that "each juror must be allowed to consider all mitigating evidence," it concluded that "such consideration of mitigating evidence may not be foreclosed by one or more jurors' failure to find a mitigating circumstance". Id.

2. Doubling of Circumstances.

The court erroneously refused proposed instructions to prevent doubling of aggravators under Provence v. State, 337 So. 2d 783 (Fla. 1976). R 2795, 2796. Such instructions ensure proper use of aggravating circumstances. Castro v. State, 597 So. 2d 259 (Fla. 1992). Given the close jury vote (8-4),[15] the signal absence of the two strongest aggravators (heinousness and coldness), the overlap of other circumstances, and the sound mitigation, this Court should reverse and order new jury sentencing proceedings.

Because of their overlap, the jury may have improperly given separate aggravating weight to the felony murder and avoiding arrest circumstances. See Bruno v. State, 574 So. 2d 76 (Fla.

---

[14] "Each of you must individually consider the evidence presented in mitigation. If you personally find a piece of mitigating evidence to be credible, you must give it independent militating [sic] weight, regardless of the views of your fellow jurors." R 2817.

[15] Castro also involved an 8-4 penalty verdict.

1991) (trial court merged felony murder and avoiding arrest circumstances).

3. Jackson instruction.

In Jackson v. State, 502 So. 2d 409, 413 (Fla. 1986), this Court wrote: "The jury must be instructed before its penalty phase deliberations that in order to recommend a sentence of death, the jury must first find that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed." The court erred in refusing to give a Jackson instruction. R 2818.

4. Non-statutory circumstances.

The trial court erred by denying defense jury instructions on non-statutory circumstances, including emotional and physical abuse, disturbance, and instability as a child, lack of acceptance from society, cooperation with the police, amenability to rehabilitation, influence of alcohol or drugs, and treatment of the co-defendant. R 2804-16. These nonstatutory factors must receive independent treatment on a like footing with statutory ones. It was error to refuse to instruct on circumstances supported by evidence. Compare Delo v. Lashley, 113 S.Ct. 1222 (1993).

5. Most aggravated, least mitigated murders.

The court refused this defense proposed jury instruction: "You may not consider the death penalty as a possible punishment, unless you find this homicide is one of the most aggravated and unmitigating [sic] of all first degree murders." R 2783. The court erred: the proposed instruction correctly states the law under, e.g., State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) ("Death

is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.") and is not covered by the standard jury instructions.

6. Weight of mitigating circumstances.

The court refused these proposed instructions: "Any single mitigating circumstance may be compelling enough to require a sentence of life imprisonment, without the possibility of parole, for twenty-five (25) years for each first degree murder conviction." R 2797. It also rejected a similar instruction: "The mitigating circumstances which I have read for you for your consideration are factors that you may consider as reasons for imposing a sentence of life imprisonment, without the possibility of parole for twenty-five (25) years on each count. You must pay careful attention to each of these factors. Any one of them, standing alone, may be sufficient to support a decision that the proper sentence is life imprisonment, without the possibility of parole for twenty-five (25) years." R 2800. The court erred: the instructions correctly state the law under State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973) ("one or more" mitigating circumstances can lead to life sentence) and Eddings v. Oklahoma, 455 U.S. 104 (1982).

7. Rehabilitation.

The court refused to instruct on rehabilitation as follows: "Death is a unique punishment in its finality and its total rejection of the possibility of rehabilitation. Thus, you should

only consider imposing the penalty of death upon DWAYNE IRWIN PARKER, if you find that there is no reasonable possibility of rehabilitation for DWAYNE IRWIN PARKER, and that no other punishment is appropriate for him." R 2789. The instruction correctly stated the law. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) ("Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.").

8. Proof of aggravating circumstances.

The court rejected instructions correctly stating the law under State v. Dixon, 283 So. 2d 1 (Fla. 1973): "You are strictly limited to the aggravating circumstances which have been defined to you. You may not consider any fact or circumstance, in aggravation, unless it fits within the aggravating circumstances you have been instructed on." R 2792. "You are to presume DWAYNE IRWIN PARKER innocent of each alleged aggravating circumstance. The prosecution must prove aggravating circumstances beyond a reasonable doubt. You may not consider any evidence offered in aggravation unless it convinces you of the existence of an aggravating circumstance beyond reasonable doubt." R 2790. "Aggravating circumstances must be proven beyond a reasonable doubt before you can give them any weight whatsoever. If evidence is introduced to support an aggravating circumstance, but that evidence fails to prove the aggravating circumstance beyond a reasonable doubt, you must totally disregard that evidence." R 2791.

Here, the court specifically found that the jury found a non-statutory aggravating circumstance (that Mr. Parker left Mr. Nicholson alone in the dark to die). The argument to the jury and the court's findings show reliance on the robbery as proof of the "great risk" circumstance contrary to Hallman v. State, 560 So. 2d 223 (Fla. 1990). Hence, these instructions were necessary to prevent illegal unconstitutional use of non-statutory aggravation.

9. Instruction on unproven aggravating circumstances.

The death penalty is reserved for the most aggravated and least mitigated of first degree murders. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973).[16] Nevertheless, the court refused an instruction[17] that there were other aggravating circumstances not applicable to Mr. Parker's case. Without this instruction, the jury could hardly determine whether Mr. Parker's case was among the most aggravated of capital offenses.

10. Aggravating circumstances must outweigh mitigation.

The court denied a defense instruction that the jury was to vote for death only if the aggravating circumstances outweighed

---

[16] This Court likewise stated at page 8 that the provision of appellate review of the sentence evidences "legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes."

[17] "I am instructing you on certain aggravating factors. There are other aggravating factors in the capital felony statute, which I have previously determined are not possibly relevant under the circumstances of this case. Although I have instructed you on several aggravating factors, this does not mean that they necessarily apply under the facts of this case. It is your job to determine which aggravating circumstances apply in this case. You must evaluate the evidence offered in aggravation and determine whether or not it proves an aggravating circumstances [sic], beyond a reasonable doubt may be considered by you in aggravation." R 2793.

the mitigating circumstances. R 2787. It erred. The instruction was correct under Arango v. State, 411 So. 2d 172, 174 (Fla. 1982) ("A careful reading of the transcript ... reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.") (e.s.) and Parker v. Dugger, 111 S.Ct. 731, 735 (1991) ("The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances.").

11. Circumstances not to be counted.

The court denied a proposed defense jury instruction that the penalty verdict was not to be reached by merely counting the sentencing circumstances.[18] The court erred. The instruction rightly stated of the law under, e.g., State v. Dixon, 283 So. 2d 1 (Fla. 1973) and Hargrave v. State, 366 So. 2d 1, 5 (Fla. 1978) ("the statute does not comprehend a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum").

---

[18] "In determining whether to recommend life imprisonment, without the possibility of parole, for twenty-five (25) years for each conviction, or death, for DWAYNE IRWIN PARKER: the procedure you are to follow is not mere counting process of the number of aggravating circumstances and the number of mitigating circumstances, but rather you are to exercise a reasoned judgment as to what factual situations require the imposition of death and which situations can be satisfied by life imprisonment without the possibility of parole for twenty-five (25) years, in light of the totality of the circumstances present." R 2785.

12. Residual doubt.

The court refused a jury instruction on residual doubt as mitigation. R 2802. This was error here, where the state put the matter of residual doubt in issue by presenting additional evidence of guilt at the penalty phase.

B. INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES

The instructions on the "great risk" and "avoid arrest" circumstances[19] were unconstitutional. The court employed standard instructions, R 2138, 2139, which merely track the statute, without setting out the limitations this Court has imposed.

The avoid arrest instruction did not provide that, where the decedent is not a law enforcement officer, there must be strong proof that the dominant or only motive for the murder was the elimination of a witness, and that the mere fact that the decedent knew and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest.[20] The great risk instruction did not provide that "'Great risk' means not a mere possibility but a likelihood or high probability," that a great risk to just three persons is insufficient,[21] and that the circumstance cannot be based on speculation.[22]

To prove the circumstances, the state must prove the elements as defined this Court. Use of standard instructions silent about these definitions and limitations relieves the state of its burden

---

[19] § 921.141(5) (c) and (e), Fla. Stat.

[20] See Perry v. State, 522 So. 2d 817, 820 (Fla. 1988).

[21] Hallman v. State, 560 So. 2d 223, 226 (Fla. 1990).

[22] Francois v. State, 407 So. 2d 885, 891 (Fla. 1981).

in violation of the Due Process, Jury Trial, and Cruel and Unusual Punishment Clauses of the state and federal constitutions. Instructions relieving the state of its burdens of proof or persuasion violate due process. Sandstrom v. Montana, 442 U.S. 510, 524 (1979), Francis v. Franklin, 471 U.S. 307 (1985).

C. SUA SPONTE INSTRUCTION ON SENTENCING ROLE OF JURY

The trial court erred in sua sponte instructing the jury that its penalty verdict was a recommendation carrying great weight. Even a correct statement of the law is error if it is irrelevant to the factual issues before the jury and serves to assure it that its errors can later be cured. Caldwell v. Mississippi, 472 U.S. 320 (1988) disapproved argument that the sentencing decision was subject to appellate review. See also Pait v. State, 112 So. 2d 380 (Fla. 1959) (argument that state had no right to appeal, that present trial was last time that state would try case). The instruction here was improper under Caldwell and Pait. Although this Court has rejected similar arguments on this point, those decisions are erroneous.

D. THE STATE'S PENALTY ARGUMENT TO THE JURY

The sentencer may not ignore, it must weigh, all mitigating circumstances before it. Hitchcock v. Dugger, 481 U.S. 393 (1987). Nevertheless, the state argued to the jury that it should disregard the valid, undisputed mitigation before it. This argument deprived Mr. Parker of his constitutional right to a sentencing decision based on consideration of all mitigating circumstances.

Further, the state improperly urged the jury to disregard the decedent's status in society. R 2298-99, 2301. Under Payne v.

Tennessee, 111 S.Ct. 2597 (1991), such evidence is relevant to the sentencing decision, and it was improper for the state to denigrate this valid sentencing factor.

The state's argument on the avoid arrest circumstance was improper: it told the jury that evidence that the murder occurred during flight was sufficient to satisfy the circumstance. R 2295.

The bulk of the state's argument on aggravating circumstances rested on the great risk circumstance: it incorrectly argued that speculation about danger to possible passers by. R 2295-98, 2304.

IX. CIRCUMSTANCES FOUND BY THE TRIAL COURT

A. RELIANCE ON NON-STATUTORY CIRCUMSTANCES

The court gave primary weight to a non-statutory aggravating circumstance: that Mr. Parker "abandoned [Mr. Nicholson] and left him lying on the street alone in the dark with blood gushing from a bullet hole until he bled to death, despite the heroic effort of the people that came to try to save him." R 2388. It was unconstitutional to consider this non-statutory circumstance. See Drake v. State, 441 So. 2d 1079, 1082 (Fla. 1983). Because it was the main circumstance used at bar, this Court should reduce the death sentence to one of life imprisonment.

The court also specifically relied on another nonstatutory aggravating circumstance, the fact that there were children in Mr. Mallow's car. R 2387.

Because of the reliance on nonstatutory aggravation, the death sentence violated the eighth amendment. Stringer v. Black, 112 S.Ct. 1130 (1992). The court also unconstitutionally placed too great emphasis on the penalty verdict rather than exercising its independent judgment.

B. AVOID ARREST CIRCUMSTANCE

There was not "strong proof" that the murder's primary reason (if there was any reason) was to avoid arrest. The record does not show that Mr. Nicholson was trying to apprehend Mr. Parker, and the two men did not know each other. Hence, it was error to find the "avoid arrest" circumstance. Mr. Parker may merely have panicked. See Perry v. State, 522 So. 2d (Fla. 1988), and Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992). The evidence was scarcely as

strong as in Garron v. State, 528 So. 2d 353 (Fla. 1988) (circumstance struck where victim was on the telephone with the operator asking for the police when shot).

C. GREAT RISK CIRCUMSTANCE

A jury may consider in aggravation that the defendant "knowingly created a great risk of death to many persons." § 921.141 (5)(c). Hallman v. State, 560 So. 2d 223 (Fla. 1990) struck the circumstance where the defendant shot it out with a security guard outside a bank he had robbed, and then, after shooting the guard, hijacked a car, kidnapping its driver:

> Next Hallman attacks the finding that he knowingly created a great risk of death to many persons. The trial court listed ten persons who were in the area of the shoot-out and could have been struck and remarked that the shoot-out occurred near a busy thoroughfare. Hallman argues that he and Hunick fired at each other from close range and that none of the bullets was aimed in the direction of a large number of people. At most, he maintains, there was only the chance that a bystander would be struck by a stray shot, and that such a danger is insufficient to support the aggravating circumstance.
>
> Again, we agree with Hallman. We set out the standard for this aggravating circumstance in Kampff v. State, 371 So. 2d 1007 (Fla.1979). We said:
>
> > "Great risk" means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon's actions must be to "many" persons. By using the words "many" the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance.
>
> Id. at 1009-10. We have held that great risk of death to three people was insufficient. Bello v. State, 547 So. 2d 914 (Fla.1989). The state's reliance on Suarez v. State, 481

> So. 2d 1201, 1209 (Fla.1985), cert. denied, 476 U.S. 1178, 106 S.Ct. 2908, 90 L.Ed.2d 994 (1986), is misplaced. In that case the defendant fired more than a dozen shots in the area of a migrant labor camp, three persons other than the victim were in the line of fire and his four nearby accomplices ran the risk of death from return fire.
>
> The trial judge referred to the presence of numerous people in the bank, and passersby on busy U.S. 98 to support his finding. The evidence showed, however, that the seven persons in the bank ran almost no risk of being struck, as they were behind partitions and away from doors or windows and not in the line of fire. Five of the witnesses outside the bank either saw or heard the shooting, but only one of them was ever in the line of fire. It is true that there were a number of passersby on U.S. 98, but of the eight shots only one was definitely aimed in the direction of the highway and only two others could have been. We do not believe that the possibility that no more than three gunshots could have been fired toward a busy highway is proof beyond a reasonable doubt that Hallman knowingly created a great risk of death to many persons.

Id. 225-226 (footnote omitted). See also White v. State, 403 So. 2d 331 (Fla. 1981).

The evidence here does not support the circumstance under Hallman. Hence the trial court erred in instructing on and finding it. The improper instruction was improper because the state used it to focus the jury's deliberations on irrelevant sentencing considerations (the robbery, the Mallows, the shoot out with the deputy).

D. CONSTITUTIONALITY OF FELONY MURDER CIRCUMSTANCE

The felony murder circumstance is unconstitutional because it mirrors the elements of felony murder. Cf. Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990) ("Since premeditation already is an

element of a capital murder in Florida, section 921.141(5)(i) [cold, calculated, and premeditated circumstance] must have a different meaning; otherwise it would apply to every premeditated murder.") (citing Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (footnote omitted)). It also violates Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L.Ed.2d 937 (1978) (plurality opinion) (death sentence unconstitutional where state statute did not provide for full consideration of, inter alia, mitigating factor of lack of intent to cause death) and Breedlove v. Singletary, 595 So. 2d 8, 12 (Fla. 1992) ("A strong presentation of mitigating evidence is more likely to tip the scales in a case where the killing was not premeditated.") because it turns the most mitigated form of murder (unintentional felony murder) into an aggravated murder. But see White v. State, 403 So. 2d 331, 336 (Fla. 1981) (rejecting Lockett argument). The court has not had occasion to determine whether Porter has overruled White. Finally, the state waived use of the felony murder circumstance by not obtaining a special verdict of felony murder at the trial for guilt. Cf. Delap v. Dugger, 890 F.2d 285, 306-19 (11th Cir. 1989) and Schad v. Arizona, 111 S.Ct. 2491 (1991).

X. FAILURE TO CONSIDER OR WEIGH MITIGATION

The sentencing order must explicitly consider and weigh all mitigating factors apparent on the record. Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987) (court "must" consider all statutory and non-statutory mitigation), Eddings v. Oklahoma, 455 U.S. 104 (1982). Hence, Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) found that failure to consider nonstatutory mitigation violated the eighth amendment and added: "under our decision in Rogers, the trial court is under an obligation to consider and weigh each and every mitigating factor apparent on the record, whether statutory or nonstatutory." Categories of non-statutory mitigation must be treated on a like footing with statutory mitigation. Campbell v. State, 571 So. 2d 415 (Fla. 1990).

The death sentence here is unconstitutional. The trial court accepted as true the mitigating evidence regarding Mr. Parker's family life both as a child, R 2390-91, and as a father, R 2384, 2387, but gave it no weight. It failed to consider other unrebutted defense factors, including cooperation with the police, child abuse in a series of foster homes, sexual abuse, homophobic discrimination, alcoholism and drug abuse, ostracism in school, limited intelligence, impaired capacity, and prospects for rehabilitation. This court should order resentencing.

XI. PROPORTIONALITY

The death sentence is disproportionate in this case. The murder was not planned out, and at most was an unpremeditated spur of the moment shooting. There was no torturous intent. Although it occurred while Mr. Parker was fleeing from a robbery, it was resulted from a chance encounter. See Songer v. State, 544 So. 2d 1010 (Fla. 1989); McKinney v. State, 579 So. 2d 80 (Fla. 1991); Clark v. State, 17 Fla. Law Weekly S655 (Fla. Oct. 22, 1992). The facts are nowhere near so egregious as those in, e.g., Jackson v. State, 599 So. 2d 103 (Fla. 1992); Downs v. State, 574 So. 2d 1095 (Fla. 1991); Hegwood v. State, 575 So. 2d 170 (Fla. 1990); Dolinsky v. State, 576 So. 2d 271 (Fla. 1991); Christopher v. State, 583 So. 2d 642 (Fla. 1991); and Reilly v. State, 601 So. 2d 222 (Fla. 1992).

XII. CONSTITUTIONALITY OF SECTION 921.141

Florida's capital sentencing scheme, facially and as applied to this case, is unconstitutional.

A. THE JURY

1. Standard jury instructions

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are so flawed as to assure arbitrariness and to maximize discretion in reaching the penalty verdict. The instructions merely track the language of the statute and thus relieve the state of its burden of proving the elements of the circumstances as developed by this Court.

2. Majority verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates due process and the Cruel and Unusual Punishment Clauses. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate due process. See Johnson v. Louisiana, 406 U.S. 356 (1972), and Burch v. Louisiana, 441 U.S. 130 (1979). Like reasoning applies to capital sentencing.

In Burch, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates due process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. Only Florida allows a death penalty verdict by a bare majority.

3. Advisory role

The standard instructions detract from the gravity of the jury's verdict, by saying it is not a final sentencing decision, contrary to the teachings of Caldwell v. Mississippi, 472 U.S. 320 (1985).

4. Anti-sympathy instruction.

The eighth amendment forbids failure to consider mercy as an important consideration in capital sentencing. Presnell v. Zant, 959 F.2d 1524 (11th Cir. 1992). Yet Florida does not allow instruction on the role of mercy, and juries are given "anti-sympathy" instructions. A jury will reasonably believe that much of the weight of the early life experiences of Appellant should be unconstitutionally ignored.

B. COUNSEL

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's, and the defendant becomes the victim of the ever-defaulting capital defense attorney. Ignorance of law and incompetence have characterized counsel in capital cases from the 1970's to the present. See, e.g., Elledge v. State, 346 So. 2d 998 (Fla. 1977) (no objection to nonstatutory aggravating circumstance). Failure of the courts to supply adequate counsel, and use of judge-created inadequacy of counsel as a procedural bar to review on the merits of capital claims, cause freakish, uneven application of the death penalty. Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases. The failure to provide adequate

counsel assures uneven application of the death penalty in violation of the Constitution.

C. THE TRIAL JUDGE

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So. 2d 908 (Fla. 1975). On the other, it has at times been considered the ultimate sentence so that constitutional errors in reaching the penalty verdict can be ignored. This ambiguity and like problems prevent evenhanded application of the death penalty.

D. THE FLORIDA JUDICIAL SYSTEM

The sentencer was selected by a system designed to exclude Blacks from participation as circuit judges, contrary to the equal protection of the laws, the right to vote, due process of law, the prohibition against slavery, and the prohibition against cruel and unusual punishment.[23] When racial discrimination trenches on the right to vote, it violates the Fifteenth Amendment as well.[24] When the decision maker in a criminal trial is selected on racial grounds, the conviction must be reversed and sentence vacated. See State v. Neil, 457 So. 2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986); Swain v. Alabama, 380 U.S. 202 (1965).

---

[23] These rights are guaranteed by the Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments to the Federal Constitution, and Article I, Sections 1, 2, 9, 16, 17, and 21 of the Florida Constitution.

[24] The Fifteenth Amendment is enforced, in part, through the Voting Rights Act, Chapter 42 U.S.C., § 1973 et al.

Election of circuit judges in circuit-wide races began in 1942.[25] At-large election districts in Florida and elsewhere historically have been used to dilute the black voter strength. See Rogers v. Lodge, 458 U.S. 613 (1982); Connor v. Finch, 431 U.S. 407 (1977); White v. Regester, 412 U.S. 755 (1973); McMillan v. Escambia County, Florida, 638 F.2d 1239, 1245-47 (5th Cir. 1981), modified 688 F.2d 960, 969 (5th Cir. 1982), vacated, 466 U.S. 48, 104 S.Ct. 1577, on remand 748 F.2d 1037 (5th Cir. 1984).[26]

The history of elections of black circuit judges in Florida shows the system has purposefully excluded blacks from the bench. Florida as a whole has eleven black circuit judges, 2.8% of the 394 total circuit judgeships. See Young, Single Member Judicial Districts, Fair or Foul, Fla. Bar News, May 1, 1990. Florida's population is 14.95% black. County and City Data Book, 1988, United States Department of Commerce. In Broward County, there are no black circuit judges.

Polarized voting, discrimination[27] and disenfranchisement,[28] and use of at-large election systems to minimize the effect of the

---

[25] For a brief period, between 1865 and 1868, the state constitution, inasmuch as it was in effect, did provide for election of circuit judges.

[26] The Supreme Court vacated the decision because it appeared that the same result could be reached on non-constitutional grounds which did not require a finding an intentional discrimination; on remand, the Court of Appeals so held.

[27] See Watson v. Stone, 148 Fla. 516, 4 So. 2d 700, 703 (1941) (Buford, J., concurring) (concealed firearm statute "was never intended to apply to the white population and in practice has never been so applied").

[28] See Davis v. State ex rel. Cromwell, 156 Fla. 181, 23 So. 2d 85 (1945) (striking white primaries).

black vote shows an invidious purpose behind the enactment of elections for circuit judges. See Rogers, 458 U.S. at 625-28. It also shows that an invidious purpose exists for maintaining this system in Broward County. The results of choosing judges as a whole in Florida, establishes a prima facie case of racial discrimination contrary to equal protection and due process in selection of the decision makers in a criminal trial.[29] These results show discriminatory effect which together with the history of racial bloc voting, segregated housing, and disenfranchisement in Florida violate the right to vote as enforced by Chapter 42, United States Code, Section 1973. See Thornburg v. Gingles, 478 U.S. 30, 46-52 (1986). This discrimination also violates the heightened reliability and need for carefully channelled decision making required by the eighth amendment. See Turner v. Murray, 476 U.S. 28 (1986); Beck v. Alabama, 447 U.S. 625 (1980). Florida allows just this kind of especially unreliable decision to be made by sentencers chosen in a racially discriminatory manner and the results of death sentencing decisions show disparate impact on sentences. See Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.R. 27 (1984); and Radelet and Mello, Executing Those Who Kill Blacks: An Unusual Case Study, 37 Mercer L.R. 911, 912 n.4 (1986) (citing studies).

The selection of sentencers is racially discriminatory and leads to condemning persons to die on racial factors, this Court

---

[29] The results in choosing judges in Broward County (no black judges) is such stark discrimination as to show racist intent. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

must reverse the circuit court and remand for a new trial before a judge not so chosen, or impose a life sentence.

E. APPELLATE REVIEW

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259. Intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt.

1. Aggravating circumstances.

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (eighth amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). Cases construing aggravating factors have ignored this rule.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious, or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death

eligible persons, or channel discretion as required by Lowenfield v. Phelps, 108 S.Ct. 546, 554-55 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So. 2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So. 2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So. 2d 988 (Fla. 1989) (reinterring Herring).

As to HAC, compare Raulerson v. State, 358 So. 2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So. 2d 567 (Fla. 1982) (rejecting HAC on same facts).[30]

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So. 2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[31] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So. 2d 719 (Fla. 1982).

---

[30] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L. Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases WIthout Making it Smaller, 13 Stetson L. Rev. 523 (1984).

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

2. Appellate reweighing

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So. 2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So. 2d 1200 (Fla. 1986).

3. Procedural technicalities

Through the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing. See, e.g., Rutherford v. State, 545 So. 2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So. 2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of eighth amendment); and Smalley v. State, 546 So. 2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated eighth amendment). Capricious use of retroactivity principles works similar mischief. In this regard, compare Gilliam v. State, 582 So. 2d 610 (Fla. 1991) (Campbell not retroactive) with Nibert v. State, 574 So. 2d 1059 (Fla. 1990) (applying Campbell retroactively), Maxwell (applying Campbell principles retroactively to post-conviction case), and Dailey v. State, 594 So. 2d 254 (Fla. 1991) (requirement of considering all the mitigation in the record arises from much earlier decisions of the United States Supreme Court).

4. Tedder.

The failure of the Florida appellate review process is highlighted by the Tedder[32] cases. As this Court admitted in Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

F. OTHER PROBLEMS WITH THE STATUTE

1. Lack of special verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found because the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the eighth amendment.

2 No power to mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because rule 3.800(b), Florida Rules

---

[32] Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17, and 22 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution. It also violates equal protection of the laws as an irrational distinction trenching on the fundamental right to live.

3. Florida creates a presumption of death

Florida law creates a presumption of death where but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case).[33] The heinousness circumstance can apply to any murder. Since at least one circumstance occurs in almost all first degree murders, Florida has a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[34] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the Federal Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988);

---

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

[34] The presumption for death appears in §§ 921.141(2)(b) and (3)(b) which requires the mitigating circumstances outweigh the aggravating.

Adamson v. Ricketts, 865 F.2d 1011, 1043 (9th Cir. 1988). It also creates an unreliable and arbitrary sentencing result contrary to due process and the heightened due process requirements in a death sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

4. Electrocution is cruel and unusual.

Electrocution violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 17 of the Florida Constitution. It amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eight Amendment Assessment of Methods of Inflicting Capital Punishment, 39 OHIO STATE L.J. 96, 125 n.217 (1978). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So. 2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish. This unnecessary pain and anguish shows that electrocution violates the Eight Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977).

CONCLUSION

This Court should reverse the convictions and sentences in this cause.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

GARY CALDWELL
Assistant Public Defender
Florida Bar No. 256919

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 24 day of June, 1993.

Of Counsel