IN THE

SUPREME COURT OF FLORIDA

STANLEY RAY ROGERS, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 76,456

INITIAL BRIEF OF APPELLANT

(On Appeal from the Seventeenth Judicial Circuit In and For Broward County, Florida)

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida. In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal

"2SR" Supplemental Record (Pursuant to this Court's Order of December 18, 1992 -- received February, 1992).

STATEMENT OF THE CASE

Appellant, Stanley Ray Rogers, was charged with one count of first degree murder, two counts of kidnapping, and one count of attempted sexual battery (R2994-2998). Jury selection began on May 21, 1990. At the close of the state's case, and at the close of all the evidence, Appellant moved for judgment of acquittal (R1519,1910-1911,2086-2097). Appellant's motions were denied (R1520,2097). The jury found Appellant guilty of all offenses as charged (R2536-2537). Appellant was adjudicated guilty of all offenses (R4347). The jury recommended the death penalty (R2880). The trial court sentenced Appellant to death for the murder charge (R4349). The trial court departed from the recommended guideline sentence and sentenced Appellant to life in prison for the two kidnapping counts and to thirty years in prison for the attempted sexual battery (R4350-4356). A timely notice of appeal was filed (R4229-4330).

STATEMENT OF THE FACTS

The relevant facts are as follows. Stacey Bevis testified that on April 3, 1989, she was driving on State Road 707 in Jensen Beach with her husband when a car swerved into her lane (R977-978). The other vehicle was moving extremely slow (R986). Mrs. Bevis could see that two people were struggling in the middle of the car (R979). Mrs. Bevis drove a little bit further, but decided to go back because of the fighting she had seen (R979). She pulled up thirty feet from the car with her headlights facing the car (R979). Appellant walked away from the car to the other side of the road (R980-981). His shirt was ripped (R988). Appellant put his hand toward his back pocket (R980-981). Mr. Bevis walked to the other car and yelled into it (R981). He then returned to the car and the Bevises went to the "Li'l Saints Store" and called 911 (R982). Later, the Bevises were taken to Orange Avenue by the police where they identified Appellant (R984).

Walter Bevis, Jr., testified that on April 3, 1989, he and his wife were travelling westbound on State Road 707 when they came around a bend at Beacon 21 and a vehicle was in their lane moving at two miles per hour (R994). The interior light of the car was on, but it appeared that something flew up and knocked it out (R1000). Mrs. Bevis honked the horn and the vehicle swerved and slammed on its brakes (R995). As the car swerved, Mr. Bevis heard a "pop" sound (R995). It appeared that somebody had been fighting in the car so the Bevises turned their car around and came back (R995). Appellant exited the front passenger's side door with his hand in his right back pocket (R995). Appellant walked directly

in front of the Bevises' car (R995). Appellant's shirt was ripped and he looked "very disheveled" and "messed up" (R1002). At that time Mr. Bevis thought Appellant might be a victim (R1001-1002). Appellant passed by and Mr. Bevis proceeded to holler into the other car but got no response (R995). The Bevises left to call the sheriff's department (R995). Mr. Bevis later returned to the car where a person was working on someone inside the car and asked for help (R997). About an hour later Mr. Bevis was asked to go to the area of Orange Avenue where he identified Appellant as the person he had seen walk away from the vehicle (R998).

Rene Daniel testified that at approximately 6:00 p.m. she arrived at "Mr. Laffs" to meet with friends and co-workers for a going away party (R1146-1147). After all Daniel's friends left, Daniel stayed with Mark Hastings and danced (R1201). Daniel stayed at Mr. Laff's until approximately 12:30 a.m. at which time she and Mark Hastings walked to her car (R1153). They leaned against her car and talked (R1154).

Daniel testified that as she and Hastings were talking, she noticed Appellant by a truck (R1207). Appellant could have been talking to the person in the truck (R1207). The truck left the parking lot (R1207). Appellant went over to a vehicle with its hood open and after a while approached them (R1154,1208). Appellant indicated that he had trouble with a wire in his car and asked them if they had a flashlight (R1156,1205). Appellant also said something about his friend not having a flashlight and not giving him a ride home (R1156). Daniel indicated that she didn't have a flashlight and Hastings suggested that Appellant check with

the bouncers (R1156). Appellant returned to his car which had its hood up (R1156,1158).

Daniel testified that Appellant later returned to her car and asked for a ride (R1159). Daniel suggested that they could pull her car around to use her headlights (R1161). Appellant indicated that he didn't have the necessary tool and asked for a ride (R1161). Appellant said that he lived a half mile away (R1161). Daniel and Hastings agreed to give Appellant a ride (R1161). Hastings decided to drive and Daniel sat in the front passenger's seat (R1161). Appellant got in the back seat (R1161). When they were ready to pull out of the lot Daniel mentioned that there was a back way and Appellant also said to go out the back way (R1163). The car turned onto State Road 707 (R1163).

Daniel testified that at some point while they were travelling on State Road 707, she looked back and saw Appellant pointing a gun at the back of Hastings' head (R1167). Daniel did not remember when the gun came out (R1214). Hastings started asking questions (R1168). Appellant answered that Hastings was in no position to be asking questions (R1168). Daniel kept taking her seatbelt off and putting it back on (R1168). Appellant told Daniel to take her clothes off (R1168). Daniel testified that Appellant never threatened her nor did she ever see the gun pointed at her (R1211-1212). Daniel just sat there (R1168). Appellant then told Hastings, "Make her take off her clothes" (R1168). Hastings said that he couldn't (R1168). Appellant squeezed Daniel's left breast (R1169). Daniel said, "Please don't do that" (R1169). At this point Hastings slowed the car down and indicated that he wasn't

from the area and turned the car around (R1169). Appellant told Hastings to take a right turn (R1169).

Daniel testified that instead of taking the turn, Hastings eased on by (R1169). Appellant twice told Hastings to take the right or he would pull the trigger (R1169). Hastings responded that he didn't want to do that because they would have a wreck (R1169). Daniel looked back and saw that Hastings had Appellant pinned against the seat (R1170). Hastings had turned to pin Appellant (R1220). Hastings told Daniel twice to get out of the car and run (R1170). Daniel jumped out of the car and ran (R1170). As she ran she heard a horn and then a shot (R1170). She then ran for help (R1170). Daniel called 911 and spoke with a dispatcher (R1172). Later, Daniel identified Appellant at a tree where he was handcuffed (R1174).

Daniel testified that she had taken acting lessons (R1192). Daniel learned from the prosecutor that Appellant lived back of the first right (R1218). Notwithstanding this, Hastings continued going straight when told to take the right turn (R1218).

Laura Dunne testified that she lives at Beacon 21 in Jensen Beach (R1026). On April 13, 1989, Dunne and her roommate were getting ready for bed when she heard banging on her door (R1029). Rene Daniel was hysterical and asked for help (R1056). Daniel said she thought someone had been shot (R1056). Daniel came inside and said she wanted to call 911 (R1087). Daniel dialed 911 and Dunne went to change (R1088,1090). Dunne returned and saw Daniel talking on the phone, but she couldn't hear what was said (R1090). Daniel was excited and so was Dunne (R1090).

After the call, Daniel's legs collapsed (R1092). Daniel was helped up, but was able to stand on her own (R1093). Daniel sat in the livingroom and Dunne and her roommate got her a soda (R1058). Then they asked Daniel what happened (R1059). Over objection (R1044-1046), Dunne testified that Daniel told her what had happened that night (R1039). Dunne was told that Daniel was at Mr. Laff's having some drinks (R1059). She met a guy named Mark (R1059). She decided to go home (R1059). Mark walked to her car (R1059). Dunne was told that Appellant approached and asked for a flashlight (R1059). Dunne was told that they said no, and Appellant walked back to his car (R1059). Dunne was told that a few moments later Appellant returned and asked for a ride (R1059). Dunne was told that Daniel and Hastings looked at one another and agreed to give the ride (R1059). Dunne was told that they got into the car (R1059). Dunne was told that they drove a couple of miles and Appellant started touching Daniel (R1061). Dunne was told that Appellant told Daniel to take her clothes off (R1061). Dunne was told that Hastings asked what was happening (R1061). Dunne was told that Appellant responded by threatening to blow Hastings brains out (R1061). Dunne was told that Hastings slowed the car down, shielded the gun, and told Daniel to get out of the car and run (R1061). Dunne was told that Daniel got out of the car and ran to her house (R1061). Dunne was told that Appellant had held the gun on Hastings (R1061). Dunne testified that the prosecutor had given her a copy of Rene Daniel's statement to see if there were any inconsistencies with what Daniel had told Dunne the night she came to the door (R1073).

Sheila Collins testified that during the early morning hours of April 3, 1989, she looked out her condominium at State Road 707 and saw a car stopped on the road (R1014-1017). Collins saw a person run away from the car (R1018). Collins could not tell if the person was a man or a woman (R1019). Collins went around to the front of her condo and went outside to look (R1019). The car had moved approximately 100 yards (R1019). Collins noticed a young man walk up to the car and say, "Buddy are you all right?" (R1019-1020). Collins went back inside and called 911 (R1020). Collins returned outside and another young man told her to call 911 and to tell them it's an apparent gunshot wound to the head (R1020). Collins returned inside and woke her husband (R1021). They went outside to see if they could be of any assistance (R1022). Collins checked Mark Hastings for a pulse (R1022). There was no pulse (R1022).

Deputy Sheriff Jeffrey Smith of the Martin County Sheriff's Department testified that he received a 911 emergency call at 1:02 a.m. on April 3, 1989, from Rene Daniel (R1240). Daniel seemed like she was out of breath, almost on the verge of hysteria (R1241). Daniel stated that she had picked up a person in front of Mr. Laff's and had given him a ride up towards Beacon 21 (R1241). She said that a gun had been pulled and she had run from the vehicle and went to an apartment to make the call (R1241). She gave a description of the vehicle and the armed person (R1241).

Robert Volzinski testified that he was driving home on State Road 707 and he saw a car parked in the middle of the road with its door open (R1008). Volzinski walked up to the car and noticed a

man slumped over the steering wheel (R1009). Volzinski smelled alcohol and thought the man had been drinking and got into a fight with his girlfriend and she had run off (R1009). Volzinski tried to wake up the man, but he would not respond (R1009). Volzinski put his hands behind the neck of the man and then noticed blood all over his hands (R1009). The engine of the car was still running (R1009). The brake light was on (R1010). When the paramedics arrived and removed the man from the vehicle the car started moving forward (R1010). The man was in respiratory arrest when Volzinski arrived and Volzinski provided emergency aid (R1011).

Deputy James Warren of the Martin County Sheriff's Department testified that he went to the scene at State Road 707 and followed some footprints that led from the scene (R1259). Warren concluded that the prints showed someone was running. The prints went to a river bank and then would periodically appear in the grass area back to Orange Street (R1265).

Sergeant Bill Ward of the Martin County Sheriff's Department also testified that the prints were of a running type (R1278). The prints periodically could not be followed (R1278). The prints were lost at Orange Street to a grassy area (R1279). Officers were checking the area when Deputy Baker hollered, "He's here" (R1280). Ward ran to a big tree where Appellant was located (R1281). Baker had Appellant face down on the ground (R1285).

Deputy William Baker of the Martin County Sheriff's Department testified that he also tracked the prints from the scene (R1290-1291). Baker followed the prints to an area near Orange Street (R1294). Baker saw Appellant sitting, leaning, or crouched against

a tree (R1295,1297). Baker drew his gun and told Appellant not to move (R1295). Baker arrested Appellant (R1295).

Crystal Haubert testified that she was a paramedic who arrived at the scene of the arrest at approximately 2:34 a.m. (R1327). Appellant was on the ground with his hands cuffed (R1327). Appellant had a scratch on his face (R1331). Haubert checked Appellant to see if he was conscious (R1330). The reaction of his pupils to light was sluggish (R1334). This is normal for a person who has been drinking (R1334). An ammonia ampule placement resulted in Appellant opening his eyes and coughing (R1333). During a second placement, Appellant held his breath (R1333). The eyelid flutter test showed that Appellant was not totally unconscious (R1330). From the examination, Haubert concluded that Appellant had been in a state of semi-consciousness (R1335).

John Holman of Martin County Fire Rescue testified that he also did a quick examination of Appellant at the arrest scene (R1308-1312). From the examination there were indications of some consciousness (R1314). Holman was unable to make a definite conclusion whether Appellant was aware of his surroundings (R1322).

Scott Marcum of the Martin County Sheriff's Department testified that he did the crime scene investigation on April 3 (R804-805). Marcum was informed that the suspect was apprehended and went to that location (R806-807). Appellant had been found approximately one-eighth (1/8) of a mile from the scene of the shooting (R909-910). Appellant was searched (R911). A gun was found in his pocket (R912). There was one bullet in the chamber (R913). There were no bullets in Appellant's other pockets (R912).

Rene Daniel's car was examined and three cartridges were found -- two live and one spent (R915).

Marcum also testified that he later collected Appellant's and Mark Hastings' clothes at the hospital (R825). Both Appellant and Mark Hastings were swabbed for gun shot residue (R920-921). The swabs were sent to the FBI (R922). Marcum does not believe that requests were made for analysis of Appellant's or Hastings' clothing (R927). Photographs were not sent for a blood splatter analysis (R929). FBI results as to the swab test on Appellant came back (R923). No results were returned as to the Hastings swab (R925). No further tests were sought (R925).

Dr. Stewart Goodman testified as an expert in neurosurgery (R1340). On April 3, 1989, Goodman was on call at St. Mary's Hospital in Palm Beach County (R1340). Goodman saw Mark Hastings for a gun shot wound to the head (R1341). Hastings was almost to the point of brain dead (R1342). Hastings was pronounced dead at 9:45 p.m. on April 3, 1989 (R1343). The cause of death was severe brain injury caused by a bullet that penetrated into the brain (R1343). From the CT scan it looked like the bullet entered just above the back of the ear (R1343-44).

Dr. Raul Vila, associate medical examiner with Broward County, testified as an expert in forensic pathology (R1348). Vila performed the autopsy on Mark Hastings on April 4, 1989 (R1348, 1357). Hastings had a gunshot wound to the head on the right side (R1348). The "projectile went through a right to left back and front and slightly upward trajectory" (R1351). The cause of death was a gunshot wound to the head (R1354). The wound was not a

contact wound (R1354). The shot was from 12 to 15 inches (R1354). Hastings was six feet tall and 180 pounds (R1358). Hastings was a muscular individual (R1358). There was 51 nanograms/millimeter of marijuana in Hastings' blood (R1362). In the cases that Vila has seen, this is not really a high level (R1366). Vila had no idea as to the position of Hastings' head when the shot was fired (R1373). Vila could not tell where the gun was pointed (R1360).

Detective Tim Fury of the Martin County Sheriff's Department testified that he searched the Rio area of Jensen Beach trying to locate the residence of Appellant (R1386). Fury testified that one could travel eastbound on State Road 707 and turn right at either Rio or the next road to get to Appellant's house (R1391). If one of the roads was taken, one could walk across a yard to reach Appellant's house (R1391). Both roads would lead one directly to Appellant's house (R1392).

Detective William Pakonis testified that he spoke with Appellant's landlord and searched through Appellant's trash (R1395). Pakonis found a box of twenty-five caliber ammunition in a plastic K-Mart bag (R1396).

FBI Agent Jack Riley testified that swabs for residue were taken from the victim's hands but were not tested (R1413).

John O'Rourke, an expert in the field of firearms examination, testified that Appellant's gun was a single action firearm (R1426). The static pressure required to pull the trigger was 3.8 to 4.7 pounds, which is below the 4 to 6 pounds average pressure (R1429, 1433). O'Rourke testified that if one person held the gun with his finger on the trigger and another person was grabbing the top of

the gun during a struggle, the gun could go off and, after the round is ejected, the gun would be left with its hammer back (R1460). O'Rourke also testified that if one finger was on the trigger and it remained still while a person on top pulled the gun the finger could be pulled back against the trigger (R1460-1461). The results might be different if no one's finger was on the trigger (R1455-1458).

The chief criminologist at the regional crime laboratory, Daniel Nippes, testified that he test fired Appellant's gun (R1465,1468). Nippes also examined Mark Hastings' shirt (R1471). Two buttons were missing from the shirt (R1473). One of the buttons was recovered from the back seat of Rene Daniel's car (R1473). Hair samples from Daniel were found on Hastings (R1484). From his examinations, Nippes concluded that the gun was fired at a range of less than 3 feet (R1487). The best estimation was 2 feet (R1492).

Deputy Sheriff Charles Rowe of the Martin County Sheriff's Department testified that he met with Rene Daniel on the night of the shooting (R1538). Rowe thought Daniel told him the gun was pulled after Hastings turned the car around (R1540). Daniel stated that after the turn Appellant appeared to become irrational (R1540).

Appellant testified that he went with his boss, John Privuznak to examine a car (R1665). Appellant bought the car for $100.00 (R1665). When Appellant got the car to the shop the motor cut off and the car would not restart (R1666). David McKenney said that he would work on the car (R1667). On April 2, 1989, Appellant

packed a cooler and waited for Brooks Emerson (R1667). They were going to go to the races (R1667). However, Emerson changed his mind (R1669). Appellant went to Sid Tinkler's house and drank some beers (R1670). The two men then bought a twelve pack and decided to go to the beach (R1670). After the beach, the two men went to "Shuckers" and had some drinks (R1671). They left for Tinkler's house at approximately 4:00 or 5:00 p.m. (R1671-1672). They agreed to meet at Mr. Laff's later (R1672). Donnie Strasner stopped by Appellant's place and the two went to Mr. Laff's together in Strasner's car (R1673). They arrived at around 8:00 p.m. (R1673).

Appellant testified that as the night went on he did not see Strasner (R1675). Appellant was concerned about being stranded there without a ride home (R1678). Appellant wanted to go home and to return with his car (R1678). Appellant asked Sid Tinkler for a ride home (R1675). Tinkler and a woman gave Appellant a ride home (R1676). Appellant returned to Mr. Laff's with his car. As Appellant pulled into the lot, his car cut off and coasted into a space (R1678). Like the prior day, the car again would not start up (R1679). Appellant told Sid Tinkler about his car problem and asked him for a flashlight and screwdriver (R1679). Tinkler did not have a flashlight (R1679). Appellant again asked Tinkler for a ride home (R1679). Tinkler refused by saying that he had just given Appellant a ride and he had met a lady (R1680).

Appellant testified that he saw Mark Hastings and Rene Daniel parked by a tree (R1680). He walked over to them and asked them if they had a flashlight (R1683). They said they didn't (R1683). Appellant went back to his car with the hope that it would start

(R1684). It wouldn't start (R1685). Appellant shut the hood (R1685). He was tired because he had been drinking all day (R1685). Appellant decided to walk home (R1685). He took his gun from the glove compartment of the car because the lock did not work (R1686). Appellant put the gun in his pocket, closed the door to the car, and began to walk (R1689).

Appellant testified that Mark Hastings asked something about whether Appellant had accomplished anything with his car (R1689-1690). Appellant walked over and told him that he couldn't see, was tired, and wanted to go home (R1690). Appellant asked Hastings if he would give him a ride (R1690). It seemed like Hastings had other things on his mind, so Appellant told Hastings that they could do a couple of lines of coke if he gave him a ride (R1690. Appellant made the offer because from his experience people that go to Mr. Laff's use cocaine (R1691). Appellant thought if he offered he might get a ride (R1692). Hastings seemed interested (R1690). Appellant stepped away to let Hastings and Daniel talk about it (R1690). They said it sounded like a good idea and everyone got in the car (R1691).

Appellant testified that Hastings asked which way they should go (R1692). Appellant's residence was on Bernard street, two streets behind the Li'l Saints store (R1676). One can take Rio, or the next street, to get to his residence (R1676-1677). The easiest way to the Rio area is by State Road 707 (R1692). Appellant answered Hastings that they should go up State Road 707, which they did (R1692). Appellant thought about going home, sleeping, and arranging to get his car the next day (R1693). As

they approached the Li'l Saints store, Appellant pointed toward the store and told Hastings to let him out there (R1693). Hastings asked, 'What about the coke?" (R1693). Appellant said that he was sorry that he was withdrawing the offer, but he was tired and just wanted to go home and go to bed (R1694). Hastings proceeded like he was going to pull into the lot (R1696). Appellant was ready to get out, but Hastings did not stop (R1696). Hastings gunned the car (R1696). He appeared very angry (R1696). Appellant asked to be let out (R1696). Appellant was very scared because Hastings did not let him out (R1697). Appellant yelled to be let out (R1697). Appellant yelled for Hastings to take the next right which would be Rio (R1697). The car passed Rio (R1697). Appellant told Hastings he had a gun and to let him out of the car (R1699). Hastings told Appellant that he didn't have a gun (R1699). Appellant pulled out the gun, tapped Hastings on the shoulder, and told him to let him out (R1699). Hastings said "allright" and began to slow the car down (R1700). Appellant testified that his finger was on the trigger, but that he did not threaten to pull the trigger (R1773-1774). Then, Hastings abruptly stopped the car and grabbed Appellant's hand (R1701). Hastings started over the seat (R1701). Hastings hovered over Appellant and was grabbing at his throat (R1702). The two men were struggling with the gun (R1702). Appellant was jerking the gun to get control of it (R1702). When the men were jerking the gun Appellant could hear the clicks (R1703). During the struggle, Appellant went down in the seat (R1703). Appellant pushed at Hastings with his feet (R1704). Hastings went back and Appellant jerked back and the gun fired

(R1704). Hastings slumped over (R1704). Appellant got out of the car (R1704). Appellant remembers that everything was bright and nothing was clear in his mind until later when he woke up in the hospital (R1705). Appellant testified that he brought out the gun because he was scared (R1708).

David McKenney testified that he was an automobile mechanic who worked in the shop next to where Appellant worked (R1546-1547). On the Saturday before his arrest, Appellant brought in an old car he had bought (R1548). There was a problem getting the car running (R1549). Some wires that go to the distributor were burnt up (R1549). McKenney worked on the car and got it running by splicing some wires (R1549). McKenney testified that, due to its condition, the car could short out again (R1550). The car could not be fixed unless one knew what to look for (R1550). McKenney testified that if he had to fix the car in the dark he would "probably kicked it and walked home" (R1558).

Sidney Tinkler testified that he and Appellant went to the beach on April 2, 1989 (R1560-1561). They had a few beers and met later at Mr. Laff's at about 7:30 or 8:00 p.m. (R1562). Tinkler drove his pickup truck (R1562). Tinkler met a girl at Mr. Laff's (R1563). As Tinkler was leaving, Appellant asked for a ride home (R1563). Tinkler and the girl gave Appellant a ride to his house and then returned to Mr. Laff's (R1564). Later, Tinkler left Mr. Laff's in his truck and the girl followed him home (R1564). Before he left, Tinkler was approached by Appellant, and Appellant asked for a flashlight and screwdriver (R1564). Appellant said there was something wrong with his car (R1564). Tinkler told Appellant that

he didn't have a flashlight (R1564). Appellant asked for another ride because his car wasn't running (R1564-1565).

Donald Strasner testified that he visited Appellant on April 2, 1989, and they had a couple of beers (R1572). Appellant invited Strasner to Mr. Laff's (R1572). They went in Strasner's car (R1572). Strasner left Mr. Laff's without Appellant (R1573). Strasner also testified that Dave McKenney worked on Appellant's car the day before when it wouldn't start (R1573-1574).

John Privuznak testified that he owns "J.P. Painting" and that Appellant works for him (R1579). Appellant was "kind of weak" and couldn't even pick up a five (5) gallon bucket (R1580). Privuznak had informed Appellant of a car being for sale (R1581). Appellant bought the car for $100.00 (R1581). Privuznak testified that "it was just a piece of junk" (R1581). The car started when Appellant bought it, but when it was brought back to the shop there was something wrong with the wires (R1582). David McKenney worked on the car (R1582).

Robert Allen testified that he is Appellant's brother-in-law and that he entered Appellant's residence twice after the arrest to retrieve some items that had been loaned to Appellant (R1636). Allen took items and did some straightening up (R1637). He encountered a K-Mart bag that had a box of bullets inside (R1637). Allen picked this up and put it with the trash (R1637-1638).

Robert Scarlotti testified as an expert in the field of use and abuse of cocaine, marijuana, and alcohol (R1870). Scarlotti testified that there is a strong correlation between the use of marijuana and the use of cocaine (R1877). The use of one drug

often will open the door to the use of other drugs (R1881). It is not unusual for drugs to be used as an inducement to spend time together (R1907). Cocaine can be used as an aphrodisiac (R1878). An individual can appear to have a normal life and use cocaine (R1881). Marijuana can, on occasion, make a person violent (R1882).

Peter Wells, Mary Vickers and Edward McCarthy testified that Mark Hastings had a reputation for peacefulness and non-aggressiveness (R1919,1925,1933).

Gregory Landrum testified that he interviewed Appellant on September 22, 1989, and that Appellant had little recollection of the events of the day of the shooting because of drinking early that day (R1951). Landrum testified that he has a doctorate degree in psychology (R1965). Fifty-one nanograms of marijuana is a low amount (R1966). Whether it makes a person more or less aggressive would depend on the individual (R1966). Marijuana can make a person impulsive (R1971). Landrum could not say whether 51 nanograms of marijuana would affect Mark Hastings (R1971).

Psychiatrist Gerald Leggett testified as an expert in the field of addictions (R1975). Leggett testified that it is difficult to speculate on the effects of fifty nanograms of marijuana on a person (R1978). The effect depends on the individual and other variables (R1978). There have been cases where marijuana makes a person irritable and aggressive (R1979).

PENALTY PHASE

Mark Kruegler, a deputy assistant commonwealth attorney for the state of Virginia, testified that Appellant was convicted of

the felony of rape in Virginia (R2685). The date of the offense was December 5, 1984 (R2685).

Detective William Showalter, of the Chesterfield County Police Department in Virginia, testified that on December 5 and 6 he investigated charges against Appellant (R2694). Over Appellant's objections (R2695), the state introduced State's Exhibit #79 into evidence (R2696). Showalter identified the exhibit as photographs of Tia Hayes (R2696-97). Showalter testified that in Virginia rape is classified as a violent felony (R2697).

Over Appellant's objections (R2762), Tia Hayes testified to the details of the 1984 Virginia incident (R2707-16). Hayes testified she met Appellant at a gas station at approximately 8:30 p.m. (R2709,2716). They started to talk and went to a Pizza Hut restaurant (R2711). Afterward, they went to a disco (R2716). At approximately 11:15 p.m., they went to his house (R2712,2717). Hayes testified that she then wanted to leave the house but Appellant would not allow her to leave (R2712). Hayes then testified in great detail to the severe beating Appellant allegedly dispensed (R2712-14). Appellant had threatened to kill Hayes during the violence (R2714). At some time that night Appellant had sexual intercourse with Hayes without her consent (R2715).

Sue Allen, Appellant's sister, is sixteen years older than Appellant (R2722). Allen testified that Appellant was hit by a car when he was five years old and his spleen had to be removed (R2723). Because Appellant had a rare blood type, a blood supply could not be found and Appellant suffered from secondary problems (R2723). At the age of 13 or 14, an adhesion that grew from the

surgery blocked Appellant's bowels and intestines (R2723). Appellant had to have three major surgeries within five days (R2723). Appellant hemorrhaged -- almost to the point of death (R2723).

Allen further testified that Appellant was a good student in high school and was a musician and artist (R2724). Appellant's father died from a heart attack two weeks before Appellant graduated from high school (R2725). It was a traumatic event for Appellant (R2725). Appellant took the responsibility of taking care of his mother (R2725-26). Later Appellant came to Florida to visit Allen because he was depressed (R2726). Appellant looked bad (R2726). Allen took, him to her doctor -- Dr. Cohen (R2726). Dr. Cohen said that Appellant was a "walking dead man" (R2727). Appellant was placed in the hospital (R2727). Appellant stayed less than one week because of medical bills (R2729). Appellant should have stayed in longer (R2729). Appellant then stayed with his sister and helped her at work (R2730). Appellant started going to bars (R2731). When Appellant drinks he is a different man (R2731).

Sidney Tinkler testified that he met Appellant a year and a half ago and worked with him for a month (R2739-40). Appellant was a good worker (R2740).

Donald Strasner testified that he worked off and on with Appellant (R2747). Appellant did good work as a painter, but was not fast enough for the profession (R2747). The lack of speed was due to some kind of pain Appellant suffered (R2747). Strasner knew that Appellant suffered pain due to some sort of accident when he

was young (R2747). Appellant was drinking quite heavily toward the end (R2747).

Oleta Rogers testified that Appellant was her son (R2755). At the age of five Appellant had to have his spleen removed after being hit by a car (R2758). The injuries he received affected his health throughout his entire life (R2760). There were three major operations which involved the removal of part of his intestines and part of his stomach (R2760). As a result Appellant has had ulcers and other digestive ailments throughout his life and has to be careful because his immune system has been affected (R2760). Appellant has been near death on a number of occasions due to internal bleeding (R2760).

Oleta Rogers testified that Appellant's father died the year he graduated (R2760). Appellant and his father were close (R2761). Appellant took the death hard and moped around and didn't talk (R2761). Oleta doesn't know if Appellant ever got over his father's death (R2672). Appellant began drinking heavily (R2762). Appellant's first job was in computer systems (R2764). Appellant loved the job, but had to quit (R2764-65). Oleta testified that Appellant can draw and build boats (R2767). However, his temperament changes when he drinks too much (R2768).

Richard Scarlotti is a member of the certification board for addiction professionals (R2787). Scarlotti has worked in the fields of addictions for ten years and has done over 1000 assessments of alcoholics (R2788). Scarlotti examined medical records, records from the evening of the shooting, a psychological evalua-

tion by Dr. Landrum, and interviewed Appellant in making a professional evaluation of Appellant (R2794).

Scarlotti testified that the American Medical Association recognizes alcoholism as a disease (R2789). Appellant is an alcoholic (R2794). Appellant's consumption of alcohol was severe (R2795). He started to break down physically and behaviorally (R2795). Appellant has a history of anemia (R2800). His ability to withstand the effects of alcohol are diminished by his thin blood and poor physical condition (R2800). The hospital report showed that on the night of the shooting Appellant had a blood alcohol level of .16 (R2795). Alcohol reduces the ability to make sound judgments (R2798). Attitudes can be perceived incorrectly when under the influence of alcohol (R2799). Alcohol is often responsible for altercations due to the misreading of behavior (R2799). One can see aggression that is not present; or one can see friendliness which is not present (R2799).

Scarlotti testified that the rehabilitation success rate for Appellant's problem is very high (R2802). If given help in the penal system, Appellant's chances for success are very high (R2803). Scarlotti testified that alcohol is not an excuse for crime, but it can help explain why the crime was committed (R2815).

SUMMARY OF THE ARGUMENT

GUILT PHASE

1. Over Appellant's objections, in closing argument the prosecutor stated that its star witness had made statements to police which were consistent with her trial testimony. These

alleged facts were not in evidence. The prosecutor improperly bolstered it star witness by commenting on facts not in evidence.

2. Over Appellant's objections, the state was permitted to introduce out-of-court statements of Rene Daniel under the excited utterance exception to the hearsay rule. However, the statements were in the form of a narrative story and do not constitute an excited utterance. It was reversible error to admit the hearsay evidence.

3. Over Appellant's objection, the trial court played an audio playback of Rene Daniel's testimony to the jury during its deliberations. Such a playback emphasized the verbal aspects of the testimony while unfairly deemphasizing the more important non-verbal aspects of the testimony. It was reversible error to playback the audio tape.

4. Appellant requested the standard jury instruction on prior threats. There was evidence which could support such an instruction. It was reversible error to deny Appellant's request for the standard instruction.

5. The trial court forced Appellant to read a portion of a deposition which impermissibly commented on his silence at the arrest scene. This was done over Appellant's objections. This was reversible error.

6. The evidence was insufficient to support convictions for attempted sexual battery, kidnapping, and murder. It was error to deny Appellant's motions for judgment of acquittal on these charges.

7. The trial court made comments indicating that the prosecution had additional evidence and witnesses beyond what was produced in court. A trial court's comments carry great weight. The trial court's comments constitute reversible error.

8. Appellant tried to elicit evidence regarding the nature of the place where Appellant and Mark Hastings met. Appellant was precluded from presenting such evidence. Appellant then was precluded from proffering this evidence and from presenting legal argument on this issue. It was reversible error in precluding Appellant from making a proffer and making legal argument.

9. Various prosecutorial acts during trial individually and cumulatively denied Appellant due process and a fair trial.

10. Over Appellant's objections, the state introduced evidence that Mark Hastings had a reputation for peacefulness. The state did not employ the proper method of proving reputation. Also, the evidence was presented in such a manner that any relevance was substantially outweighed by the danger of unfair prejudice.

11. Appellant was prohibited from introducing evidence of Mark Hastings' character trait for using drugs. Under the facts of this case such evidence was relevant. It was error to exclude this evidence.

PENALTY PHASE

12. During the penalty phase, the state was permitted to call a witness to testify to the details of alleged crimes committed by Appellant in Virginia. Appellant requested that he be permitted to call a witness (Marsha Jones) to the Virginia incident. He was

not allowed to do so. This was reversible error. Appellant then requested that he be allowed to proffer the testimony of the witness. He was not allowed to do so. This was reversible error.

13. Appellant was charged with attempted murder due to an alleged beating in the Virginia case. Appellant was acquitted of this charge. However, in the penalty phase the state presented the details of the attempted murder. Under the Florida Constitution evidence of crimes for which a defendant has been acquitted is not admissible. Thus, it was error to introduce details of an alleged attempted murder.

14. The state introduced testimony that a pair of panties were found in Appellant's home in 1984. The panties were not linked to the prior offense and were irrelevant. The admission of this evidence was reversible error.

15. Appellant presented and argued a number of non-statutory mitigating circumstances in this case. These circumstances were uncontroverted. It was error to fail to find these non-statutory mitigating circumstances.

16. Appellant presented and argued a number of non-statutory mitigating circumstances in this case. The trial court failed to address any of these circumstances in its sentencing order. This was error.

17. Appellant requested that the jury be given a special jury instruction limiting consideration of duplicate aggravating circumstances. The trial court denied the requested instruction. This was error. Castro v. State, 597 So.2d 259 (Fla. 1992).

18. The jury was instructed by the trial court that the sentencing decision was the sole responsibility of the judge. It was reversible error to lead the jury to believe that they had no responsibility for the sentence Appellant would receive.

19. Appellant attempted to introduce hearsay evidence during the penalty phase. Hearsay testimony is admissible during the penalty phase of a capital trial. It was error to exclude Appellant's evidence.

20. Appellant objected to the jury instructions on mitigating circumstances requiring "extreme" mental or emotional disturbance and "substantial" impairment. Mitigating circumstances cannot be restricted by the use of such modifiers. Thus, it was reversible error to require that mental or emotional disturbance be "extreme" or that impairment be "substantial".

21. Over Appellant's objection, the trial court instructed the jury that they could find the aggravating factor that the killing was cold, cruel, and premeditated. Where the killing occurred during a mutual struggle, it was error to give such an instruction. The error was not harmless.

22. Due to the substantial mitigation present in this case, the death penalty is not proportionally warranted.

23. Appellant moved the court to give a number of special jury instructions defining the non-statutory mitigating circumstances. The trial court denied them. It was error to fail to adequately define the non-statutory mitigating circumstances.

24. At the time of the offense, Appellant had not yet begun serving a sentence of imprisonment nor was there any evidence that

a warrant was issued initiating the process for Appellant to begin serving his sentence. It was error to find the aggravating circumstance that Appellant was under a sentence of imprisonment.

25. The trial court instructed the jury that the mitigating circumstances must outweigh the aggravating circumstances in order for a life sentence. Such an instruction is erroneous because it incorrectly states the burden of proof.

26. Florida' death penalty statute operates in an unconstitutional manner. It does not meet the constitutional requirements of evenhanded, nonarbitrary application. The standard jury instructions are constitutionally infirm, trial judges commit reversible error with astonishing regularity, the statute has not been strictly or consistently construed, and the use of technical bars to review has turned capital litigation into a maze of traps for the unwary.

27. The aggravating circumstances used at bar are unconstitutionally vague, have not been strictly construed, do not conform to their legislative purposes, and are subject to inconsistent application as to make them unconstitutional.

28. The reasons given for departure from the guidelines are invalid. It was error to depart from the guidelines.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO BOLSTER ITS CASE BY COMMENTING ON MATTERS UNSUPPORTED BY THE EVIDENCE PRODUCED AT TRIAL.

During its closing argument the prosecutor addressed the credibility of Rene Daniel by stating that she had made out-of-

court statements consistent with her trial testimony (R2347-2350). Specifically, the prosecutor made the following comments:

> MR. BARLOW: ... She gives a statement to Mark Baker in the Sheriff's Department. No inconsistencies there shown by the defendant.

(R2349). Appellant's counsel immediately objected on the ground that this statement was not in evidence (R2349). The prosecutor then commented on a statement given to Detective Silvas by Daniel and argued that the defense did not cross-examine regarding the statement:

> MR. BARLOW: She gave a statement to Detective Silvas. Nothing inconsistent there. You didn't hear Defense counsel cross examine --
>
> MR. LASLEY: Objection, Judge, improper argument.
>
> THE COURT: Overruled. Proceed, sir.
>
> MR. BARLOW: You didn't hear Defense counsel using that statement saying, "Didn't you tell a different statement on a different day to Detective Silvas?" It didn't happen. Consistent again. Then ladies and gentlemen, Miss Daniel --
>
> MR. LASLEY: Judge, can we approach on the matter?
>
> THE COURT: No sir. Proceed.

(R2349). As can be seen from the above quote, Appellant again objected and his objection was overruled (R2349). It was reversible error to overrule Appellant's objections and to permit the prosecutor to bolster the credibility of its key witness by facts not in evidence and by commenting on Appellant's failure to cross-examine the witness on the facts not in evidence.

It is well-settled that a prosecutor's closing argument must be confined to the facts or matters which are in evidence. Eg.

Huff v. State, 437 So.2d 1087, 1091 (Fla. 1983).[1] Here, the prosecutor improperly bolstered the testimony of Rene Daniel by telling the jury that her testimony was consistent with statements she made to detectives Baker and Silvas. However, at no time did the state, nor Appellant, introduce evidence that Daniel had made any statements to Detective Mark Baker or Detective Silvas.

The prosecutor did not stop by informing the jury of the existence of the statements not in evidence, but emphasized that the statements were consistent with Daniel's testimony.

It is improper for the prosecutor to intimate in closing argument that he could produce additional evidence to corroborate its witnesses or theory. See e.g. Richardson v. State, 335 So.2d 835 (Fla. 4th DCA 1976) (prosecutor's comment that he could have brought a "lot of police officers" implies existence of additional harmful evidence, and constitutes reversible error); Wilder v. State, 355 So.2d 188, 189 (Fla. 1st DCA 1989) (state commented that witness who was not called would have corroborated another witness by testifying to a prior consistent statement of the witness); Thompson v. State, 318 So.2d 549 (Fla. 4th DCA 1975) (state commented that he could have produced other witnesses to corroborate its one witness, reversed because prosecutor is intimating that he has additional harmful knowledge about case).

The instant case is more egregious, the prosecutor did not merely intimate, but explicitly informed the jury of facts not in

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[1] Such comments imply superior knowledge by the prosecutor and amounts to the prosecutor testifying. See Wheeler v. State, 425 So.2d 109 (Fla. 1st DCA 1982) (comments indicated that prosecutor had information outside record and constituted reversible error).

evidence which bolstered the credibility of the key witness. Clearly, it was error to overrule Appellant's objections.

It should also be noted that the out-of-court statements Daniel allegedly made to the police which the prosecutor referred to were rank hearsay and would not be admissible as evidence. E.g. Lamb v. State, 357 So.2d 437 (Fla. 2d DCA 1978) (error to admit evidence of statements made to police officer to bolster credibility).

The error of improperly bolstering Rene Daniel's testimony cannot be deemed harmless. Daniel's testimony was a key component to the state's case. Other state witnesses, Stacey and Walter Bevis, testified that they observed a struggle occurring when the shot was fired. Although Daniel had left the car before the struggle and shot, her testimony as to what occurred before her exit portrays Appellant as the aggressor who was in the midst of an assault. This is directly contrary to the testimony of Appellant. In fact, it was so important to the prosecutor that Daniel's testimony be considered credible that prior to trial he showed her statement to the other witnesses to compare with what she had told them (R1036). The jury was given the task of deciding whether to believe Daniel's testimony.

It is the burden of the state to prove beyond a reasonable doubt that the error did not influence the jury for the error to be harmless. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1985). The focus of the harmless error test is the possible effect of the improper evidence on the jury. State v. DiGuilio, 491 So.2d 1129,

1139 (Fla. 1985); State v. Lee, 531 So.2d 133, 137 (Fla. 1986).[2] Where the credibility of the state's key witness is an issue, the improper bolstering of the credibility of that witness will not be deemed harmless and constitutes reversible error. Thompson v. State, 318 So.2d 549, 552 (Fla. 4th DCA 1975) (error of commenting on matters not in evidence especially harmful in case where credibility of single state witness and single defense witness in issue, such error "could have had the effect of unfairly tipping the scales"); Preston v. State, 470 So.2d 836 (Fla. 2d DCA 1985).

The improper bolstering by introducing statements made to police officers put a "cloak of credibility" on Daniel's testimony. See Perez v. State, 371 So.2d 714, 717 (Fla. 2d DCA 1979) (when the prior consistent statements are made to police officers, who are generally viewed "as disinterested and objective and therefore highly credible, the danger of improperly influencing the jury becomes particularly grave"). It cannot be said beyond a reasonable doubt that the improper bolstering of the state's key witness was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1985).

Finally, the Court has long recognized, as demonstrated in Deas v. State, 119 Fla. 839, 161 So. 729 (1935), that a prosecutor's improper argument to facts outside the evidence is particularly egregious and must be rebuked:

> When it is made to appear that a prosecuting officer has overstepped the bounds of that propriety and fairness which should charac-

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[2] One does not reweigh the evidence and try to guess at whether the jury would have decided credibility differently absent the improper evidence. As long as the improper evidence could influence the jury, the error cannot be deemed harmless. State v. DiGuilio, supra; State v. Lee, supra.

> terize the conduct of a state's counsel in the prosecution of a criminal case, or where a prosecuting attorney's argument to the jury is undignified and intemperate, and contains aspersions, improper insinuations, and assertions of matters not in evidence, or consists of an appeal to prejudice or sympathy calculated to unduly influence a trial jury, the trial judge should not only sustain an objection at the time to such improper conduct when objection is offered, but should so affirmatively rebuke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments.

161 So. at 731 (emphasis added).[3] Thus the error in this case cannot be deemed harmless. The error violated the due process and confrontation clauses. Fifth, Sixth and Fourteenth Amendments, U.S. Const., Article I, §§ 9, 16, Fla. Const. Appellant's con-

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[3] In Deas, supra, this Court found it appropriate to quote the following from Berger v. United States, 293 U.S. 552, 55 S.Ct. 629, 633, 79 L.Ed.2d 665 (1935), to illustrate this point:

> [The United States Attorney] ... is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, i.e. is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

victions and sentences must be reversed and this cause remanded for a new trial.

POINT II

THE TRIAL COURT ERRED BY PERMITTING THE STATE TO INTRODUCE THE HEARSAY NARRATIVE STATEMENTS OF RENE DANIEL WHICH WAS IMPROPERLY USED TO BOLSTER HER TRIAL TESTIMONY.

Laura Dunne testified to a number of out-of-court statements made by the state's primary witness -- Rene Daniel. In the midst of Dunne's testimony, the jury was excused and a hearing was held as to the admissibility of the various statements (R1030-1046). The trial court heard a proffer of two of Daniel's statements which Dunne would testify to.

The first out-of-court statement occurred when Daniel was banging on Dunne's door crying, "Oh, my God, oh my God. I think somebody's been shot" (R1030). Appellant acknowledged that this was admissible as an excited utterance.

Dunne testified that the second statement occurred after Daniel dialed 911 and talked to the police, after she paced back and forth for a while, after she was given a soda and sat on the couch and was told to relax (R1030-1031). Dunne then asked Daniel what had happened (R1031). Daniel answered with a narrative rendition of the night's events beginning with meeting Mark Hastings at Mr. Laffs (R1031-1032). The prosecutor argued that this narrative was an excited utterance (R1042). Appellant objected and argued that it wasn't (R1044-1045). The trial court overruled Appellant's objection and permitted all of Daniel's

statements to be introduced through Dunne (R1046).[4] This was error.

In the present case the state introduced the out-of-court narration pursuant to the excited utterance exception to the hearsay rule.[5] Of course, statutes are to be construed against the party claiming the statutory exception. Pal-Mar Water Management District v. Board of County Commissioners of Martin County, 384 So.2d 232 (Fla. 4th DCA 1980). Statutes are to be strictly construed in a light most favorable to the party against whom they are asserted. E.g., Negron v. State, 306 So.2d 104 (Fla. 1974). Moreover, because the basis for the excited utterance exception has

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[4] The proffered statement Dunne testified to (R1031-1032), was virtually identical to the statement testified to in front of the jury (R1059, 1060).

[5] Section 90.803(2), Florida Statutes (1989) reads as follows:

> EXCITED UTTERANCE. -- A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

historically been in question,[6] the exception should be applied only where the requirements are clearly met.

The rationale for the excited utterance exception lies in the special reliability by excitement superseding the powers of reflection. See Hamilton v. State, 547 So.2d 630 (Fla. 1989). The utterance is reliable because it is impelled, rather than the result of reflection. Rene Daniel's narrative to Laura Dunne should not have been admitted into evidence.

The contents and nature of the statement in this case shows reflection. The statement in question is the following narrative given by Daniel to Dunne after Dunne had asked what happened:

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[6] As noted in McCormick On Evidence (2nd Ed.) § 297, ftnt. 9, the reliability serving as the basis for the exception may be outweighed by the distorting effect of the excitement:

> "One need not be a psychologist to distrust an observation made under emotional stress; everybody accepts such statements with mental reservation. M. Gorphie cites the case of an excited witness to a horrible accident who erroneously declared that the coachman deliberately and vindictively ran down a helpless woman. Fiore tells of an emotionally upset man who testified that hundreds were killed in an accident; that he had seen their heads rolling from their bodies. In reality only one man was killed, and five others injured. Another excited gentleman took a pipe for a pistol. Besides these stories from real life, there are psychological experiments which point to the same conclusion. After a battle in a classroom, prearranged by the experimenter but a surprise to the students, each one was asked to write an account of the incident. The testimony of the most upset students was practically worthless, while those who were only slightly stimulated emotionally scored better than those left cold by the accident." Hutchins and Slesinger, Spontaneous Exclamations, 28 Colum. L. Rev 432, 437 (1928) (footnote references omitted).

> THE WITNESS: Okay. She said she had been in Mr. Laff's for a couple of hours and she had met this guy Mark. She had been talking to him for a couple of hours. She decided to go home. He was gentlemanly enough to walk her to her car. She said they walked out to the car at which time a man approached them, which is the Defendant, asked them for -- if they had a flashlight. She said no. And he went back to his car. He came back in a couple of minutes and he asked, "Can you give me a ride. I just live up the street a mile or so." Rene said that her and Mark kind of looked at each other, hesitated and said okay. At which point Mark drover her car, got in the passenger seat -- I mean got in the driver's seat. She got in the passenger's seat. And the Defendant was in the back seat. They were driving down the road a little ways and the Defendant she said started touching he, feeling her. He said, "Take off your clothes." At this point Mark was like, "Hey, man, what's going on. What are you doing -- what are you doing this for?" He said, "Shut up or I'll blow your fucking brains out." At this point Mark slowed down. I guess he had stopped the car. He went like this -- this what she said. He went like this to shield the gun and he said, "Jump, get out of the car, run." And that's when she ran and that's when she saw a light on in my apartment and came there.

(R1031-1032). This is a narrative, or story, reflecting on, and communicating, the details of what had previously occurred during the evening.[7] The contents of the narrative show a well organized summation of details rather than an utterance when the capability of reflection has been suspended. For example, the narrative begins with an ordered reflection of the beginning of the evening; even to the extent of including Daniel's conclusion that Mark Hastings was acting "gentlemanly" by escorting her to the car

[7] Compare this to Daniel's non-reflecting utterance when she initially arrived at Dunne's residence where she cried, "Help me. Help me. Oh, my God, oh my God. I think somebody's been shot" (R1030).

(R1031). The ordering of the events shows reflection. The characterization of someone as "gentlemanly" is formed through a process of evaluation and reflection. The length, and detail, of the statement shows reflection. In the narrative, Daniel quotes what other individuals say with regard to commonplace conversation -- "Can you give me a ride. I just live up the street a mile or so" (R1032). Reflecting on what others have said cannot be legitimately claimed to be an excited utterance.

It has long been recognized by this Court that a statement "in the form of a narrative of a past event" is not part of the res gestae:

> If a person who was a part or a witness to a transaction makes at, or shortly after the incident, a statement *in the form of a narrative of a past event*, although relating to the transaction, such statement is not considered a part of the res gestae and (is not) admissible as evidence.

Green v. State, 113 So. 121, 123 (Fla. 1927) (emphasis added).[8] Other states have also long prohibited the use of such narrative statements. For example, in State v. Hendricks, 73 S.W. 194 (Mo. 1903) a victim was assaulted near his home and struggled to his feet and walked home. When he arrived home his wife asked, "What is the matter?" He told he the details of how he reached the place of the assault, who the offenders were, and how they assaulted him. The contents of the statement showed that it was the result of reflection. The court held that the statement was purely narrative

[8] The excited utterance exception is one of the group of hearsay exceptions which was previously called "res gestae." State v. Jano, 524 So.2d 660, 662 (Fla. 1988).

and not admissible.[9] Likewise, in the present case, the contents and nature of the out-of-court narrative shows that it is not the product of a mind incapable of reflective thought.

Moreover, the utterance is supposed to explain or illuminate the exciting event. When the statement goes beyond the event and describes the past details of the evening, it cannot be said that the statement is an impulsive, nonreflecting expression. See United States v. Knife, 592 F.2d 472, 481 ftnt. 10 (8th Cir. 1979) (statement not admissible as excited utterance where very nature of contents included reflection).

In addition, there were intervening circumstances between the time of the incident and when Rene Daniel told the narrative story to Laura Dunne. For example, after Daniel entered the residence she called "911" and talked with, and answered questions of, a police officer. She would later pace back and forth for a while (R1030,1035). Then she sat on the couch to relax and drink a soda (R1030,1035). It was after these intervening circumstances, that Daniel told her narrative to Laura Dunne. The intervening circumstances exclude the narrative from qualifying as an excited utterance. See Quiles v. State, 523 So.2d 1261, 1263 (Fla. 2d DCA 1988) (statements made after declarant went home and called the police); State v. Estoup, 1 So. 448 (La. 1887) (statement made 10

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[9] See also e.g. People v. Westcott, 86 Cal.App. 298, 260 P. 901 (1927) (victim shot when responding to doorbell, his wife telephoned police and doctor, neighbor showed up and victim made statement in response to a question -- the statement was held to be inadmissible because it was not the natural and spontaneous outgrowth of events, but a mere narrative of a transaction).

minutes after shooting when victim sitting by relative talking was not admissible as res gestae).

More importantly, as the above discussion shows, Daniel's narrative was made after there was time to reflect. An excited utterance

> "must have been made before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance ..."

Lyles v. State, 412 So.2d 458, 460 (Fla. 2d DCA 1982). This Court has recognized that if there is time for reflective thought then the statement will not be admissible as an excited utterance unless there is proof that the declarant did not engage in reflective thought:

> Perhaps an accurate rule of thumb might be that where the time interval between the event and the statement is long enough to permit reflective thought, the statement will be excluded in the absence of some proof that the declarant did not in fact engage in a reflective thought process.

State v. Jano, 524 So.2d 660, 662 (Fla. 1988). As explained above, due to the circumstances and time involved, there was opportunity and time for reflective thought by Daniel. As explained above, the content and nature of the narrative shows that Daniel did engage in a reflective thought process; not proof that she did not.

Merely because there was testimony that Daniel outwardly appeared to be in an excited state does not make her narration admissible as an excited utterance. See Preston v. State, 470 So.2d 836, 837 (Fla. 1985) (record showed that declarant had an opportunity for reflection thus, despite testimony that she was

"nervous" and "upset" when she made the statements, the statements were not admissible as excited utterances). One can appear nervous and excited and yet his or her capacity for reflective thought may not have been suspended. Thus, where there is an opportunity for reflective thought the statement will not qualify as an excited utterance. As explained above, not only was there an opportunity for reflective thought in this case, there was also evidence that the narrative was the result of a reflective thought process.[10]

The error in the instant case cannot be deemed harmless. As explained in Point I, Rene Daniel's credibility was an extremely important matter for the jury to consider. It cannot be said that the bolstering of her credibility by use of the inadmissible hearsay statement was harmless. See Preston v. State, 470 So.2d 836 (Fla. 2d DCA 1985) (inadmissible hearsay used to bolster credibility of a key witness is "highly prejudicial" and thus reversible error). The error violated Appellant's right to due process, confrontation, and a fair trial. Fifth, Sixth and Fourteenth Amendments, U.S. Const., Article I, §§ 9, 16, Fla. Const. Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

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[10] To permit the admission of the narrative in this case would result in an unwarranted enlargement of the excited utterance exception. Prior to the evidence code, the specific exceptions to the hearsay rule all existed in the form of the res gestae rule. State v. Johnson, 382 So.2d 765, 766 (Fla. 2d DCA 1980). The res gestae rule had been historically criticized as "catch all" which was sufficiently ambiguous to save evidence which would not be admissible under a more defined exception. Green v. State, 113 So.2d 121, 123 (Fla. 1927). The problem was alleviated by the delineation of the code's specific exceptions. Hopefully, the problems will not reoccur through an unwarranted enlargement of the specific exceptions.

POINT III

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO PLAYING AN AUDIOTAPE OF RENE DANIEL'S TESTIMONY.

Prior to, and during, trial Appellant objected to the fact that the trial would proceed without a court reporter and would instead be tape recorded (R199,413). The trial court overruled the objection (R413). The concerns over the lack of a court reporter came to fruition when the jury later asked for a playback of Rene Daniel's testimony (R2505). Appellant objected on the ground that the true demeanor of Rene Daniel was important and an audio playback would distort the jury's view of demeanor because it fails to reflect the physical performance of the witness:

> MR. LASLEY: The objection was that it would be over -- the Defense has relied so strongly on her demeanor on the stand and it would not reflect -- it would reflect the -- the hysterics, but not the actual physical performance that she was putting on. * * * -- of the lack of a read back in the form of a transcript. In other words they should not get to hear what we consider -- called faking cracks and breaks in her voice and all, rather than just a standard read back of the transcript.

(R2505-2506). The trial court overruled Appellant's objection (R2505-2506). The jury heard the playback (R2513). This was error.

It has been recognized that there are important distinctions between dispassionate readbacks and playbacks of testimony of an impassioned witness. Martin v. State, 747 P.2d 316, 319 (Okla. Cir. 1987). The playback results in undue emphasis of the witness' testimony. See United States v. Binder, 769 F.2d 595, 601, ftnt. 1 (9th Cir. 1985) (permitting the replay was equivalent to allowing

a live witness to testify a second time, the testimony should have been transcribed and read to the jury). A dispassionate readback merely gives the jury objective information. It does not portray the demeanor of the witness. Whereas, a playback of testimony provides a vehicle for studying the demeanor of the witness. The danger of providing an audio playback is that the jury only is given the least reliable half of the factors pertaining to a witness' credibility.

In the present case the problem of playing back an audiotape is especially harmful when one considers that visual, rather than verbal, factors from a witness are the most important clues in determining the credibility of the witness.[11] The obvious problem with an audio playback is that the jury hears the manner of the witness' speech without seeing how the witness is acting when speaking. Thus, an audio playback is inherently misleading. Testimony may sound entirely credible, but the witness may be acting in such a way that the testimony is actually incredible. Essentially, the playing of the audio tape would result in the jury determining credibility of the witness with only half of the

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[11] "The true meaning of the spoken word may be amplified or modified by any one of many nonverbal cues, such as postures, gestures, facial expressions, and other bodily activities; hence, the commonplace expressions "Actions speak louder than words" and "Look me straight in the eye if you're telling the truth." In fact, according to various social studies, as much as 70% of communication between persons occurs at the nonverbal level." Inbau, Reid, and Buckley, Criminal Interrogation and Confessions (3d ed.) at 50. See also Eckman and Friesen, Unmasking the Face: A Guide to Recognizing Emotions From Facial Clues (1975); Eckman and Friesen, Detecting Deception From the Body or Face, 29 J. Personality & Soc. Psy. 288-298 (1974). A recent study also finds that visual aspects are the most important in determining credibility. American Psychologist, Sept. 1991.

picture in mind. Replaying only the audio portion of the testimony amounts to presenting live testimony without the physical confrontation from which the jury judges demeanor.[12] As noted in Coy v. Iowa, 108 S.Ct. 2798, 2802 (1988), a jury will determine credibility from the physical nature of the witness:

> The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier will draw its own conclusions.

(emphasis added). The playback also unduly emphasizes the testimony of one witness, by in essence allowing her to testify live a second time, above that of all the other witnesses.

Obviously, credibility is a key issue, a view of only half of the picture would not be harmless error. In fact, after the trial, one juror indicated that after hearing the audio tape, without seeing the witness's demeanor on the stand, the juror reached a decision (R4269).

This was in line with Appellant's earlier concerns that "... the Defense has relied so strongly on her demeanor on the stand and it would not reflect -- it would reflect -- the hysterics, but not the actual physical performance that she was putting on" (R2505) -- "They should not get to hear what we consider -- called faking cracks and breaks in her voice and all, rather than just a standard readback of the transcript" (R2506).

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[12] E.g., people speak of not being able to tell lies with a "straight face"; see also Macbeth, Act I, Scene VII, line 81: "Away, and mock the time with fairest show: False face must hide what the heart doth know."

The playback of the audio tape violates the due process and confrontation clauses. Fifth, Sixth, and Fourteenth Amendments, U.S. Const., Article I, §§ 9, 16, Fla. Const.

POINT IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR THE STANDARD JURY INSTRUCTION ON PRIOR THREATS.

Appellant requested the jury be read the standard jury instruction on prior threats (R2231-32). The Florida Standard Jury Instruction on prior threats reads as follows:

> If you find that the defendant who because of threats or prior difficulties with (*victim*) had reasonable grounds to believe that he was in danger of death or great bodily harm at the hands of (*victim*), then the defendant had the right to arm himself. However, the defendant cannot justify the use of force likely to cause death or great bodily harm, if after arming himself he renewed his difficulty with (*victim*) when he could have avoided the difficulty.

Florida Standard Jury Instructions in Criminal Cases, 3.04(e), p. 42-43 (2d ed.). The trial court denied the requested standard instruction. Failure to give the requested instruction was reversible error.

It is axiomatic that a defendant is entitled to a jury instruction on the theory of his defense if there is any evidence in the record to support it. Palmes v. State, 397 So.2d 648 (Fla. 1981), cert. den. 102 S.Ct. 369 (1981); Holley v. State, 423 So.2d 562 (Fla. 1st DCA 1982). A defendant is entitled to this instruction if there is any evidence to support it, regardless of how weak or improbable it may appear to be. Holley; Taylor v. State, 410

So.2d 1358 (Fla. 1st DCA 1982); Dudley v. State, 405 So.2d 304 (Fla. 4th DCA 1981).

In the present case there was evidence supportive of Mark Hastings threatening Appellant prior to Appellant taking out his gun. Appellant testified that he pointed at the Li'l Saints store and asked Hastings to let him out (R1693). Hastings proceeded like he was going to pull into the lot (R1696). Appellant was ready to get out, but Hastings did not stop (R1696). Hastings "gunned" the car (R1696). He appeared very angry (R1969). Appellant asked to be let out (R1696). Appellant was very scared because Hastings did not let him out (R1697). Appellant yelled to be let out (R1697). Appellant yelled for Hastings to take the next right which would be Rio (R1697). Hastings refused to let Appellant out of the car and drove by Rio (R1697).

Thus, Hastings' actions, of accelerating the car, as Appellant was about to exit it, combined with Hastings' anger, occurring prior to Appellant taking out his gun was sufficient to create a jury question as to whether Appellant had reasonable grounds to believe that he was in danger of great bodily harm. Thus, the requested instruction should have been given.

A trial judge's instruction on a theory of defense must not be incomplete or equivocal. Blitch v. State, 427 So.2d 785 (Fla. 2d DCA 1983). The trial judge has the duty to give a full instruction that governs the law of the case with respect to the alleged facts. Polk v. State, 179 So.2d 236 (Fla. 2d DCA 1965). Great care must be exercised in giving instructions so that the jury may obtain the whole picture of a particular subject matter. Jackson

v. State, 317 So.2d 454 (Fla. 4th DCA 1975). "Amid a sea of facts and inferences, instructions are the jury's only compass." United States v. Walters, 913 F.2d 388, 392 (7th Cir. 1990).

At bar the jury was not given a complete instruction as to Appellant's defense so as to obtain the whole picture of his defense. This is especially egregious when one considers that Appellant was merely requesting the standard jury instruction to properly instruct the jury. It was reversible error to deny Appellant's request for the standard jury instruction as to the theory of his defense. Appellant was denied due process and a fair trial. Article I, Section 9, Florida Constitution; Fifth, Sixth and Fourteenth Amendments, United States Constitution.

POINT V

THE TRIAL COURT ERRED IN FORCING APPELLANT TO PRESENT EVIDENCE OF HIS SILENCE AT THE ARREST SCENE.

Firefighter John Holman testified that he observed Appellant in handcuffs and surrounded by deputies (R1310-11). Holman believed there was a good chance that Appellant was conscious (R1313). Defense counsel cross-examined Holman as to his deposition as follows:

> BY MR. LASLEY:
>
> Q At that time did you -- was the following question asked you and did you respond as follows. "Question: Did he appear to be -- I suppose this really calls for a conclusion. But did he appear on the surface at least to be aware of his surroundings? Answer: I'm not able to tell you that.

(R1321). The trial court directed the defense attorney to continue reading from the deposition (R1321). The defense attorney asked

to approach the bench (R1321). The trial court denied the request and directed the attorney to continue reading (R1321). Again, the attorney requested "strongly" to approach before he read (R1321). The trial court again denied the request (R1322). The defense attorney then read the following as directed:

> BY MR. LASLEY:
>
> Q "I'm not able to tell you that. He opened his eyes again. He was never verbal with anything we did. He would not answer anything. So.

(R1322) (emphasis added).[13] At the next available bench conference defense counsel made the following motion:

> MR. LASLEY: Judge, I want to move for a mistrial. The court's requiring me to comment upon Defendant's silence at that time. Although I agree it was part of a three line answer. It was irrelevant to whether or not he could tell and whether or not he on a previous occasion indicated he could not tell whether the Defendant was aware of his surroundings. That's why I only wanted one line and that's why --

(R1325). The trial court denied Appellant's motion. The trial court erred in forcing Appellant to present evidence of his silence at the arrest scene.[14]

The standard of review is whether the comment is "fairly susceptible" to an interpretation which would bring it within the prohibition against comments on silence. State v. Thornton, 491 So.2d 1143 (Fla. 1986); State v. Kinchen, 490 So.2d 21 (Fla. 1985).

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[13] The witness then testified he had made such a statement in his depositions (R1322).

[14] Later, Appellant moved for mistrial (R1337) when paramedic Crystal Haubert testified that Appellant did not answer her questions at the scene (R1335). Based on the same reasons stated here, the motion should have been granted.

Clearly, the testimony that Appellant "would not answer anything" is fairly susceptible to an interpretation which would bring it within the prohibition against comments on silence. See State v. Thornton, 491 So.2d 1143, 1144 (Fla. 1986) (comment that "he did not answer any questions at the time of the initial arrest" was fairly susceptible); Hicks v. State, 590 So.2d 498 (Fla. 3d DCA 1991) (fact that Hicks did not make statements in process of being subdued); Graham v. State, 573 So.2d 166 (Fla. 4th DCA 1991) (testimony that defendant refused to give statement upon his arrest). This is true even where the statement is susceptible to alternative interpretations. State v. Thornton, 491 So.2d 1143, 1144 (Fla. 1986) (while comment could be interpreted as to voluntariness it can also be interpreted as comment on silence -- thus admission of the comment was error). Thus, it was error to introduce evidence that Appellant "would not answer anything" while in custody. Article I, Section 9, Florida Constitution; Fifth, Sixth and Fourteenth Amendments, United States Constitution.

Where Appellant was in circumstances in which some people might expect that an innocent person would immediately explain what occurred, especially where he claims that the killing was not intentional, it cannot be said beyond a reasonable doubt that the error was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL FOR ATTEMPTED SEXUAL BATTERY, KIDNAPPING, AND MURDER.

Appellant was charged with attempted sexual battery, kidnapping, and first degree murder. Appellant moved for a judgment of

acquittal on each of these charges (R1519,1911,2086-2097). It was error to deny Appellant's motions.

1. Attempted sexual battery.

Sexual battery is defined as the "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object." Section 794.011(1)(h), Florida Statutes (1989). The state's support for the attempted sexual battery charge came from Rene Daniel's testimony that Appellant touched her breast. Clearly, the fondling or grabbing of a breast is not part of sexual battery. See Lanier v. State, 443 So.2d 178 (Fla. 3d DCA 1983). The touching of a breast is not oral, anal, or vaginal contact. Nor is an attempt to do so, as the touching of one's private parts (the vaginal or anal area) might be.

An attempt to commit a crime consists of two essential elements -- 1) the specific intent to commit a crime; and 2) an overt act beyond mere preparation done toward its commission. E.g., State v. Coker, 452 So.2d 1135 (Fla. 2d DCA 1984). Preparation consists of arranging the means necessary for the commission of the offense. Id. at 1136. Thus, Appellant's alleged order to remove Daniel's clothing would, at best, constitute a mere preparation toward the commission of a sexual battery.[15] It simply would not constitute the overt act required for attempted sexual battery. In addition, the ordering of the removal of clothes does not prove

[15] The should be noted that this order was made separate and distinct from any alleged touching. In addition, the ordering of the removal of clothing could be mere preparation of acts or offenses other than sexual battery.

the intent to commit sexual battery. Such an order could be with the intent to commit a lewd and lascivious act or merely to see a nude woman.

2. Kidnapping.

The evidence relating to an alleged kidnapping was that Appellant pulled a gun on Mark Hastings and Rene Daniel and ordered them to drive the car down a road which was located on the right hand side. Daniel testified that they refused to comply with Appellant's order and continued to drive in a different direction (R1169). This is evidence of an attempted kidnapping and is insufficient to support a conviction for kidnapping.[16]

The pertinent portion of the kidnapping statute in reference to this issue provides:

> The term "kidnapping" means forcibly, secretly, or by threat confining, abducing, or imprisoning another person against his will and without lawful authority ...

Section 787.01(1)(a), Florida Statutes (1989). Obviously, in the present case where Appellant's order to take a right turn was ignored and the car was driven in a direction against Appellant's wishes, it cannot be said that Appellant was abducing Hastings and Daniel against their wills. At best, this was an unsuccessful attempt at kidnapping. See Green v. State, 496 So.2d 256, 259 (Fla. 5th DCA 1986) (where defendant has intent to drive victim away from scene, but another intervenes to prevent defendant from doing so the evidence support an attempted kidnapping); Duba v.

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[16] Appellant's trial counsel, in moving for the judgment of acquittal, argued that the evidence only supported a lesser offense of attempted kidnapping (R2095).

State, 446 So.2d 1167 (Fla. 5th DCA 1984) (defendant guilty of attempted kidnapping where he pointed pistol at victim and told her to get in van, but the victim ran away instead). Appellant's convictions and sentences for kidnapping must be reversed.

3. **Premeditated murder.**

Rene Daniel testified that she exited the car when Hastings pinned Appellant against the seat (R1170,1220). Stacey and Walter Bevis, the only eyewitnesses to the actual shooting of Rene Daniel, testified that as they were driving on State Road 707 they saw the two men [Appellant and Hastings] struggling within the car (R979, 995). At this time Mr. Bevis heard a "pop" sound (R995). Because of the fighting in the car, the Bevises approached the car (R979, 995). Appellant, "very disheveled" and "messed up" walked away from the car (R1002,988). Mark Hastings would die as a result of being shot within the car. However, the evidence was insufficient to show the death was the result of a premeditated design to kill.

A premeditated design to kill is more than simply an intent to murder, it is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind, both before and at the time of the homicide. McCutchen v. State, 96 So.2d 152 (Fla. 1957). In the present case the evidence did not show reflection and deliberation by Appellant in shooting Mark Hastings. Rather, the state's witnesses testified that Hastings grabbed Appellant's gun, the two men struggled over the gun, and the gun fired. Clearly, such evidence is not sufficient to prove that Appellant had, upon reflection and deliberation, formed a conscious purpose to take Mark Hastings' life. Hall v.

State, 403 So.2d 1319 (Fla. 1981) (The evidence involving the defendants' intent was subject to conflicting interpretations -- "one of which is that Coburn struggled with one or both of the defendants until either Hall or Ruffin pulled the trigger without intending to kill. If this were true, then the killing was not premeditated."); Ferguson v. State, 379 So.2d 163 (Fla. 3d DCA 1980) (during struggle, "defendant turned the deceased's hand with the gun toward the deceased and pulled the trigger a number of times"; conviction for first degree murder was reversed where there was insufficient evidence of premeditation). Appellant's conviction and sentence for murder in the first degree must be reversed.

POINT VII

IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO MAKE COMMENTS INDICATING THAT THE PROSECUTION HAD ADDITIONAL EVIDENCE AND WITNESSES BEYOND WHAT WAS PRODUCED IN COURT.

On two occasions the trial court made comments indicating that the prosecution had additional evidence and witnesses beyond what it had produced in court. First, during the state's case, the trial court ruled that certain state evidence would not be admissible (R1998). However, the prosecutor would be permitted to proffer the excluded evidence. The trial court specifically informed the jury of this as follows:

> THE COURT: About five minutes. Ladies and gentlemen, I've already made my ruling on this side bar, but the State does have a right to proffer that for the record. In other words, I've got to give him an opportunity to do what he wants to do on the record outside of your presence. I'm told it will take about five minutes. So please step into the jury room and don't speculate on what we're doing or talking about please.
>
> (Jurors leave the Court room.)

(R1998). More importantly, later during the prosecution's case the prosecutor indicated he had one last witness who could not be reached (R1501). At a bench conference, the trial court indicated that he would give the prosecutor another chance to locate the witness (R1506). The trial court then informed the jury that a recess was being taken so that the state could locate its final witness:

> THE COURT: Okay. Ladies and gentlemen, I'm -- do you have any witnesses other than that may you just told me about side bar?
>
> MR. BARLOW: No, Judge.
>
> THE COURT: He's gonna be your last witness, right?
>
> MR. BARLOW: He is.
>
> THE COURT: Okay. Now ladies and gentlemen, this witness that we're trying to locate is Deputy Sheriff Smith, I think who testified -- I know he testified previous and I think yesterday. Can't find him. So I've given the State a reasonable time to locate him. They've called all day long, can't locate him. We don't know where he -- we don't know -- no answer at home. Can't find him at the Sheriff's office. They say he's might be back Monday night. I don't know. But I've told him that -- I'll allow him to call him -- he's got to call him by 3:30. So we're gonna have to be in recess until 3:30. But sir, at 3:30 you must produce him if you intend to call him.

(R1506-1507). After the recess the state rested without calling any additional witnesses (R1511). The trial court's statement about the state having an additional witness was error.

There is no need for the trial court to advise the jury as to why recesses are being taken. Cf. United States v. Hansen, 544 F.2d 778, 780 (5th Cir. 1977) (no need to advise the jury that

someone has pleaded guilty). Judicial comments will be deemed improper where the trial court's words can be construed in a manner so as to prejudice a defendant's case. E.g. Young v. State, 330 So.2d 235 (Fla. 2d DCA 1976); Kellum v. State, 104 So.2d 99 (Fla. 3d DCA 1958). In the present case, where the trial court informed the jury that the state had one remaining witness but that witness did not testify and that the state has the right to proffer evidence outside its presence, there are obviously comments indicating that the state had additional evidence that it did not produce. The implication from the prosecutor of such additional evidence has been repeatedly held to be error. E.g. Richardson v. State, 335 So.2d 835 (Fla. 4th DCA 1976) (error for prosecutor to state that he could produce additional evidence).

The prejudice is even greater where the trial court makes the comments indicating that additional evidence or witnesses exist. McClain v. State, 353 So.2d 1215, 1217 (Fla. 3d DCA 1977) ("prejudice to an accused form such a prohibited comment is greater when it is made by the judge"). As is commonly known, the words of the trial court carry great weight and, notwithstanding the absence of objection, prejudicial comments will warrant a new trial. See Ferber v. State, 353 So.2d 1256, 1257 (Fla. 2d DCA 1978); McClain v. State, supra. Here,the trial court's comments, indicating the existence of a state witness and evidence beyond what was produced at trial, certainly was prejudicial and harmful in light of the close nature of the case. The comments deprived Appellant of due process and a fair trial under Article I, Section 9 of the Florida

Constitution and the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

POINT VIII

THE TRIAL COURT ERRED IN PRECLUDING APPELLANT FROM PROFFERING TESTIMONY TO A LINE OF QUESTIONING AND IN PRECLUDING APPELLANT FROM PRESENTING LEGAL ARGUMENT ON THIS ISSUE.

During the cross-examination of Rene Daniel, Appellant attempted to ascertain the nature of the place where Appellant and Mark Hastings had met. Specifically, Appellant attempted to question Daniel as to the age of the crowd that goes to Mr. Laff's on reggae night (R1198). The state objected to this line of questioning (R1198). The trial court sustained the objection and held the questioning to be irrelevant (R1198). Appellant moved to proffer the answers to the line of questioning (R1198). The trial court denied the proffer (R1199). Appellant then moved to access the record for argument as to the proffer (R1199). However, this was denied "as well" (R1199).

The law is well-settled that refusal to permit a proffer of testimony is error. Pender v. State, 432 So.2d 800 (Fla. 1st DCA 1983); Hawthorne v. State, 408 So.2d 801 (Fla. 1st DCA 1982). A proffer of testimony is necessary to ensure full and effective appellate review. Pender, supra. The trial court erred in precluding Appellant from proffering the answers to his line of questioning and in precluding Appellant from presenting legal argument as to why the proffer should be allowed.

At first glance it might appear that the line of questioning regarding the ages of people attending reggae night at Mr. Laff's is totally unrelated to the case. We will never know because

defense counsel was not permitted to present legal argument to show a relation of this evidence to this case. However, one can speculate as to one possible claim as to why such evidence would be relevant.[17] The prosecutor, during his cross-examination of Appellant, implied that Appellant was lying with regard to his meeting with Daniel and Hastings because one would not offer cocaine to two strangers at Mr. Laff's (R1761). Appellant gave the following response on cross-examination:

> A: Well, it wasn't a matter of offering these two strangers. I mean we're talking about individuals that are about the same age, they're in the same place, they're acting in a manner which is -- is very acceptable to -- to my peer group.

(R1761). Thus, it appears the nature of Mr. Laff's on reggae night had become an issue with regard to Appellant's credibility. We also know that the significance of the people at Mr. Laff's on reggae night might not be readily apparent to the jurors. Five members of the jury venire had visited Mr. Laff's on more than one occasion (R250). There is no indication that any of them had visited Mr. Laff's on reggae night. The legal argument, and proffered testimony, might have shown that the crowd on reggae night is considerably different in age and attitude towards drugs than on any other night at Mr. Laff's. Such evidence might be relevant by rebutting the prosecutor's intimation that Appellant is not credible when saying that he would offer two "strangers"

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[17] In all likelihood this is not the argument that would have been advanced by the trial attorney. Speculation on appeal cannot substitute for the legal argument of the person in the best position to know the true relevancy and importance of the evidence -- the trial attorney.

cocaine. Such evidence could corroborate Appellant's testimony that the people were not strangers on reggae night -- instead they were the same age, in the same place, acting in the same manner which is "very acceptable." In other words, because of the nature of the people attending on reggae night it is not unusual to offer cocaine to strangers. The proffered testimony could have been relevant to corroborate Appellant's credibility; or it could be relevant for other reasons. The above speculation on appeal is not substitute for the trial attorney to be given the opportunity to make a legal argument for the proffer and an opportunity to proffer the testimony.

The error of precluding a proffer on the line of questioning and precluding legal argument as to why a proffer is needed constitutes reversible error. Pender v. State, 432 So.2d 800 (Fla. 1st DCA 1983). The denial of the proffer and legal argument precluded Appellant from establishing the legal basis for his inquiry and thereby foreclosed appellate review of the propriety of the trial court's ruling. Id. Appellant's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and under Article I, Sections 9, 15 and 16 of the Florida Constitution were violated. Because Appellant was precluded from presenting legal argument or a proffer the error cannot be deemed harmless beyond a reasonable doubt and this cause must be reversed for a new trial.

POINT IX

APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY PROSECUTORIAL MISCONDUCT DURING TRIAL.

Various prosecutorial acts during trial individually and cumulatively denied Appellant a fair trial.

During cross-examination of Dr. Scarlotti, the prosecutor attempted to impeach the witness on the number of occasions that he had testified in a criminal trial (R1887-91). Over Appellant's objection (R1889-91), the prosecutor read from a deposition the specific cases at which Scarlotti had testified (R1891). Included within this deposition was the fact that Appellant's trial counsel and Scarlotti were involved in an unpopular high profile Annette Green case in neighboring Palm Beach County (R1891). Obviously, the name of the specific cases the defense attorney and doctor were involved in are irrelevant. Evidence of unrelated cases of third parties is irrelevant and inadmissible. State v. Norris, 168 So.2d 541 (Fla. 1954). Evidence that the defense counsel and defense witness have been involved in an unpopular, high profile case could be held against Appellant.

During trial the prosecutor was told by the trial court not to wave the gun around the courtroom (R1771). Despite this admonition, the defense attorney later had to object to the prosecutor walking around the courtroom with the gun (R1771). The trial court sustained the objection and directed the prosecutor not to place the gun in front of Appellant nor to wave the gun around

the courtroom (R1771).[18] The prosecutor then handed Appellant the gun and asked him to examine it (R1772). Defense counsel objected on the ground that the prosecutor was "harassing" Appellant (R1772). The trial court told Appellant to point the gun at some object rather than at a person (R1772). Appellant, then, jokingly asked if Mr. Barlow (the prosecutor) would be all right (R1772).

It was improper for the prosecutor to walk around the courtroom waving the gun around. See Spriggs v. State, 392 So.2d 9 (Fla. 4th DCA 1980); Jenkins v. State, 563 So.2d 791 (Fla. 1st DCA 1990); In re Sturgis, 529 So.2d 281 (Fla. 1988) (reprimand of judge who displays hand gun while presiding at hearings). The prosecutor's act of handing Appellant the gun was also improper. Such action obviously had the potential for prejudicing Appellant in front of the jury. It was error for the prosecutor to thrust the gun upon Appellant thus essentially goading him into a prejudicial act. Cf. Duncan v. State, 525 So.2d 938 (Fla. 3d DCA 1988) (error for prosecutor to wave toy gun during trial with intent to goad defendant into asking for mistrial).

More importantly, during the closing argument the prosecutor used the situation he created with the gun to claim that Appellant was guilty and his testimony was not believable:

> In any case, I submit to you Stanley Ray Rogers, the man seated here in the court room. The man that has been before you for ten days. That man that took the witness chair leaning back with his legs crossed with a gun to point at the prosecutor after the judge told him not

[18] Despite the admonition, the prosecutor waved the gun during closing argument and had to again be told not to wave the gun or point it at the jurors (R2328).

> to point the gun at anyone. That's the man that is responsible for Mark Hastings' death.
>
> * * *
>
> In his story, the Defendant's story, not credible, not believable. Remember his demeanor on the stand. His cockiness. His leaning back in the chair. His asking the Judge, "Is it okay to point the gun at the prosecutor?" That's the sort of attitude, the same remorse that he had towards Mr. Hastings in the car that night, he showed toward the prosecutor in the court room.

(R2323,2325). The trial court later noted that such an argument was improper but it was not objected to.[19] It is clearly improper to equate Appellant's demeanor at trial with what happened on the date of the offense. See Williams v. State, 550 So.2d 28 (Fla. 3d DCA 1989). Again, the error is especially egregious when one considers that it resulted from a situation created by the prosecutor.

In addition, the prosecutor repeatedly asked questions of Appellant when he testified after the objections to those questions were repeatedly sustained (R1747-1751). Specifically, the prosecutor initially asked two questions of Appellant as to his conversation with Dr. Scarlotti (R1747). The trial court sustained two objections because Scarlotti had not testified and the questions were beyond the scope of direct examination (R1747). However, the prosecutor was undaunted and asked five more questions regarding the conversation with Scarlotti (R1747-1751). The objections were again sustained (R1747-1751). It was clearly improper for the

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[19] Defense counsel explained that he had not heard that argument (R2354-55).

prosecutor to repeatedly ask questions to which objections had been sustained. Gonzalez v. State, 450 So.2d 585 (Fla. 3d DCA 1984).

The prosecutor's misconduct in this case deprived Appellant due process and a fair trial and sentencing under Article I, Sections 9, 16 and 17 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT X

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO PRESENT EVIDENCE THAT MARK HASTINGS HAD A REPUTATION FOR PEACEFULNESS.

Over Appellant's objections (R1915-1919,1926,1930), the state was permitted to introduce evidence that Mark Hastings had a reputation for peacefulness. This was reversible error for the reasons stated below.

A. The state did not employ the proper method of proving reputation.

The premise for concluding that reputation is a reliable method of proving character is based on the presumption that community opinion is deemed to be trustworthy. Ehrhardt, Florida Evidence § 405.1 (1992 Edition). Reputation is not the result of personal observations, but is the product of the community. Thus, to prove reputation, a predicate must be laid that the reputation evidence is based on reputation in the community rather than based on personal observations. Stripling v. State, 349 So.2d 187, 192 (Fla. 3d DCA 1977) cert. den. 359 So.2d 1220 (Fla. 1978); Rogers v. State, 511 So.2d 526, 530 (Fla. 1987) (no error in excluding reputation evidence because party failed to lay proper predicate); Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979) (error to

allow witnesses to testify to reputation "because no proper predicate was laid for their testimony").

In the present case witnesses testified that Mark Hastings had a reputation for peacefulness.[20] However, no proper predicate was laid for this testimony. In fact, the only foundational evidence presented showed that a proper predicate did not exist. For example, when asked how he became familiar with Hastings' reputation for peacefulness, Peter Wells answered that Hastings had worked with a "youth basketball league" that has children from the ages of five (R1916). Appellant objected and the trial court sustained the objection (R1916). However, the trial court explained that the witness should not tell the basis as to why he believes the reputation is good (R1917). Despite this fact, Mr. Wells again indicated that he knew of Hastings' reputation for peacefulness because "I saw him -- saw him in a situation" (R1918). Appellant again objected and the objection was again sustained (R1918). Again, Wells was asked about reputation (R1919). Despite the trial court's efforts to educate the prosecutor regarding what constitutes reputation evidence, the prosecutor again asked Mr. Wells how he knew the reputation and Mr. Wells started to answer that he had "seen" Mark Hastings do something (R1919). Obviously, Mr. Wells was not legitimately able to testify as to Mark Hastings' reputation in the community. Instead, he was testifying to Hastings' peacefulness based on specific acts of Hastings in the community. The prosecutor had failed to lay the proper predicate

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[20] These witnesses were: Peter Wells, Mark Vickers, and Pastor Edward McCarthy (R1914-1936).

for admission of the reputation evidence. Rogers, supra (reputation must be more than personal opinion, fleeting encounters, or rumor).[21]

B. The evidence was presented in such a manner that any relevance was substantially outweighed by the danger of unfair prejudice.

The prosecutor presented the so-called reputation evidence in an unfairly prejudicial manner. Evidence was presented through a priest in his garb (R1926,1933). Appellant objected to this (R1926-27). In addition, reputation evidence was presented through Hastings' work with small children at a YMCA (R1916). The presentation of evidence in this form creates undue sympathy and is unduly prejudicial to Appellant. See Kane Furniture Corp. v. Miranda, 506 So.2d 1061, 1067 (Fla. 2d DCA 1987) (presentation of sympathy deprived Kane of a fair trial); Welty v. State, 402 So.2d 1159 (Fla. 1981) (defendant should receive as dispassionate a trial as possible). Moreover, the impact of the improper sympathy evidence is even greater when one considers that the probative value of reputation evidence is minimal. J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1986 (Chadbourn rev. 1981).

The introduction of the reputation evidence denied Appellant due process and a fair trial and sentencing. Article I, Sections 9 and 17, Florida Constitution; Fifth, Sixth, Eighth and Fourteenth Amendments, United States Constitution.

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[21] Later, a minister would testify as to the peacefulness of Hastings (R1938). The prosecutor explained that the testimony was based on knowing Hastings from high school (R1927).

POINT XI

THE TRIAL COURT ERRED IN PROHIBITING APPELLANT FROM INTRODUCING EVIDENCE THAT MARK HASTINGS HAD A REPUTATION FOR USING DRUGS.

Appellant moved to introduce evidence that Mark Hastings had a reputation for using drugs (R1593-1605).[22] The trial court held such evidence was irrelevant and prohibited Appellant from introducing it (R1608-10). This was error.

"Under section 90.404(1)(b), evidence of a pertinent character trait of the victim is admissible when it is offered by the accused to prove that the victim acted in conformity with his or her character." Ehrhardt, Florida Evidence § 404.6 (1992 Edition).[23] As explained by defense counsel, Appellant would testify that Mark Hastings agreed to give him a ride in exchange for cocaine and the state's theory was that the ride was given out of kindness (R1603, 1690). Thus, an issue was whether Hastings was a person who used drugs -- i.e. his character trait for using drugs was relevant. Therefore, it was error to prohibit Appellant from introducing

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[22] A proffer by defense was unobjected to, but the state did object to the relevancy of the character evidence (R1599-1601).

[23] Section 90.404, Florida Statutes (1989) reads as follows:

> (1) CHARACTER EVIDENCE GENERALLY. -- Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion, except: * * *
>
> (b) Character of victim. --
>
> 1. Except as provided in § 794.022, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait; or * * *

evidence of Hastings' reputation for use of drugs. §§ 90.404(1)(b)(1); 90.405(1) (proof of character to be made through reputation). The exclusion of the relevant evidence denied Appellant due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, U.S. Const.; Article I, Sections 9, 16, Florida Constitution.

PENALTY PHASE

POINT XII

THE TRIAL COURT ERRED IN EXCLUDING A DEFENSE WITNESS DURING THE PENALTY PHASE AND IN PROHIBITING APPELLANT FROM PROFFERING THE TESTIMONY OF THE WITNESS.

Over Appellant's objection, in the penalty phase, the state was permitted to call a witness to testify to the details of alleged crimes committed by Appellant in Virginia (see Point XIII, infra). Appellant later requested that he be permitted to call Marsha Jones regarding the Virginia incident (R2673). The state objected and the trial court sustained the objection ruling that the fact Appellant was sentenced was the only thing relevant about the Virginia case (R2674). Appellant then moved to proffer the testimony of Marsha Jones (R2674). The trial court declined to permit the proffer (R2674). The trial court erred in excluding the defense evidence and in prohibiting the proffer of that evidence.

1. IT WAS REVERSIBLE ERROR TO PREVENT APPELLANT FROM PROFFERING THE TESTIMONY OF MARSHA JONES.

The law is well-settled that refusal to permit a proffer of testimony is error. Pender v. State, 432 So.2d 800 (Fla. 1st DCA 1983); Hawthorne v. State, 408 So.2d 801 (Fla. 1st DCA 1982). A proffer of testimony is necessary to ensure full and effective

appellate review. Pender v. State, 432 So.2d 800 (Fla. 1st DCA 1983).

At bar, the state, by introducing the details of the Virginia case, obviously believed the facts of the Virginia case were relevant to Appellant's sentencing. Despite this fact, Appellant was precluded from calling or even proffering its witness (Marsha Jones) regarding the Virginia charges.[24] The denial of the proffer precluded Appellant from establishing the relevancy of the testimony and thereby foreclosed appellate review of the propriety of the trial court's ruling. Pender v. State, supra, at 802 (error to preclude party from proffering testimony which would allow court to judge whether excluded evidence was admissible). The refusal to permit the proffer was error.

As explained in Pender, supra, the error in prohibiting a proffer of excluded evidence can hardly be deemed harmless:

> Since this court has no way of knowing what the proffered testimony would have been, we cannot say that this error is harmless beyond a reasonable doubt. Therefore, the judgment and sentence are reversed, and this cause is remanded for proceedings not inconsistent with this opinion.

432 So.2d at 802. Appellant's sentence must be reversed and this cause remanded for a new sentencing proceeding.

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[24] Appellant was charged with attempted murder and rape (R2704). The attempted murder related to the severity of the beating which occurred during the rape (R2704). Appellant was acquitted of attempted murder (R2704). However, Tia Hayes, the state witness during phase II, testified to the details of both the attempted murder and the rape in Virginia (R2707-16).

2. IT WAS REVERSIBLE ERROR TO EXCLUDE A DEFENSE WITNESS DURING THE PENALTY PHASE.

A trial judge should exercise the broadest latitude in admitting evidence during the sentencing portion of a capital case. Messer v. State, 330 So.2d 137 (Fla. 1976). Thus, this Court has held that having a witness testify to details of a prior violent crime is appropriate because "the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." Francois v. State, 407 So.2d 885, 890 (Fla. 1982) (quoting from Elledge v. State, 346 So.2d 998 (Fla. 1977)). This Court has made clear that a defendant would also be permitted to present evidence pertaining to the circumstances of the prior conviction:

> Conversely, a defendant must be allowed to present evidence pertaining to the degree of his or her involvement in and the circumstances of the events upon which previous convictions are based.

Francois v. State, supra, at 890. In Francois, supra, this Court declined to vacate the sentence for precluding the defendant from inquiring into the circumstances of the prior conviction because the defendant had failed to make a proffer of the excluded evidence even though he was "perfectly free to do so." Id. Here, Appellant offered Marsha Jones to rebut the state's evidence concerning the prior incident. Unlike in Francois, supra, Appellant attempted to proffer Jones' testimony, but the trial court would not allow the proffer.

It was unfair to permit the prosecution to present its version of the circumstances of the prior incident while precluding

Appellant from presenting his witness to testify to the circumstances of the prior incident. Such a "double standard" amounts to a violation of due process. See O'Connell v. State, 480 So.2d 1284, 1287 (Fla. 1985) (excluding juror after state examines juror, without permitting defense questioning, constitutes a double standard which violates due process). This is especially unfair where Appellant was acquitted of some of the allegations the prosecutor presented through its witness to the prior incident (see Point XIII). Leaving the jury with only the prosecution's version of the prior incident, while excluding Appellant's witness, violated Appellant's rights under Article I, Sections 9, 15 and 16 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT XIII

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE FOR WHICH APPELLANT WAS ACQUITTED.

Over objection the state was permitted to introduce evidence of a Virginia incident in which Appellant was charged with attempted murder and rape. State witness Tia Hayes testified that Appellant physically beat her and raped her in 1984 (R2707-16). The attempted murder for which Appellant was charged related to the severity of the beating (R2704). Appellant was acquitted of the attempted murder (R2704). It was error to present the details of the attempted murder for which Appellant was acquitted.

Under Article I, Section 9 of the Florida Constitution evidence of crimes for which a defendant has been acquitted is not admissible at a subsequent trial. Burr v. State, 576 So.2d 278 (Fla. 1991). In Burr this Court reversed a sentence of death

because evidence of a crime for which Mr. Burr was acquitted was introduced into evidence. The evidence of acquitted crimes may have contributed to the weight given to the aggravating factors. Thus, a new sentencing was required. Id.

Likewise, in the present case the jury heard testimony regarding the attempted murder. In addition, over Appellant's objection, photographs relating to the attempted murder were introduced into evidence (R2689,2695). Obviously, such evidence would sit heavily in the jury's weighing the aggravating factor of prior violent felony. This is especially true where the severity of the beating was emphasized to the jury by the prosecutor in his penalty argument (R2843). Such evidence may have tipped the scales in the way the jury weighed the aggravating factors against the mitigating factors (see Points XV, XXII, infra). The error cannot be deemed harmless beyond a reasonable doubt. Appellant's sentence must be reversed and this cause remanded for resentencing without the admission of the evidence for which Appellant was acquitted.

In addition, as recently noted by this Court in Rhodes v. State, 547 So.2d 1201 (Fla. 1989) the introduction of the details of a prior offense is error where the prejudicial value outweighs the probative value:

> Although this Court has approved the introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial, ... the line must be drawn when that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value.

547 So.2d at 1204-05 (emphasis added). Certainly the prejudicial value of the details of a severe beating for which Appellant was acquitted clearly outweighed any probative value attaching to those details.[25]

Finally, even if the evidence was properly admitted, detailing collateral offenses for which sentence has already been imposed in a capital sentencing proceeding invites punishment for them, a double jeopardy violation.[26] Cf. United States v. Halper, 109 S.Ct. 1892 (1989) (although sanction denominated 'civil,' when it could only be punishment for offense already punished, sanction violated double jeopardy; use of details invites jury to punish prior offense); Graham v. West Virginia, 224 U.S. 616, 32 S.Ct. 583, 586 (1912) (approving a habitualization statute, but noting

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[25] This is especially true where the state had filed a copy of conviction regarding the offense for which Appellant had been convicted. As explained in Rhodes, supra, a taped statement from the victim of a prior crime is not necessary where a copy of the conviction necessary for aggravation has been filed:

> [W]e see no reason why introduction of the tape recording was necessary to support aggravation in this case. The State had introduced a certified copy of the Nevada judgment.... There was testimony from Captain Rolette regarding his investigation of the incident. This evidence was more than sufficient to establish the aggravating circumstance ... and to establish the circumstances of the crime.

Rhodes, 547 So.2d at 1205, n.6.

[26] Double jeopardy is prohibited by the Fifth and Fourteenth Amendments to the Federal Constitution and Article I, section 9, of the Florida Constitution. Although this Court has ruled previously that some details of offenses for prior violent felonies may be introduced in a capital sentencing hearing, see Elledge v. State, 346 So.2d 998 (Fla. 1977), it must reconsider in light of the serous constitutional error in twice punishing a person for a crime.

it limited evidence to facts or prior offense and offender's identity, not reopening questions of guilt, unlike introducing details).

POINT XIV

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE TESTIMONY REGARDING TORN AND DISHEVELED PANTIES WHICH WERE NOT RELEVANT.

Over Appellant's objection (R2700), Detective Showalter was allowed to testify that in 1984 a pair of torn and disheveled panties were found in Appellant's home (R2700). It was error to admit such evidence which was not shown to be relevant to Appellant's prior felony.

Although the state presented evidence that some torn and disheveled panties were found in Appellant's home sometime after the Tia Hayes incident, the state did not link the evidence with Tia Hayes. Neither Detective Showalter, nor Tia Hayes, testified that the torn and disheveled panties belonged to Tia Hayes. Because of the failure to link this evidence to Tia Hayes, it was not relevant. See Castro v. State, 547 So.2d 111, 114 (Fla. 1989) (error to introduce evidence of knife found in the defendant's residence where the knife was not connected to the crime charged); Huhn v. State, 511 So.2d 583 (Fla. 4th DCA 1987) (pistol found in glove box of defendant's car was irrelevant absent showing it was linked to the offenses charged).

The error is not harmless. The potential for confusion and unfair prejudice was great. Since the torn and disheveled panties were not linked to Hayes by the state, the logical, although erroneous, conclusion left with the jury is that Appellant com-

mitted other collateral crimes. The introduction of such evidence is presumed harmful. See Peek v. State, 488 So.2d 52, 56 (Fla. 1986). It cannot be said beyond a reasonable doubt that the error was harmless. The introduction of the evidence violates Article I, Sections 9 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT XV

THE TRIAL COURT ERRED IN FAILING TO FIND THE NON-STATUTORY MITIGATING CIRCUMSTANCES PRESENTED AND ARGUED IN THIS CASE.

Appellant presented and argued as non-statutory mitigating circumstances in this case that: (1) Appellant had a significant history of alcohol abuse which affected his life; (2) the death of Appellant's father changed his life; (3) Appellant was good to his family and provided for his mother; (4) Appellant was severely injured during childhood and the injuries affected the rest of his life; (5) Appellant had been drinking at the time of the offense, and his judgment was impaired at the time and (6) chances for rehabilitation are very high (R2722-2815,2855-59). A court must find as a mitigating circumstance those factors "reasonably established by the greater weight of the evidence." Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). "The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor." Maxwell v. State, 17 F.L.W. S396 (Fla. June 25, 1992). In the present case the non-statutory mitigating circumstances were not controverted by any competent evidence as explained below.

1. Appellant had a significant history of alcohol abuse which affected his life.

It is undisputed that Appellant was an alcoholic (R2794). A number of witnesses testified to his heavy drinking (R2731,2747, 2762,2795) and the fact that he was a different person when he drank (R2731,2768). Adding to the effect of alcohol was the fact that Appellant has a history of anemia and his ability to withstand the effects of alcohol are diminished (R2800). Alcohol was breaking Appellant down physically and behaviorally (R2795). These facts were not disputed and constitute valid mitigating circumstances. See e.g., Wright v. State, 586 So.2d 1024, 1031 (Fla. 1991) ("significant history of alcohol abuse"); Stevens v. State, 552 So.2d 1082, 1086 (Fla. 1989) ("Stevens developed a serious drinking problem that worsened shortly before his arrest"); Buford v. State, 570 So.2d 923, 925 (Fla. 1990) (defendant was an alcoholic who drank heavily). It was error not to find this uncontroverted circumstance.

2. Death of Appellant's father changed Appellant's life.

It is undisputed that the death of Appellant's father two weeks before Appellant graduated from high school had a traumatic effect on Appellant's life (R2725). Appellant and his father were close (R2761). Appellant took the death hard and became depressed (R2761). Appellant then began drinking heavily (R2762). The loss of a parent can be a mitigating circumstance. See Way v. Dugger, 568 So.2d 1263, 1266 (Fla. 1990). Especially, where the parent and child are close and the loss of parental guidance occurs at a time when the guidance is needed. In the instant case the loss of Appellant's father was the beginning of a chaotic life from which

Appellant would never quite recover (R2761-62). It was error not to find this uncontroverted circumstance.

3. Appellant was good to his family and provided for his mother.

It is uncontroverted that, despite the trauma due to the death of his father before his high school graduation, Appellant took the responsibility of taking care of his mother (R2725-26). Also, when Appellant first came to visit his sister he had to be placed in the hospital because he was a "walking dead man" (R2727). Despite the fact that he was released from the hospital prematurely (R2724), Appellant helped his sister at work (R2730). Appellant's family also testified to their love for him. These uncontroverted facts are mitigating. See Perry v. State, 522 So.2d 817, 821 (Fla. 1988) (fact that defendant was "kind" and "good to his family" was mitigating); Pardo v. State, 563 So.2d 77, 79 (Fla. 1990) ("love and affection of his family" was mitigating). It was error for the trial court not to find them.

4. Appellant was severely injured during childhood and the injuries affected the rest of his life.

It is uncontroverted that Appellant was hit by a car at the age of five and his spleen had to be removed (R2723). Due to complications resulting from the surgery, Appellant later had to have three major operations which involved the removal of part of his intestines and stomach (R2760). As a result Appellant has had ulcers and other digestive ailments throughout his life and his immune system has been affected (R2760). The injuries Appellant received affected his health throughout his entire life (R2760).

Appellant has been near death on a number of occasions due to internal bleeding (R2760).

Trauma during childhood which creates adversities throughout life is a mitigating circumstance. It was error for the trial court not to find this uncontroverted mitigating circumstance.

5. Appellant had been drinking and his judgment was impaired at the time of the offense.

The evidence showed that Appellant had been drinking throughout the day before the incident (R1562,1572,1670,1685,2741,2800, 2818). The hospital report that day showed that Appellant had a blood alcohol level of .16 (R2795). Testimony showed that when Appellant drinks he is a different man (R2731). Testimony also showed that Appellant's alcohol consumption would cause reduced ability to make sound judgments and perceive others' attitudes correctly (R2799).

Despite the fact that this circumstance was shown by the evidence, the trial court rejected this circumstance because there was not "substantial" impairment (R4368). However, impairment due to alcohol does not have to be "substantial" to be a non-statutory mitigating circumstance. Cf. Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990) (disturbance does not have to be "extreme" to be mitigating "no matter what the statute says"). Any degree of impairment, whether it be slight or substantial, can be mitigating. It would be error not to find this mitigating circumstance because the impairment was not substantial.[27]

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[27] Appellant is not claiming that slight impairment weighs as or more heavily in mitigation than substantial impairment. However, both slight and substantial are mitigating to some extent and thus must be recognized. Any contrary restriction of mitigat-

6. Chances for rehabilitation are very high.

The undisputed testimony was that the rehabilitation success rate for Appellant's drinking problem is very high (R2802).

It was error for the trial court to fail to find the uncontroverted evidence of the mitigating circumstances. Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). The failure to find the circumstance violates Article I, Sections 9, 16 and 17 of the Florida Constitution, and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT XVI

THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE NON-STATUTORY MITIGATING CIRCUMSTANCES IN ITS SENTENCING ORDER.

Defense counsel argued as non-statutory mitigating circumstances that: Appellant had a history of alcohol abuse; the death of his father had changed his life; Appellant was good to his family and provided for his mother (R2855-59). In the written sentencing order the trial court totally failed to address these mitigating circumstances (R4368).[28] The trial court errs when it does not "expressly evaluate in its written order" the mitigating circumstances argued by the defense. Campbell v. State, 571 So.2d 415, 419 (Fla. 1990); Smith v. McCormick, 914 F.2d 1153, 1166 (9th

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ing factors would unconstitutionally create the "'unacceptable' risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). Obviously, the difference between the two is that after being recognized substantial impairment will carry greater mitigating weight than slight impairment.

[28] As noted in Point XV, supra, the trial court addressed only one of the non-statutory mitigating circumstances argued by the defense.

Cir. 1990) (sentencing court must "explicitly discuss in its written findings all relevant mitigating circumstances"); Maxwell, supra, 17 F.L.W. at S396 ("every mitigating factor apparent in the entire record" must be considered and weighed); Article I, Sections 9, 16 and 17, Florida Constitution; Fifth, Eighth, and Fourteenth Amendments, United States Constitution.

POINT XVII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S SPECIAL REQUESTED LIMITING INSTRUCTION ON THE CONSIDERATION OF DUPLICATE AGGRAVATING CIRCUMSTANCES.

Appellant requested that the jury be given the following special jury instruction limiting consideration of duplicate aggravating circumstances:

> A fact which you consider as the basis for finding one aggravating circumstance may not also be considered by you as the basis for finding another aggravating circumstance; you may consider the same fact in aggravation only once; and never more than once, even though it may come within the definition of more than a single aggravating circumstance which I have read to you.

(2SR145,R2592). The trial court denied the request (R2615).

In Castro v. State, 597 So.2d 259 (Fla. 1992) this Court held that while it was not error to instruct the jury on all the aggravating factors, it was error not to give a special instruction limiting consideration of circumstances that could double. 597 So.2d at 261. Thus, it was error to deny Appellant's requested jury instruction. The error denied Appellant due process and a fair sentencing contrary to Article I, Sections 9 and 17, Fla. Const.; Fifth, Eighth and Fourteenth Amendments, United States Constitution.

POINT XVIII

THE JURY WAS IMPROPERLY LED TO BELIEVE THAT THEY HAD NO RESPONSIBILITY FOR THE SENTENCE APPELLANT WOULD RECEIVE IN THIS CASE.

The trial court unequivocally instructed the jury that the sentencing decision was the sole responsibility of the judge and that their verdict was merely advisory:

> THE COURT: * * * Final decision as to what punishment shall be imposed rests solely with the Judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

(R2676) (emphasis added). The trial court again instructed the jury that the final decision as to punishment belonged to him (R2859). This occurred despite Appellant's motions to prevent the denigration of the jury's role in sentencing (R2573).

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the United States Supreme Court held that the Eighth Amendment requirement of heightened reliability in capital sentencing is impermissibly compromised where the jury has been led to believe that the responsibility for determining the propriety of a death sentence rested elsewhere. Noting that its capital punishment decisions were premised on the assumption that a capital sentencing jury is aware of its "truly awesome responsibility", the Court wrote:

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

Caldwell v. Mississippi, supra (105 S.Ct. at 2641-42).

In Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), the Eleventh Circuit determined that the Caldwell principle is applicable to the Florida sentencing scheme, notwithstanding the potential availability of the "override" provision of the statute, which, under certain carefully limited circumstances, permits (but never requires) the trial court to reject the jury's recommended sentence. See Tedder v. State, 322 So.2d 908 (Fla. 1975), and its numerous progeny. Under Florida law, the jury's recommendation "is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983); see e.g. McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Tedder v. State, supra. A Florida capital defendant is entitled by law to a meaningful jury recommendation [see Richardson v. State, supra, at 1095)], and in cases where a death sentence was predicated on a tainted jury death recommendation, this Court has not hesitated to reverse for a completely new penalty proceeding.[29] Recognizing the importance of the jury's penalty recommendation, the Eleventh Circuit in Adams v. Wainwright, supra (at 1530) concluded that the jury's role in Florida

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[29] See e.g., Patten v. State, 467 So.2d 975 (Fla. 1985) (improper "Allen charge" given to deadlocked penalty jury); Robinson v. State, 487 So.2d 1040 (Fla. 1986); Toole v. State, 479 So.2d 731 (Fla. 1985) (inadequate jury instructions on penalty phase); Dragovich v. State, 492 So.2d 350 (Fla. 1986) (improper cross-examination in penalty phase); Teffeteller v. State, 439 So.2d 840 (Fla. 1983) (prosecutorial misconduct in penalty phase closing argument); Trawick v. State, 473 So.2d 1235 (Fla. 1985); Dougan v. State, 470 So.2d 697 (Fla. 1985) (improper evidence and argument); Valle v. State, 502 So.2d 1225 (Fla. 1987) (improper exclusion of evidence offered in mitigation).

capital sentencing is "so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell."[30] Misleading the jury into minimizing their sense of responsibility for the death sentence makes the sentence unreliable. See Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988).

The instruction that the final decision as to punishment rests solely with the trial court, violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution.

POINT XIX

THE TRIAL COURT ERRED IN PROHIBITING APPELLANT FROM INTRODUCING HEARSAY EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL.

Sue Allen testified that due to Appellant's poor physical condition when he arrived in Florida she took him to see Dr. Cohen (R2726-27). Dr. Cohen examined Appellant and concluded that he should be hospitalized (R2727). Sue Allen began to testify as to what Dr. Cohen had specified was wrong with Appellant's health

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[30] Unlike several western states under whose death penalty statutes the trial court is solely responsible for the capital sentencing decision, Florida has a "trifurcated" sentencing procedure in which the jury, the trial court, and this Court each plays a critical role. See State v. Dixon, 283 So.2d 1 (Fla. 1973); Tedder v. State, supra. For that matter, the Governor (who decides clemency petitions and signs warrants), the Cabinet, and the federal courts also have significant impact on whether a particular capital defendant lives or dies, but that certainly doesn't mean the trial judge or prosecutor is free to make a point of this to the jury. Caldwell v. Mississippi. The Eighth Amendment requires reliability in capital sentencing [Caldwell], and the recognized purpose of Florida's trifurcated procedure is to provide safeguards -- safeguards which were missing under the prior statutory scheme -- against unwarranted imposition of the death penalty. State v. Dixon, supra, at 7-8. Every participant in the process -- each juror, the trial judge, and each member of this Court -- must consider the question of penalty as if a man's life depended on it; that is the essence of the Caldwell rule.

(R2727). However, the state objected on the grounds of hearsay (R2727). The trial court sustained the objection (R2727).

Hearsay testimony is admissible at the penalty phase of a capital trial. Section 921.141(1), Florida Statutes (1987); Muehleman v. State, 503 So.2d 310 (Fla. 1987). Thus, it was error to exclude the hearsay testimony of Sue Allen as to what Dr. Cohen had told her of Appellant's condition. Exclusion of such evidence of Appellant's health condition would be relevant toward the jury's decision in phase two. Such an exclusion violated the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

POINT XX

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE JURY INSTRUCTIONS ON MITIGATING CIRCUMSTANCES REQUIRING "EXTREME" MENTAL OR EMOTIONAL DISTURBANCE AND "SUBSTANTIAL" IMPAIRMENT.

Appellant requested the jury be instructed on the mitigating circumstances of the offense being committed while Appellant was under the influence of "extreme" mental or emotional disturbance, and that the capacity of Appellant to conform his conduct was "substantially" impaired, without the modifiers "extreme" or "substantially" (R2827). Appellant explained that if these modifiers were not eliminated the jury would discount the mitigating evidence because it did not reach the level of "extreme" or "substantial" (R2827). The trial court denied Appellant's request. This was error.

The refusal to instruct without the modifiers would lead to rejection of unrebutted mitigating circumstances when viewed under

the strict statutory definition of "extreme" mental or emotional disturbance or "substantially" impaired. The limitation of the jury's consideration of mitigating circumstances by use of modifiers "extreme" or "substantially" violates Article I, Sections 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

In Cheshire v. State, 568 So.2d 908 (Fla. 1990) this Court held it was error to restrict consideration of mitigating circumstances by the use of the "extreme" modifier despite the language of the statute:

> Florida's capital sentencing statute does in fact require that emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, *any* emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. *Lockett; Rogers*. Any other rule would render Florida's death penalty statute unconstitutional. *Lockett*.

568 So.2d at 912.

The instant scenario presents the extreme of vague sentencing criteria, where the use of such modifiers can be viewed by the particular sentencer as preventing consideration of valid mitigation unless it rises to some ethereal benchmark specified by statute. As here, unless the evidence shows that the independent considerations constitute "extreme" mental or emotional influences, the sentence summarily rejects valid mitigation and affords the facts no weight in the sentencing process. The addition of the term "extreme" prevents consideration of compelling emotional or mental influences as valid mitigation unless the perpetrator is

psychotic, and, perhaps, even then. See Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986) (defendant not under influence of "extreme" mental or emotional distress, even though two of five psychiatrists testified that defendant was legally insane at the time of offense). The modifiers unduly restrict the categories that may be considered as mitigation, and their use violates the Eighth and Fourteenth Amendments by making consideration of valid mitigation inconsistent, arbitrary and capricious.

Here, the instructions with the modifiers of "extreme" and "substantially" would prevent the jury from considering such things, for example, as Richard Scarlotti's testimony that Appellant had a blood alcohol level of .16 on the night of the shooting (R2795) and that his ability to make sound judgments is reduced due to the alcohol (R2798). Instead of considering whether Appellant was mentally or emotionally disturbed to some degree, or whether Appellant's capacity to conform his conduct was merely impaired to some degree, the instruction confined the statutory mitigating factor to an "extreme" disturbance or a "substantial" impairment. In this regard, the statutory limitations of the extent of mental or emotional disturbance, or the extent of impairment, that must be present before it can be considered to affect an aggravating factor impermissibly violates the teaching of Skipper v. South Carolina, 476 U.S. 1 (1986) and Lockett v. Ohio, 438 U.S. 586 (1978) and Article I, Sections 9 and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT XXI

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THEY COULD FIND THE AGGRAVATING FACTOR THAT THE KILLING WAS COLD, CRUEL, AND PREMEDITATED.

Over Appellant's objection (R2833), the trial court instructed the jury that they could consider the aggravating factor that the killing was cold, cruel, and premeditated (CCP) (R2861). This was error.

It is well-settled that in order for CCP to apply there must be a "heightened premeditation." For example, in Farinas v. State, 569 So.2d 425 (Fla. 1990) the defendant kidnapped the victim; the victim ran from the car; and the defendant followed with a gun and shot the victim after unjamming his gun three times. This Court held that although the killing may have been premeditated it was not the result of heightened premeditation and thus CCP did not apply. Likewise, in McKinney v. State, 579 So.2d 80 (Fla. 1991) the defendant abducted the victim, ordered him to drive to a location, and then shot him multiple times. This Court held that there was no heightened premeditation and that the crime had occurred only through a "chance encounter." 579 So.2d at 85. The present case does not involve the type of execution killing which is typical for the CCP aggravator. Rather, the killing occurred after a mutual struggle. It was error to instruct the jury that they could find CCP. The improper instruction denied Appellant due process and a fair sentencing contrary to the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

Despite the fact that the trial court did not include CCP as a factor in imposing the sentence, it cannot be said that the error was harmless. See Omelus v. State, 584 So.2d 563, 564 (Fla. 1991) (error was not harmless where jury was improperly instructed on aggravating factor and recommended death even though trial court did not utilize the factor); Jones v. State, 569 So.2d 1234 (Fla. 1990) (error not harmless even though trial court did not find factor improperly instructed on). The prosecutor heavily relied on this factor in arguing to the jury (R2845-46). It cannot be said beyond a reasonable doubt that the error was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT XXII

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988). Its application is reserved for "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

The evidence showed, and the trial court found, the killing was not cold, calculated, or premeditated (CCP) nor heinous, atrocious, nor cruel (HAC). Instead, the only witnesses to the killing testified that it occurred during a struggle. Obviously, this is not evidence beyond a reasonable doubt that the killing was "committed in a manner that sets it apart from the norm of capital felonies." See McKinney v. State, 579 So.2d 80, 84 (Fla. 1991) (defendant abducted victim, ordered victim to drive to location,

and then shot victim multiple times; death was disproportionate even though murder occurred during violent felony).

Furthermore, there was substantial mitigation present to make death disproportionate. See Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1990). As explained in Point XV, supra, Appellant had a significant history of alcohol abuse affecting his life, the death of his father changed his life, he was severely injured during childhood and the injuries affected the rest of his life, he was good to his family and provided for his mother, he had been drinking at the time of the offense and his judgment was impaired, and the chances for rehabilitation are high.

Appellant acknowledges that three aggravating factors were found in this case. However, proportionality analysis is not based on the number of aggravating factors. See Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) (although five aggravating factors, including prior violent felony but excluding HAC and CCP, existed -- death was not proportionally warranted); Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1988) (death disproportionate when proportional review of two aggravating factors, including a prior violent felony, against mitigating factors). Rather, proportionality review is based on the quality of the circumstances. In the present case, the two aggravating factors of prior violent felony and that the offense was committed by a person under the sentence of imprisonment, are strongly related. The offense for which Appellant was under a sentence of imprisonment was the same offense which qualified as the prior violent felony. Thus, while they technically qualify, the two aggravating circumstance were

somewhat duplicitous. Likewise, the remaining aggravating circumstances that the killing occurred during the commission of a felony is related to the felony murder for which Appellant was convicted. The three interrelated, or duplicitous, aggravating circumstances do not carry the weight that other unrelated aggravating circumstances, such as CCP and HAC, would carry. See Fitzpatrick, supra.

From the manner of the killing, and the mitigating circumstances and aggravating circumstances, it cannot be said this is one as the least mitigated and most aggravated murders for which the death penalty is reserved. Art. I, Sections 9, 16, 17, Fla. Const.; Fifth, Eighth and Fourteenth Amendments, U.S. Const.

POINT XXIII

THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY DEFINE NONSTATUTORY MITIGATING CIRCUMSTANCES.

Defense counsel moved the court to give the numerous special jury instructions defining non-statutory mitigating circumstances.[31] The trial court denied them (R2599,2608). Failing to instruct on specific nonstatutory mitigating circumstances on motion of defense violates due process and the Eighth Amendment requirement all mitigating evidence be considered in a death sentencing proceeding.

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[31] The defense moved the court to instruct on the following non-statutory mitigating circumstances:

(1) that being under the influence of alcohol during some or all of the offenses (2SR168);

(2) Appellant used alcohol during his youth (2SR169);

(3) less than reasonable doubt about guilt (2SR154).

Parker v. Dugger, 111 S.Ct. 731 (1991), supports the proposition that juries must be told what the non-statutory mitigation is upon request. In Parker, the Supreme Court found the appellate review inadequate because this Court failed to consider the non-statutory evidence in declaring error harmless and finding the jury override valid. The Court noted the difficulty in defining nonstatutory mitigation:

> Nonstatutory evidence, precisely because it does not fall into any predefined category, is considerably more difficult to organize into a coherent discussion; even though a more complete explanation is obviously helpful to a reviewing court, from the trial judge's perspective it is simpler merely to conclude, in those cases where it is true, that such evidence ... does not outweigh the aggravating circumstances.

Parker, 111 S.Ct. at 738.

Given the lack of clarity in defining non-statutory mitigation as recognized in Parker, putting this issue before the jury in lump form, with no instructions on what can mitigate, invites the jury to decide for itself what is mitigating. Due to the instruction, the jury below may not have considered all the mitigating evidence presented. See Boyde v. California, 110 S.Ct. 1190, 1198-1200 (1990). In Boyde, the Court approved use of a catch-all instruction, but one with a wider scope than Florida's catch-all. Also, in Boyde, the prosecutor explicitly told the jury to weigh the evidence of the defendant's background, removing any reasonable probability that the jury did not so weigh it. Boyde, 110 S.Ct. at 1201. In contrast, the prosecutor here explicitly told the jury to weigh only the statutory mitigators. Failing to instruct on and define mitigators was error. The refusal to instruct on the non-

statutory mitigators rendered a reasonable probability of the jury ignoring relevant mitigating evidence contrary to the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT XXIV

THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT APPELLANT WAS UNDER A SENTENCE OF IMPRISONMENT.

The trial court found that Appellant was under a sentence of imprisonment as an aggravating factor. However, Appellant had not begun to serve his sentence nor was there any evidence presented that a warrant was issued initiating the process for Appellant to begin serving his sentence. Compare Gunsby v. State, 574 So.2d 1085 (Fla. 1991) (defendant had not reported to jail as directed and warrant had issued was sufficient for aggravator of under sentence of imprisonment). Thus, Appellant was not under a sentence of imprisonment. It was error to find this factor. Fifth, Eighth and Fourteenth Amendments, U.S. Const., Art. I, §§ 9, 16, 17, Fla. Const.

POINT XXV

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE CORRECT BURDEN OF PROOF IN THE PENALTY PHASE.

Appellant requested the jury be instructed the burden of proof for the penalty phase requires that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt (2SR162,R2605). The instruction was denied and the jury was instructed that the mitigating circumstances must outweigh the aggravating circumstances in order for a life sentence to be

imposed (R2860). Of course, due process requires that the state has the burden of proof. Arango v. State, 411 So.2d 172, 174 (Fla. 1982). The instruction given in this case incorrectly states the burden of proof and thus violates Article I, Sections 9 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.

POINT XXVI

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

A capital sentencing scheme is constitutional only to the extent that it is structured to avoid freakish or arbitrary application of the death penalty. See Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Since Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the operation of section 921.141, Florida Statutes, has promoted freakish and arbitrary application of the death penalty. In Proffitt, the court held that the statute, as written, could be consistent with the Eighth Amendment. The Court did not contemplate the regression toward arbitrary application that has since occurred.

Rather than being reserved for the most conscienceless and pitiless criminals, the Florida death penalty is reserved for those with lawyers unfamiliar with the law, and for those tried by improperly instructed juries. It is seldom meted out correctly, much less even-handedly in the trial courts, and Florida's appellate review system simply fails to comply with the dictates of Proffitt. That statutory aggravating circumstances are poorly

defined, are arbitrarily applied, and exclude the consideration of mitigating evidence.

1. The jury

a. Standard jury instructions

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

i. Heinous, atrocious, or cruel

Pope v. State, 441 So.2d 1073 (Fla. 1983) bars jury instructions limiting and defining the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application of in violation of the dictates of Maynard v. Cartwright, 108 S.Ct. 1853 (1988) and Shell v. Mississippi, 111 S.Ct. 313 (1990). Since, as shown below, this Court has been unable to apply this circumstance consistently, there is every likelihood that juries, given no direction in its use, apply it arbitrarily and freakishly.

ii. Cold, calculated, and premeditated

The same applies to the "cold, calculated, and premeditated" circumstance. The standard instruction simply tracks the statute.[32] Since the statutory language is subject to a variety of constructions, the absence of any clear standard instruction ensures arbitrary application. See Rogers v. State, 511 So.2d 526 (Fla. 1987) (condemning prior construction as too broad). Jurors

[32] The instruction is: "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." This instruction and the others discussed in this section are taken from West's Florida Criminal Laws and Rules 1990, at 859.

are prone to like errors. The standard instruction invites arbitrary and uneven application. It results in improper application of the circumstance. Since the statutory language is subject to a variety of constructions, the standard instruction ensures arbitrary application. Since CCP is vague on its face, the instruction based on it also is too vague to provide the constitutionally required guidance. Any holding that jury instructions in Florida capital sentencing proceedings need not be definite would directly conflict with the Cruel and Unusual Punishment Clauses of the state and federal constitutions. These clauses require accurate jury instructions during the sentencing phase of a capital case. See Cartwright, supra.

iii. Felony murder

The standard jury instruction on felony murder does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least aggravated form of first degree murder. In this regard, the following discussion of the premeditation aggravating circumstance in Porter v. State, 564 So.2d 1060, 1063-64 (Fla. 1990) (footnote omitted) is especially pertinent:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder.

The same logic applies to the felony murder aggravating circumstance. It violates the teachings of Zant v. Stephens by turning the offense of felony murder, without more, into an aggravating circumstance. It applies an aggravating circumstance to every first degree felony murder. Further, the instruction turns the mitigating circumstance of lack of intent to kill[33] into an aggravating circumstance. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process clauses of the state and federal constitutions.

b. 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.

Accepting for the purpose of argument that there is no federal constitutional right to a jury in capital sentencing, Appellant argues that the Florida right to a jury[34] must be administered in a way that does not violate due process. Cf. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) (although there is no constitutional right to appeal, state law right to appeal must be administered in compliance with due process).

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[33] See Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (death penalty statute unconstitutional where it did not provide for full consideration of, inter alia, mitigating factor of lack of intent to cause death).

[34] The right to a jury in capital sentencing predates the 1968 constitution and is therefore incorporated into article I, section 22, Florida Constitution. Cf. Carter v. State Road Dept., 189 So.2d 793 (Fla. 1966).

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, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), and Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979). It stands to reason that the same principle applies to capital sentencing so that our statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six must be unanimous, 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. See, e.g., Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), Thompson v. Oklahoma, 108 S.Ct. 2687 (1988), and Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). Among the states employing juries in capital sentencing, only Florida allows a death penalty verdict by a bare majority.

c. Florida allows an element of the crime to be found by a majority of the jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. See State v. Dixon, 283 So.2d at 9. The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16, and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v.

Rickets, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 109 S.Ct. 2055 (1989).

d. Advisory role

The standard instructions do not inform the jury of the great importance of its penalty verdict. In violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) the jury is told that its verdict is just "advisory."

2. Counsel

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the defendant has no say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through to the present. See, e.g., Elledge v. State, 346 So.2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance).

Failure of the courts to supply adequate counsel in capital cases, and use of judge-created inadequacy of counsel as a procedural bar to review on the merits of capital claims, cause freakish and 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.

3. The trial judge

a. The role of the 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 is considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored under, e.g., Smalley v. State, 546 So.2d 720 (Fla. 1989). This ambiguity and like problems prevent evenhanded application of the death penalty.

That our law forbids special verdicts as to theories of homicide and as to aggravating and mitigating circumstances makes problematic the judge's role in deciding whether to override the penalty verdict. The judge has no clue of which factors the jury considered or how it applied them, and has no way of knowing whether the jury acquitted the defendant of premeditated murder (so that a sentencing order finding of cold, calculated and premeditated murder would be improper), or whether it acquitted him of felony murder (so that a finding of killing during the course of a felony would be inappropriate).[35] Similarly, if the jury found the defendant guilty of felony murder, and not of premeditated murder, application of the felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons

[35] See Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (double jeopardy precluded use of felony murder aggravating circumstance where it appeared that defendant was acquitted of felony murder at first trial).

as required by the eighth amendment under, e.g., Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

b. 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.[36] Because Appellant was sentenced by a judge selected by a racially discriminatory system this Court must declare this system unconstitutional and vacate the penalty. When the decision maker in a criminal trial is purposefully selected on racial grounds, the right to a fair trial, due process and equal protection require that the conviction 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). When racial discrimination trenches on the right to vote, it violates the Fifteenth Amendment as well.[37]

The election of circuit judges in circuit-wide races was first instituted in Florida in 1942,[38] before this time, judges were selected by the governor and confirmed by the Senate. 26 Fla.Stat. Ann. 609 (1970), Commentary. At-large election districts in

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[36] 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.

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

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

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).[39]

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 (hereinafter Single Member District). Florida's population is 14.95% black. County and City Data Book, 1988, United States Department of Commerce. In Martin County, there are circuit judgeships, none of whom are black. Single Member Districts, supra.

Florida's history of racially polarized voting, discrimination and[40] disenfranchisement,[41] and use of at-large election systems to minimize the effect of the black vote shows that an invidious purpose stood behind the enactment of elections for circuit judges

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[39] 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.

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

[41] A telling example is set out in Justice Buford's concurring opinion in Watson v. Stone, 148 Fla. 516, 4 So.2d 700, 703 (1941) in which he remarked that the concealed firearm statute "was never intended to apply to the white population and in practice has never been so applied."

in Florida. See Rogers, 458 U.S. at 625-28. It also shows that an invidious purpose exists for maintaining this system in Martin 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.[42] 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 freedom from cruel and unusual capital punishment. 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 sentences 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); see also, Radelet and Mello, Executing Those Who Kill Blacks: An Unusual Case Study, 37 Mercer L.R. 911, 912 n.4 (1986) (citing studies).

Because the selection of sentences is racially discriminatory and leads to condemning men and women to die on racial factors, this Court must declare that system violates the Florida and

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[42] The results of choosing judges in Martin, 0 blacks is such stark discrimination as to show racist intent. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

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

4. Appellate review

a. Proffitt

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.

Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. 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 our aggravating factors have not complied with this principle.

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).[43]

Similarly, the "great risk of death to many persons" factor has been inconsistently applied and construed. Compare King v. State, 390 So.2d 315, 320 (Fla. 1980) (aggravator found where defendant set house on fire; defendant could have "reasonably

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[43] 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).

foreseen" that the fire would pose a great risk) with King v. State, 514 So.2d 354 (Fla. 1987) (rejecting aggravator on same facts) with White v. State, 403 So.2d 331, 337 (Fla. 1981) (factor could not be applied "for what might have occurred," but must rest on "what in fact occurred").

The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict construction in favor of the accused would be that the circumstance should apply only where the prior felony conviction (or at least the prior felony) occurred before the killing. The cases have instead adopted a construction favorable to the state, ruling that the factor applies even to contemporaneous violent felonies. See Lucas v. State, 376 So.2d 1149 (Fla. 1979).

The "under sentence of imprisonment" factor has similarly been construed in violation of the rule of lenity. It has been applied to persons who had been released from prison on parole. See Aldridge v. State, 351 So.2d 942 (Fla. 1977). It has been indicated that it applies to persons in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). See Peek v. State, 395 So.2d 492, 499 (Fla. 1981).

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,[44] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. 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).

d. Procedural technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[45] 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

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

[45] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the special scope of review violates the eighth amendment under Proffitt.

eighth amendment). Use of retroactivity principles works similar mischief.

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[46] 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.

5. Other problems with the statute

a. 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.

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[46] 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.")

Our law in effect makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16, and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting a similar Sixth Amendment argument.

b. 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 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.

c. 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[47]). In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first degree murders, Florida imposes 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.[48] 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); Adamson, 865 F.2d at 1043. 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.

D. Florida unconstitutionally instructs juries not to consider sympathy.

In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), reversed on procedural grounds sub nom. Saffle v. Parks, 110 S.Ct. 1257 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violates the Lockett principle. The Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987) (upholding constitutional instruction prohibiting consideration of mere sympathy), writing that sympathy uncon-

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

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

nected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Parks, 860 F.2d at 1553. The instruction given in this case also states that sympathy should play no role in the process. The prosecutor below, like in Parks, argued that the jury should closely follow the law on finding mitigation. A jury would have believed in reasonable likelihood that much of the weight of the early life experiences of Appellant should be ignored. This instruction violated the Lockett principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

E. Electrocution is cruel and unusual.

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 17 of the Florida Constitution. Many experts argue that electrocution 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) (hereinafter cited, "Gardner"). 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). A punishment which was constitutionally permissible in the past becomes unconstitutionally cruel when less painful methods of execution are developed. Furman v. Georgia, 408 U.S. 239, 279 (Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J., dissenting). Electrocution violates the Eighth Amendment and the Florida Constitution, for it has no become nothing more than the purposeless and needless imposition of pain and suffering. Coker, 433 U.S. at 592. The improvement in methods of execution over time have made the court's last consideration of this issue in Ferguson v. State, 105 So. 840 (Fla. 1925), appeal dismissed 273 U.S. 663 (1927) obsolete.

POINT XXVII

THE AGGRAVATING CIRCUMSTANCES USED AT BAR ARE UNCONSTITUTIONAL.

1. Felony murder

As already argued, this circumstance does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least aggravated form of first degree murder. Further, it turns the mitigating circumstance of lack of intent to kill into an aggravating circumstance. Hence, it violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions.

2. Prior violent felony

As already noted, this circumstance has been broadly construed in violation of the rule of lenity. Further, construction has

permitted juvenile adjudications of delinquency to satisfy this aggravating circumstance contrary to the usual construction of "conviction" as not including juvenile adjudications. See Campbell v. State, 571 So.2d 415, 418 (Fla. 1990). Due to such a construction, the silence of the statute is used against the defense rather than the state. This manner of statutory construction is contrary to the Due Process and Cruel and Unusual Punishment Clauses.

3. Under sentence of imprisonment

This circumstance has been construed in a manner as to violate the rule of lenity and the due process clause. This Court initially held it applied to "prescribe the death penalty for a capital felony committed by a prisoner...." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), and escapees from prison, Songer v. State, 322 So.2d 481 (Fla. 1975). Departing from that constitutionally acceptable limiting construction, however, it has since been applied to those released from prison and on parole, Aldridge v. State, 351 So.2d 942 (Fla. 1977), and indicated it also applies to those in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). See Peek v. State, 395 So.2d 492, 499 (Fla. 1981). It also has been expanded to apply to where the defendant has not yet begun to serve the sentence of imprisonment. See Gunsby v. State, 574 So.2d 1085 (Fla. 1991). The construction of this circumstance violates the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions.

POINT XXVIII

THE TRIAL COURT ERRED IN DEPARTING FROM THE RECOMMENDED GUIDELINE RANGE.

The trial court departed from the guidelines and sentenced Appellant to life imprisonment for the two kidnapping convictions and to thirty (30) years in prison for attempted sexual battery (R4350-52). This was error.

The trial court departed from the guidelines because of an escalating "pattern" of criminal conduct and because the capital felony could not be scored (R4356). The so-called escalating "pattern" was a result of comparing the 1984 Virginia incident and the incident for which Appellant was on trial. A "pattern" of criminal activity cannot be legitimately ascertained by merely comparing two offenses. Davis v. State, 534 So.2d 821 (Fla. 4th DCA 1988) ("as one swallow does not a summer make"); State v. Smith, 507 So.2d 788, 791 (Fla. 1st DCA 1987) (prior offense was shooting into a motor vehicle and present offense was armed robbery "implication of our holding to the contrary would authorize departure in every case where a defendant has a prior conviction, a result clearly in conflict with the purposes of the sentencing guidelines"); see also Grant v. State, 547 So.2d 952 (Fla. 3d DCA 1989) (no escalating pattern even though offense at conviction, 2° murder, was obviously more serious than prior misdemeanors).

Appellant recognizes that departures based on unscorable offenses have been upheld. See Weems v. State, 469 So.2d 128 (Fla. 1986). However, logically a departure should not be permitted for a factor which could be included within the guideline scoresheet, but is not. Points for a capital offense could have easily been

included in the scoresheet by simply scoring a number of designated points for the capital felony. Presumably, scoring was not provided for the capital felony because it is understood that offense would be fully punished separately from the guidelines case. In addition, the departure for the unscored offense should be no greater than that which Appellant could receive if the offense had been scored. See Puffinberger v. State, 581 So.2d 897 (Fla. 1991).

CONCLUSION

Based on the foregoing arguments, this Court should vacate Appellant's convictions, and vacate or reduce his sentences, and remand this cause for a new trial or grant relief as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 16th day of July, 1992.

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