IN THE SUPREME COURT OF FLORIDA

RONALD WAYNE CLARK, JR.,

Appellant,

v. CASE NO. 77,156

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT, IN
AND FOR NASSAU COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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Procedural Progress of the Case

A Nassau County grand jury returned an indictment on May 1, 1990, charging Ronald Wayne Clark, Jr., with first degree premeditated murder for the shooting death of Charles Carter. (R 824) Clark proceeded to a jury trial on October 31, 1990. (R 912) The jury found him guilty of premeditated murder as charged and returned a specific verdict form for that offense. (R 916). After hearing additional evidence during the penalty phase of the trial, the jury recommended a death sentence on November 20, 1990. (R 938)

Circuit Judge Henry Lee Adams, Jr., adjudged Clark guilty on December 13, 1990 and sentenced him to death. (R 956, 939-951) In support of the sentence, the judge found four aggravating circumstances: (1) the homicide occurred during a robbery; (2) the homicide was committed for pecuniary gain; (3) the homicide was especially heinous, atrocious, and cruel: and (4) the homicide was committed in a cold, calculated and premeditated manner. (R 941-947) The judge rejected Clark's abuse as a child and his life-long history of alcohol and drug problems as mitigating factors and found no mitigating circumstances. (R 947-950)

Clark filed his notice of appeal to this court on December 20, 1990. (R 1067) Thereafter, on December 21, 1990, the court filed corrected findings in support of the death sentence which

corrected some clerical errors appearing on pages 9 and 11 of the order. **(R 1072-1085)**

Facts -- The Prosecution's Case

Thomas Garcia and Raymond Haddock drove to McClean's Swamp Hunting Club in Nassau County on October 30, 1989. (R **234-235, 242)** **They** drove to the entrance road leading into the hunting club property, and Haddock **began to** unlock the cable that served as **a** gate across the roadway. (R **235, 242-243)** Garcia walked to the woods to the side of the roadway, where he discovered the body of a dead man lying beside a pine tree. (R **235-236, 245-246)** The two men looked at the body but did not touch it. (R **238, 245)** Garcia **also** noticed **a** pool of blood near the cable and four teeth **lying** in the blood. (R **238-239)** Neither **of** the men disturbed the area, **the cable** gate or the blood. (R **246)** They ran **to** the highway and obtained assistance in notifying the police. (R **243-244, 237)** Deputy Connie Johnson and Detective Charlie Calhoun arrived at the scene, (R **230-232, 249)**

Detective Calhoun and **a** crime scene technician from FDLE, Steve Leary, began the investigation at the scene. (R **249-252, 268-279)** **Calhoun** searched the body for identification, but found none, but he did find a business card from **Gator** City Cab Company. (R **252)** Leary photographed **the** scene, including the pool of **blood** near the cable gate across the **road**. **(R 269-274)** He also recovered the teeth in the area. **(R 274)** **A** shotgun pellet was recovered at the same location. (R **274)** Leary **also**

found a shotgun pellet on the body of the victim. (R 274) Via fingerprints from the victim, Calhoun ultimately identified the victim as Charles Carter. (R 255-257)

Dr. Peter Lipkovik, a forensic pathologist, performed the autopsy on Carter. (R 406-409) He discovered two gunshot wounds, one to the mouth and one to the left upper chest. (R 410, 412) The entrance wound to the mouth involved the lips, upper and lower jaws, and proceeded to the back of the head where it exited just behind the left ear. (R 410) This wound was caused by a large single projectile as would be fired from a shotgun. (R 410) Lipkovik found no pellets in this wound. (R 411) The muzzle of the gun would have been within two to three feet of the victim at the time of the shot. (R 411-412) This wound have caused unconsciousness immediately and death within one to two minutes. (R 412) The second wound to the left upper chest was a grazing type of wound. (R 412) Lipkovik recovered pellets from the wound of .00 size. (R 413) The barrel of the gun would have been within about ten feet, since wadding from the shells were in the wound. (R 413-415) However, there were no powder burns to the skin. (R 414) The wound probably would not have caused unconsciousness and was not immediately life threatening. (R 415) Lipkovik performed a blood alcohol test and concluded that the victim had a reading .28 at the time of death. (R 419) This would be the equivalent of 16 drink units within the last hour of his life. (R 421)

Detective Calhoun testified that the investigation of the homicide stopped until November 29, 1990, when a confidential

informant came forward. (R 257-258) Brian Corbett told Calhoun that he was an eyewitness to the homicide and that Ronald Clark was the perpetrator. (R 259-260) Corbett also provided Calhoun with the name of another witness, David Hatch. (R 260)

Corbett testified at trial. (R 291-349) He knew Ronald Clark, and in fact, had been his roommate for a brief time. (R 300-301) On October 29, 1989, Corbett was driving to Yulee with his cousin and his cousin's wife. (R 301) He saw Clark and David Hatch walking along the road. (R 301-302) Clark had been driving his girl friend's black Camaro and the car was stuck in the ditch. (R 302) Corbett assisted them in pulling the car out of the ditch. (R 302) Then, he accompanied Clark and Hatch in the Camaro. (R 302-303) The three men bought a six-pack of beer in Yulee and drove toward Jacksonville. (R 304) They stopped at a Pizza Hut Restaurant, ate pizza, drank beer and left without paying. (R 305-306) After leaving the restaurant, they went to a neighborhood area where they obtained help in changing a flat tire. (R 306) Clark was driving the Camaro during this time. (R 307) Next, they drove to a fishing boat on which David Hatch worked and lived. (R 307) Charles Carter was on the boat. (R 308) He came up from the sleeping quarters and joined the other three men in drinking beer. (R 308-309)

Corbett also testified about the amount of alcohol consumed that night. (R 325-335) When Corbett first saw Clark and Hatch on the street, they had already been drinking. All three then purchased three six-packs of beer. (R 327) Corbett in a

prior deposition said that he drank about five or six beers and Clark drank about the same number. He also said that Clark was intoxicated when he met him on the road. (R 327) Clark was driving and his driving was fine according to Corbett. (R 327) Corbett said that after they left the Pizza Hut where they drank mare beer, they went to the fishing boat where they continued to drink. He testified that he did not remember Clark drinking any beer on the boat. (R 331) However, on a prior deposition, Corbett said they all drank beer until they ran out. (R 332) He also said that Carter gave Clark $11 to buy gasoline for the car. (R 333)

The four men decided to drive back to Nassau County to buy more beer. (R 309) Clark was driving, David Hatch was in the front passenger seat, Charles Carter was in the back seat behind Hatch, and Corbett was seated behind the driver's seat. (R 309) They drove to a remote area, and Clark stopped the car at a wooded road with a cable gate crossing. (R 310-311) The four men got out of the car to use the rest room. (R 311) Corbett said he turned around to walk back toward the car when he saw Ronald Clark push David Hatch away, pull up a shotgun from his side and shoot Carter in the chest. (R 312) The shotgun was sawed-off and had no stock. (R 313) At one time, Corbett had owned the gun. (R 324-325) The shotgun was angled from Clark's hip going in an upward direction. (R 313) Corbett said he was shocked and headed for the car. (R 313) Corbett said Clark shot Carter again. (R 314) However, Corbett also said that after the first shot, he got back into the car and

did not see the second shot fired; he did not actually see who fired the second shot. (R 340) Corbett also testified that he did not observe any argument between Carter or Clark during the night. (R 323)

Corbett testified that he was frightened and asked to be taken home. (R 314) Hatch returned to the car after a short time, and Clark returned later. (R 314-315) Clark put the shotgun back in the car between the seat and the console. (R 315) Corbett said that Clark did not appear impaired at the time. (R 317) Clark commented that he thought Corbett was "freaking out" about the shooting. (R 317) Corbett also testified that Clark said something about getting the man's job. (R 317) Clark drove Corbett home and told him not to say anything or he would kill him. (R 318) Corbett saw Clark about two weeks later, and he asked Corbett if he had heard any news about what had happened. (R 319) Corbett told him that he had not, but he showed Clark a newspaper article about the crime. (R 319) Clark said the newspaper article was wrong because he shot the man with a .12 gauge shotgun with a slug, not a high-powered rifle. (R 319)

David Hatch testified for the prosecution. (R 349) Hatch worked on the fishing boat, captained by Al Midyett, as one of the five person crew. (R 358) Hatch had known Clark for twelve to thirteen years. (R 351) The two men partied together frequently, drinking heavily and using marijuana. (R 352-353) In October 1989, there was an opening for a crew member on the boat. (R 353) Clark tried to get the job without success. (R

353) On October 29, 1989, the captain hired Charles Carter. (R 354) Hatch met Carter that day when he came aboard the boat. (R 354) Clark came to the boat around 12:00 that morning to see Hatch, driving his girl friend's Camaro. (R 355) Clark met Carter that morning, and they drank at least one beer together. (R 355-356) Hatch, Clark, and Carter also drove Al Midyett's truck to Carter's motel for Carter to collect his belongings. (R 356-357) Hatch returned Midyett's truck, and Hatch and Clark then left in Clark's girl friend's car. (R 357) They bought beer along the way, a twelve-pack. (R 357-358) Eventually, the car got stuck in a ditch. (R 358) This occurred around 6:00 p.m. (R 358) The two men had consumed all but three or four of the beers at that point. (R 359) They began walking down the road, and Brian Corbett stopped to help them. (R 359-360) Then Corbett, Clark and Hatch began riding together in the Camaro. (R 360-361) Hatch said they bought another six-pack of beer and drank it. (R 360) Next, they drove to the Pizza Hut restaurant and ate pizza and drank a pitcher of beer. (R 361) Later, they returned the fishing boat. (R 361) Carter came from the sleeping quarters, and the four men drank beer. (R 361-362) The four later left in Clark's car and bought more beer. (R 361-364) They drove to a wooded area where Clark pulled the car onto a road which was leading into the woods and blocked by a cable gate. (R 365) They got out of the car. (R 365-366) Carter was standing in front of the cable gate and facing Hatch, who was then at the front of the car on the driver's side. (R 366) Clark came from

behind the car, pushed Hatch to the away, and shot Carter. (R 366) Clark pulled the shotgun from his side. (R 367) Hatch was about five or six feet away at the time of the shot. (R 367) Hatch had not seen the gun before that day. (R 367-368) Carter was hit by the blast and fell back over the cable. (R 368) Carter was about ten feet away at the time of the shot. (R 368) Clark reloaded the gun, walked over to Carter, and pulled the trigger again. (R 368-369) Hatch did not know where the second shot hit Carter and did not know if Carter was alive or not at that time. (R 369) He said that Clark was laughing as he went through Carter's pocket and took his wallet and money, eleven dollars. (R 371, 378) Additionally, Clark took a pair of black cowboy boots which Carter was wearing. (R 390) Clark then pulled the body to a ditch and returned to the car. (R 378) He put the gun between the seat and the console. (R 378) They then drove Corbett home. (R 378) Clark told Hatch and Corbett that if they said anything to anybody, he would kill them. (R 371) He allegedly said he killed Carter for his job. Hatch said that Clark said, "I guess I got the job now." (R 371) Hatch believed that Clark had consumed eight to ten beers by that point during the day. (R 371) Hatch admitted he had been drinking, but was not intoxicated at the time. (R 369) He said they had had no hard liquor or drugs that day. (R 372)

Hatch went back to the boat to sleep. (R 372) The next morning, the captain waited for Carter to show up. (R 372) Hatch did not say anything about Carter to the captain because Clark was present at the boat. (R 373) Clark tried to get

Hatch to talk to the captain about hiring him. (R 373) Hatch did so because he was scared. (R 373) Hatch also told the jury that he had been arrested for accessory after-the-fact because he denied knowledge of the case earlier. (R 374) He was sentenced to five years in prison. (R 375)

On cross-examination, Hatch said he knew that Carter had money. (R 375) He had loaned Hatch $20 earlier in the day. (R 376) He also loaned the captain of the boat $20. (R 376) It was Hatch's idea to bring Carter along with them when they left the boat that night. (R 377) Hatch said he did not notice anything wrong with Clark's driving other than he got stuck on the dirt road. (R 380) However, he did see Clark fidgeting and pulling his hair earlier. (R 380) On an deposition, Hatch said that the car got stuck because "Ronnie was driving crazy" and that the two of them were intoxicated at that point. (R 382) Hatch said they were drinking Budweiser beer on the evening of the shooting. (R 383) He had also been drinking earlier with Captain Midyett. (R 383) After working on the boat, they went inside and continued to drink. (R 383) Clark was with them at that point. (R 383) Hatch denied that he helped bring Carter out to that location in order to get his money. (R 387) He denied having seen the shotgun previously. (R 387)

A former neighbor and friend of Ronald Clark's, Gary Eugene Moody, testified about a statement Clark allegedly made to him about the murder. (R 391-400) On February 7, 1990, Ronald Clark telephoned him and talked about the murder charge in Nassau County. (R 398) Clark said he shot the man once with

a shotgun, and then after he fell, shot him again. (R 399) He said he shot the man in the chest and the mouth. (R 399) Clark was either in jail or the hospital at the time of the telephone conversation. (R 400)

Facts -- The Defense Case

Ronald Clark testified in his own behalf in support of his voluntary intoxication defense, (R 472) Clark testified that he began drinking alcohol at the age of twelve or thirteen because he was depressed and wanted to forget his problems. (R 474-475) He is the oldest of five children and lived with his father and stepmother. (R 473-474) He also used various illegal drugs -- marijuana, cocaine, acid -- as well as using the various prescription medications he stole from his father -- anti-depressants, pain killers, and muscle relaxers. (R 475) He testified that his father suffers from a mental illness and the medications were prescribed for him. (R 476) Clark testified that got drunk to the point of passing out at least once a week since he was fourteen years old. (R 476) He remembers having alcoholic black outs. (R 477) He described instances of getting drunk and not remembering how he got home. (R 477) On one occasion, he started drinking in Jacksonville and ended up in Georgia doing drugs with no idea how he got there. (R 478) He said that he and David Hatch engaged in heavy drinking and drug use together over the twelve years they had known each other. (R 479) Clark said he knew Brian Corbett for about a year and a half, and they also drank a lot

together. (R 480) Clark said he one time was sent to drug rehabilitation program but did stay there. (R 480) He was imprisoned and was to receive psychiatric help on another occasion but did not receive it. (R 480) His stepmother took him to the Baptist Hospital one time for treatment, but he was refused to admit him, as did the University Hospital. (R 480-481)

In October of 1989, Clark said he was following his customary drinking habits. (R 481) On October 29, 1989, he awoke between 8:00 and 9:00 in the morning in the shelter in the woods behind his father's house where he lived. (R 481-482) He went to the Hall's Country Store and got a pack of Budweiser beer. He smoked crack cocaine and took various pills, which had been prescribed for his father, before he left home. (R 482) Clark went to his former boss's house and drank the six-pack of Budweiser beer. (R 483) He then drove to the fishing boat to see David Hatch. (R 484) He drank three or four beers with Hatch by 10:00 or 11:00 in the morning. (R 484) They went to a bar, and Clark drank a daiquiri and two or three beers. (R 484-485) He and Hatch then drove back to Nassau County to buy more beer, a twelve-pack of Budweiser. (R 485-486) They began driving and drinking. (R 486) Clark and Hatch consumed the twelve-pack of beer while driving around. (R 486) He said the two of them then went to a Jiffy Store and stole a case of beer. (R 487) Just before consuming the case of beer, Clark got the Camaro stuck in the sand. (R 488) After Clark met with Brian Corbett, the three men then bought more beer, three

twelve-packs of Budweiser. (R 489) They drove to the Pizza Hut, ordered two pizzas and two pitchers of beer. (R 490-491) Clark said he was intoxicated at that point, (R 491) He had also taken more pills. (R 491) As he drove away from the Pizza Hut, he damaged a back wheel of the car. (R 491-492) He had to have someone change the tire for him. (R 492) They drove back to the boat and started drinking again, (R 492) Clark said he was drunk and about to pass out. (R 492) He said he did not remember Charles Carter coming up from the sleeping quarters to drink. (R 493) He said he did not dislike Charles Carter and did not even remember seeing him that night. (R 493) Clark testified that he did not want the job on the fishing boat. (R 493) He said he was interested in the job at first, but then found out that the boat stayed out six or seven days at a time. (R 494) Says he remembers waking up the next morning in the yard of his father's house. (R 494) His girl friend's car was parked in the yard. (R 495) There was a shotgun hole in the floorboard of the car. (R 495) Clark testified he did not remember any shooting incident that night. (R 498) When questioned on cross-examination about the statement he allegedly made to Gary Moody, Clark said that he was merely explaining what he was charged with, not that he had done the shooting. (R 498-499) He denied going to the fishing boat the day after the shooting and asking for a job. (R 502)

Clark's stepmother, Francis Clark, testified about his childhood; he was five-years-old when she married his father in 1975. (R 437-438) Clark began using alcohol when he was

thirteen or fourteen. **(R 438-439)** She observed him several hundred times while under the influence of alcohol or drugs. **(R 441)** Alcohol changed his behavior so that he appeared **as** if he had no feelings for anyone. (R **442)** He would occasionally go off with friends to drink and come back three to five days later. (R **442)** He was permanently suspended from school. (R **442)** His father was hospitalized in the psychiatric ward of Baptist Hospital at the time of trial. **(R 442-443)** At various times, he had prescription medications at home where his son could obtain them. (R **443)** Clark would take his father's anti-depressants and other medication. (R **443)** Mrs. Clark made efforts to get treatment for her stepson, but because they had no insurance, she was unable to secure it. (R **444-445)**

A psychologist, Dr. Manual N. Chaknis, examined Clark on February 4, 1986, when he was seventeen years old. **(R 450-451)** Chaknis described **the** family history of Clark's childhood. **(R 452)** His parents divorced when he was about five years old. (R 452) He moved back and forth between residences staying one to one and a half years at a time. (R **452)** Ronald himself remembered nothing of the time when his parents lived together. (R **452)** He viewed his mother in dramatic extremes. (R **453)** On the one hand, he saw her as a loving woman who took him places **and** did things with him, and on the other hand, he saw her as evil. (R 453) Painful experiences in his life caused him to view her as threatening. (R 453) Once she left a gun on the bed, which he interpreted to be a gesture of her desire that he commit suicide. (R **453)** His father had a history of medical

problems and alcohol abuse. (R 453) Clark initially hated his stepmother after his father remarried. (R 454) However, he began to see her in a kinder way, probably because she had been supportive of him. (R 454) He was also sexually victimized by two of his mother's lesbian lovers. (R 454) The first lover was accepting of him, but the second molestation involved extreme brutality and sadistic acts. (R 454) Clark's school adjustment was poor, and he was taunted by his classmates because of his mother's sexual orientation. (R 454) He quit school in the tenth grade to avoid being expelled. (R 455) He had tried to attack a classmate and his vice-principal with a two-by-four. (R 455) He was drinking alcohol at age six and was consuming one to two six-packs a week by the time he was eleven or twelve years old. (R 455) By mid-1983, he was drinking eight beers a day, (R 455) He also began drinking vodka and rum daily, after moving back to Jacksonville. (R 455-456) During his alcohol and drug usage, Clark reported he used LSD approximately 100 times, he used PCP, cocaine, placidyls, quaaludes, tylenol #3, and tylox. (R 456) He said he used alcohol and drugs to block pain. (R 456) Clark also deliberately overdosed on a number of occasions. (R 456) He was evaluated for a seizure disorder as a young child, but did not have an epileptic diagnoses. (R 457) He had several bicycle and motorcycle accidents during his life and he received several blows to the head, none of which required medical attention. (R 456-457) He had a history of aggressive behavior and several fighting episodes. (R 457) He said enjoyed hurting people and also

watching blood splatter. **(R 457)** The pain he received from scratches and bruises were enjoyable to him. (R **457)** He said he would break out windows and feel the glass cutting his hands because he enjoyed the pain. (R **457-458)**

Chaknis determined that Clark functioned in the lower average range of intelligence. (R 462) Due to his background, Chaknis viewed his angry, aggressive, **and** hostile personality as consistent with his abusive history. (R 462-463). Clark **saw** himself as alienated from other people and was acting out **as** a major way of coping. **(R 463-465)** Chaknis concluded that Clark needed significant inpatient treatment. (R **466)** He believed that without treatment, Clark might act out in a more brutal or violent manner. (R **467)** Chaknis recommended he be treated in secure inpatient facility at that time. (R **470)**

Dr. Peter Macaluso, a medical doctor specializing in addiction medicine, examined Clark and testified. (R 506-509). Macaluso examined Clark's backgrou d and extensive history of alcohol and drug use, which began at the age of five. (R 540) He also noted Clark's history of alcoholic blackouts, and periods of amnesia while under the influence of alcohol. (R 541) Macaluso testified that blackouts are the hallmark of severe alcohol and chemical dependency problems. (R 541) He said that Clark used drugs in an obsessive, compulsive manner, meaning he had to have the drugs when they were in his presence. (R 543) Macaluso said that during blackouts, Clark would experience hallucinations, severe paranoia, and paranoid delusional thinking. **(R 545)** He would feel frightened all the

time. (R 545) Clark also had suicidal thinking from the age of sixteen (R 545-546), and this resulted in four or five suicide attempts. (R 546) Macaluso noted that Clark had fresh sutures on his wrist at the time of his examination, (R 546)

Macaluso was of the opinion, that on the day of the offense, Clark was suffering from a long-term alcohol and drug abuse and suffering blackouts and hallucinations. (R 549-550) His judgement was impaired on the night of the incident. (R 551) Macaluso testified that Clark did not have the capacity or the ability to premeditate a homicide. (R 551) The alcohol diminished his capacity to form judgements or to perceive adequately, (R 551) Clark would have had no insight into situations. (R 553) Macaluso testified that Clark said he did not remember the shooting incident and could have been in a blackout. (R 556-567)

The State presented two witnesses in rebuttal, Dr. George Barnard, and Dr. Ernest Miller, (R 581, 617) Barnard examined Clark and determined that he was sane at the time of the offense. (R 587-588) He described an alcoholic blackout as a memory disturbance, rather than a disturbance that impairs judgement. (R 589-590) Consequently, someone experiencing a blackout simply do not remember what occurred during the time of blackout. (R 589-590) Barnard was of the opinion that Clark did not suffer an alcoholic blackout for the time of the shooting. (R 591-599) Barnard said that the long-term affects of alcohol and drug abuse coupled with a large consumption of alcohol or drugs would lead to impaired judgement. (R 600-610)

The person would be more likely to do things of an impulsive nature without planning. (R 611) The person would not have planned or premeditated, it just happens. (R 611) Barnard said if a person had drunk enough to the point where it affected his judgement, he would not be able to know the nature and quality of the act. (R 612) However, Barnard was of the opinion that he the drug and alcohol involved, as reported to him, did not cause Clark to loose contact with reality. (R 615)

Miller also examined Clark and diagnosed him as suffering from a depressive disorder and drug and alcohol addiction. (R 617-620) Based on the information given to Miller, he believed that Clark had been subjected to alcoholic blackouts. (R 621) He described a blackout as a period of amnesia following a period of sustained drinking. (R 621) Miller testified that a blackout does not impair the persons ability to pursue role-directed behavior while drinking, (R 621-622) Miller was of the opinion that, at the time of the shooting, Clark was not intoxicated to the degree that he was incapable of forming the intent requirement for first-degree murder. (R 621-622)

Penalty Phase -- Sentencing

The State presented no additional testimony during the penalty phase of the trial. Clark presented the testimony of Dr. George Barnard. (R 732)

Barnard again detailed the Clark's family history and history of drug and alcohol abuse. (R 733-737) He concluded that Clark did not suffer from psychotic behavior and was not

severely depressed at the time of the examination. (R 738-739) His behavior was colored by the instability of his family life and the strong hatred towards women he developed because of the sexual abuse. (R 739) His father was also a drug dealer and had influence on Clark's moral development. (R 739-740) Barnard concluded that at the time of the crime, Clark's judgement would have been impaired. (R 742) He was under the influence of drugs and alcohol, although witnesses did not indicated he was so intoxicated he did not know what he was doing. (R 743) Barnard found no evidence of extreme mental or emotional disturbance or substantial impairment of his thought processes at the time of the crime. (R 747-750)

SUMMARY OF ARGUMENT

1. The trial court improperly found and considered four aggravating circumstances which renders Clark's death sentence improperly imposed. The prosecution failed to prove that this shooting death was committed in a heinous, atrocious or cruel manner or that the homicide was cold, calculated and premeditated. Furthermore, the homicide did not occur during the commission of a robbery and was not committed for pecuniary gain. Injection of these improper aggravating circumstances into the sentencing process invalidates the death sentence.

2. During the trial, Clark presented testimony in mitigation about his background, his abused childhood, alcoholism and drug abuse, as well as evidence of his intoxication at the time of the crime. The State presented nothing to refute this evidence of mitigating circumstances. The court acknowledged the mitigating evidence presented but rejected the statutory mitigating circumstances concerning mental impairments and found no nonstatutory mitigation even remotely established. The court did not find any of the circumstances to exist and weighed nothing in mitigation when determining sentence. The judge should have found nonstatutory mitigating circumstances. His failure to do so skewed the sentencing weighing process rendering the death sentence unconstitutional.

3. At best, the State proved that Clark committed a murder during a robbery or theft. Felony murders typically do not qualify for the imposition of a death sentence absent other

compelling aggravation. Clark's death sentence is disproportional and must be reversed.

4. The court improperly instructed the jury on the heinous, atrocious or cruel aggravating circumstance because the evidence did not support the jury instruction. The homicide was the result of a spontaneous shooting death and the victim died quickly with minimal pain. Giving the instruction on HAC prompted the prosecutor's argument on the issue which improperly directed the jury to consider facts which were irrelevant. Moreover, compounding the error and misleading the jury, the court then gave a jury instruction on HAC which failed to limit and guide the jury's decision-making process. These errors could have affected the jury's sentencing recommendation for death and ultimately the court's sentence, since a life recommendation would have triggered the standard in Tedder v. State, 322 So.2d 908 (Fla. 1975). Clark has been deprived of his rights to due process and fair sentencing phase trial,

5. The trial court should not have read a penalty phase jury instruction which told the jury that the sentencing decision was solely the judge's responsibility. An instruction stressing the importance of the jury's recommendation should also have been given. The instruction, as read, improperly diminished the role of the jury in violation of the Eighth and Fourteenth Amendments.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FINDING FOUR AGGRAVATING CIRCUMSTANCES WHICH IMPROPERLY SKEWED THE SENTENCING DECISION AND RENDERS CLARK'S DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION,

A.

The Trial Court Erred In Finding That The Homicides Were Especially Heinous, Atrocious Or Cruel.

The trial judge found that the homicide was committed in an especially heinous, atrocious or cruel manner. In the sentencing order, the judge wrote,

> Charles Carter was shot twice by the Defendant with a single-shot short barrelled shotgun, The first shot had an upward angle to the chest area. This shot was not immediately life threatening, and the victim would have remained conscious. The shot was fired from a distance of approximately 10 feet, the force of which threw him to the ground. The Defendant approached the victim while on the ground, reloaded the shotgun and fired the fatal shot into the victim's mouth from 2-3 feet away. The victim died within 1 or 2 minutes following the second shot. The Court concludes that the murder was especially heinous, atrocious, and cruel.

(R 945-947)

The homicide was a nearly instantaneous shooting death. This Court has consistently held that such killings do not qualify for the heinous, atrocious or cruel aggravating circumstance. E.g., Brown v. State, 526 So.2d 903 (Fla. 1988); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Armstrong v.

State, 399 So.2d 953 (Fla. 1981); Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976). Nothing about the manner of the killing suggested it was done to cause unnecessary suffering. Brown v. State, 526 So.2d at 907; Gorham v. State, 454 So.2d 556, 559 (Fla. 1984); Dixon v. State, 283 So.2d 1, 9 (Fla. 1973). Multiple gunshots administered within minutes do not satisfy the requirements of this factor. See, e.g., Amoros v. State, 531 So.2d 1256, 1260 (Fla. 1988) (victim shot three times at close range within a short period of time as he tried to escape); Lewis v. State, 377 So.2d at 646, (victim shot in the chest and then several more times as he tried to flee). Even execution-style killings do not necessarily qualify for this aggravating circumstance. See, Kampff v. State, 371 So.2d 1007 (Fla. 1979); Menendez v. State, 368 So.2d 1278 (Fla, 1979).

This is not a case where the victim suffered physically and mentally for a significant period of time before the fatal shot. See, Jackson v. State, 522 So.2d 802, 809-810 (Fla. 1988). There was no fear of impending death during this confrontation. The actual shooting was a spontaneous act. The fact that the victim lived a few moments between the first and second shots does not evidence the prolonged mental suffering and terror necessary to make a shooting death heinous, atrocious or cruel. See, Brown, 526 So.2d at 906-907, n. 11 (although victim begged not to be shot just before fatal wound, this Court rejected HAC circumstance). This is unlike the situation in Jackson, for example, where the victim was bound

and driven to a remote area, fully aware of his impending execution. Furthermore, the fact that the victim may have suffered some pain is insufficient to separate this crime apart from the norm of first degree murders resulting from a shooting death.

The circumstances of the shooting in Brown are virtually identical to the ones here. In Brown, victim was shot in the arm, and he said, "Please don't shoot." Brown then immediately administered the fatal shot. On these facts, this Court held that the murder was not especially heinous, atrocious or cruel. 526 So.2d at 907. In this case, there is no evidence that the victim was aware of being shot after the first shot to the chest. The medical examiner said the first wound was not life threatening and probably would not have cause unconsciousness (R 411-415), but there was no testimony from the eyewitnesses that the victim acted conscious after the first shot. (R 291-349, 349-387) The fatal wound was administered shortly after the first.

The homicide was not especially heinous, atrocious or cruel, and the trial court erred in finding and considering this factor in sentencing.

B.

The Trial Court Erred In Finding That The Homicide Was Committed In A Cold, Calculated And Premeditated Manner.

The premeditation aggravating factor provided for in Section 921.141(5)(i), Florida Statutes, requires more than the

premeditation element for first degree murder. See, e.g., Hill v. State, 515 So.2d **176** (Fla. **1987); Floyd v.** State, 497 So.2d 1211 (Fla 1986); Preston v. State, **444** So.2d. 939 **(Fla.** 1984); Jent v. State, **408 So.2d** 1024 **(Fla.** 1981). The evidence must prove beyond a reasonable doubt that a heightened form of premeditation existed -- one exhibiting a cold, calculated manner without any pretense of moral or legal justification. Ibid. ''This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). There must be "...**a** careful plan or pre-arranged design to kill...." Rogers v. State, 511 So.2d 526 (Fla. **1987).**

In finding the premeditation aggravating factor, the trial judge stated:

> Charles Carter[sic] and the victim had met for the first time the day of the homicide. During the course of the day, while together, the never exchanged any angry words. The shared several drinks together. The Defendant drove Carter and the other passengers around isolated wooded areas of Nassau County for the purposes of getting them lost, so they could not located the body once the murder occurred. The Defendant found the spot he was looking for, a logging road and under the pretense of having to relieve himself, parked the car. After the passengers left the vehicle, including the victim, he removed the shotgun, and without warning, shot the victim, the first time from approximately 10-feet away. After reloading and firing the second shot to the victim's mouth, he dragged the body to another location to conceal it. Upon his return to the car, he announce to Hatch that he had the victim's job. He returned the shotgun to the car and concealed it with some object. The Court concludes that the homicide **was**

committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.

(R 946-947)

Contrary to the judge's finding, the required heightened degree of premeditation was not proven beyond a reasonable doubt. This aggravating circumstance should not have been considered in sentencing.

Initially, there is no evidence of a plan to kill. As this Court held in Rogers, the crime must be calculated, which involves a plan or prearranged design to kill. 511 So.2d at 533, Although Clark drove the car and fired the gun, there is no evidence he preplanned the killing. In fact, there is evidence contradicting such a theory. First, Hatch testified that it was his idea to invite Carter along on the drive with Clark and Corbett. (R 377) Second, the shooting occurred in the presence of two uninvolved witnesses; this is hardly the product of a preplanned, calculated murder. Third, the Clark's alcohol and drug use that day impaired his judgment. Although the jury concluded that he was capable of premeditating a murder, his impairment would negate the ability to preplan a calculated murder. This homicide was the spontaneous, misguided act of an alcoholic under the influence of an excessive amount of alcohol and drugs. The State's own expert testified that someone under the influence of alcohol was prone to act in a Spontaneous manner without judgement. (R 611) Instead of showing a calculated murder, the evidence shows the spontaneous shooting by a

mentally and emotionally disturbed man under the influence of alcohol.

The trial judge also referred to the fact of multiple shots. However, on several occasions, this Court has rejected the premeditation circumstance even though the victim suffered several gunshot wounds. E.g., Caruthers v. State, 465 So.2d 496 (Fla. 1985) (victim shot three times); Blanco v. State, 452 So. 2d 520 (Fla. 1984) (victim shot seven times). Even the fact that the gun had to be reloaded does not necessarily qualify the homicide for the premeditation factor. Hamilton v. State, 547 So.2d 864 (Fla. 1989). The trial judge should not have found and considered the premeditation aggravating circumstance.

C.

The Trial Court Erred In Finding That The Homicide Was Committed For Pecuniary Gain.

The trial court found that the homicide was committed for pecuniary gain. In support of this aggravating circumstance, the court wrote,

> Earlier the day of the homicide, the Defendant met with Hatch and the captian [sic] of the fishing boat on which Hatch was employed. The Defendant asked the captian(sic) for employment on the boat and was advised that none was available because Charles Carter had been hired. Following the murder, the Defendant stated to Hatch, "I guess I have the job now." The next day the Defendant showed to claim the job. The Court concludes that the victim was murdered for his job as a "Hand" on a fishing vessel. This aggravating factor is found to exist.

(R 945)

The court's finding of this aggravating circumstance is flawed for some of the same reasons as the finding for the premeditation aggravating circumstance -- it presupposes Clark had the ability to plan. (See, Issue II, B, supra.) More reasonably, Clark killed the victim in an alcohol induced state and as an afterthought, mentioned that the victim's job was then available. See, Hill v. State, 549 So.2d 179 (Fla. 1989). There was no evidence that Clark was motivated to kill the victim to obtain his job.

Even if established by the evidence, this aggravating circumstance would be improperly doubled with the aggravating circumstance of the homicide being committed during a robbery. (See, Issue 11, D, infra.) The court focused on the taking of money and shoes from the victim's body for that Circumstance, but the motive of financial gain was the same for both. Both factors should not have been found and weighed in sentencing. See, Provence v. State, 337 So.2d 783 (Fla. 1976).

D.

The Trial Court Erred In Finding That The Homicide Was Committed During A Robbery.

The trial judge found that the homicide was committed during the commission of a robbery. In support of this aggravating circumstance, the judge wrote,

> After shooting the victim, the Defendant removed from him his shoes, wallet, and money. The Court finds this aggravating factor to exist. A robbery did occur.

(R 944-945) This finding was erroneous. First, there was no evidence that Clark's motive for the murder was to steal the victim's wallet and shoes. The taking of this property was an after thought. Hill v. State, 549 So.2d 179 (Fla. 1989). Additionally, the pecuniary gain circumstance and the robbery circumstance cannot both be found and weighed in the sentencing process. Provence v. State, 337 So.2d 783 (Fla. 1976). Although the court discussed different facts to support the two circumstances, the financial gain motive was the same.

ISSUE II

THE TRIAL COURT ERRED IN FAILING TO FIND NONSTATUTORY MITIGATING CIRCUMSTANCES SINCE EVIDENCE ESTABLISHING THEM WAS UNREFUTED.

During the guilt and penalty phases of the trial, Clark presented testimony in mitigation concerning his background, his abused childhood, alcoholism and drug abuse. (R **472-567, 732-750)** The State presented nothing to refute this evidence of mitigating circumstances. The court rejected the statutory mitigating circumstances concerning mental impairments, finding that Clark did not suffer from an extreme mental or emotional disturbance and that his capacity was not substantially impaired by the use of alcohol and drugs. **(R 948-949)** However, the court acknowledged that the evidence "tend[ed] to establish that the Defendant was **a** disturbed person"; "his judgement may have been impaired to some extent"; that he "drank an excessive amount alcohol on the date of the murder" and **"may** have ingested a controlled substance." (R **948-949)** In his sentencing order, the judge stated,

> There is no doubt from the record herein that the Defendant led a hard and difficult life. His early childhood experiences of being abused by his mother's lesbian lover or having to witness physical abuse and violence between his parents **was** unfortunate.

(R 950) However, the court continued and found none of this undisputed evidence mitigating. (R 950) The court weighed four aggravating factors against "no factors that can be even remotely argued in mitigation." (R 950) The trial judge then proceeded to his sentencing, weighing nothing in mitigation.

(R 950) This skewed the sentencing weighing process and rendered the death sentence unconstitutional. Amends. V, VI, VIII, XIV U.S. Const.; Eddings v. Oklahoma, 455 U.S. 104 (1982).

In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court clarified the trial judge's responsibility to find mitigating circumstances when supported by the evidence. This Court wrote,

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature. See, Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature ....The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.

Campbell, at 419-420. (footnotes omitted) A short time later this Court reiterated this point in Nibert v. State, 574 So.2d 1059 (Fla. 1990):

> A mitigating circumstance must be "reasonably established by the evidence." Campbell v. State, No. 72,622, slip op. at 9 (Fla. June 14, 1990); Fla. Std. Jury Instr. (Crim) at 81; see, also, Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert., denied, 484 U.S. 1020 (1988). "[W]here uncontroverted evidence of a mitigating factor has been presented, a

> reasonable quantum of competent proof is required before the factor can be said to have been established." Campbell, slip op. at 9 n.5. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved ....

Nibert, at 1061-1062. The judge in this case did not properly fulfill these sentencing responsibilities in regard to the finding of mitigating circumstances, His sentencing order is defective, and the death sentence was imposed without weighing the mitigating circumstances present.

Ronald Clark's death sentence has been imposed in an unconstitutional manner, He urges this Court to reverse his sentence.

ISSUE III

THE TRIAL COURT ERRED IN SENTENCING CLARK TO DEATH SINCE THE SENTENCE IS DISPROPORTIONAL.

The State prosecuted this case as a premeditated murder during a robbery. Under the best evidence available to the State, a death sentence is inappropriate. A premeditated murder during the commission of another felony, without any additional aggravation, simply does not qualify for a death sentence when compared to similar cases. See, e.g., Proffitt v. State, 510 So.2d 896 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Richardson v. State, 437 So.2d 1091 (Fla. 1983). Clark's death sentence violates the Eighth and Fourteenth Amendments and Article I, Sections 9, 16 and 17 of the Florida Constitution and must be reversed.

This Court has consistently reversed death sentences imposed simply for murders committed during a robbery or burglary. Ibid. Even the complete absence of mitigating factors has not changed this result. Rembert, 445 So.2d at 340. Ronald Clark's offense is easily comparable to these cases. He allegedly shot the victim during the commission of an armed robbery. Although the trial court found nothing in mitigation, Clark presented unrefuted evidence of nonstatutory mitigating circumstances about his intoxication at the time of the crime; his alcohol and drug addiction; and his emotional, physical and sexual abuse as a child. (See, Issue II, supra) In Caruthers, the defendant, after drinking "a considerable amount of beer,"

shot a store clerk three times during an armed robbery. After disapproving the premeditation and avoiding arrest aggravating factors, this Court held that Caruthers, whose only prior offense was for stealing a bicycle, should not die. 465 So.2d at 499. In Rembert, the defendant, after drinking part of the day of the homicide, bludgeoned a store owner to death during a robbery. No other aggravating circumstances were present and no mitigating circumstances were found. His death sentence was reduced to life. 445 So.2d at 340. In Proffitt, the defendant stabbed his victim as he awoke during the burglary of his residence. The trial court found the homicide was cold, calculated and premeditated in addition to being committed during the burglary, Proffitt had no significant criminal history. This Court reduced his sentence. 510 So.2d at 898. In Richardson, the defendant beat his victim to death during a residential burglary. This Court approved four of the six aggravating circumstances found. Although the jury recommended life, no mitigating circumstances were found to exist. His sentence was reversed for imposition of life imprisonment. 437 So.2d at 1094-1095. In Menendez v. State, 419 So.2d 312 (Fla. 1982), the defendant shot a store owner twice during a robbery. No other aggravating circumstances existed, and Menendez had no significant criminal history. This Court reversed his death sentence. Finally, in Holsworth v. State, 522 So.2d 348 (Fla. 1988), the defendant stabbed two victims, killing one, during a burglary of a residence. Three aggravating circumstances were approved and no mitigating circumstances were found, but this

Court concluded that jury could have based its life recommendation on evidence of childhood trauma, drug usage and past history of nonviolence. Holsworth's death sentence was reduced to life.

Like the defendants in each of these cases, Clark also does not deserve to die for his offense. Ronald Clark's death sentence is disproportional to his crime. He urges this Court to reverse his death sentence with directions to the trial court to impose a life sentence.

ISSUE IV

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE SINCE THE EVIDENCE DID NOT SUPPORT THE GIVING OF THE INSTRUCTION, ALLOWING THE PROSECUTOR TO IMPROPERLY ARGUE THE EXISTENCE OF THE CIRCUMSTANCE BASED ON IRRELEVANT FACTORS, AND THEN, GIVING AN INSTRUCTION WHICH UNCONSTITUTIONALLY FAILED TO LIMIT AND GUIDE THE JURY'S CONSIDERATION OF THE EVIDENCE WHEN EVALUATING WHETHER THE CIRCUMSTANCE WAS PROVED.

Clark objected to the court's instructing the jury that the it could consider if the evidence supported the heinous, atrocious or cruel aggravating circumstance. (R 759-761) The evidence did not support the jury instruction since the homicide was the result of a spontaneous shooting death and the victim died quickly with minimal pain, This Court has consistently held that such homicides, as matter of law, do not qualify for the heinous atrocious or cruel aggravating circumstance. (See, section 1 of this Issue, infra) Giving the instruction on HAC prompted the prosecutor's argument on the issue which was improper and directed the jury to consider facts which were irrelevant. (See, section 2 of this Issue, infra) Further compounding the error and misleading the jury, the court then gave a jury instruction on HAC which failed to limit and guide the jury's decision-making process on this point. (See, section 3 of this Issue, infra) These errors could have affected the jury's sentencing recommendation for death and ultimately the court's sentence, since a life recommendation would have triggered the standard in Tedder v. State,

322 So.2d 908 (Fla. 1975). *See*, Omelus v. State, Case No. 73,911 (Fla. June 13, 1991). Clark has been deprived of his rights to due process and fair sentencing phase trial. Amends. V, VI, VIII, XIV, U.S. Const.; Art. I, Secs. 9 & 16 Fla. Const. This Court must reverse Clark's death sentence.

1. The Evidence Did Not Support An Instruction On HAC

The homicide here was committed quickly with two shots fired from a shotgun at close range. (R 313-315, 406-415) The victim was unaware he was about to be shot until the first gunshot struck his chest and knocked him to the ground. (R 313-315, 366-369) Although the medical examiner said the first wound was not fatal and the victim could have remained conscious, there was no testimony from the two eyewitnesses that the victim was conscious or alert after the first shot, (R 313-315, 366-369, 415) In any event, the second fatal shot to the head was administered moments later and caused immediate unconsciousness and death shortly thereafter. (R 412) This Court has repeatedly and consistently held that simple, quick, shooting deaths, where the victim is not aware of his impending death until just before the fatal wound, does not fall outside the norm of first degree murders so as to be classed as especially heinous, atrocious or cruel, E.g., Brown v. State, 526 So.2d 903 (Fla. 1988); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Lewis v. State, 377 So.2d 640 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976); see, also, Issue 11, A, supra, and

authorities cited therein. Nevertheless, the trial court overruled defense counsel's objection to the giving of a jury instruction on the heinous, atrocious or cruel aggravating factor. The instruction was not supported by the evidence and the court erred in giving it and misleading the jury,

2. The Prosecutor Improperly Argued State Of Mind As A Variable To Consider When Evaluating HAC

During his penalty phase argument to the jury, the prosecutor suggested that the jury consider Clark's state of mind when deciding if the homicide was especially heinous, atrocious or cruel. His argument, in pertinent part, was as follows:

> You also have the testimony of John Hatch, that according to him after Mr. Clark did this he turned around and started laughing about what he had just done. He started laughing about what he had done.
>
> Now you also have this apparent enjoyment that Mr. Clark derived from this and this was bolstered by the testimony of Dr. Chaknis. Dr. Chaknis was the doctor that interviewed Mr. Clark way back in 1986, four years ago. And he testified that when he interviewed Mr. Clark then that Mr. Clark emphasized his extreme enjoyment in hurting people, and especially noted the pleasure he derives from watching blood splatter.
>
> Remember that the defendant harbored these feelings from as far back as 1986. He laughed as he committed the crime.
>
> We submit that is an aggravating circumstance and you should place great weight in that in coming to your recommendation.

(R 770-771)

This argument was improper. First, the perpetrator's state of mind at the time of the homicide is irrelevant for determining if the homicide is especially heinous, atrocious or

cruel. Hitchcock v. State, 578 So.2d 685, 692 (Fla. 1990); Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983); Michael v. State, 437 So.2d 138, 141-142 (Fla. 1983). Furthermore, even if the perpetrator's state of mind was relevant, here the prosecutor's argument focused on an expert's opinion about Clark's state of mind at the time of a psychiatric evaluation conducted years earlier, not at the time of the homicide. Remoteness of the information, alone, rendered the prosecutor's argument improper and misleading.

Second, the prosecutor's argument constituted an improper suggestion to the jury to consider lack of remorse as an aggravating factor in reaching its sentencing decision. Emphasizing the testimony of David Hatch that Clark allegedly laughed at one point after the shooting, the prosecutor implied that Clark lacked remorse and invited the jury to consider that in sentencing. (R 371, 378, 770-771) In Pope v. State, 441 So.2d 1073, this Court recognized that lack of remorse is not an aggravating circumstance, accord, Hill v. State, 549 So.2d 179 (Fla. 1989); Patterson v. State, 513 So.2d 1263 (Fla. 1987); McCampbell v. State, 421 So.2d 1072 (Fla. 1982), and further held that "absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.'' Pope, 441 So.2d at 1078. This Court explained the rationale for the holding as follows:

> The new jury instruction on finding a homicide to be especially heinous, atrocious or cruel now reads: "The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or

> cruel." No further definitions of the terms are offered, nor is the defendant's mind set ever at issue. Thus, we find any consideration of defendant's remorse extraneous to the question of whether the murder of which he was convicted was especially heinous, atrocious or cruel.

Pope, at 1078. (emphasis added)

In Hill v. State, 549 So.2d 179, this Court reversed a capital case for a new sentencing phase trial because of remarks made in the jury's presence which invited the consideration of the defendant's lack of remorse. Just as in this case, the prosecutor in Hill drew the jury's attention to the fact that the defendant laughed during a statement he gave the police about the crime. Ibid, at 184. The prosecutor made the same mistake here -- the defendant's state of mind was not at issue and a suggestion that he lacked remorse was improper, misleading and inflammatory. Just as this Court did in Hill, Clark's death sentence must also be reversed for a new penalty phase trial.

3. The Instructions To The Jury Failed To Limit And Guide The Findings Necessary To Satisfy HAC

Ronald Clark's jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. The trial court instructed on the aggravating circumstances provided for in Section 921.141 (5)(h) Florida Statutes as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

(R 792) Additionally, the court defined the terms "heinous", "atrocious" and "cruel" as follows:

> Heinous means extremely wicked or shockingly evil.
>
> Atrocious means outrageously wicked and vile.
>
> Cruel means designed to inflict a high degree of pain, utter indifference to, or even enjoyment of, the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was consciencess[sic] or pitiless and unnecessarily torturous to the victim.

(R 792) Although this explanation of the aggravating circumstance was taken from this Court's decision in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), it is inadequate to guide and limit the jury's sentencing function, The instructions given are unconstitutionally vague because they fail to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV U.S. Const.; Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. , 111 S.Ct. ___, 112 L.Ed.2d 1 (1990).

In Maynard, the Supreme Court held that Oklahoma's "especially, heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague under the Eighth Amendment. The Court concluded that language of the circumstance failed to apprise the jury of the findings it must make to impose a death sentence. The jury was left with unchannelled discretion in

reaching its sentencing decision. Relying on Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 998 (1980), the Court affirmed the decision of the Tenth Circuit Court of Appeals invalidating the death sentence.

> We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey, The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous," does not, is untenable. To say that something is "especially heinous" merely suggests that the jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous." Godffey, supra, at 428-429, 64 L.Ed.2d 398, 100 S. Ct. 1759. Likewise in Godfrey the addition of "outrageously or wantonly" to the term "vile" did not limit the overbreadth of the aggravating factor.

100 L.Ed.2d at 382.

Florida's "especially heinous, atrocious or cruel" aggravating circumstance is identical to Oklahoma's and suffers the same fatal flaw. Although this Court has attempted to narrow the class of cases to which the factor applies, e.g., Brown v. State, 526 So.2d 903, 906-907 (Fla. 1988); State v. Dixon, 283 So.2d at 9., the jury was not adequately instructed on the limitations imposed via this Court's opinions. The instructions, as given, could have lead the jurors to "believe that every unjustified, intentional taking of human life is

'especially heinous'.'' Maynard, 100 L.Ed.2d at 382. Ronald Clark's jury was left with no guidance and unchannelled discretion to determine the applicability of the aggravating circumstance.

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious or cruel aggravating circumstance using precisely the same wording as the trial judge used in this case. The Mississippi court told the jury the same definitions of "heinous", "atrocious" and "cruel" as the trial judge told Clark's jury. 112 L.Ed.2d at 4, Marshall, J., concurring. The Supreme Court remanded to the trial court stating, "Although the trial court in this case used a limiting instruction to define the 'especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L.Ed.2d at 4, Since the definitions employed here are precisely the same as the ones used in Shell, the instructions to Clark's jury were likewise constitutionally inadequate.

Proper jury instructions were critical in the penalty phase of Clark's trial. Although no instruction on HAC should have been given, Clark was, at least, entitled to have a jury's recommendation based upon proper guidance from the court concerning the applicability of the aggravating circumstance. The deficient instructions deprived him of his rights as guaranteed by the Eighth and Fourteenth Amendments and Article I Sections 9, 16 and 17 of the Florida Constitution. This Court must reverse his death sentence.

ISSUE V

THE TRIAL COURT ERRED IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTIONS WHICH DIMINISH THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> [An] 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, 472 U.S. at 333. Although a Florida jury's role is to recommend a sentence, not impose one, the reasoning of Caldwell is applicable. See, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted, Dugger v. Adams, 485 U.S. 933, 108 S.Ct. 1106, 99 L.Ed.2d 267, reversed, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1988). A recommendation of life affords the capital defendant greater protections than one of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the jury's decision is critical, and any diminution of its importance violates Caldwell. Adams; Mann v. Dugger, 817 F.2d 1471, 1489-1490 (11th Cir.), on rehearing, 844 F.2d 1446 (11th Cir.

1988), cert. den., 489 U.S. 1071, 109 S.Ct. 1353, 103 L.Ed.2d 821 (1989).

The trial court read penalty phase instructions to the jury, and in part, those stated:

> The final decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you as the jury render to the court an advisory sentence as to what punishment should be imposed upon the defendant.
>
> * * * *
>
> As you have been told the final decision as to what punishment shall be imposed is a responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence....

(R 729, 791) The instruction is incomplete, misleading and misstates Florida law. Contrary to the court's assertion, the sentence is not solely its responsibility. The jury recommendation carries great weight and a life recommendation is of particular significance. Tedder. The instruction failed to advise the jury of the importance of its recommendation. The instruction failed to mention the requirement that the sentencing judge give the recommendation great weight. Finally, the instruction failed to mention the special significance of a life recommendation under Tedder. The instruction violates Caldwell. Clark realizes that this Court has ruled unfavorably to this position. E.g., Combs v. State, 525 So.2d 853 (Fla. 1988); Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987).

However, he asks this Court to reconsider this ruling and reverse his death sentence.

CONCLUSION

Upon the foregoing reasons and authorities, Ronald Clark asks this Court to reverse his death sentence and remand his case to the trial court for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Mr. Richard Martell, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Mr. Ronald W. Clark, Jr., #812974, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 13th day of November, 1991.

W. C. McLAIN