IN THE SUPREME COURT OF FLORIDA

THOMAS A. WYATT, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 77,666

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Nineteenth Judicial Circuit of Florida.

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7600

GARY CALDWELL
Assistant Public Defender
Florida Bar No. 256919

Counsel for Appellant

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STATEMENT OF THE CASE

A. Procedural history.

An Indian River Grand Jury indicted Thomas Wyatt and Michael Lovette for four counts of first degree murder, one count of sexual battery, three counts of kidnapping, two counts of robbery with a firearm, three counts of grand theft, one count of arson, and one count of possession of a firearm by a convicted felon. R 3960. The charge of possession of a firearm by a convicted felon was severed pursuant to State v. Vazquez, 419 So. 2d 1088 (Fla. 1982). R 4145. One of the murder charges was also severed, R 4172, and the defendants were severed. R 4155. The case was tried to a jury which found Mr. Wyatt guilty of the remaining thirteen offenses as charged. R 4380-83. The jury recommended death sentences for the three murders, R 4413-15, and the court imposed three death sentences as well as lengthy consecutive sentences on the other charges. R 4449-60. Mr. Wyatt filed a timely notice of appeal, R 4525, and this cause follows.

B. Jury selection.

During introductory remarks to the jury before voir dire questioning began, the trial court read to the venire the charges against Mr. Wyatt, including the previously-severed charge of possession of a firearm by a convicted felon. R 23-24. Pointing out that it was an early stage in the proceedings, the defense moved that the court strike the panel. R 31-32. The court granted the state a recess to confer with the Office of the Attorney General. R 32. The state argued that the court should give a curative instruction. The defense replied that a curative instruction could merely highlight the matter. R 34-39. The trial court denied the motion. R 42. There was extensive discussion of a curative instruction, with defense counsel

eventually agreeing to an instruction that the court had inadvertently read a charge that did not apply "to this defendant in this cause." R 45-58. The state and court agreed that the issue is preserved for appeal. R 55 (PROSECUTOR: "You are well preserved here with your motion for a mistrial. THE COURT: Yes, amply.").

Matters pertaining to cause challenges and the conduct of voir dire examination are set forth in the argument section of this brief.

C. Trial.

Between 11:00 p.m. and midnight on May 17, 1988, three persons were murdered at Domino's Pizza in Vero Beach: William Edwards (the manager), Frances Edwards (his wife, also an employee), and Matthew Bornoosh (a deliveryman). The bodies were in a bathroom, the men clothed, the woman nude, semen in her vagina. Mr. Edwards had been shot twice: one bullet went through his chest and a lung, and lodged behind the shoulder blade; the other, fired at close (not contact) range, went through the forehead, caused massive destruction to the brain, and lodged in the back of the head. Ms. Edwards was shot once in the back of the head from indeterminate range; the bullet passed through both hemispheres of the brain. She had recent bruises and minor scrapes on the right leg. Mr. Bornoosh had an injury to the top of the head, likely caused by a glancing bullet, and a gunshot wound to the left side of the head.[1] Money was gone from the safe.

1. Evidence linking Mr. Wyatt to the murders fell into three broad categories: circumstantial evidence linking him to the area, physical evidence at the scene, and various statements made by him.

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[1] The trial court overruled defense objections that parts of the medical examiner's testimony were speculative. R 1475-76, 1521-22, 1547, 1548.

A. Around 11:45 p.m. on May 17, Robin Christy saw a fancy red and white car in front of Domino's. R 1054. Later that night she told the police, saying it was a "compact car." R 1064-65. The Vero Beach Police issued a BOLO for a red and white compact car, R 1592 (Capt. Blanton), R 1608 (Det. Mills), and around 8:00 a.m. received a report of a car matching the description. R 1594-95 (Det. Mills). The car, a burgundy or maroon Cadillac, was found in a remote location, badly burned. R 1595, 1608 (same). Nearby were a zippered money bag, several money wrappers, and two bullets. R 1597, 1607 (same); R 1643 (Lt. Kuehn). Between the car and Domino's, officers found a shirt bearing the name "Matthew." R 1651 (Capt. Blanton). The car had been stolen from a Jacksonville used car dealer, R 1655, who testified that there had been a .38 pistol in the car when it was stolen. R 1705.

A man with a like car checked into the Budget Bed & Breakfast at Yeehaw Junction on May 17. R 1745-48 (motel clerk).[2] He and his companion stayed in room 111. R 1749 (same). Telephone records showed a collect call from the motel to Tommy Wyatt's mother at 5:50 p.m. on May 17, and another at 8:37 from Marvin Gardens, a bar and restaurant near Domino's. R 1894, R 1901-1902 (telephone company personnel); R 1904, 1907 (Capt. Blanton). A call was also made from the motel to a relative of Michael Lovette at 5:48 on May 17. R 1892-93.

That night a truck driver picked up Mr. Wyatt and another man between Vero Beach and Yeehaw Junction. He let them off around dawn in Lake Wales. R 1955-57.

According to a suspected documents examiner, the person who had registered at the Yeehaw Junction motel also registered at the Budgetel

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[2] The man was Michael Lovette. The motel clerk testified that Lovette "was not the type that should be driving a car like that," R 1745, and she thought the two were drug dealers. R 1745-46.

Inn in Brandon, and this person was Michael Lovette, a former North Carolina prison inmate. R 2169-77. A registration at the Grove Motel in Lakeland matched Mr. Wyatt's handwriting.[3] R 2181. To establish Mr. Wyatt's handwriting, the state introduced writing samples from his prison file during the testimony of a North Carolina escape investigator. R 2117-18. Mr. Wyatt objected that the state had available many other handwriting samples (developed since his arrest), and unnecessarily used the witness to establish that Mr. Wyatt was a prison escapee; he went so far as to agree to stipulate that he had had filled out the Grove Motel registration. R 2097-2116. The state offered not to use the North Carolina prison records only if Mr. Wyatt would agree that Mr. Lovette authored the other registrations; Mr. Wyatt declined, and the court overruled the defense objection. Id. The Grove Motel registration was in the name "John Whitmore."

From May 20 to June 2, Mr. Wyatt, using the name John Whitmore, lived at Glen Ellen Motel in Clearwater, befriending John Rassel. R 2192-94 (motel manager). A road map found at the motel bore finger and palm prints of Mr. Wyatt and Mr. Lovette. R 2290 (fingerprint examiner). Mr. Rassel testified, over objection, R 2202-2205,[4] that

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[3] The Budgetel and Grove registrations were dated May 18, 1988.

[4] The state argued, and the trial court ruled, that evidence of the car theft and all evidence related to flight was admissible:

> THE COURT: That, of course, is spread on the record now, but now we are down to this Ford Taurus. But I think that as it relates to the question of flight, I think it's admissible because flight is a legitimate area that the state can pursue. And anything that is connected with the flight I think is proper. And assuming that the necessary predicates are laid, I would so instruct the jury at the end of the case.

R 2204 (e.s.). The state's use of collateral evidence was the subject of substantial argument after jury selection and before opening

Mr. Wyatt stole a Ford Taurus at Madeira Beach. R 2211-12. Before moving away, Mr. Wyatt gave Fred Fox a bag containing bullets, R 2234-35, which was eventually given to the police. R 2260-61 (Lt. Dappen).

Larry Bouchette, a carpenter in Myrtle Beach, South Carolina, testified that in late May or early June 1988 he took "John Rassel" (Mr. Wyatt) into his home and hired him to do construction work. R 2367-68. One night, he bailed Mr. Wyatt out of jail; although he said he had been arrested for public drunkenness, Mr. Bouchette later learnt he was arrested for auto theft. R 2368-70. That evening, as they were drinking with others, Mr. Wyatt said in an argument either that "he had killed three people before and he could do it again," R 2371 (direct examination),[5] or "Larry, I've killed before and I will kill again if I have to." R 2379 (impeachment with depostion).

William O'Neil, a former Myrtle Beach police officer, testified over objection, R 2395-96 (renewing motion in limine), that he arrested John Rassel (Mr. Wyatt) June 19, 1988: He stopped a Ford Taurus for a traffic offense. R 2390-93. After the car was stopped, Mr. Wyatt (a passenger in the car) ran away, and, when caught, got into a violent struggle. R 2396-97. A gathering crowd tried to free Mr. Wyatt (who seemed intoxicated). R 2399-2400.

Mr. Wyatt was arrested for the murders on July 8 after fleeing a South Carolina Highway Patrolman. The court overruled the defense objection to testimony about fleeing the patrolman. R 2404-2405.

B. According to a "compositional analyst," bullets in the bag given to Mr. Fox "were of the same close compositional association"

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statements. R 954-64.

[5] The trial court overruled the defense objection to this testimony. R 2361-63.

as those taken from the bodies, R 2331: they apparently came from a batch of bullets made at the same place on or about the same day. R 2336.

Forensic testing indicated that Matthew Bornoosh, William Edwards, and Michael Lovette did not contribute the semen found in Ms. Edwards' vagina, but Mr. Wyatt, because of his blood type, could have. R 1948-49 (criminalist Daniel Nippes).

The state introduced through Dr. Kevin McElfresh of Life Codes Corporation, over defense objection, DNA evidence to the effect that the semen could only have come from Mr. Wyatt. Mr. Wyatt objected to this testimony arguing that DNA testing evidence is not valid scientific evidence, and that the procedures used here were inadequate. Also over objection, R 2952-54, the court allowed testimony from criminalist Daniel Nippes (who did not actually participate in the DNA testing at bar) to the effect that he is active in developing DNA testing in Florida and recommended that the samples be sent to Life Codes.

C. Over objection, the state used testimony from law enforcement officers as to statements Mr. Wyatt made after his arrest.

Karl Payne, the deputy who arrested Mr. Wyatt, said that he gave his name as Jim Williams or Wilson, but then immediately said: "I am the one you are looking for, I am Tommy Wyatt." R 2457-58. En route to the station, Mr. Wyatt said it might be a feather in his cap that he had arrested Tommy Wyatt. R 2460. At the station,[6] Mr. Wyatt asked if they used the electric chair in South Carolina; Deputy Payne said they did, but added that he had nothing to worry about since he had

[6] The defense objected unsuccessfully to Deputy Payne's testimony about Mr. Wyatt's statements as irrelevant and having little probative value. R 2421-45.

done nothing in South Carolina to get the electric chair. Asked if Florida used the electric chair, he said he did not know. R 2462.

FBI Agent Michael Clemens and other officers interviewed Mr. Wyatt the night of his arrest. Mr. Wyatt told about travels with Michael Lovette through various states, and said they had parted in Florida. R 2576-77. He said "Jim," another personality within him, would do things over which he, Tommy, had no control. R 2578. He said Jim had hurt a bunch of people and that he (Tommy) did not want to hurt any one else. Id. George Faulk of the South Carolina Department of Law Enforcement gave similar testimony about the interview.

Patrick McCoombs, a federal prison inmate, testified to statements supposedly made by Mr. Wyatt while the two awaited extradition from South Carolina. A former inmate in a unit for high-security risks, violent offenders, and incorrigibles at Florida State Prison, he told Mr. Wyatt he had been "a runaround on death row," and Mr. Wyatt responded with interest about rules and privileges there. R 2754-2756. Thereafter, Mr. Wyatt told Mr McCoombs about the Domino's Pizza crime as follows: Mr. Wyatt wanted to show Michael Lovette how it was done. R 2758. He asked for a pizza and the man behind the counter gave him a hard time and told him to hold up, and he pulled his pistol out, and said "Hold up on this, motherfucker." R 2759. There was a woman and a young Cuban delivery boy. R 2760-2761. After pushing these two into the bathroom, Mr. Wyatt brought the manager to the safe, and got a money bag with $1000 out of the safe; he pistol whipped the man because the safe had less money than expected. Id. When they put the people into the bathroom, Mr. Lovette donned a Domino's T-shirt and went to the front counter. R 2763. One man began to beg, and Mr. Wyatt was extremely upset: "I was real pissed-off

about this guy lying to me about this money because I knew there was more money in there." R 2765. The man was begging, saying please you got to let me go, please don't kill me. I have a two-year-old daughter and if you want more money you can take my wife, take he home with you, one of you all can go with her and I've got more money at home, and Mr. Wyatt said he shot him in the chest for lying. R 2766. After shooting the man, he told the others that they were dead, that he could not leave witnesses; the woman started crying, and the Cuban knelt and prayed. R 2767. Not wanting to hear the woman cry, he shot her in the head; he went to the Cuban, put the gun in his ear, and told him "Listen real close because you're going to hear it coming," something to that effect, and shot him; he saw that the first man was still alive so he went back and shot him in the head. R 2767. Mr. Wyatt wanted to clean the bodies up, said there was blood all over the bathroom, wanted to move the bodies to where they would not be quickly discovered, but Mr. Lovette was "flipping out", screaming that they should leave. R 2768. They got rid of the Cadillac because they were going to split up and had gotten into an argument and he was going to give Mr. Lovette the Cadillac to get rid of him, but Mr. Lovette had talked him into staying together. R 2768. He left the gun in some water. R 2787-2788.

In addition to the foregoing, Mr. McCoombs was the source of much character evidence about Mr. Wyatt.

Asked by the state to describe Mr. Wyatt's demeanor, Mr. McCoombs replied: "The only way I could describe Tommy Wyatt's demeanor is to say this, all right. Like I said, I was a runaround on death row for 7 months and I never forgot the majority of those people that I was on death row with. I mean, I could start naming some of these people that

was up there on death row. There were some infamous, infamous characters and --" R 2770. The defense objected, and the state said it would rephrase the question, and the judge said, "All right. You better." R 2770-2771. Asked again, he replied: "I mean, have you ever seen anybody smile with their mouth and not with their eyes? That's the effect that I had, somebody that -- if I looked at him -- the way I look at him, if he was pointing a gun at me, I would have knew that he was going to kill me." R 2771-2772. The court overruled a defense objection to this testimony. R 2772.

After hearing Mr. Wyatt's account, Mr. McCoombs had a nightmare: he saw Wyatt looking at him, with the gun pointing at him, and he began to feel the feelings of the manager. R 2773. He felt like a participant in the murder. R 2773.

When Mr. Wyatt discussed his crimes and use of guns, Mr. McCoombs considered that he himself had used a gun in a robbery and that he might have killed someone, and started feeling he was in the same league with Tommy Wyatt. R 2779. He wanted out of that, he is not quite in that league. Id. He was a thief most of his life but he has never been one to go shooting people up. R 2779-2780.

Mr. Wyatt asked if it was hard to have someone killed in prison, and Mr. McCoombs replied that it was not very hard, it just depended on if the money was right and if you knew the right people. R 2791-2792. He gave Mr. Wyatt names of people he had done time with; Mr. McCoombs was afraid that when he got to the prison Mr. Wyatt would look up the people whose names he gave. R 2792. Concerned lest Mr. Lovette testify against him, Mr. Wyatt asked Mr. McCoombs "to hook it up for him" and that is why he gave him the names. R 2792-93.

Mr. Wyatt said they had statements against him, and that they were no good because he had a split personality; he told them that he was Jim, that Jim was mean and he was not. R 2786. He was laughing about it. Id.

Mr. Wyatt said one of the reasons McCoombs was caught for his bank robbery was that he did not intimidate people enough, saying "You should have stuck it in -- stuck it in her face and socked her in the head a couple of times to get her mind right." R 2761. He said that's what he did to someone at Domino's. R 2762.

Mr. McCoombs decided he must choose whether to accept that he was like Tommy Wyatt or to show that he was not. R 2789. He did not want to be a participant in the crime, did not want to have to feel guilty about people dying, especially the man; in prison when somebody has guts, you have to respect them for that, and he respected the man's guts for trying to get his wife out of there; so he decided to write the whole thing down and send it to the federal marshall. R 2790.

Mr. McCoombs strongly intimated that Mr. Wyatt would have him killed for testifying against him. As a consequence of his testifying, the next several years are not going to be "a very joyful experience" for him: "I'm going to have to run, I'm going to have to hide." R 2791. The only thing that he asked for in exchange for his testimony is "a little bit of protection. I have asked for my well-being to be looked out for." R 2796. He testified that convicts live by a "code" and that one could pay for violating the code. R 2752. He had "added incentive" not to go back to prison because "if I go to Florida prison, everybody knows me everywhere." R 2858-59.

Mr. McCoombs also gave testimony about Mr. Wyatt's activities after separating from Mr. Lovette. He went to Clearwater, stayed with

two guys and a girl, one of the guys was named John, and he later used John's name. R 2780. They went to the beach, and a girl found some keys in front of Ford Taurus, and Mr. Wyatt stole it. R 2781.

Thinking the police were after him, he went to the Carolinas. R 2782. He had a homosexual driving the car and they were cruising around partying and were pulled over and the officer asked him whose car it was, and he said it belonged to his father which was a mistake: he should have said it was the homosexual's. The officer called the car in, and Mr. Wyatt tried to flee. R 2782. He got out of jail in Myrtle Beach when he dyed his hair, and used a fake accent and used John's name. 2783-2784. His boss bonded him out. Upset about the police getting his car, he broke into his boss's house and stole a truck. R 2784. When an officer pulled him over for going too slow, he jumped out of the truck and ran in the woods, and every time he came out of the woods, the law was waiting for him. R 2785.

Near the end of Mr. McCoombs' testimony, the defense unsuccessfully objected and moved for a mistrial when he testified that he was to be placed in a witness protection program, but it depended on his passing a polygraph test. R 2866-67.

2. Mr. Wyatt testified: He and Mr. Lovette stole the Cadillac, stayed at the motel in Yeehaw Junction, and then went to Vero Beach. They went to Marvin Gardens, but then Mr. Lovette left and Mr. Wyatt stayed at the bar drinking. R 3251-53. Eventually reappearing, Mr. Lovette said they had to leave; he was anxious and in a hurry, saying a policeman had been following him and he thought the police might have the tag number from the car. R 3254. Mr. Lovette drove, and he was speeding and driving all over the road, although the red engine light indicated overheating. R 3255. Mr. Lovette was so nervous, shaking

and everything, worried about police coming, that Mr. Wyatt insisted on driving. R 3256. The engine was heating up, and the car started missing, but they decided to keep on, but eventually Mr. Wyatt pulled it off the road. R 3257. The car quit running and it was smoking on the inside. R 3258. Saying they should burn the car, Mr. Lovette piled some papers on the back seat and lit them. R 3258-3259. As they walked along State Road 60 for a few hours, Mr. Lovette kept saying they had to get as far from town as they could. R 3259. He said he had robbed a pizza parlor, had got a couple of hundred dollars and some liquor. R 3260. They got a ride in a truck. R 3261. Mr. Lovette said the people at the pizza place could recognize him and they had better keep heading west. R 3262. They parted in Tampa, and Mr. Wyatt went to Clearwater. R 3263-3264. He stole a Fort Taurus at Madeira Beach. R 3265-3266. He was stopped in the Taurus in Myrtle Beach and tried to escape. R 3269-3272. Larry Bouchette bonded him out, but later they argued about whether Mr. Wyatt could use his truck. R 3273-3275. He did not tell Mr. Bouchette that he had killed anyone. R 3277. He stole the truck. R 3277. The officer who eventually arrested him made it clear that he was in big trouble in Florida and that when Florida was finished with him he would have nothing to worry about, and Mr. Wyatt responded with a comment about the death penalty. R 3283. When he reached the sheriff's department he was bleeding, had a pretty deep cut from a bramble on his thigh. R 3284. A man read him his rights, or told him his rights, but he did not finish the Miranda rights. R 3285-3286. It was an officer behind a desk. R 3286. Asking for an attorney, Mr. Wyatt refused to sign a waiver of rights form. R 3286. The officer said he could not reach an attorney or public defender at that time of night, and continued to

question him. R 3287. The officers in the interview room wore weapons. 3288. An officer kept asking different questions, saying that they knew he was here, there, and various places, saying they had people that saw him, and Mr. Wyatt would occasionally say, Okay, yeah, maybe I was there, they would not stop questioning him. R 3288. After he had been in there for about an hour and a half, he was tired of listening to questions, knew he would never get out unless he said something they wanted to hear, and one officer asked if there was something inside him that made him do bad things and he said, yes, and he "started just telling them all kinds of shit." R 3289. Finally he said he would tell him everything they wanted to know if he could get some sleep and then come back at 9:00 o'clock. R 3291. This was around 3:00 or 3:30. R 3291.

At the jail, he met Patrick McCoombs, whom he know as "Squeegee," because he had apparently beat somebody up with a squeegee at prison. R 3291-3292. Mr. McCoombs related his criminal history, had tattoos all over his body, and Mr. Wyatt thought he was a biker or a prisoner. R 3294. The lawyer representing Mr. Wyatt on the extradition gave him papers about the investigation from Yeehaw Junction and about Mr. Wyatt's movements from Vero Beach, to Yeehaw Junction. R 3295. Mr. Wyatt had a couple of people mailing him newspaper articles concerning the arrest and investigation and the charges. R 3295. He discussed these matters with Mr. McCoombs and asked for his advice, let him see all the investigative work and news clippings. R 3296. He never told Mr. McCoombs that he did all these things. R 3297. Mr. Wyatt denied committing the crimes at Domino's Pizza. R 3298. He did not remember saying that the arrest would be a real feather in the officer's cap. R 3336-3337. He did not tell his story to the FBI agent and the others

because he wanted to talk to an attorney, and in his experience law enforcement officers take things out of context and apply them to things that incriminate one more. R 3339-3340.

D. Sentencing phase.

After the jury found Mr. Wyatt guilty on the afternoon of Tuesday, January 29, the defense moved for a continuance of the sentencing hearing because Mr. Wyatt's mother and sister were unavailable to testify: the mother suffered from severe mental problems, and her condition had worsened; the sister had complications arising from her pregnancy. R 3592. It also sought a continuance on the ground that Dr. Rifkin, a psychiatrist who had examined Mr. Wyatt before, had recommended a reexamination of him before the penalty phase. R 3597. In a somewhat confused discussion, the prosecutor accused Mr. Wyatt personally of having "gotten some jail house education and ... trying to play games with this Court". R 3599. Defense counsel said that he had only very recently become aware of the worsened condition and incapacity of Ms. McDaniel (Mr. Wyatt's mother). R 3600. The judge expressed his view that he was "not persuaded that [Mr. Wyatt] has at all cooperated with this Court in attempting to secure the appropriate witnesses." R 3601. The state proposed a telephonic tape recorded interview with the sister, or that the defense obtain an affidavit from her by fax, or that information from her be presented in some other way. R 3603. The state said that it had learnt some months before that the mother was in no condition to give testimony about her son. Id. The trial court ordered that the penalty phase begin on the morning of Thursday, January 31. R 3605.

On Thursday, the defense renewed the motion for continuance. R 3629. The state argued that Dr. Rifkin had given no reason for

reexamination of the defendant, R 3631, and that Mr. Wyatt's mother had been incompetent for at least two months. R 3632. It repeated that the sister's testimony could be provided by affidavit or videotape or taped telephone conversation. R 3633. The defense rejoined that the mother was lucid at least as of the previous weekend. R 3634. The state said it would not oppose testimony from the defense investigator as to what the mother had told him. R 3634-35. Again the state blamed Mr. Wyatt personally, saying he was "playing games here". R 3636.

Mr. Wyatt addressed the court personally, saying that, since the state's evidence would not be by affidavits or videos, such evidence on his behalf would lack credibility before the jury. R 3638-39. After discussion whether he would make a statement to the jury, Mr. Wyatt said he was not going to offer mitigation, given the absence of his mother and sister. R 3641.

A. The state presented evidence over objection that Mr. Wyatt and Mr. Lovette walked away from a prison work crew, entered a home, stole a canoe, and then stole a car. R 3657-70. It also presented over objection, R 3678-80, evidence that he and Riley Greer asked Larry Hollar for a ride in North Carolina, then robbed, beat, and kidnapped him, stealing his car. R 3676-83. Over objection, it put into evidence a photograph depicting the injuries sustained by Mr. Hollar. R 3685-86 (in responding to the objection, the state conceded, "Absolutely it's prejudicial." R 3686.) It also presented evidence that he was involved in the robbery and kidnapping of a chef at a Chinese restaurant in Greenville, South Carolina. R 3653-55, 3694-99. The court overruled a defense hearsay objection to testimony from a South Carolina deputy as to what the chef told him about the incident through an interpreter. R 3702-3703. After the deputy's detailed

testimony, the defense unsuccessfully renewed its objection to evidence regarding the Greenville crimes. R 3709. The state presented testimony from George Faulk, a South Carolina law enforcement officer, that Mr. Wyatt said that "Jim" wanted to kill the man in Greenville. R 3713.

Richard Tymec testified to an armed robbery committed by Mr. Wyatt and Mr. Lovette at the Taco Bell restaurant he managed in Holly Hill, Florida. R 3717-26.

No defense evidence was presented to the jury, which made three death recommendations. The trial court refused to order a PSI and refused a psychiatric examination of Mr. Wyatt. R 3777-78, 3785-86.

B. When the case came up for sentencing, the trial court revisited the matter of the mother and sister. Mr. Wyatt told the court that, although his mother was hospitalized in the middle of the trial, she had since been released from the hospital and the psychologists and psychiatrists said that she could now give testimony. R 3920. She could have given testimony if the sentencing phase had been continued. R 3920.

The court asked Mr. Wyatt whether at any time he informed his attorneys that his mother and sister were not to appear during any phase of the trial, and he replied that the initial instructions were that he did not want anybody to appear for him, but as certain things changed during the trial that he felt were wrong, he changed his mind before the sentencing phase was ever considered and he had thought that he would be granted various motions and things, but they were denied and that he had never expected that it would get to the sentencing phase. R 3921. After some confusion, Mr. Wyatt said that he had thought at the jury sentencing that if the state was going to offer

aggravating factors by videotape or affidavits he would do the same, but that the psychiatrists said that the mother was unable to give testimony on a videotape or affidavit, and he said that he did not want to offer anything if he could not have them give testimony in the sentencing phase, although he assumed that the sister could give a videotaped statement or an affidavit. R 3922.

The court asked defense counsel Sidaway if the matters represented by Mr. Wyatt were substantially correct. R 3922. He replied that Mr. Wyatt told him that he did not anticipate that he wanted any mitigating circumstances put on by family or anyone else, his mother was in rather precarious mental health, and Mr. Wyatt did not feel that members should be involved in the event of a penalty phase. R 3922. Before Sidaway was on the case, a defense investigator had been to North Carolina and done preliminary work as to the family and possible penalty phase witnesses. R 3922-3923. Defense investigator Herschel Thompson later went to North Carolina and spoke with the mother and other family members, and Sidaway himself went to North Carolina with another investigator, speaking to family members in North Carolina and other people including teachers, neighbors, Mr. Wyatt's father, several other people; and Ms. Horne interviewed potential mitigation witnesses in South Carolina. R 3923. Mr. Wyatt, during the trial, advised Sidaway of his mother's and sister's situation. R 3923-3924. The sister was bedridden as a result of the pregnancy during the trial and was unavailable; the mother's condition was such that she could not give any kind of a statement whatsoever. R 3924. Mr. Wyatt's position was that if his mother and sister could not be there in person (as the state's witnesses would be), then he would not want to put on any

mitigating circumstances. Sidaway said he could give the court the names of witnesses they would have called in mitigation. R 3924.

The judge said that Mr. Wyatt vacillated all during the trial as to his instructions and his personal wishes, that the court tried the best it could to be cooperative with him. R 3925. The court specifically noted "that even at this late date no one has made a proffer of what that testimony would have been. And certainly that would have been of great aid to Court." R 3925.

Sidaway said that Mr. Wyatt's instructions were that if the mother and sister could not personally appear during the sentencing phase, he would not want a videotape or an affidavit. R 3925. Mr. Wyatt and Sidaway considered the two key mitigation witnesses were the mother and sister; if they could not appear in person, Mr. Wyatt did not want them to testify and did not want any other possible mitigating witnesses. R 3925-3926. The other witnesses could have appeared in person: the attorneys had had subpoenas issued. R 3926. Sidaway said that they could have had the witnesses available, but he has received no different communication from Mr. Wyatt about whether they should appear. R 3926.

The prosecutor opined that Mr. Wyatt had probably told counsel all along, before he knew that the mother and sister were unavailable, that he did not want anybody. R 3928. The prosecutor felt that up until the night that Mr. Wyatt found out that the family could not be there, all through that time he was telling counsel that he did not want mitigation witnesses. Id. The prosecutor sought to turn defense counsel into witnesses: "I think that -- that I would request that not only that you -- that you cover what you did already with Mr. Sidaway and Miss Horne, but that you cover with both of them what actually

happened and why they did have mitigation witnesses lined up in addition to family and up until the night before the sentencing phase isn't it true that the Defendant didn't want them. And by all this I'm not accusing these two lawyers of -- of playing games or doing anything wrong her. I think that it's the Defendant that's manipulating things. But what I'm afraid of is that they, in fact, did a thorough job in preparing the Defense in this case. But four or five years from now it's going to be made to look by this Defendant sitting in prison through some jailhouse lawyer or some other paid lawyer that they didn't do their job and we need to make the record clear now that the only reason they didn't present mitigation was because he didn't want it." R 3929. "The State's position is that he was saying all along before that even if his mother and sister were available he didn't want anybody and that's what caused them not to actually have those witnesses there." "So I'd ask the Court to inquire first didn't he, in fact, tell them he didn't anybody period out to a point." R 3930.

The judge asked: "Were you ever instructed to that effect, Mr. Sidaway, by your client?" R 3931. When Sidaway was hesitant to answer on the basis of attorney-client privilege, the court ordered him to answer. Sidaway said he was instructed by Mr. Wyatt when he first came on the case that he did not want him to present mitigating witnesses, that the main ones would be his family members, it was a burden on his mother and a burden on his sister and other family members. R 3931.

The state asked that the court also inquire of defense counsel Horne, and she said that her answers would be the same as Sidaway's. R 3933-34. The prosecutor continued: "Your Honor, if you would, again -- she's in a position to where I don't think that they're comfortable in volunteering, but I think that when it got to the penalty phase

based on representations made in Court by both attorneys it appeared as though most of the communication had been between Ms. Horne and the Defendant. And so to make the record clear as to the actions of both attorneys I'd ask that you question her in the same manner that you did Mr. Sidaway." R 3933. Ms. Horne said that before trial she was instructed by her client, in the presence of investigator Thompson, not to present any mitigation. R 3934. The court opined that Horne had gone "to extraordinary lengths" to get one witness brought in for mitigation testimony. R 3934-3935.

The state jumped in again: "Judge, just one other thing I'd ask you to inquire is at what point if counsel can inform you, at what point did the Defendant then change his mind. The testimony so far has been before the trial he was saying he didn't want it. I'd ask the court to inquire at what point did he change his mind during the trial and say that he wanted mitigation witnesses, being his mother and his sister." R 3935. The judge asked Horne about that, she asked whether she was being commanded, and the judge told her to answer, knowing that she was asserting attorney/client privilege, and she said: "Judge, it was basically the night before the penalty phase that we were instructed by our client to -- to try and get his mother and his sister to testify (indiscernible)." R 3935.

Prosecutor Morgan mentioned the matter of the handwriting exemplars and the proffer to stipulate to admit records from jail cell in North Carolina and that Mr. Wyatt refused: "That was totally his own fault." R 3936. In Morgan's view, Mr. Wyatt's having taken the stand and admitted he was a convicted felon cured any prejudice regarding the court reading the severed count of possession of a firearm by a convicted felon. R 3936. Sidaway replied that the damage

was done at the point, and the denial of the mistrial changed the entire trial strategy. R 3937.

Horne volunteered that Mr. Wyatt's change of mind (as to mitigation) may have occurred the night after the trial, and Sidaway said that his recollection was that Mr. Wyatt told them over the weekend, on a Monday, as opposed to Wednesday. R 3938.

In sentencing Mr. Wyatt to death, the court found seven aggravating circumstances: the murders occurred while he was under a sentence of imprisonment; he had been previously convicted of a violent felony; the murders occurred during the course of kidnapping and sexual battery; the murders were committed to avoid arrest; the murders were committed for pecuniary gain; the murders were especially heinous, atrocious, or cruel; the murders were cold, calculated, and premeditated without a pretense of moral or legal justification. R 4487-4503. It found no mitigating circumstances. Id.

SUMMARY OF THE ARGUMENT

The conduct of the jury selection requires reversal. The court forbade questioning pertinent to capital punishment, the reasonable doubt standard, and the prospective jurors' ability to abide by their convictions, erroneously denied defense cause challenges, intemperately rebuked counsel and displayed biased behavior, and erroneously refused to strike the venire.

It was error to deny the motion to suppress forensic evidence obtained in violation of the affidavit requirement for search warrants. It was also error to deny the motion to suppress statements where Mr. Wyatt invoked the right to counsel during police interrogation.

The court erred in permitting the use of DNA evidence based on speculative and ever-changing evidence of the DNA characteristics of

small sample populations. It also erred in overruling the objection to DNA testimony based on examinatins made by persons who were not witnesses with no showing that those persons complied with accepted protocols. It was error to let one witness bolster the expertise of another.

Admission of irrelevant prejudical evidence that Mr. Wyatt was an escaped prisoner requires a new trial.

The state's extensive use of collateral crimes and bad character evidence requires a new trial.

The unreasoned decision to have Mr. Wyatt shackled during individual voir dire was prejudicial error.

The refusal to hear a defense proffer requires a new trial.

It was error to permit speculative testimony from the medical examiner regarding the deaths.

The flight, "premeditated murder" and reasonable doubt instructions were improper.

The prosecutor's improper argument as to guilt was so improper as to require reversal.

The jury and non-jury sentencing hearings were unconstitutional. The trial court erred in not granting a continuance so that the defense could present mitigation. The waiver of mitigation was not knowing and intelligent. The court did not inform itself of the available mitigation and hence was in no position to deny a continuance. The unreasoned decision refusing a mental evaluation was improper. After the penalty recommendations, the court determined the sentence prior to the sentencing hearing, and conducted the sentencing hearing without determining whether there was mitigation and whether mitigation was

waived, and turned defense counsel into state witnesses defeating Mr. Wyatt's right to advocacy for his life.

The record does not support the premeditation and heinousness circumstances, and it was error to instruct on them. The instructions themselves were unconstitutional.

It was error to let the state use in aggravation evidence of non-violent criminal conduct.

The court erred in letting the state use detailed evidence and photographs depicting prior violent felonies, which the state agreed was prejudicial.

Use of hearsay at sentencing violated the Confrontation Clause.

The state's penalty phase argument was so improper as to require resentencing.

Florida's death penalty statute is unconstitutional.

ARGUMENT

1. VOIR DIRE OF VENIRE

The conduct of the jury selection requires reversal. The court forbade questioning pertinent to capital punishment, the reasonable doubt standard, and the prospective jurors' ability to abide by their convictions, erroneously denied defense cause challenges, intemperately rebuked counsel and displayed biased behavior, and erroneously refused to strike the venire.

A. A court violates due process and the eighth amendment if it bars questioning to ferret out jurors who would automatically vote for a death sentence. Morgan v. Illinois, 112 S.Ct. 2222 (1992). One unfair juror is one too many. Id. General fairness and "follow the law" questions do not suffice to protect the defendant's rights.

At bar, as the defense began asking about the death penalty, the court sua sponte cut in, saying, "I think they have been through enough," and recessed for the evening. R 231. The next day, when juror Hadley said it is difficult to overcome feelings of sympathy, R 261-62, the judge sustained the state's objection to questions about sympathy and anger. R 261-63. When juror McConnell said the death penalty could be a "necessary" outcome, R 267, and juror Burton said it was preferable to life imprisonment, R 285-86, the court sustained the state's objection to asking if life imprisonment could protect society in a capital case. R 289.

B. The state must prove to each juror the elements of its case beyond a reasonable doubt. The reasonable doubt standard "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." In re Winship, 397 U.S. 358, 364 (1970). The jurors must have "an abiding conviction of guilt."

When the defense questioned a prospective juror on the point, asking whether, if she had a reasonable doubt, she would "stand by it and fight for it, or ... have a tendency to go along with the other people," the court interrupted and instructed the jurors that, while they should not yield their firm opinions, they should deliberate with the other jurors and "accomodate [themselves] to the jury's collective judgment." R 676-77. When defense counsel sought to elaborate on the point, the trial court cut her off: "Well, that ends it, madam, because that's what their duty is. Now, let's not go on." R 677-78. The court erred in cutting short the questioning on this crucial issue and giving an improper and erroneous sua sponte "Allen"[7] charge.

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[7] Allen v. U.S., 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

C. Doubts of jurors' partiality are resolved in favor of excusing them. Walsingham v. State, 61 Fla. 67, 56 So. 195, 198 (1911) ("in criminal cases, whenever, after a full examination, the evidence given upon a challenge leaves a reasonable doubt of the impartiality of the juror, the defendant should be given the benefit of the doubt.").

Relying on Walsingham and other cases, the Court wrote in Singer v. State, 109 So. 2d 7, 24 (Fla. 1959):

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

From Singer the rule has evolved that "rehabilitation" by leading questions does not remove the presumption in favor of excusing the juror. In Club West v. Tropigas of Florida, Inc., 514 So. 2d 426 (Fla. 3d DCA 1987), the court wrote:

> Where a juror initially demonstrates a predilection in a case which in the juror's mind would prevent him or her from impartially reaching a verdict, a subsequent change in that opinion, arrived at after further questioning by the parties' attorneys or the judge, is properly viewed with some scepticism. See, e.g., Johnson v. Reynolds, 97 Fla. 591, 599, 121 So. 793, 796 (1929); Singer, 109 So. 2d at 24. The test to be applied by the court is whether the prospective juror is capable of removing the opinion, bias or prejudice from his or her mind and deciding the case based solely on the evidence adduced at trial. Singer, 109 So. 2d at 24; State v. Williams, 465 So. 2d 1229, 1231 (Fla.1985). A juror's assurance that he or she is able to do so is not determinative. Singer, 109 So. 2d at 24; Smith v. State, 463 So. 2d 542, 544 (Fla. 5th DCA 1985); Leon, 396 So. 2d at 205.

Cf. Morgan v. Illinois (general fairness and "follow the law" questions not enough to detect those who would automatically impose death

sentence). Club West found error in denial of a cause challenge where a juror first said her husband's ownership of stock in a corporate defendant might enter into her decision in the case, but on further questioning assured the court that it would not affect her verdict.

Similar is Price v. State, 538 So. 2d 486 (Fla. 3d DCA 1989), where a juror, asked whether her husband's friendship with the decedent might make some difference in the case, said: "Just a little. I think it would be there." Id. 488. When the court "rehabilitated" her, she said she could be fair, would have no prejudice, and would base her verdict on the law and the evidence. The district court reversed, writing at page 489:

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

Here the court erred in denying defense cause challenges to several jurors. In coarse terms it forbade argument on cause challenges.[8] It then denied a defense cause challenge to juror Ryden, R 346-

[8] "I don't want any argument. If you challenge for cause, I will rule on it. You can carry this thing out too damn far. Now, cut it out. If you want to challenge for cause, challenge it and I will rule." R 344. This in response to defense counsel's simple remark that "I think we need to argue one."

47,[9] who had said she could not do her work if on the jury, could not put it out of her mind, and would be bothered by photographs and might not be able to give full attention to the case. R 105-106, 147 (questioning by prosecutor). She would have "hesitation" about following instructions that sympathy for the victims could play no role in her verdict. R 258 (questioning by defense counsel). She had a "very strong opinion for the death penalty in first degree murder, and I am against imprisonment for first degree murder." R 293 (same). She would have difficulty following the law, although it would go against her conscience. Id. She would give full consideration to the circumstances as instructed by the law, but could not set aside personal beliefs, but would follow the law. R 329-331 (questioning by state).

After exhausting its peremptory challenges, the defense unsuccessfully sought to excuse juror Haughey for cause and to obtain an additional peremptory challenge to excuse him. R 867-69, 890-92. Mr. Haughey had read about the case in the newspaper. R 855 (defense questioning). Asked if he would automatically vote for death in either a felony murder or premeditated murder case, said: "If the evidence warranted it, yes, I would go for the death penalty, I would vote for the death penalty." Asked again, he said: "if the evidence in the case warranted a guilty verdict and I had the option of life imprisonment with twenty-five years and parole or the death penalty, I would say I would choose the death penalty." R 856-57 (same). He said he would consider mitigating circumstances, but "would be lying if I said I wouldn't be leaning toward the death penalty. But I would consider

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[9] The defense used a peremptory challenge to excuse Ms. Ryden. R 350.

the circumstances, but they would have to be awful good." R 857. He would "be fair" but "the mitigating would really have to out number the aggravating." R 858. Out of the presence of other jurors, he said he had "read that it was a triple murder and that there was a rape involved, and that the owner of the Domino's Pizza was -- and his wife were killed, she was raped. A hitchhiker was picked up and killed, and a car burned." R 888 (e.s.). He said the article would not affect his ability to be fair and impartial. R 889. Mr. Haughey served on the jury which convicted Mr. Wyatt, R 3589 (polling jury as to guilt verdict), and voted for his death, R 3780 (polling as to penalty verdict).

The court erred in denying cause challenges to jurors Ryder and Haughey. There was ample doubt of their fairness and impartiality.

D. Trial by a biased judge is "fundamentally unfair." Rose v. Clark, 478 U.S. 570, 577 (1986). Judges must maintain an air of strict neutrality lest the jury and the public view them as unfair. Cannons 1, 2.A, 3.A.(1), (6), and 4, Cannons of Judicial Ethics; Standard 6-1.5, ABA Standards for Criminal Justice.

A trial is unfair if the court engages in unfavorable comments and interjections,[10] or unnecessarily rebukes counsel in the jury's presence.[11] Remarks reasonably susceptible of interpretation by the jury as showing favoritism defeat the right to a fair trial.[12]

The state gave the venire an extensive lecture on the law of homicide and principals, the facts of the case, the relationship

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[10] Keane v. State, 357 So. 2d 457 (Fla. 1978).

[11] Jones v. State, 385 So. 2d 132 (Fla. 4th DCA 1980), Tyndall v. State, 234 So. 2d 154 (Fla. 4th DCA 1970). See Wilkerson v. State, 510 So. 2d 1253 (Fla. 1st DCA 1987) (collecting cases).

[12] Huhn v. State, 511 So. 2d 583, 590 (Fla. 4th DCA 1987).

between the penalty and guilt phases, and the principle of reasonable doubt, interjecting an occasional rhetorical (addressed to no one, receiving no response) question. R 124-33. The court interposed no objection. But when defense counsel questioned the jury as a group, the court jumped on him in the jury's presence:

> THE COURT: Counsel, I haven't heard a question in ten minutes.
>
> [DEFENSE COUNSEL]: I think I just asked one, Judge.
>
> THE COURT: That is enough.

R 230. As counsel resumed questioning, the court interrupted again:

> THE COURT: Counsel, I think this is a propitious monent to recess for the evening. I want to get this jury on its way. I think they have been through enough.

R 231 (e.s.).

The next morning, defense counsel asked jurors about the death penalty. Panel members showed strong prejudice for the death penalty and against life imprisonment.[13] The court sustained a state objection to a question on this vital matter,[14] admonishing counsel in the jury's presence: "I will sustain the objection. Let's go on Counsel. I have allowed this to go on at some length. Let's get on with the issues in this case." R 289 (e.s.). Out of the jury's presence, the court refused to permit defense argument on cause challenges. R 344.

That afternoon, juror Roberts (a court reporter) declared that she would be uncomfortable serving in a criminal case because "of

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[13] R 256-57 (juror Weiss); R 267 (juror McConnell); R 277, 285-86 (juror Burson).

[14] The question: "Do you feel like society could be protected by a prison sentence? I mean, do you consider that society is being protected by, in a capital offense, a sentence of life in prison?" R 288-89.

everything I know about the criminal justice system, which I think is a contradiction in terms," and said the state "would love to have me on your panel. I don't believe the defense would," R 468, and said that she sees "evidence get suppressed that, in my humble layperson's opinion, the jury needs to see. And I get very frustrated with that ... and I see what the jury is not allowed to see." R 470. Discharging this biased juror, the court said in the jury's presence:

> Mrs. Roberts, I would love to have you sit on this jury and take advantage of your expertise, but in all fairness to you and in all fairness to the state and to the defendant, I don't think it's wise for you to persist in this case. And I think I am placing you in a completely untenable position; and therefore, I am going to excuse you on my own motion.
>
> I would love to have you sit and maybe some other time, but I will excuse you, madam.

R 474 (e.s.). No other discharged juror received such a tribute.

At day's end, when a prospective juror expressed problems concerning the presumption of innocence, the court sua sponte gave an example of the presumption of innocence involving an example in which the juror, receiving a speeding ticket, decides "to go before the judge and, you know, tell him my story." R 546.

The next day, as the defense asked a juror whether she would be firm in her decision, or go with the others, the court sua sponte broke in, advised the juror of a duty to deliberate with other jurors and then curtly forbade further questioning on the topic. R 677.

Later that day, as the defense asked a juror about the factors that might cause her to vote for or against the death penalty, the court sua sponte interrupted: "Counsel, you know, I think that's an unfair question because they haven't heard the instructions by the Court. Now, if they agree to apply the instructions of the Court, I

don't know how she can answer that question properly." R 749. When defense counsel rephrased the question, the court said: "A rose by any other name madam." R 749. The court then asked the jury if they would agree to follow its instructions, and sua sponte refused to allow further questioning. R 749-50 ("I think that ends it."). Counsel approached the bench and moved for a mistrial on the ground that the court had indicated to the jury that there would be a capital sentencing proceeding in the case, and the court denied the motion, adding: "Now, let's sit down and go on.... I am a little tired of all this. Go on and let's finish this." R 751-52.

Later that day, when the defense asked a juror about preconceptions about the death penalty, the court sua sponte scolded counsel, concluding: "Now, they have no idea what the instructions of the Court are and you people keep insisting all of these things, these collateral things, without them having any idea what the Court is going to instruct them. And I think that that's unfair to these jurors, so I don't think the juror should answer it." R 821-22.

The conduct of the court during jury selection requires reversal of Mr. Wyatt's convictions and sentences.

E. The court also erred in refusing to strike the venire when it informed the potential jurors of the charge of possession of a firearm by a convicted felon. As defense counsel pointed out, jury selection had not begun, and there would be minimal delay resulting from striking the jury. Information that the defendant has a prior conviction is presumed prejudicial. State v. Vazquez, 419 So. 2d 1088 (Fla. 1982). There was no valid reason not to strike the venire.

2. DENIAL OF MOTIONS TO SUPPRESS PHYSICAL EVIDENCE AND STATEMENTS

A. The state's forensic evidence placing Mr. Wyatt at the scene was based on blood and hair samples taken pursuant to a search warrant. The court heard the defense motion to suppress these samples during the trial. R 2710-16. The evidence on the motion showed that Captain Blanton of the Vero Beach Police presented a South Carolina judge with an eleven-page document which Blanton termed an "affidavit." R 2713-14. Although Blanton orally swore to the truth of the document's contents, the document itself contained no jurat. R 2715-16.

Both Florida and South Carolina require one or more affidavits as a basis for issuance of a search warrant. § 17-13-140, S. C. Code; § 933.04, Fla.Stat. Both states require strict compliance, and there is no "good faith" exception. State v. McKnight, 352 S.E.2d 471 (S.C. 1987); Collins v. State, 465 So. 2d 1266 (Fla. 2d DCA 1985).[15] Although there does not seem to be any South Carolina case on point, this Court has held that an "affidavit" without an appropriate jurat is no affidavit at all. State ex re. Richardson v. Lawrence, 120 Fla. 836, 163 So. 231 (1935). Capt. Blanton's "affidavit," lacking the formal requisites, had no more effect than any other piece of paper: it was not an affidavit as recognized at law, so that the search warrant was illegal and the trial court erred in denying the motion to suppress.

B. The motion to suppress statements was also heard during the trial. FBI Agent Clemens testified that, when read his Miranda rights, Mr. Wyatt "quiried [sic] me as to whether I thought he needed an attorney or not, indicating, you know, 'do I -- do you think I need a lawyer?'" R 2483. Clemens believed Wyatt's exact words may have been

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[15] Of course, the state made no argument based on any "good faith" exception at bar, and thus has waived any such defense.

something to the effect of: "Do you think I probably need a lawyer" or something. R 2484. "I explained to him that I couldn't advise him one way or the other as to whether or not he needed an attorney or didn't need an attorney, only he could make that determination. If he wanted an attorney, an attorney would be provided for him. If he wanted to go ahead and talk to us, you know, we were interested in talking to him." R 2484. Right after that, Mr. Wyatt asked what is it that you want to talk to me about, or what do you want to talk about, and Agent Clemens replied: "Well, we would like to discuss pretty much the events that have taken place between the time that you left North Carolina and right now." R 2485. Mr. Wyatt then said: "Well, I can talk about some of that." R 2485-2486. Agent Clemens then "went back to the form, you know, to try and obtain a signature on the waiver to go ahead and begin the interview, at which time he indicated that, you know, 'I am not signing anything.' At that point, you know, before being more of a bureaucratic thing of the FBI, you know, I felt that he had, in fact, you know, understood his rights and the fact that he was unwilling to sign the form did not in any way make me feel that he was not waiving his rights, so we just went ahead and went on and conducted the interview." R 2486-2487.

When a suspect invokes the right to counsel, custodial interrogation must stop. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Here, when Mr. Wyatt asked about a lawyer and refused to sign the rights card, the officers simply went ahead with the interrogation in violation of the Constitution. It was error to deny the motion to suppress.

3. DNA EVIDENCE

Dr. Kevin McElfresh, director of Identity Testing at Life Codes Corporation, testified that the chances were one in thirty-three billion of the semen in Ms. Edwards' vagina being from someone other than Mr. Wyatt. R 3199. He based his statistical analysis on measurements of the DNA made by Dr. Baird and Melinda Keel, who did not testify, R 3178-79, 3193,[16] and on DNA taken from a sample population. The measurements, called sizings, are made with precise scientific instruments. Lorah Perlee, a Life Codes research scientist, testified that two sizings are made and averaged; the average is used for comparison. R 3149-50. If there is more than a 1.8% difference in the sizings, they are not averaged. R 3151. The defense objected to the DNA testimony on several grounds.

1. The defense objected to the statistical testimony because, as shown on examination of Dr. McElfresh, it was based on rather speculative and ever-changing evidence concerning the DNA characteristics of small sample populations. R 3031-47, 3051-52. As the defense pointed out, the Supreme Court of Minnesota has found the sample population figures so speculative and variable as to lead to the presentation of unreliable and misleading statistical evidence with "potentially exaggerated impact on the trier of fact." State v. Schwartz, 447 N.W.2d 422 (Minn. 1989). Under the teachings of State v. Schwartz, the trial court erred in permitting the state present testimony of the one in thirty-three billion figure.

2. The defense also objected to Dr. McElfresh's statistical testimony pointing out that it was based on measurements made by

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[16] Dr. McElfresh made one sizing of one "probe," but did not make sizings of the other probes. R 3176. (There were four probe results. R 3196.)

persons who were not witnesses. R 3165. The state rejoined that it was not necessary to hear from the people who actually made the sizings. R 3166. The court overruled the defense objection without explanation. R 3179.

The court erred. There was no showing that Baird and Keel complied with accepted scientific protocols.

Florida uses the "Frye"[17] standard for expert evidence. Flanagan v. State, 18 FLW S 475 (Fla. Sept. 9, 1993), Stokes v. State, 548 So. 2d 188, 195 (Fla. 1989). U.S. v. Two Bulls, 918 F.2d 56 (8th Cir. 1990) and U.S. v. Jakobetz, 955 F.2d 786 (2nd Cir. 1992) discuss at length the admissibility of DNA testimony under the Frye test as opposed to more liberal evidentiary standards. In U.S. v. Jakobetz, the Second Circuit, using its own "liberal" standard, authorized use of DNA evidence, but noted that many authorities have taken a stringent approach to admission of DNA evidence. 955 F.2d at 794-96. In U.S. v. Two Bulls, the Eighth Circuit, employing the Frye standard, agreed with People v. Castro, 545 N.Y.S.2d 985 (N.Y.Sup.Ct. 1989) in determining that the proponent of DNA evidence must show reliability of laboratory procedures.

As a Frye jurisdiction, Florida should follow the principles set out in U.S. v. Two Bulls, People v. Castro, and advanced by Professor Imwinkelreid and others.[18] At bar, the state had the burden of showing the adequacy of the sizings made by Dr. Baird and Ms. Keel. Dr. McElfresh could scarcely testify that there was only one chance in 33,000,000,000 that they erred in testing procedures or did not mix up

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[17] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

[18] See the discussion in U.S. Jakobetz.

samples. The court erred in permitting testimony based on their measurements.

3. The trial court also erred in permitting criminalist Daniel Nippes testify that he is a member of a committee developing DNA evidence in Florida and that he recommended sending the samples to Life Codes, where he had studied. R 2951-55. It is improper to use one expert to establish or detract from the expertise of another. See Ecker v. National Roofing of Miami, 201 So. 2d 586, 588 (Fla. 3rd DCA 1967), Nowitzke v. State, 572 So. 2d 1346, 1352 (Fla.1990) (citing cases), Carver v. Orange County, 444 So. 2d 452, 454 (Fla. 5th DCA 1984). See also Tingle v. State, 536 So. 2d 202 (Fla.1988) (expert may not be used to bolster credibility of witness).

4. EVIDENCE OF MR. WYATT'S PRIOR IMPRISONMENT

For the ostensible purpose of laying a predicate for the testimony of a handwriting expert, the state presented samples of Mr. Wyatt's handwriting through the testimony of a North Carolina prison escape investigator. R 2097-2118. As defense counsel pointed out, the state had Mr. Wyatt in its custody and had access to other writing samples. The state offered no predicate for its claim that only the North Carolina prison handwriting sample could serve its purpose.[19] It was reversible error to let the state inform the jury that Mr. Wyatt was an escaped convict. Czubak v. State, 570 So. 2d 925 (Fla. 1990).

[19] In fact, the state used post-arrest handwriting samples taken from Mr. Lovette to establish his handwriting. R 2138-39.

5. COLLATERAL CRIME AND CHARACTER EVIDENCE

Over objection, R 2202-2205,[20] the court let the state present evidence that Mr. Wyatt stole a Fort Taurus at Madeira Beach a week or two after the murders. Also over objection, R 2361-63, it allowed testimony that, a month after the murders, he told Larry Bouchette that he had killed three people and could do it again, and evidence that he stole Bouchette's truck. Over objection, R 2395-96, the court allowed testimony that, a month after the murders, Mr. Wyatt ran away from a police officer investigating a stolen car in which Mr. Wyatt was a passenger, and that, when caught, he put up a violent struggle.

The court erred in ruling that any evidence pertaining to flight was admissible. Section 90.404, Florida Statutes, bars evidence of collateral bad acts except in narrow circumstances. Since such evidence is prejudicial, the state must affirmatively establish its propriety. Malcolm v. State, 415 So. 2d 891, 892, n.1 (Fla. 3d DCA 1982). The evidence is proper only where there are "pervasive similarities" between the collateral act and the charged offense, Gore v. State, 599 So. 2d 978 (Fla. 1992), or there are very strong policy reasons for admission of the evidence, as in cases involving familial sexual battery on a minor. There are no such pervasive similarities or policy considerations here. Use of extensive collateral evidence under the rubric of evidence of flight is improper. Merritt v. State, 523 So. 2d 573 (Fla. 1988). See also Dailey v. State, 594 So. 2d 254

[20] The court ruled that "anything that is connected with the flight I think is proper." R 2204. The state based its argument (and the trial court apparently based its ruling), that all evidence of flight was admissible, on Bundy v. State, 455 So. 2d 330, 348 (Fla. 1984). R 2202-2205. Bundy authorized an instruction on flight, and did not discuss the admissibility of evidence of collateral crimes. Fenelon v. State, 549 So. 2d 292 (Fla. 1992) overruled Bundy.

(Fla. 1991). Improper collateral crime evidence violates due process. McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993).

The auto thefts were irrelevant to any fact in issue, and resisting arrest was only logically related to theft. See generally Wright v. State, 586 So. 2d 1024 (Fla. 1991). The statement that he could kill again showed only criminal propensity. See Jackson v. State, 451 So. 2d 458 (Fla. 1984) (evidence defendant pointed gun at witness and said he was a thoroughbred killer). The extensive evidence of actions after the alleged crimes was reversible error. Merritt.

The court also erred by overruling the defense objection to testimony from Mr. McCoombs that Mr. Wyatt had the look of a killer. ("I mean, have you ever seen anybody smile with their mouth and not with their eyes? That's the effect that I had, somebody that -- if I looked at him -- the way I look at him, if he was pointing a gun at me, I would have knew that he was going to kill me." R 2771-2772.) Jackson.

Mr. McCoombs several times in his testimony spoke of fear that Mr. Wyatt would retaliate against him for his testimony as part of a "convict code," R 2790-92, and finally asserted that, after testifying, he would be placed in a witness protection program, subject to his passing polygraph tests. R 2866. The defense unsuccessfully objected and moved for a mistrial. R 2866-67. The testimony was improper. Ponticelli v. State, 593 So. 2d 483, 489 (Fla. 1991).

Improper use of character evidence such as collateral crime evidence usually requires reversal of a resulting conviction. In Keen v. State, 504 So. 2d 396 (Fla. 1987), the state asked the defendant if he had previously tried to kill his sister-in-law. The trial court held the question improper, but refused a mistrial. This Court held

that the single question required reversal of Mr. Keen's conviction for first degree murder of his wife, noting that such evidence is "presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged."

6. SHACKLING OF DEFENDANT

When defense counsel objected that Mr. Wyatt was shackled during individual voir dire in chambers, the court judge overruled with these words: "He is in the custody of the sheriff. He is not in my custody." 303. Thus it made no determination whether shackling was necessary. Given the prejudicial effect of shackling, it is reversible error to have the defendant shackled without the court's determining its necessity. Bello v. State, 547 So. 2d 914 (Fla. 1989).

7. REFUSAL TO HEAR PROFFER

Refusal to allow a proffer of evidence requires reversal of a resulting conviction. Pender v. State, 432 So. 2d 800 (Fla. 1st DCA 1983), Hawthorne v. State, 408 So. 2d 801 (Fla. 1st DCA 1982). The trial court's failure to make a record sufficient to allow appellate review requires reversal; a court cannot lawfully exercise discretion without informing itself of the proposed evidence on the record. See Smith v. State, 500 So. 2d 125, 126 (Fla. 1986) (discovery violation; "A reviewing court cannot determine whether the error is harmless without giving the defendant the opportunity to show prejudice or harm."), Loucks v. State, 471 So. 2d 131 (Fla. 4th DCA 1985) (voir dire of venire); United States v. Simtob, 901 F.2d 799, 804 (9th Cir. 1990) (error to deny motion to reopen evidence to admit tape without hearing tape: "The trial judge, in effect, declined to exercise his discretion at all; his determination of the tape's cumulative nature, or,

alternatively, of its value to the defense, was therefore made without a proper 'consideration of relevant factors,' and constituted an abuse of discretion."), United States v. Walker, 915 F.2d 480 (9th Cir. 1990) (failure to inquire fully into conflict of interest).

Here, the court reversibly erred in adopting such a deaf-eared policy, refusing to hear a defense proffer of evidence to show why the defendant's fingerprints were illegally obtained. R 1830-33.

8. SPECULATIVE TESTIMONY OF MEDICAL EXAMINER

The trial court overruled defense objections that testimony of Dr. Hobin, the medical examiner, was speculative. Dr. Hobin testified over objection that: he could imagine as a possibility that Mr. Edwards was kneeling down when shot, and that he was shot as he turned towards the shooter, R 1475-76, Ms. Edwards' wound was consistent with the assumption that she was kneeling, R 1521-22, and that the injury to Mr. Bornoosh was consitent with the shooter firing from outside the bathroom, and the bullet glancing off Bornoosh's skull, and hitting the wall behind, depositing some hair. R 1545-48. The trial court erred. The questions assumed facts not in evidence and were speculative. A party may not use speculative questioning to establish its theory of the case. Del Monte Banana Co. v. Chacon, 466 So. 2d 1167 (Fla. 3rd DCA 1985). The state did not dispute that the evidence was prejudicial, R 1475, 1546-47, and reversal is required.

9. JURY INSTRUCTIONS

1. Flight.

Over objection, R 3377-79, the court instructed the jury on flight, and the prosecutor argued flight to the jury as evidence of guilt. R 3458-61 (argument of prosecutor).

It is improper to instruct on flight. Fenelon v. State, 549 So. 2d 292 (Fla. 1992). See also Wright v. State, 586 So. 2d 1024, 1030 (Fla. 1991) and Jackson v. State, 575 So. 2d 181, 188-89 (Fla. 1991).

The state must show absence of prejudice beyond a reasonable doubt. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). The test is whether the improper instruction "contributed" to the verdict. Id., Sochor v. Florida, 112 S.Ct. 2114, 2123 (1992). The state is ill placed to call harmless a matter it urged the jury to consider. See generally DeMarco v. U.S., 928 F.2d 1074 (11th Cir. 1991) (prosecution capitalized on false evidence in argument to jury).

2. Premeditated design to kill.

The jury instruction on "premeditated murder" unconstitutionally removed an issue from the jury's consideration and relieved the state of its burdens of persuasion and proof.

a. Section 782.04(1)(1), Florida Statutes defines first degree murder. It provides for two forms of the offense. One is murder from a premeditated design, and the other is felony murder. The statute defines murder from premeditated design as follows:

> The unlawful killing of a human being:
>
> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being.

McCutchen v. State, 96 So. 2d 152, 153 (Fla. 1957) defined the "premeditated design" element (emphasis supplied):

> A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be

> premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.

See also Littles v. State, 384 So. 2d 744 (Fla. 1st DCA 1980) (quoting McCutchen).

In Owen v. State, 441 So. 2d 1111, 1113 n.4 (Fla. 3rd DCA 1983), the court wrote (emphasis supplied):

> "'Premeditation' and 'deliberation' are synonymous terms, which, as elements of first-degree murder, mean simply that the accused, before he committed the fatal act, intended that he would commit the act at the time that he did, and that death would be the result of the act." [Cit.] Deliberation is the element which distinguishes first and second degree murder. [Cit.] It is defined as a prolonged premeditation and so is even stronger than premeditation. [Cit.]

Similarly, the revised fourth edition of Black's Law Dictionary defines "deliberation" at page 514:

> **DELIBERATION.** The act or process of deliberating. The act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means. See Deliberate.

b. The trial court has a duty to instruct the jury on the law. Rule 3.390(a), Florida Rules of Criminal Procedure, provides in pertinent part: "The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel."D u e process requires instructions as to what the state must prove in order to obtain a conviction. See Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (willfully depriving person

of civil rights; jury not instructed as to meaning of "willfully": "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial."). It is fundamental error to instruct the jury incorrectly as to what the state must prove in order to obtain a conviction. State v. Delva, 575 So. 2d 643 (Fla. 1991) (error in instruction on element not fundamental where element not in dispute).

The federal and state constitutional rights to trial by jury carry with them the right to accurate instructions as to the elements of the offense. In Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945), the court wrote in reversing a conviction where there was an incorrect instruction on self-defense:

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

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

A jury instruction that relieves the state of the burden of proof or of persuasion as to an element of the offense is unconstitutional. In Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), a defendant in Maine was charged with murder, which under Maine law required proof not only of intent but of malice. The trial court instructed the jury that malice was an essential element of the crime. But then it instructed the jury that if the prosecution established that the homicide was both intentional and unlawful, malice was to be implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. The Supreme Court held that the resulting conviction was unconstitutional because the instruction relieved the state of the burden of proving the malice element. See Sandstrom v. Montana, 442 U.S. 510, 524, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (discussing Mullaney). In Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the Supreme Court held that a jury instruction is unconstitutional where it relieves the state of the burden of persuasion as to the elements of the offense charged. Where a jury instruction authorizes a conviction on an improper theory of guilt, the resulting conviction is illegal. E.g. Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988) (citing cases).

C. The standard jury instruction on first degree murder, which was used here, R 3523-29, does not explicitly state that "a premeditated design" is an element of first degree murder. It provides:

> There are two ways in which a person may be convicted of first degree murder. One is known as premeditated murder and the other is known as felony murder.
>
> Before you can find the defendant guilty of First Degree Premeditated Murder, the State must prove

> the following three elements beyond a reasonable doubt:
>
> 1. (Victim) is dead.
>
> 2. The death was caused by the criminal act or agency of (defendant).
>
> 3. There was a premeditated killing of (victim).
>
> "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the premeditation at the time of the killing.
>
> If a person had a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated.

The standard instruction is unconstitutional and misstates Florida law. It unconstitutionally relieves the state of its burdens of proof and persuasion as to the statutory element of premeditated design. The only attempt in defining the premeditation element is: "'Killing with premeditation' is killing after consciously deciding to do so." There is no mention of the requirement, under McCutchen, that the state prove "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation," and that "the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution."

Additionally, the standard instruction relieves the state of the burdens of proof and persuasion as to the requirement that the premeditated design be fully formed before the killing. While the standard instruction states that "killing with premeditation" is killing after consciously deciding to do so, it relieves the state of its burden by creating a presumption: "It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the premeditation at the time of the killing." Thus the jury is told that it need only find premeditation at the time of the killing. Finally, it does not instruct the jury that the premeditated design element, carrying with the element of deliberation, requires more than simple premeditation.

3. Reasonable doubt.

An improper instruction on reasonable doubt is a structural defect which can never be harmless. Sullivan v. Louisiana, 113 S.Ct. 1078 (1993), Cage v. Louisiana, 111 S.Ct. 328 (1990).

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

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

Speculation and imagination come into play when one determes to act in the most important of one's affairs. A doubt founded on speculation or an imaginary or forced doubt will cause one to hesitate to act.[21] The instruction was unconstitutional.

Appellant agrees that Woods v. State, 596 So. 2d 156 (Fla. 4th DCA 1992) rejected a similar argument. Woods was wrongly decided

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

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

because it used an incorrect legal standard[22] and is contrary to United States v. Holland, Cage and Sullivan.

The instruction violated article 1, sections 9 (due process), 16 (rights of accused), 21 (access to courts), and 22 (trial by jury) of the state constitution, and the fifth (due process), sixth (jury trial), and fourteenth (due process and incorporation) amendments to federal constitution.

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

10. THE PROSECUTION'S FINAL ARGUMENT AS TO GUILT

Improper argument is subject to review even absent an objection if it amounts to fundamental error. E.g. Grant v. State, 194 So. 2d 612 (Fla. 1967); Pait v. State, 112 So. 2d 380 (Fla.1959); Riley v. Willis, 585 So. 2d 1024 (Fla. 5th DCA 1991); Stokes v. Wet 'N' Wild, Inc., 523 So. 2d 181 (Fla. 5th DCA 1988). Fundamental error occurs where the prosecutor's presentation, as a whole, is of such a character that neither rebuke nor retraction may entirely destroy its sinister influence. Ryan v. State, 457 So. 2d 1084, 1091 (Fla. 4th DCA 1984), Wilson v. State, 294 So. 2d 327, 329, n.3 (Fla. 1974).

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

"Arguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury. For this reason, misconduct by the prosecutor, normally an elected public official must be scrutinized carefully. Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1934)." Drake v. Kemp, 762 F.2d 1449, 1459 (11th Cir. 1985).

The state may not: urge consideration of the defendant's future dangerousness;[23] use epithets;[24] make assertions of personal belief in the defendant's guilt[25] or in the veracity of the witnesses,[26] or directly or indirectly vouch for a witness's credibility;[27] comment directly or indirectly on defense failure to call witnesses; comment on matters not in evidence;[28] elicit sympathy for the decedent, the complaining witness, or their families;[29] attack counsel;[30] or suggest

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[23] Rahmings v. State, 425 So. 2d 1217 (Fla. 2d DCA 1983) (acquittal would "prevent a murder"), Williams v. State, 425 So. 2d 591 (Fla. 3d DCA 1982) (defendant would commit more crimes). See also Teffeteller v. State, 439 So. 2d 840, 844-45 (Fla. 1983).

[24] O'Callaghan v. State, 429 So. 2d 691 (Fla. 1983) (calling defendant liar during cross-examination), Green v. State, 427 So. 2d 1036 (Fla. 3d DCA 1983) (cunning; "Dragon Lady"), Ryan v. State, 457 So. 2d 1084, 1091 (Fla. 4th DCA 1984) (rich), Watson v. State, 559 So. 2d 342 (Fla. 4th DCA 1990) ("bad guy who [was] elevating his crime").

[25] Jones v. State, 449 So. 2d 313 (Fla. 5th DCA 1984).

[26] Id.; Stokes v. Wet 'n' Wild.

[27] U.S. v. Eyster, 948 F.2d 1196 (11th Cir. 1991).

[28] U.S. v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991) (government may not "allude to evidence not formally before the jury").

[29] Gonzalez v. State, 450 So. 2d 585 (Fla. 3d DCA 1984), Edwards v. State, 428 So. 2d 357 (Fla. 3d DCA 1983) (trial court "should so affirmatively rebuke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments").

[30] U.S. v. Friedman, 909 F.2d 705 (2nd Cir. 1990), Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984).

that law enforcement thinks the defendant is guilty.[31] Evidence of the defendant's felony convictions are impeachment, but are not evidence of guilt. § 90.610, Fla.Stat. Argument dwelling on the defendant's prior criminal record requires reversal. Brown v. State, 284 So. 2d 453 (Fla. 3rd DCA 1973), Bullard v. State, 436 So. 2d 962 (Fla. 3rd DCA 1983).

The state's argument to the jury violated these principles. It went well beyond commenting on the evidence: "This was a crime that shocked the community, a small, quiet community, Indian River County, Vero Beach. It was a crime that went unsolved for a couple of months. But you saw and you heard the testimony of the law enforcement officers who participated in the investigation of this case, that a task force was formed because of the enormity of this crime and the complexity. And it was formed made up of officers of several law enforcement agencies. The sheriff of Indian River County and police chief of Vero Beach gave men, time, equipment and money, that my office assigned David Morgan full-time to work with these officers in this case, the Florida Department of Law Enforcement assigned agents full-time to work on this case. We didn't do all that so we could come in here and impress you with a bunch of witnesses; we did that because these murders needed to be solved." R 3432-3433. "They didn't just rush out and arrest the first people that they found; they painstakingly investigated every lead they could, and when it looked like there were no leads, they continued on. Every piece of evidence was not assumed to be a useful piece of evidence and just left at that, every piece of evidence was sent not only to experts, but the best ones we could find. Dan Nippes was a local expert in the Indian River Regional

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[31] Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984).

Crime Laboratory, but he's well-known, not only throughout the state but the United States, as an expert in his field. People from the Florida Department of Law Enforcement could have probably done some of the tests that we had done in this case, but we wanted to make sure that we had people who were premiere in their field, not to impress you but so that we were sure that we could put together a case that would prove that these defendants were guilty. That's why these people were called in, that's why these samples were sent to them." R 3433-3434. "Was there any question asked of any witness, other than Wyatt saying it's not his, was there any question asked of any witness that indicates to you in any way that you should not or cannot accept the DNA testimony? Was there anything that he asked either of him that indicates in any way that they are not sure of their testimony is not reliable?" R 3438. "I think it's clear from the evidence in this case that even if you don't believe that Wyatt was the one who physically took the shirt from Matthew Bornoosh, both of them were committing that robbery, each is as guilty as the other for all the acts of their co-defendant." R 3449. "He claimed he doesn't know why Lovette burned the car. The truth is though that he knows very well. This is not a naive young man. This is a twenty-seven year old, at the time a twenty-five year old, 8-time convicted felon, who knew very well why he and Lovette decided to burn that car." R 3456. "Remember him testifying about stuff in the trunk of that car? He knew that there was evidence of him; fingerprints, hairs, fibers in that car. And he knew, that 8-time convicted felon knew what he had to do to make sure that car wasn't linked back to him." R 3457. "There is really only conflict between one witness and every other witness. This isn't a case where you have a lot of witnesses who are all conflicting with

each other. We have one witness, the Defendant, who conflicts with all the other witness, just about all the other witnesses." R 3461. "And belief [sic] me, if the defense -- if there had been offers or promises of better treatment or easier sentence or getting out of jail or a money reward to McCoombs, the defense would have drilled that home to you. And that's just absolutely not the case here." R 3465. "If the contact with McCoombs had been instigated by law enforcement, the defense would have known that. The defense took a lot of time to look at every single exhibit. Every time that we used something, every time that we showed something, they sat there for minutes, minute after minute, looking at these things and examining these things. Don't walk out of here with the impression that that was the first time they saw this. All these exhibits, all of these witnesses, all of this evidence was not only known to the Defendant's attorneys before this trial, but they had the opportunity to talk to every witness to see every police report we had, to examine every witness' statement that we had, to talk to the people in Greenville and at the federal penitentiary to find out whether there had been any deals made with McCoombs or whether there was any pressure put on McCoombs." R 3465-3466. "Mr. Morgan didn't say anything under his breath. What he said to him was, 'On those 8 felonies that you were convicted of, was it your fault or was it police fault?' Do you recall Wyatt saying, 'Hey most of those it was the police.' He blames all of his problems on other people. Everything that goes against him in this case, he tells you you shouldn't believe." R 3473. "This is a man, twenty-seven years old, twenty-five at the time, who manipulates people, who gets what he wants by manipulating people. I submit that his story is not worthy of belief. He is cunning. He told McCoombs he had it figured out: 'No guns; no

case.' And, 'Jim did it.'" R 3475-3476. "Now, this is a novice. This is a man, by his own admission, who has been convicted of 8 felonies. This is a man who was smart enough to burn the car so they wouldn't get trace evidence. But they want you to believe that because they found no fingerprints in this building that he wasn't there." R 3477. "This is a guy who has no feelings. This is a guy who has no emotions. He was that way when he was talking to Agent Clemens, the FBI agent, about Jim being the one that did this. He had that same cool, calm detachment when he testified to you from the witness stand yesterday. He's actually dangerous. He's a very dangerous man and one to be feared. He would have you believe that this 8-time convicted [felon] only brought a gun to the State of Florida to protect himself because it's such a dangerous place. Because Florida is such a dangerous place, this guy had to bring a gun into Florida to protect himself. The real reason why Florida was so dangerous on May 17, 1988, was because of this 8-time convicted felon was walking around with a gun and a stolen car in Vero Beach." "You know, with that same coolness that he sat on that witness stand and talked to you, with that same detachment that he carries out the rest of his life, he took that gun into that Domino's store and he took these three people and put them in the bathroom and executed them one-by-one. It didn't stop him from doing anything else. This is the type of person that you are dealing with." R 3479-3480.

11. CONDUCT OF SENTENCING HEARING

The jury and non-jury sentencing hearings were unconstitutional. The trial court erred in not granting a continuance so that the defense could present mitigation. The waiver of mitigation was not knowing and intelligent. The court did not inform itself of the available

mitigation and hence was in no position to deny a continuance. After the penalty recommendations, the court determined the sentence prior to the sentencing hearing, and conducted the sentencing hearing without determining whether there was mitigation and whether mitigation was waived, and turned defense counsel into state witnesses defeating Mr. Wyatt's right to advocacy for his life. In sum, the sentencing procedure violated the principles set out in Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1948):

> The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open.

A. The trial court erred in denying a continuance of the jury sentencing proceeding and letting the case go the jury without presentation of mitigation.

1. This is not a case in which the defendant forbade evidence and argument in mitigation because he sought the death penalty. The record shows that Mr. Wyatt wanted presentation of mitigation from his mother and sister, that the trial court made only a feeble attempt to vindicate his right to mitigation, and that the waiver of mitigation was not based on an understanding of the nature of penalty proceedings. Although the prosecutor urged upon the court (on the basis of nothing on the record) his personal belief that Mr. Wyatt had turned himself

into a jailhouse lawyer capable of manipulating the system,[32] and the court "bought" the prosecutor's improper statements of personal opinion, the record shows it was the state which was manipulating the system: the prosecutor knew months before the trial that the defendant's mother was incompetent and failed to bring the unavailability of this crucial witness to the attention of counsel and the court. Had the state not concealed this important fact, appropriate measures could have been taken. The state knew for months that, at the last minute, it would present Mr. Wyatt with the fait accompli of his mother's absence at the most crucial point in his life and in the proceedings. Given the state's bad faith, the court erred in denying a continuance. State v. Reed, 421 So. 2d 754 (Fla. 4th DCA 1982); Wike v. State, 596 So. 2d 1020 (Fla. 1992). Since the court did not inform itself of the nature of the testimony that the sister and mother could present, it was in no position to determine the necessity of a continuance.

2. The record shows that Mr. Wyatt thought that the state would be limited to direct evidence and that, in consequence, it would be unfair and ineffective to present his mitigation through a tape or affidavit. He was unaware that the state would be allowed to place substantial reliance on hearsay in its case for death. His court-appointed counsel was unaware of the applicable law, R 3660, so there was no one to inform that his decision was based on a misunderstanding of the nature of the proceeding. Insofar as there was a waiver of mitigation it was involuntary and unknowing, and therefore invalid.

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[32] Since the state accompanied its attacks with assertions that defense counsel were victims of Mr. Wyatt's "manipulation," defense counsel were no no position to counter the attacks, for to do so would be to divert the attacks to themselves.

A waiver of important constitutional rights must be knowing and intelligent. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). The waiver at bar was not, and reversal is required.

3. The court also erred in its unreasoned refusal to order a mental evaluation. Any waiver of mitigation is suspect where the record raises doubts about the defendant's mental condition. Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986). The court's decision both unconstitutionally blocked the development of mitigation, Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 53 (1985) and resulted in failure to present mitigation where the decision not to present mitigation may have been the product of the defendant's delusional or defective mental state.[33]

B. The post-jury sentencing proceeding was also unconstitutionally conducted.

1. The defendant has a constitutional right to present mitigation to the trial court even if it was not presented to the jury. Craig v. State, 510 So. 2d 857 (Fla. 1987). See also Spencer v. State, 615 So. 2d 688 (Fla. 1993). Waiver of mitigation must be made by the defendant personally. E.g. Hamblen v. State, 527 So. 2d 800 (Fla. 1988). The record shows that in January Mr. Wyatt sought a continuance of the jury sentencing hearing because of the illness of his two main mitigation witnesses (his mother and his sister). When the court refused the continuance, Mr. Wyatt decided not to present mitigation to the jury. The record shows that when the case came before the court on February 22 for sentencing, his mother had recovered sufficiently that she would be able to testify. R 3920. The court made no inquiry

[33] Needless, the court may not rely on its own subjective view of the defendant's mental condition. Scott v. State, 420 So. 2d 595 (Fla. 1982).

as to waiver of mitigation at that time, and the record shows none. The court erred by conducting the sentencing hearing without determining if mitigation was available.

2. After receiving the jury's recommendations, the court refused to order a PSI or a mental examination of Mr. Wyatt, and then prepared its typed sentencing order before the next hearing without hearing anything from the defense. The court erred. Under Spenser, the court is to conduct an allocution hearing to hear argument and evidence before preparing the sentencing order. Cf. Keech v. State, 15 Fla. 591, 609, (1876) Ball v. United States, 140 U.S. 118, 129-30, 11 S.Ct. 761, 35 L.Ed. 377 (1891), Green v. United States, 365 U.S. 301, 304, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961).

Here, although he complained that no one proffered the mitigation, the judge thwarted mitigation by refusing to order a PSI or mental evaluation (the state opposed neither) and did not require a proffer of mitigation. The request for a PSI and mental examination belies any claim that the waiver of mitigation for the jury carried to allocution; further, the statements of counsel should have given rise to doubts about reliance on Mr. Wyatt's waiver of mitigation without determination of his mental condution. The refusal of the PSI and mental evaluation[34] bespoke a determination of sentence without hearing mitigating evidence or argument, which was confirmed by the preparation of the sentencing order before the hearing.

3. Since he had already prepared his sentencing order, the judge did not take into account the defendant's statement in mitigation expressing sympathy for the families of the decedents. The court

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[34] "I think at this point, I don't need one, and I don't think it would be particularly helpful at this point. I don't know." R 3777-78. "I don't see any particular need for that." R 3785.

sarcastically cut Mr. Wyatt off and then launched into a full scale inquiry into attorney-client communications. Since the court failed to consider the statement in mitigation and heard no further mitigation, resentencing is required under Eddings, Craig and Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

4. Since defense counsel were turned into witnesses for the prosecution, Mr. Wyatt was deprived of his right to counsel at the sentencing proceeding. Busy with the court and prosecutor, counsel adduced no evidence or argument in favor of sentences of life imprisonment. Resentencing is required under Blanco v. Singletary, 943 F.2d 1477, 1497 (11th Cir. 1991) and Koon v. Dugger, 619 So. 2d 246-250-51 (Fla. 1993).

12. THE PREMEDITATION AND HEINOUSNESS CIRCUMSTANCES

"[T]he trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984)." Robertson v. State, 611 So. 2d 1228 (Fla. 1993). At bar the court erred by instructing the jury on, and by applying, the premeditation and heinousness circumstances. The instructions on the circumstances, and the circumstances themselves, are unconstitutional.

1. Cold, calculated, and premeditated.

The circumstance does not apply when the defendant is enraged or when the evidence does not show intent to commit murder before the fatal episode began. See Sochor v. State, 619 So. 2d 285 (Fla. 1993) (enraged by woman's resistance, defendant strangled her), Power v. State, 605 So. 2d 856 (Fla. 1992) (Defendant raped, kidnapped, stabbed 12-year-old girl. Although rape was carefully planned, evidence did

not show that murder was carefully planned.), Gore v. State, 599 So. 2d 978 (Fla. 1992) (taking woman to remote location, defendant raped and murdered her), Geralds v. State, 601 So. 2d 1157 (Fla. 1992) (during carefully planned burglary of home of family he knew, defendant bound and then murdered woman), Lawrence v. State, 614 So. 2d 1092 (Fla. 1993) (after procuring gun, defendant committed robbery during which he killed victim). The evidence at bar does not show a prearranged design to murder: the state's main witness, Mr. McCoombs testified that they were the result of rage because the safe did not contain enough money and the defendant was angry at the persons in the store. See Thompson v. State, 456 So. 2d 444 (Fla. 1984), White v. State, 446 So. 2d 1031, 1037 (Fla. 1984).

The instruction itself merely tracked the statute. The statutory terms, without modification, are unconstitutional. Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). Hence, the instruction was itself unconstitutional.

The circumstance itself is unconstitutional: although this Court has ruled that the circumstance "ordinarily" applies to contract and execution murders, the qualifier "ordinarily" leads to arbitrary application in violation of the teachings of Maynard v. Cartwright, 486 U.S. 356 (1988).

2. Especially heinous, atrocious, or cruel.

It was error to use this circumstance for these murders by gunshot. The facts do not vary significantly from those in the following cases disapproving use of the circumstance: Burns v. State, 609 So. 2d 600 (Fla. 1992) (defendant shot trooper who was standing in watery ditch begging for his life); Robertson (defendant shot woman as she cried and screamed after he shot her companion); Bonifay v. State,

18 FLW S 464 (Fla. Sept. 2, 1993) (defendant shot store clerk as he lay on floor begging for his life and talking about his wife and children); Santos v. State, 591 So. 2d 160 (Fla. 1991) (defendant chased and shot woman and children running down street screaming).

From the foregoing, it was error for the court to find these circumstances and instruct the jury on them. The brunt of the prosecutor's argument on sentencing circumstances focussed on the heinousness and premeditated circumstances.[35] This Court should order a new jury sentencing. Lawrence v. State, 614 So. 2d 1092 (Fla. 1993).

The instruction on the heinousness circumstance was unconstitutional. Espinosa v. Florida, 112 S.Ct. 2926 (1992). The circumstance is also unconstitutional. Although the court may have limited its application in stangulation cases, Sochor v. Florida, it has not otherwise limited it in a consistent way: in Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1984) the court officially renounced all limiting constructions on the circumstance.

13. PENALTY PHASE EVIDENCE OF CRIMINAL ACTIVITY

At penalty, the state called a North Carolina prison official to testify that Mr. Wyatt and Mr. Lovette had walked away from a prison road crew. R 3658-59. The trial court erred in overruling defense objections, R 3663-65, 3672, to evidence that they committed various thefts after leaving the road crew.

The issues at sentencing are strictly limited to the aggravating and mitigating circumstances: the state may not present evidence of nonstatutory aggravating circumstances. Elledge v. State, 346 So. 2d

[35] The argument on the heinousness circumstance covered 118 lines of transcript. R 3749-54. Argument on the premeditation circumstance covered 45 lines. R 3754-56. By contrast, argument on the other five circumstances totalled 119 lines. R 3744-49.

998, 1002 (Fla. 1977), Provence v. State, 337 So. 2d 783, 786 (Fla. 1976), Dougan v. State, 470 So. 2d 697, 701 (Fla. 1985). Theft of property during an escape is not an aggravating circumstance. The state's theory, that it had "an obligation to tell the jury how they escaped," had no basis in law. Since the state argued that the evidence was "certainly relevant to the aggravating circumstances," R 3665, it cannot now say that it did not contribute to the sentences. Hence, reversal for resentencing is required.

14. PENALTY PHASE EVIDENCE REGARDING PRIOR VIOLENT FELONY

The court overruled the Mr. Wyatt's continuing objection to detailed evidence about prior violent felonies and to a photograph showing Mr. Hollar's injuries sustained in the commission of prior violent felonies by Mr. Wyatt. R 3678-80, 3685-86. The court erred. Elledge v. State, 613 So. 2d 434 (Fla. 1993). Since the state agreed that the evidence was prejudicial, R 3686 ("MR. MORGAN: Absolutely it's prejudicial."), R 3679 ("MR. MORGAN: I can agree that the intent is to prejudice the jury against the defendant."), it cannot now argue lack of prejudice. Hence, reversal is required.

15. CONFRONTATION CLAUSE AT SENTENCING

The court erred in overruling a defense hearsay objection to testimony from a South Carolina deputy about statements the robbed chef made to him through an interpreter.

The Confrontation Clause applies to capital sentencing proceedings. Moore v. Zant, 885 F.2d 1497, 1511-12 (11th Cir. 1989) (discussing history of issue). See also Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) and Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (Specht applies to capital sentencing proceedings). In Rhodes v. State, 547 So. 2d 1201

(Fla. 1989), this Court recognized as much, but then authorized the use of hearsay testimony in violation of the Confrontation Clause. Subsequent rulings of the United States Supreme Court[36] make clear that the use of hearsay testimony violates the Confrontation Clause, so that this Court should revisit Rhodes and recognize that the use of hearsay in capital sentencing proceedings violates the Confrontation Clause.

16. IMPROPER PENALTY ARGUMENT

Over objection, the state argued to the jury at penalty:

> You know, in their case [referring to the decedents], unlike Tommy Wyatt, they didn't have the privilege or the protection of our constitution; they didn't have the privilege of having a grand jury consider the evidence in their case, like Tommy Wyatt did; they didn't have the privilege of having a four-week trial with two attorneys to represent them and a judge to preside over it to make sure that everything was done according to the law; they didn't have the privilege of twelve jurors.

R 3760. The defense also objected to the following argument:

> If this isn't what the death penalty was created for, if this isn't what the courts have upheld the use of the death penalty for, then I can't conceive of a murder that would be more fitting.

R 3758. The prosecutor argued concerning nonstatutory mitigation: "I don't think that you heard anything. I don't think there was one thing that you heard in this trial, in either the first or second phase, that even with this catchall category of mitigating circumstances would qualify as a mitigating circumstance." R 3744. He said, "... and when I asked you to return a verdict of guilty I said to you that I felt that we had proven the case both by premeditation and by felony murder. Now, you know what your considerations were when you went back into the jury room, and I feel that the state made out a

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[36] Idaho v. Wright, 110 S.Ct. 3139 (1990) and Dever v. Ohio, 111 S.Ct. 575 (1990).

strong case for both theories of first degree murder." R 3746. He argued that: The killer was "the same defendant who has been sitting at that table for the last four weeks smiling through this trial." R 3752. Mr. Wyatt "didn't feel any remorse over this. It didn't bother him afterwards. It wasn't something that he did on the spur of the moment and he regretted it later. It wasn't something that he sat up at night and worried about or had nightmares about. It wasn't something that he suddenly found God for afterwards and asked for his forgiveness. He bragged about it to Patrick McCoombs." R 3755-56.

The state argued that finding of single aggravating circumstance would justify the death sentence, regardless of its weight: "Under the law, if only one aggravating circumstance was proved, if you felt that there wasn't any mitigating circumstance that outweighed it, you could recommend death." R 3740. It argued that the jury should not consider in mitigation the fact that Mr. Wyatt had consecutive life sentences for the Holly Hill and Greenville crimes. R 3757.[37]

These arguments were improper. The state may not: urge the jury to consider that, unlike the defendant, the decedents did not have a trial,[38] or that the defendant felt no remorse;[39] comment on the defendant's demeanor in court;[40] or intimate a personal belief in the

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[37] This Court recognized that consecutive life sentences are a basis for a life verdict. Jones v. State, 569 So. 2d 1234, 1239-40 (1990). See also Cooper v. State, 581 So. 2d 49, 52 (Fla. 1991) (Barkett, J., concurring).

[38] See Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989) ("the prosecutor concluded his argument by urging the jury to show Rhodes the same mercy shown to the victim on the day of her death.).

[39] E.g. Pope v. Wainwright, 496 So. 2d 798, 802-803 (Fla. 1986) (comment on lack of remorse "clearly improper").

[40] Id. (prosecutor improperly commented on defendant's grinning during trial; "comments on a defendant's demeanor off the witness stand are clearly improper").

propriety of application of the death penalty.[41] It is a violation of the eighth amendment to refuse to consider any mitigating factor. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). A new jury sentencing is required under King v. State, 18 Fla. L. Weekly S465 (Fla. Sept. 2, 1993).

17. CONSTITUTIONALITY OF SECTION 921.141

Florida's capital sentencing scheme, facially and as applied to this case, is unconstitutional for the reasons set forth below.

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 assure arbitrariness and maximize discretion in reaching the penalty verdict.

i. Heinous, atrocious, or cruel

The instruction used here does not limit and define 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); Shell v. Mississippi, 111 S.Ct. 313 (1990); and Espinosa v. Florida, 112 S.Ct. 2926 (1992).

The instruction also violates due process because it relieves the state of its burden of proving the elements of the circumstances as developed in the case law.[42]

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[41] Tucker v. Kemp, 726 F.2d 1496, 1505 (11th Cir. 1985) (en banc) ("There are not many times that I come before a trial jury and make the request that I will be making of you in this case.").

[42] For example, the instruction fails to inform the jury that torturous intent is required. See McKinney v. State, 579 So. 2d 80, 84 (Fla. 1991) ("The evidence in the record does not show that the defendant intended to torture the victim").

ii. Cold, calculated, and premeditated

The same applies to the "cold, calculated, and premeditated" circumstance. The instruction simply tracks the statute.[43] 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 are prone to like errors. See Hodges v. Florida, 113 S.Ct. 33 (1992) (applying Espinosa to CCP and acknowledging flaws in CCP instruction). 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. Espinosa v. Florida, 112 S.Ct. 2926 (1992). The instruction also unconstitutionally relieves the state of its burden of proven the elements of the circumstance as defined by case law defining the "coldness," "calculated," "heightened premeditation," and "pretense" elements.

iii. Felony murder

This circumstance fails to narrow the discretion of the sentencer and therefore violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process clauses of the state and federal constitutions.

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[43] 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."

b. Majority verdicts

The Florida sentencing scheme unconstitutionally places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates due process and the Cruel and Unusual Punishment Clauses. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate due process. See Johnson v. Louisiana, 406 U.S. 356, 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). The same reasoning 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. 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 1 (Fla. 1973). 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 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

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

ignored. This ambiguity and like problems prevent evenhanded application of the death penalty.

4. 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.[44] 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.[45]

The election of circuit judges in circuit-wide races was first instituted in Florida in 1942,[46] 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 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,

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[44] 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.

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

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

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).[47]

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 St. Lucie and Indian River Counties, there are circuit judgeships, none of whom are black. Single Member Districts, supra.

Florida's history of racially polarized voting, discrimination and[48] disenfranchisement,[49] 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 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

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[47] 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.

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

[49] 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."

due process in selection of the decision makers in a criminal trial.[50] 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 sentencers 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 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.

5. 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

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

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).[51]

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,[52] 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

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[51] 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).

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

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

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[53] 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.

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[54] 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.

6. 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 violates double jeopardy and collateral estoppel where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It ensures uncertainty in the fact finding process contrary to the eighth amendment.

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

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[54] 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.")

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 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)[55]. 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.[56] This sys-

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

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

tematic 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 unconnected 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. 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). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So. 2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

This unnecessary pain and anguish shows that electrocution violates the Eight Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977).

CONCLUSION

This Court should reverse the convictions and sentences and order a new trial or grant such other relief as may be appropriate.

Respectfully submitted,

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

GARY CALDWELL
Assistant Public Defender
Florida Bar No. 256919

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Celia Terenzio, Assistant Attorney General, 1655 Palm Beach Lakves Blvd., Suite 300, West Palm Beach, Florida 33401, by courier this 18 day of November, 1993.

Of Counsel