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IN THE SUPREME COURT OF FLORIDA

DONN A. DUNCAN, Appellant,	)	
vs.	)	CASE NO. 78,630
STATE OF FLORIDA, Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CONTENTS i

TABLE OF CITATIONS iii

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

SUMMARY OF ARGUMENTS 10

ARGUMENTS

POINT I

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE 1, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. 11

POINT II

IN VIOLATION OF THE FIFTH, SIXTH AND THE FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 9 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN THE STATE WAS PERMITTED TO INTRODUCE EVIDENCE OF APPELLANT'S PRIOR MURDER CONVICTION WHICH INCLUDED A PHOTOGRAPH OF THE VICTIM WHERE SUCH EVIDENCE HAD NO RELEVANCE TO ANY ISSUE BEFORE THE JURY AND SUCH EVIDENCE WAS HIGHLY PREJUDICIAL. 21

POINT III

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO TEE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S SPECIALLY REQUESTED JURY INSTRUCTIONS IN THE PENALTY PHASE. 27

TABLE OF CONTENTS (CONT.)

CONCLUSION 30

CERTIFICATE OF SERVICE 30

TABLE OF CITATIONS

PAGE NO.

CASES CITED:

Adams v. State
412 So.2d 850 (Fla. 1982; 24

Alford v. State
307 So.2d 433 (Fla. 1975
cert. denied 427 U.S. 912 (1976) 23

Arango v. State
411 So.2d 172 (Fla. 1982) 16, 17

Armstrong v. State
399 So.2d 953 (Fla. 1981) 16, 17

Blair v. State
406 So.2d 1103 (Fla. 1981) 19

Booker v. State
397 So.2d 910 (Fla. 1981) 23

Caruthers v. State
465 So.2d 496 (Fla. 1985) 16

Coker v. Georgia
433 U.S. 584 (1977) 12

Douglas v. State
328 So.2d 18 (Fla. 1976) 16, 17

Elledge v. State
246 So.2d 998 (Fla. 1977) 22

Fitzpatrick v. State
527 So.2d 809 (Fla. 1988) 12-14, 18

Freeman v. State
563 So.2d 73 (Fla. 1990) 22

Furman v. Georgia
408 U.S. 238 (1972) 11

Gardner v. State
313 So.2d 675 (Fla. 1975) 16, 17

Gregg v. Georgia
428 U.S. 153 (1976) 27

Huckaby v. State 343 So.2d 29 (Fla. 1977)	15
King v. State 514 So.2d 354 (Fla. 198'7)	22
LeDuc v. State 365 So.2d 149 (Fla. 1978)	16-18
Livingston v. State 565 So.2d 1288 (Fla. 1988)	15
Llovd v. State 514 So.2d 396 (Fla. 1988)	16
McKinney v. State 573 So.2d 80 (Fla. 1981)	20
Menendez v. State 419 So.2d 312 (Fla. 1982)	19
Oats v. State 446 So.2d 90 (Fla. 1984)	19
Penn v. State 574 So.2d 1079 (Fla 1991)	19, 20
Presnell v. Georgia 439 So.2d U.S. 14 (1978)	27
Preston v. State 564 So.2d 120 (Fla. 1990)	19
Proffitt v. State 510 So.2d 896 (Fla. 1987)	15, 16, 19
Reddish v. State 167 So.2d 858 (Fla. 1964)	24
Rembert v. State 445 So.2d 337 (Fla. 1984)	16
Rhodes v. State 547 So.2d 1201 (Fla. 1989)	22, 24, 25
Ross v. State 474 So.2d 1170 (Fla. 1985)	16
Smalley v. State 546 So.2d 720 (Fla. 1389)	19

Songer v. State
544 So.2d 1010 (Fla. 1989) 17, 18

State v. Dixon
283 So.2d 1 (Fla. 1973),
cert. denied sub nom., 416 U.S. 943 (1974) 11-13, 17, 19

Thomas v. State
59 So.2d 517 (Fla. 1952) 23

Trawick v. State
473 So.2d 1235 (Fla. 1985) 22, 25

Zamora v. State
361 So.2d 776 (Fla. 3d DCA 1978) 23

OTHER **AUTHORITIES:**

Fifth Amendment, United States Constitution 21
Sixth Amendment, United States Constitution 21
Eighth Amendment, United States Constitution 27
Fourteenth Amendment, United States Constitution 21

Article 1, Section 9, Florida Constitution 21, 27
Article 1, Section 17, Florida Constitution 27
Article 1, Section 22, Florida Constitution 27

Section 90.403, Florida Statutes (1991) 25
Section 782.04(1)(a)1, Florida Statutes (1991) 1
Section 784.021(1)(a), Florida Statutes (1991) 1
Section 921.141(5)(b), Florida Statutes (1991) 11

Florida Rules of Criminal Procedure, 3.390 29

IN THE SUPREME COURT OF FLORIDA

DONN A. DUNCAN,)
Appellant,)
vs.) CASE NO. 78,630
STATE OF FLORIDA,)
Appellee.)

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On January 17, 1991, the Grand Jury in and for Orange County returned an Indictment charging Appellant with one count of first degree premeditated murder, in violation of Section 782.04 (1)(a)1, Florida Statutes (1991) and one count of aggravated assault, in violation of Section 784.021(1)(a), Florida Statutes (1991). Numerous pre-trial motions were filed directed to the legality of the imposition of the death penalty. (R 1089-1148) These motions were disposed of by a pre-trial hearing conducted May 9, 1991. (R 829-873)

Appellant proceeded to jury trial on the charges on May 20 - 23, 1991, with the Honorable Daniel P. Dawson, Circuit Judge, presiding. (R 1-828) Following deliberations, the jury returned verdicts finding Appellant guilty as charged as to both

counts. (R 820, 1251-1252)

On July 1, 1991, the penalty phase of Appellant's trial was conducted. (R 874-1052) Defense counsel requested thirty (30) special jury instructions, only one of which was granted and given by the trial judge. (R 966-993, 1282-1305) Following deliberations, the jury returned an advisory verdict recommending that Appellant be sentenced to death by a vote of 12-0. (R 1047, 1317) Both defense counsel and the prosecutor filed memorandums in support of the proper sentence to be imposed. (R 1319-1322, 1327-1330, 1331-1339)

On August 30, 1991, Appellant again appeared before Judge Dawson. (R 1054-1060) Appellant was adjudicated guilty of both offenses and sentenced to three and one half years in prison for the aggravated assault conviction. (R 1057) With regard to the first degree murder conviction, Judge Dawson sentenced Appellant to death, finding one aggravating circumstance and fifteen mitigating circumstances. (R 1060, 1340-1345, 1346-1348)

Appellant filed a timely Notice of Appeal on September 9, 1991. (R 1351) Appellant was adjudged insolvent and the office of the Public Defender was appointed to represent him on appeal. (R 1350)

STATEMENT OF THE FACTS

In December of 1990, Appellant lived with his fiancee, Deborah Bauer, her mother, Antoinette Blakely, and her daughter, Carrieanne Bauer. (R 517-518, 576) On the evening of Cecember 28, 1990, Debbie Bauer went over to a friend's house at around 6·30 p.m. (R 577, 519) Appellant was in the bedroom, asleep, when Debbie left. (R 577, 520) Carrieanne and Antoinette were watching television. (R 519, 578) Appellant awoke and came into the living room and asked where Debbie was. (R 520, 578) Carrieanne told Appellant 'chat she had gone to a friend's house to which Appellant replied, "Oh yeah, that's right." (R 520-521, 578) Appellant then left the house and returned in approximately one-half hour. (R 521-522, 578) Appellant left the house again saying, "I'll be back in a little while." (R 579) Approximately one hour later and told Antoinette and Carrieanne that Debbie wouldn't be home until later because she had gone off with a guy named Little Mark who was going to buy her beer, since Appellant had refused to do so. (R 522, 579) Appellant also told them that he did not want Debbie to sleep in the bedroom because he didn't want any argument and that he would be leaving in the morning. (R 579, 523)

Debbie Bauer arrived home at approximately 10:30 p.m. (R 523, 582) Antoinette told Debbie that Appellant was angry and didn't want to be bothered. (R 582) Debbie went into the bedroom only for three or four minutes when she went to get some

cigarettes. (R 525, 5) Neither Antoinette nor Carrieanne heard any arguing or fighting between Appellant and Debbie. (R 563, 526) Debbie slept on the couch in the living room. (R 525, 564)

The next morning, Antoinette awoke first and went into the kitchen. (R 586) Carrieanne awoke about 6:45 a.m. (R 527) Debbie then got up and went outside to smoke a cigarette. (R 527, 586) Although Carrieanne thought that her mother was drunk the night before, Debbie did not act drunk that morning. (R 528) At some point, Appellant came out of the bedroom fully dressed and went into the kitchen where he and Antoinette got into an argument. (R 529, 586) Appellant went back into the bedroom and put on a jacket and returned to the living room. (R 531) Appellant walked out the door onto the porch where Debbie was sitting, smoking her cigarette. (R 533)

Richard Ferguson, a neighbor, was standing outside the fence in front of Debbie's house, waiting for a ride. (R 713) He saw Debbie sitting on the porch, smoking her cigarette. (R 714) Ferguson observed Appellant come out the front door and stand behind Debbie looking down at her for two to three seconds. (R 715) Debbie said nothing and appeared to be unaware of Appellant's presence. (R 716) After a few seconds, Appellant appeared to punch Debbie in the back two times. (R 716) Then Appellant put his left hand on Debbie's shoulders, around her neck, and pulled her back. (R 717) At the same time, Appellant swung his right leg over her as if he was mounting a horse. (R

717) Appellant continued to punch Debbie four to six times, real fast, in her upper torso. (R 717) Debbie started to scream, which caused Carrieanne to come out of the front door. (R 534, 717) Carrieanne also thought that Appellant was punching her mother. (R 534) However, Carrieanne soon realized that Appellant was stabbing Debbie and she started screaming. (R 717, 536)

Appellant then came towards Carrieanne with knife in hand and said, "You little bitch, you want it too?" (R 537, 590) Carrieanne's eyes bulged and she screamed. (R 718) Carrieanne was scared that Appellant would kill her so she ran into the closet in the house. (R 537) Upon hearing the commotion, Antoinette grabbed two knives from the kitchen and started to go outside. (R 590) However, she discarded the knives. (R 590) Antoinette then yelled to Richard Ferguson to call 911 because Appellant had stabbed Debbie. (R 720, 595) Appellant said, "I hope you die bitch." Then he said, "Yeah, I did it on purpose. I'll sit here and wait for the cops." (R 540) Appellant then walked out to the gate where he waited until the police arrived. (R 540, 591)

When the police arrived, the deputies approached Appellant, who told them, "I stabbed her.!' (R 633, 617) Appellant was then patted down and placed in the police vehicle. (R 617) Appellant was very cooperative and posed no problem. (R 618) Although Appellant appeared that he had been awake for quite a while, the officers observed no evidence of intoxication.

(R 640-641, 619) After being advised of s Miranda warnings, Appellant indicated that he wished to give a statement without the presence of an attorney and told the police that he and Debbie had argued and that he came outside and remembered stabbing her two times. (R 636)

William Anderson, the medical examiner and forensic pathologist, conducted an autopsy on Debbie Bauer. (R 652-655) Debbie had been pronounced dead at the emergency room at the Orlando Regional Medical Center at 9:41 a.m. (R 656) The cause of death was the stab wound to the right chest. (R 683) Additionally, Debbie suffered two life threatening wounds to the flank of her Sack. (R 683) Debbie also suffered three defensive wounds, one on each of her arms, and one on her leg. (R 661) The hospital records indicated that upcn admission, Debbie Bauer was intoxicated but alert. (R 688) Her blood alcohol level at %he time of her admission into the hospital was .143. (R 685) If the last time she had consumed alcohol was the evening before, she must have been quite intoxicated with a blood alcohol level of at least .260. (R 689)

PENALTY PHASE:

In 1969, while an inmate at the Florida Correctional Institution at Lowell, Florida, Appellant took a bush axe and severely cut the face and head of a follow inmate, one Willie Fred Davis. (R 889, 893, 895) Appellant was arrested for the crime and when he was interviewed by the police, he told them that he had been threatened by the inmate Davis, the night before

when he had approached him and made a comment to the effect "White Cracker., I'm going to get you." (R 895) The next day, Appellant went to maintenance and got a bush axe and then went to the bathroom where Davis always went at noon time. (R 895) Appellant hit Davis three times with the bush axe in the head, threw down the bush axe, went to the prison guards and told them that he. had just killed someone. (R 896) Appellant told a fellow inmate, "Let that be a lesson to everybody, you can only push a man *so* far and that's what happens to you." (R 897) At the time of this offense, Appellant was twenty-three years of age, five foot nine inches tall and weighed 145 pounds. (R 905) Willie Davis was a very large man, six foot tall and over 250 pounds. (R 905) Willie Davis was known to be a bully in the prison and had problems with many inmates. (R 905, 919) Although Appellant was indicted for the first degree murder of Willie Davis, he was permitted to plead to second degree murder and received a life sentence. (R 917) Appellant was released on parole in 1978 and was discharged successfully from parole in 1984. (R 956)

Sarah Martin has known Appellant €or twenty-five years and dated him for a time, during which time they discussed marriage. (R 930-931) Appellant was a hard worker and very conscientious. (R 931) When Sarah Martin got arrested for drugs and was in and out of treatment centers, Appellant was always there for her and **was** very supportive. (R 932) Appellant told her that he knew he had a drinking problem. (R 932)

Una Liebig, Appellant's older sister testified regarding their upbringing. (R 935) Appellant's parents were missionaries and preachers. (R 936) Appellant's biological father went into the service, but when he came out he just one day, without warning, left his family. (R 936) This had a very traumatic effect on the entire family, including Appellant who was only two years old at the time. (R 937) When Appellant was nine years old, his mother remarried a man who was twenty-five years older than she was. (R 937-938) Within three months of the marriage, Appellant's mother developed spinal meningitis which cause paralysis in the left side of her brain. (R 939) Although Appellant's mother could take care of herself, her ability to reason was severely damaged. (R 939) Appellant's step father did not like having children around and the children did not feel welcome in their home. (R 944-945) In the house where they lived, Appellant and his older sister were forced to share a room and a bed. (R 941) The step father mentally abused his children and made them feel like low life. (R 946) Appellant never really had a loving home life. (R 948) Appellant had a young son who died of pneumonia when he was only one month old. (R 950, Exhibit 5) Appellant also had a previous relationship with a Joyce Wells. (R 953) Appellant and Miss Wells were extremely happy but the relationship ended when Joyce Wells was killed in a head-on automobile accident. (R 953) Appellant has an alcohol problem and gets mean when he drinks. (R 956) Although Appellant's Grandmother loved him, she did not

really have time for him. (R 958)

SUMMARY OF ARGUMENTS

Point I Mr. Duncan's sentence of death violates the Eighth and Fourteenth Amendments and Florida law because it is a disproportionate sentence in comparison with other similar cases. The trial court found one aggravating circumstance and fifteen mitigating circumstances. This Court has never affirmed a death sentence based solely on the finding of the aggravator present in this case. No intent-laden aggravation was proved, like cold, calculated or premeditated or heinous, atrocious and cruel. Thus, this case presents the issue of whether death is proper when extensive evidence in mitigation balances against meager findings in aggravation. Appellant asserts that it is not.

Point II The trial court erred in admitting into evidence at the penalty phase, a photograph of the victim of a previous crime committed by Appellant. Although the state is permitted to present some details of the prior violent felony conviction, in the instant case the admission of the photograph was irrelevant and highly prejudicial. Its admission compromised the integrity of the jury's recommendation. A new penalty phase is required.

Point III The trial court committed reversible error by refusing to instruct the jury during the penalty phase on correct statements of the law as requested by defense counsel. These requested instructions were accurate statements of the law and were particularly applicable to the facts of the instant case.

POINT I

APPELLANT'S DEATH SENTENCE IS DIS-
PROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE,
AND IS CRUEL AND UNUSUAL PUNISHMENT IN
VIOLATION OF ARTICLE 1, SECTION 17 OF THE
FLORIDA CONSTITUTION, AND THE EIGHTH
AND FOURTEENTH AMENDMENTS TO THE
UNITED STATES CONSTITUTION.

In imposing the death penalty, Judge Dawson found that the State had proved one aggravating circumstance that Appellant had previously been convicted of another felony involving the use or threat of violence to a person. Section 921.141(5)(b), Florida Statutes (1991). This aggravating circumstance was based on Appellant's previous conviction for second degree murder in 1969 and his contemporaneous conviction for aggravated assault in 1991. (R 1342) In mitigation, the trial court considered fifteen separate factors, although six of these factors were given little or no weight by the trial court. (R 1342-1344) Appellant contends that the death penalty cannot stand since it is disproportionate to the crime and constitutes cruel and unusual punishment.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring), that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 2, 17 (Fla. 1973), cert. denied sub nom., 416 U.S. 943 (1974).

See also Coker v. Georgia, 433 U.S. 584 (1977) (the requirement that the death penalty be reserved for the most aggravated crimes is a fundamental axiom of Eighth Amendment jurisprudence). This Court, unlike individual trial courts, reviews "each sentence of death issued in this state," Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), to "[g]uarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Dixon, 283 So.2d at 10, and to determine whether all of the circumstances of the case at hand "warrant the imposition of our harshest penalty." Fitzpatrick, 527 So.2d at 812. Appellant's case is neither "most aggravated" nor "unmitigated." Indeed, it is the least aggravated and one of the most mitigated of death sentences ever to reach this Court. The "high degree of certainty in . . . substantive proportionality [which] must be maintained in order to insure that the death penalty is administered evenhandedly," Fitzpatrick, 527 So.2d at 811, is missing in this case, and the death penalty is plainly inappropriate on this record.

First, this case is not "most aggravated." **No** aggravating circumstance relating to intent, or indeed, to any aspect of the offense was found by the sentencer, only that Appellant had a prior conviction for a violent felcny. "[T]he aggravating circumstance of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent."

Fitzpatrick, 527 So.2d at 812.[1] This Court has never affirmed a death sentence when the only aggravating circumstance present was the prior conviction of a felony involving violence.[2]

Second, this is not "the sort of 'unmitigated' case contemplated by this Court in Dixon." Fitzpatrick, 527 SO.2d at 812. Two statutory and thirteen nonstatutory mitigating circumstances wee found by the sentencing judge, and were supported by abundant testimony.[3] The two statutory mitigating circumstances alone rendered the death sentence disproportionate. The sentencer found the statutory mitigating circumstances of extreme emotional or mental disturbance, and substantively impaired capacity to conform conduct.

Without question, this case is not a proper one for capital punishment. It cannot fairly be compared with other cases reversed by this Court, because, as noted, none has ever

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[1] These are Florida's most serous aggravating circumstances, and truly define "the most aggravated, the most indefensible of crimes." Dixon, 283 So.2d at 8. Heinous, atrocious, or cruel, as an aggravating circumstance, intuitively, and in fact, plays a substantial role in the affirmance of Florida death sentences. 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). Eighty-two percent of death sentences in Florida involved a finding of heinous, atrocious, or cruel, and sixty-eight percent involve cold calculated and premeditated. Radelet, Rejecting the Jury: The Imposition of the Death Penalty in Florida, 18 U.C Davis L.Rev. 1409, 1418 (1985).

[2] The aggravating circumstance of prior violent felony conviction does exist in cases affirmed by this Court, but always in addition to other sustained aggravating circumstances.

[3] Of the thirteen non-statutory mitigating circumstances, the trial judge found that six of these factors should be given little or no weight.

been this mitigated and nonaggravated. A look at reversal on proportionality grounds does, however, reveal that since more aggravated and less mitigated cases than Appellant's are not proper for the ultimate penalty, surely Mr. Duncan must be spared.

In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988, this Court accepted the sentencing judge's findings of five statutory aggravating circumstances, including those that showed culpable intent (pecuniary gain/arrest avoidance). Mr. Fitzpatrick had been convicted of the murder of a law enforcement officer. Mr. Fitzpatrick shot the officer while holding three persons hostage with a pistol in an office; Mr. Duncan was not engaged in the commission of a felony at the time of the offense. Mr. Fitzpatrick had been previously convicted of violent felonies, as has Mr. Duncan. Mr. Fitzpatrick established the existence of three statutory mitigating circumstances -- extreme mental or emotional distress, substantially impaired capacity to conform conduct, and age. Id. at 811, Mr. Duncan established two of these. Mr. Fitzpatrick's crime was significantly more aggravated than Mr. Duncan's, yet this Court found Mr. Fitzpatrick's actions to be "not those of a cold-blooded, heartless killer," since "the mitigation in this case is substantial." Id. at 812.

Moving from five down to two statutory aggravating circumstances, this Court has not hesitated to reverse on proportionality grounds, in circumstances less mitigated than Mr.

Duncan's. For example, in Livingston v. State, 565 So.2d 1288 (Fla. 1988), the defendant killed a store attendant, shooting her twice with a pistol during the commission of an armed robbery. This Court found that two aggravating circumstances (prior viclent felony/felony murder), when compared to two mitigating circumstances (age/unfortunate home life), "does not warrant the death penalty." Id at 188.[4] In comparison, Mr. Duncan's case involved one aggravating circumstance, and fifteen mitigating circumstances. In Proffitt v. State, 510 So.2d 896 (Fla. 1987), the two aggravating circumstances of cold, calculated and premeditated, and felony/murder, were insufficient to call for the death penalty, when Mr. Proffitt had had a nonviolent history, and was happily married, a good worker, and a responsible employee.[5] Finally, in Huckaby v. State, 343 So.2d 29 (Tla. 1977), this Court affirmed two especially powerful aggravating circumstances (heinous, atrocious or cruel, and great risk of harm to many persons), but held that the two statutory mitigating factors (which were also found here) rendered death improper (extreme mental or emotional disturbance/substantive impairment).

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[4] Of special importance to the Court in mitigation in Livingston and in many of the following cases is the offender's addiction to and/or intoxication from drugs, or alcohol. This overriding factor is also present in Appellant's case.

[5] "The record also reflects that Mr. Proffitt had been drinking." Proffitt, 510 So.2d at 98. Mr. Proffitt was given life on appeal despite the proper finding of a cold, calculated, and premeditated, killing. Proffitt, 510 So.2d at 893 (Ehrlich, J., concurring specially in result only).

Turning to cases with one aggravating circumstance, even heinous, atrocious or cruel, as a single aggravating circumstance, cannot sustain a death sentence when the crime 'was probably upon reflection, of not long duration," and where drug addiction (alcohol) is a contributing factor to one's "difficulty controlling his emotions." Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). Felony-murder as a sole aggravating circumstance is insufficient for death, Lloyd v. State, 514 So.2d 396, 403 (Fla. 1988); Caruthers v. State, 465 So.2d 496 (Fla. 1985), where there is at least one statutory mitigating circumstance, or evidence of drug (alcohol) abuse. Rembert v. State, 445 So.2d 337, 338 (Fla. 1384); see also Proffitt, supra.[6]

This Court has NEVER affirmed a death sentence where the sole aggravating circumstance related to prior violent felony conviction. Counsel can point to only five cases where this Court has affirmed a death sentence based on a single valid aggravating circumstance. See Arango v. State, 411 So.2d 172 (Fla. 1982); Armstrong v. State, 399 So.2d 953 (Fla. 1981); LeDuc v. State, 365 So.2d 149 (Fla. 1978); Douglas v. State, 328 So.2d 18 (Fla. 1976); and Gardner v. State, 313 So.2d 675 (Fla.

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[6] This Court is careful not to sustain death when felony-murder simplicitur is the only aggravating circumstance. See Proffitt, supra. It would be fundamentally incongruous to affirm when the only extant aggravating circumstance does not reflect an additional bad part of the actual killing (i.e., robbing and killing), but instead reflects a condition or status of the defendant (i.e. prior conviction €or a violent felony),

1975).[7]

In 11 but one of the previou v cite- cases where death sentences based on a single, valid aggravating factor were affirmed, the crimes involved torture-murders. In Gardner, Doualas, and LeDuc nothing was found in mitigation by the trial court. In Arango, the only mitigating factor was that Arango had no significant prior criminal history. In Armstrong (the only non-torturous murder), this court upheld one valid factor in aggravation, but agreed with the trial court that there were not mitigating circumstances to weigh. Appellant's case involves substantial mitigation that was actually accepted by the trial court. (R 1342-44)

In Songer v. State, **544** So.2d 1010 (Fla. **1989),** this Court faced a death penalty imposed by a trial judge based on one statutory aggravating factor, viz, the murder of a highway patrolman committed while Songer was under sentence of imprisonment. Due to the presence of several mitigating factors, this Court overturned the death sentence and remanded for imposition of a life sentence despite a jury recommendation of death. The reasoning of this Court is instructive:

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders. State v. Dixon, **283** So.2d 1 (Fla. **1973)**, cert denied, **416** U>S. 943, **94** S.Ct. **1950, 40** L.Ed.2d 295 (1974). To secure that goai and to protect against arbitrary imposition of

[7] Attached as an Appendix to this Brief is a letter from Dr. Michael Radelet, a recognized authority on death penalty statistics wherein he verifies these assertions.

the de th pen lty, re iew each case in light of others to make sure the ultimate punishment is appropriate.

Our customary process of finding similar cases for comparison is not necessary here because of the almost total lack of aggravation and the presence of significant mitigation. We have in the past affirmed death sentences that were supported by only one aggravating factor, (see, e.g., LeDuc v. State, 365 So.2d 149 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979), but those cases involved either nothing or very little in mitigation. Indeed, this case may represent the least aggravated and most mitigated case to undergo proportionality analysis.

Even the gravity of the one aggravating factor is somewhat diminished by the fact that Songer did not break out of prison but merely walked away Erom a work-release job. In contrast, several of the mitigating circumstances are particularly compelling. It was unrebutted that Songer's reasoning abilities were substantially impaired by his addiction to hard drugs. It is also apparent that his remorse is genuine.

Songer v. State, 544 So.2d at 1011.

In Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), this Court noted that, "Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Despite the presence of five statutory aggravating factors and three mitigating factors, Fitzpatrick's death sentence was reversed and the case remanded for imposition of a life sentence on the premise that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." Fitzpatrick, 527 So.2d at 811 (emphasis in original). Fitzpatrick equates with the instant case; neither is the most

aggravated and unmitigated of serious crimes.

In Penn v. State, 574 So.2d 1079 (Fla 1991), this Court approved the trial court's finding that the murder was heinous, atrocious, or cruel. In mitigation, the court found that Penn had no significant history of prior criminal activity and that he acted under the influence of extreme mental or emotional disturbance. This Court then concluded:

> Generally, when a trial court weighs improper aggravating factors against established mitigating factors, we remand for reweighing because we cannot know if the result would have been different absent the impermissible factors. Oats v. State, 446 So.2d 90 (Fla. 1984), receded from on other grounds, Preston v. State, 564 So.2d 120 (Fla. 1990). However, one of our functions "in reviewing a death sentence is to consider the circumstance in light of our other decisions and determine whether the death penalty is appropriate." Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). On the circumstances of this case, including Penn's heavy drug use and his wife's telling him that his mother stood in the way of their reconciliation, this is not one of the least mitigated and most aggravated murders. See State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Compare Smalley v. State, 546 So.2d 720 (Fla. 1989) (heinous, atrocious, cruel in aggravation: no prior history, extreme disturbance, extreme impairment in mitigation); Songer v. State, 544 So.2d 1010 (Fla. 1989) (under sentence of imprisonment in aggravation: extreme disturbance, substantial impairment, age in mitigation); Proffitt v. State, 510 So.2d 896 (Fla. 1987) (felony murder in aggravation; no prior history in mitigation); Blair v. State, 406 So.2d 1103 (Fla. 1981) (heinous, atrocious, cruel in aggravation; no prior history in mitigation). After conducting a proportionality review, we do not find the death sentence warranted in this case.

Penn, 574 So.2d 1079, 1083-4. See also, McKinney v. State, 573 So.2d 80 (Fla. 981) (Death sentence disproportionate given only one valid aggravator, and mitigation show that defendant had no significant criminal history, had mental deficiencies, and alcohol and drug history).

A comparison of this case to those in which the death penalty has been affirmed leads to no other conclusion but that the death sentence must be reversed and the matter remanded for imposition of a life sentence. Never before has this Court affirmed the death penalty based solely on this aggravating factor. When compelling mitigation exists such as that existing in this case, as found by the trial judge, the death penalty is simply inappropriate under the standard previously set by this Court.

POINT II

IN VIOLATION OF THE FIFTH, SIXTH AND THE FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 9 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN THE STATZ WAS PERMITTED TO INTRODUCE EVIDENCE OF APPELLANT'S PRIOR MURDER CONVICTION WHICH INCLUDED A PHOTOGRAPH OF THE VICTIM WHERE SUCH EVIDENCE HAD NO RELEVANCE TO ANY ISSUE BEFORE THE JURY AND SUCH EVIDENCE WAS HIGHLY PREJUDICIAL.

Prior to commencement of the penalty phase, defense counsel moved in limine to prevent the state from presenting facts and circumstances concerning Appellant's 1969 conviction for second degree murder other than the fact that he entered a plea to the charge and was adjudicated guilty of the offense. (R 1277-1279, 877-879) The trial court denied the motion but held that with respect to the admission of a photograph of the victim of the prior murder, that the court would wait and see what evidence the state presents before ruling whether the prejudicial value of such photograph outweighed any probative value. (R 879) The state then proceeded to present the evidence through the investigator of the 1969 murder and elicited from him the details of the crime including the fact that the victim was severely cut about the face and head with some very gaping wounds. (R 889-893) At this juncture the state was then permitted over objection to admit a picture of the victim of the prior murder conviction. (R 900-902) The state then presented the testimony of the prosecutor of the former murder case, who again testified to details concerning the offense. (R 911-921) Appellant

submits that he has been sentenced to die not by a reasonable decision based on his record, but rather from an emotional reaction against inflammatory and inadmissible evidence of a prior crime. The introduction of the photograph of Willie Fred Davis' head showing the graphic and gruesome wounds was cumulative, immaterial, and prejudicial and inflamed the jury's passions contrary to Florida law, due process and the heightened reliability required in death penalty proceedings.[8]

This Court has on many occasions ruled that in an attempt to prove the aggravating circumstance of a prior violent felony conviction, the state is not limited solely to the judgments of conviction but rather may present details of the prior crimes. Elledge v. State, 346 So.2d 998 (Fla. 1977) and King v. State 514 So.2d 354 (Fla. 1987). However, this Court stated in Rhodes v. State, 547 So.2d 1201, 1204-5 (Fla. 1989):

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

See Freeman v. State, 563 So.2d 73, 76 (Fla. 1990); see also Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985) (error to

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[8] This error contravened. the due process of law requiring reliable criminal proceedings as guaranteed by the Fifth, Sixth and Fourteen Amendments to the United States Constitution and Article 1, Section:; 9, 17, and 22 of the Florida Constitution as well as the Eighth Amendment to the United States Constitution and Article 1, Section 17 of the Florida Constitution.

allow details of collateral crime victim's suffering). In this case that line was crossed.

Photographs of Willie Fred Davis did nothing except inflame the passions of the jury. The state presented evidence through the chief investigating officer as well as the prosecutor concerning the details of the Davis murder. The investigator testified in graphic detail of the injuries inflicted by Appellant on Mr. Davis. Further, the state elicited Appellant's confession to the murder of Willie Davis. Despite this abundant evidence, the state was still permitted over defense objection to admit the photograph of Davis' corpse. The photograph revealed nothing beyond the testimony which was already before the jury. Further, the photograph was totally unnecessary to prove that the offense was a prior violent felony. In fact, the trial court instructed the jury that the offense of second degree murder is a crime of violence.

The photograph should be received in evidence with great caution. Thomas v. State, 59 So.2d 517 (Fla. 1952). The test for admissibility of photographs is relevancy. Zamora v. State, 361 So.2d 776 (Fla. 3d DCA 1978). A photograph is admissible if it properly depicts factual conditions relating to the crime and if it is relevant in that it aids the court and jury in finding the truth. Booker v. State, 337 So.2d 910 (Fla. 1391). Even if photographs are relevant, the court should still be cautious in admitting them if the prejudicial effect is so great that the jury becomes inflamed. Alford v. State, 307 So.2d

433 (Fla. 1375) cert. denied 427 U.S. 912 (1976). In Adams v. State, 412 So.2d 850 (Fla. 1982) this Court noted with approval the trial judge's reasoned judgment in proh biting the introduction of "duplicitous photographs." Photographs taken of the victim after the body is removed from the scene should be received with added caution since their relevance is generally lessened. Reddish v. State, 167 So.2d 858 (Fla. 1964). In Rhodes., supra, the statc introduced a taped statement from the victim of a prior crime committed by the defendant. This Court ruled that the admission of this evidence was error in that it was irrelevant and highly prejudicial. The information presented to the jury did not directly relate to the crime for which Rhodes was on trial, but instead described the physical and emotional trauma and suffering of a victim totally collateral crime committed by Rhodcs. In so ruling, this Court stated in a footnote:

> Furthermore, we see no reason why introduction of the tape recording was necessary to support aggravation in this case. The state had introduced a certifi d copy of the Nevada judgment and sentence indicating that Rhodes had pled guilty to and was convicted of an offense involving the use or threat of violence. There was the testimony from Captain Rolette regarding his investigation of the incident. This evidence was more than sufficient to establish the aggravating circumstance that Rhodes had previously committed a felony involving the use or threat of violence and to establish the circumstances of the crime.

Rhodes, 547 So.2d at 1205, n.6. This holding is directly applicable to the situation herein. The state had entered a

certified copy of the judgment of conviction and presented the testimony not only of the investigating officer but also the prosecutor of the prior murder. The admission of the photograph was simply irrelevant to any issue at trial.

The photograph also does not pass the test of Section 90.403, Florida Statutes (3991) which excludes evidence whose prejudicial effect outweighs its probative value. Appellant fully admitted to committing this prior offense. The investigating officer testified in detail as to the method in which the crime was committed. The state never showed how this photograph added anything to the proof of this aggravating circumstance. In fact, the only justification put Eorth by the state for the admission of this photograph was that it showed the force used. Quite simply, this is irrelevant. The photograph in question was highly prejudicial and this prejudice outweighed any possible probative value it may have had. See Henrv v. State, 574 So.2d 73 (Fla. 1991): Rhodes, 547 So.2d at 1205; Trawick v. Stste, 473 So.2d at 1240; see also Hawkins v. State, 206 So.2d 5,8 (Fla. 1968) (no error to permit photos of dead victims of other crimes introduced to prove fixed pattern in method of killing, but "ordinarily we would not approve the introduction of photographs of the dead victims of the other crimes."). In Trawick, this Court held it was error to introduce evidence of surviving collateral crime victim's pain and suffering and use it to prove the crime was especially heinous, atrocious or cruel. It is equally error to allow such detail about the victim of a

collateral crime to be used to inflame the jury against the defendant under the prior violent felony aggravating circumstance. In Henry, the defendant was charged with killing his estranged wife. The state introduced details of Henry's killing of her son nine hours later, including a medical examiner photo of the corpse. This Court held the prejudicial effect outweighed the probative value of the collateral evidence. Since Appellant's confession to the Davis murder as well as the testimony of the investigating officer and the prosecutor of that crime fully established the details of this offense., the prejudice from the photograph of Davis' corpse similarly outweighs any probative value. Appellant is entitled to a new penalty phase.

POINT III

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S SPECIALLY REQUESTED JURY INSTRUCTIONS IN THE PENALTY PHASE.

Appellant filed written requests for several special jury instructions as the penalty phase. (R 1282-1305) After reviewing all of the requested jury instructions, the trial court denied all but one. (R 966-993) Appellant contends on appeal that the trial court committed reversible error in denying proposed instructions 2 (R 1285), 3 (R 1286), 4 (R 1287), 5 (R 1288), 6 (R 1289), 8 (R 1291), 10 (R 1293), and 25-30 (R 1300-1305).

Due process of law applies "with no less force at the penalty phase of the trial in a capital case" than at the guilty determining phase of any criminal trial. Presnell v. Georgia, 439 So.2d U.S. 14, 15-17 (1978). The need for adequate jury instructions to guide the recommendations in capita! cases was expressly recognized in Gregg v. Georgia, 428 U.S. 153, 192-3 (1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a law suit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior

> precedents and fixed rules of law. ... When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

The instructions given in this case were far from adequate to avoid the constitutional infirmities that inhered in the death sentence as imposed under the pre-Furman statutes. Furman v. Georgia, 408 U.S. 238 (1972). Appellant's death sentence rests in part on the inadequately instructed jury's recommendation.

All of the rejected instructions recited in the preamble to this point were correct statements of the law and were directly applicable to Appellant's case. The standard instructions did not clearly tell the jury that the state bore the burden to show that the aggravating factors outweighed the mitigating factors, [proposed instruction #2]; that the mitigating factors need not be proven beyond a reasonable doubt [instruction #3]; the death penalty is reserved for only the most aggravated and unmitigated of cases [instruction #4]; The jury never learned that the Legislature has established eleven statutory aggravating factors, only one of which was even arguably applicable to Appellant [instruction #6]. The jury was never told that they were not required to recommend the death penalty. [instruction #8] Although the 'jury was instructed that on the "catch all" mitigating factor of any other aspect of Appellant's character, the requested instructions 25-30 directly reflected the evidence as presented during the penalty phase and

told the jury that if they believed such evidence, that it could constitute a non-statutory mitigating factor. The requested instructions clarified vayuc and confusing standard jury instructions. They also would have helped the jury in their analysis and weighing process.

Contrary to the trial Court's assertion, the standard jury instructions did not cover most of the specially requested instructions. Florida Rules of Criminal Procedure, 3.390 provides that the presiding judge shall charge the jury upon the law of the case. Unfortunately, Appellant's jury was not adequately instructed. With regard to the requested instructions 25 - 30 concerning non-statutory mitigating factors, the trial court denied these requests by stating there was no requirement that he instruct on these and that he was concerned of the danger of elevating the non-statutory mitigating to the same status as statutory mitigating factors. Appellant asserts that this concern was highly improper. Nun-statutory mitigating circumstances are indeed to be given the same status as statutory mitigating factors. This Court has recognized that the statutory mitigating factors set forth in the statute are not exhaustive but rather are only put there as guidance. If this list is not meant to be exhaustive, then it necessarily and logically follows that non-statutory mitigating factors not on that list are to be given equal consideration by the sentencing jury. Because of the great weight placed on the jury's recommendation by the trial court, Appellant's death sentence is constitutionally infirm. A

new sentencing proceeding must be afforded him.

CONCLUSION

Based on the foregoing cases, argument and authorities, Appellant respectfully requests this Honorable Court to: vacate his death sentence and remand for imposition of a life sentence. In the alternative, Appellant requests this Court to vacate his death sentence and remand for a new penalty phase before a newly empaneled jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Donn A. Duncan, No. 013871, P. O. Box 747, Starke, FL 32031 on March 27, 1932.

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