IN THE SUPREME COURT OF FLORIDA

THOMAS WYATT, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 79,245

CORRECTED INITIAL BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE AND FACTS

Thomas Wyatt appeals his conviction for first degree murder and death sentence in the death of Cathy Nydegger.[1]

A. Ms. Nydegger's body was found dead in a rural area of Indian River County on May 20, 1988. R 547-48, 556-67. She died of a single gunshot wound to the top of the head; the gun had been in contact with the head when the shot was fired. R 642-43. A bruise on her face was consistent with her having fallen and struck a car or rough object (such as the road). R 639. Her blood contained seventeen times a potential lethal amount of cocaine. R 655, 669-70. A plastic straw found in her pocket, R 583, 588, contained cocaine residue. R 681-83. DNA testing of semen in her vagina showed that the semen was Michael Lovette's; it did not match Mr. Wyatt. R 1556.

Ms. Nydegger had been at a bar called Club 92 in Seffner, a small community near Tampa, the night before her body was discovered. Jennifer Oler, a bartender, testified that Mr. Wyatt and Michael Lovette arrived in a taxi, R 730-33, and Mr. Wyatt and Ms. Nydegger played with the Skill Crane, winning several stuffed animals; eventually the two left together, carrying several of the stuffed animals. R 735-37. Ten or fifteen minutes later, Mr. Wyatt returned and left with Mr. Lovette. R 738. While not disputing that he and Mr. Lovette met Ms. Nydegger at the bar, Mr.

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[1] The indictment also charged Mr. Wyatt with other offenses involving the murder of three employees at a Domino's Pizza in Vero Beach. The instant charged was severed from the others prior to trial. The convictions and sentences as to the other counts form the basis of a separate appeal before this Court.

Wyatt testified that it was Lovette who spent more time with her in the bar and who initially left with her. R 1654-59.

1. The state presented both circumstantial evidence and a jailhouse statement to establish that Mr. Wyatt murdered Ms. Nydegger. The circumstantial evidence (not disputed by the defense) was: Mr. Wyatt possessed Ms. Nydegger's car when he registered under an assumed name at the Glen Ellen Motel in Clearwater on May 20, R 805-806; he abandoned the car some days later at a parking lot, R 749;[2] while at the motel, he gave Freddie Fox a bag containing bullets matching the fatal bullet, R 852, 1446-47; Mr. Fox took from Mr. Wyatt a firearm with rifling characteristics similar to those of the gun used to kill Ms. Nydegger. R 847, 1414-19.[3]

Testimony concerning the jailhouse statement came from Patrick McCoombs, who met Mr. Wyatt in jail in South Carolina. A man who had spent almost all of his life incarcerated for various offenses, R 1480, he testified over defense objection, R 1476-77, about a very strict "convict code" involving silence regarding other inmates and manipulation of the system to one's own ends. R 1483-84, 1502-1503. Regarding Mr. Wyatt's statements to him about Ms. Nydegger, he recounted: At a bar in Florida with Michael Lovette, Mr. Wyatt saw Ms. Nydegger, who was drunk, and he just wanted to have a good time so he got her out of the bar; he wanted to have

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[2] The police found head hairs matching both Mr. Wyatt and Ms. Nydegger in the car. R 1565-74. Pubic hairs belonging to Ms. Nydegger were also found in the car. R 1567-68.

[3] The state's firearms expert testified that hundreds of thousands of guns have similar characteristics. R 1421.

sex with her but once he got in the car he didn't want to have sex with her anymore, he just wanted to kill her. R 1499. He blew the top of her head off, or blew her brains out. R 1499. Asked why he did that, he replied that he wanted to see her die, that Mr. McCoombs should not be upset because she was nothing but a barfly, nobody cared for her. R 1500. He said that they dumped the body off of Route 60. R 1501.

2. In addition to the foregoing, the state presented considerable evidence concerning Mr. Wyatt's character and his activities before and after the Nydegger murder, including: He and Mr. Lovette stole a car from a used car lot in Jacksonville on May 16, and burned the car in Indian River County on May 18, 1988. R 916-17, 942-54 (detailed testimony about arson).[4] At the scene of the arson were cartridges, bank bags and coin wrappers. R 935-36, 948-50. The police thought that the arson and the Nydegger murder were related. R 1043, 1078. He and Mr. Lovette checked into a motel in Yeehaw Junction under the name Billy Mathis. R 973-48, 9996, 1001-1004, 1013-23. Mr. Wyatt stole a Ford Taurus at Madeira Beach while living at the Glen Ellen Motel. R 1199-1204, 1509. On June 19, 1988, he was arrested in Myrtle Beach, South Carolina for being a passenger in the stolen Taurus, attempted to flee, struggled with the arresting officer, and gave the police a false name. R 1092, 1202-1204, 1371-81, 1510-11. After his employer, Larry Bouchette, bonded him out, they had an argument, and Mr.

[4] The car was found about 3.5 miles from Ms. Nydegger's body. R 918. The state's theory was that Wyatt and Lovette needed Ms. Nydegger's car to return to the scene to retrieve a briefcase. With no basis in the record, the state hypothesized that this briefcase may have contained drugs. R 1926.

Wyatt stole Mr. Bouchette's truck and wallet. R 1211-14, 1511-12. He stole from another person at Bouchette's house. R 1228. Mr. Bouchette once heard him threaten to kill someone. R 1228-29. Mr. Wyatt hit Mr. Bouchette's neighbor on the head with a bottle. R 1226-27. On July 7, 1988, while driving Bouchette's truck, he almost hit a state trooper's car in South Carolina, and then fled. R 1238-44. When arrested later than day, he spoke the officer in the holding cell, and said: "You know, it turns out you're pretty nice, I'm glad I didn't have a gun when you stopped me." R 1261. He feigned conversion to Christianity after his arrest. R 1359-61. He made statements to law enforcement officials concerning his alter ego, "Jim," to the effect that "Jim" was extremely dangerous, had hurt many people, and had to be put to death. R 1337-41. He told the officer (Deputy Karl Payne) who arrested him on July 7, 1988 that the arrest would be a feather in his cap, and he questioned the officer about death penalty procedures in South Carolina and Florida. R 1396-98. He questioned Mr. McCoombs about accommodations on Florida's death-row (McCoombs had been a "run-around" there). R 1489-94. He discussed with McCoombs taking advantage of an associate at the Clearwater motel, and using that person's identification papers. R 1505. He pretended he was from Ireland. R 1505. He was with a homosexual when stopped in the stolen car in Myrtle Beach. R 1510-11. He had made up "Jim," and used "Jim" as a ploy to create a split-personality defense. R 1514. He planned to use Mr. McCoombs' contacts on death row to kill Mr. Lovette. R 1515-16.

3. Mr. Wyatt testified that, while he and Mr. Lovette were at Club 92, Ms. Nydegger came in and began arguing with the barmaid. R 1656. She then helped him with the crane game, and won a little stuffed animal. R 1657. When Mr. Lovette started talking to Nydegger, Wyatt spoke with the barmaid, who said that Ms. Nydegger had stolen her cocaine from the bathroom. R 1657. Ms. Nydegger denied the accusation. R 1658. Nydegger and Lovette left together, then Lovette returned, and they all went to the motel in Nydegger's car. R 1659. After a while, Ms. Nydegger and Mr. Lovette left to get beer and food, and Mr. Wyatt stayed at the motel room. He woke up around 8:00 a.m., when Lovette came in and said Cathy had let him use her car, he had taken her home and they were to pick her up around 12:00 or 1:00. R 1660. Mr. Lovette left the room and never returned. R 1661. Eventually, Mr. Wyatt went outside and saw Cathy's car with the key in it; after more waiting, he drove it back to Club 92. R 1662. He kept looking for Lovette, but eventually drove through Tampa to Safety Harbor, looking for someone he had worked for before. R 1662-63. He then drove on to Clearwater, and stayed at the Glen Ellen Apartments. R 1663. He left the car at a parking lot and walked back to the Glen Ellen. R 1664-65. He used a false name at the motel because he had been involved in the car theft in Jacksonville and the arson, so he decided to use the alias. R 1665. Mr. Lovette's suitcase, which was in the car, contained a .38 special and bullets. R 1666.

Mr. Wyatt had 21 felony convictions. In his testimony, Mr. Wyatt admitted to the Jacksonville car theft, R 1642, the Madeira

Beach car theft, R 1670, the arson of the car near Yeehaw Junction, R 1645-48, the use of various aliases, R 1665, the theft of Bouchette's truck, R 1680 (he denied taking the wallet), the resisting arrest in Myrtle Beach, R 1676, the near accident and running away at the time of his eventual arrest, R 1682-85, and telling the police about "Jim." R 1698-95. He denied telling Mr. McCoombs that he had killed Ms. Nydegger. R 1701. Much of the cross-examination of Mr. Wyatt consisted of questioning him as to whether the state's witnesses had lied. R 1756, 1759, 1777-78, 1786, 1787, 1794, 1795, 1800, 1806, 1806-1807, 1807-1808, 1820-21, 1826-27.

B. 1. The state's penalty phase evidence pertained to Mr. Wyatt's prior convictions for various violent felonies.

Captain Sydney DuBose of the Indian River County Sheriff's Office testified, over hearsay objection, R 2072, that Mr. Wyatt and Michael Lovette escaped from prison in North Carolina in May 1988, R 2073, kidnapped and robbed Mr. Kwok, the chef at a South Carolina restaurant, R 2072, and robbed a Taco Bell in a Daytona Beach suburb. R 2076. Ronnie Robinette, a North Carolina corrections officer, testified that Wyatt and Lovette walked away from a work crew, and apparently burglarized a house, stole a canoe, and stole a vehicle. R 2081-84. Mr. Wyatt had been in prison for kidnapping, assault, inflicting serious injury, and robbery. R 2085. Larry Hollar testified that, when he gave a ride to Mr. Wyatt and another man in 1986, they beat, robbed and kidnapped him, putting him in the trunk of his car. R 2092-97. The trial court overruled defense objections to admission of a

photograph of Mr. Hollar showing his injuries. R 2100. Mr. Wyatt was found guilty and imprisoned. R 2102. Gregory Rollins, a South Carolina deputy sheriff, testified over hearsay objection, R 2110, about the Kwok robbery: two men robbed Mr. Kwok at gunpoint, forced him into the trunk of his car, drove a short distance and then abandoned the car; Mr. Kwok then escaped from the trunk. R 2107-2108. Various investigators determined that the prints of Mr. Wyatt and Mr. Lovette were on the car. R 2112. Returning to the stand, Capt. DuBose testified that, in the Taco Bell robbery, Mr. Wyatt threatened to kill the manager with a gun, became a madman when he thought the manager had set off an alarm. R 2117-19.

Two law enforcement officers testified to details of three murders committed by Mr. Wyatt and Mr. Lovette at Domino's Pizza in Vero Beach a few days before the Nydegger murder. Their hearsay testimony was to the effect that the two men murdered three Domino's employees, that Mr. Wyatt's sperm was found in the vagina of one of the employees, that the bullets that killed the employees matched the bullet used to kill Ms. Nydegger, and that, according to Mr. McCoombs: Mr. Wyatt murdered the employees as a lesson to Mr. Lovette, he beat the manager because there was little money in the safe, the manager begged for his life and his wife's life (his wife was one of the other two employees), Mr. Wyatt shot the manager for lying to him, the wife begged to be released because she had a two-year-old daughter, Mr. Wyatt told her they would have to kill them to eliminate witnesses, and, before shooting the third employee, he told him that if he listened close he would hear the bullet coming. R 2163-76. The trial court overruled objections

to admission of photographs of the murder victims. R 2155-56. Over a defense objection that his testimony was cumulative, a medical examiner gave extensive testimony about the injuries suffered by the persons in the Domino's murders. R 2184-94.

2. The defense presented evidence regarding Mr. Wyatt's childhood and background. Mr. Wyatt's mother, Jean McDaniel, testified that she was in and out of mental hospitals throughout Mr. Wyatt's life. R 2231. Her husband, the defendant's father, was an abusive drunk. R 2233. The neighbors said: "This kid is never out, you keep him in prison." R 2233. The father would poke and punch baby Thomas until there were bruises, saying that he was going to be a man. R 2233. Probably Tommy's first memory of his father was his father choking his mother. R 2234. When Ms. McDaniel remarried, Tommy was terribly nervous, always spilled his milk at the evening meal and his stepfather would curse; the stepfather was an abusive person, more verbally than physically. R 2237. There has only been one period in Ms. McDaniel's life since she was 16 years old that she was fairly stable for five years. R 2237. When she came out of the state hospital after her first hospitalization during the second marriage (the boys had been sent to live with her mother, the daughters stayed with the stepfather), the boys came to see her at home, and the stepfather told them that they were going back to their grandma's, that their mother could not care for them and "I saw a little boy die from his eyes and his heart, he died." R 2238.

When Tommy was in 7th or 8th grade, he was sexually abused by a teacher. R 2239-40. Three years into her second marriage, Ms.

McDaniel left home, got into a car with a total stranger, and left town. R 2243. The stepfather went with Tommy to fetch the mother back, the stepfather said that the mother was sick, and ordered Tommy to get the mother out of the automobile and bring her back. R 2243-44. While Tommy was still a young boy, Ms. McDaniel left him off in Columbia, South Carolina where his father was. R 2244. In his late teens, Tommy married, there was a child, but the child died, which devastated Tommy. R 2244-45.

Tommy Wyatt's sister, Pamela Caudill, testified: When they were growing up, there wasn't much of a family or a home, it was broken and unstable; they stayed with many relatives, various aunts and uncles would take them in, they had stepfathers, they didn't know their real father, they were kind of scattered at times. R 2248. As a child, Tommy was more loving and compassionate than the rest, but seemed to be nervous or withdrawn. R 2249. Their father was a mean man. R 2249. The first day that the father returned from the service, he kept calling Tommy stupid in a way that frightened Pamela. R 2249-50. As a child, Tommy had a foot problem, one of his feet turned in he was clumsy a lot and had accidents walking; that first day that the father came back they were going down the steps, and Tommy fell down the steps and broke his sucker and the father picked him up and shook him and called him stupid and said he was always falling, and Tommy wanted his sucker and the father said he couldn't have the sucker. R 2250-51. Every remembrance that she had of the father was that there was screaming and arguing; he was always drinking, always loud. R 2251. The stepfather was a forceful man, and had peculiar

methods of discipline, but was not as loud as the father. R 2251. One time in the back seat of the car Tommy and Pamela were fussing, and the step-father made them get out and fight, urging Tommy to hit the sister. R 2252. Tommy began to use drugs and alcohol around age 13. R 2253. He continued to use drugs and alcohol continuously for years. R 2253. While in a juvenile correctional center, he worked with severely handicapped retarded children, he would take care of them. R 2254-55. He would change their diapers, he taught children with spina bifida to eat and swallow. R 2255.

Barry Wyatt, Tommy's brother, testified that every year or couple of years while they were growing up the mother would become mentally ill. R 2260. The first thing Tommy remembered about his father was the father beating the mother and choking her when he was real young. Id. The stepfather had really unusual forms of punishment. R 2261. The punishment was harder on Tommy than on Barry. R 2261. When he was around 9 or 10, Tommy started messing with drugs and alcohol and his troubles just got worse and worse and worse. R 2261. One time when they were camping, they saw a boy fall in the water and Tommy, who was 10 or 11, jumped in and rescued the boy. R 2262. Another time, Tommy pulled a woman and her four children from a car after a car accident. R 2262-63.

Barry's wife, Kim, testified that Tommy told her he had never felt loved, the one time in his life that he thought he could be loved and give love back was when he was going to have a child but his child died. R 2275. He took the death of the child very hard. R 2275. One time the father tried to provoke Tommy into fighting

with him, and pushed him to the floor and started beating him, but Tommy would not fight back or hit his father and Barry had to pull the father off; Tommy was about 19 then. R 2276.

Max Phillips, Tommy's uncle, testified that, when she was a girl, Tommy's mother would beat her head against the wall, lie on the floor, kicking, screaming or just getting completely uncontrollable, and two or three people would have a hard time holding her. R 2279. Many times she went into mental hospitals. Id. All through Tommy's life, his mother went into mental hospitals. R 2279-80. The effect on Tommy was neglect, hurt, deep hurt. R 2280. Tommy was abandoned lots of times while she was in mental hospitals, and he was abused all the time. R 2280. At one point in her life, she would walk around the street muttering to herself, talking to herself with a cane with her hair matted down like a street person. R 2281. Tommy was aware of this and saw it when he was growing up. R 2281. Tommy had a drug problem when he was about 10 years old. R 2287.

Norbierto Pietri, a death-row inmate, testified to Mr. Wyatt's good character and conduct on death-row. R 2209-18.

3. By a vote of 11 to 1, the jury returned a verdict recommending imposition of the death penalty. R 2363.

In sentencing Mr. Wyatt to death, the trial court found six aggravating circumstances: that Mr. Wyatt was under a sentence of imprisonment at the time of the murder; that he was previously convicted in North Carolina of the violent felonies of robbery and kidnapping; that he was engaged in or was an accomplice to the robbery of Ms. Nydegger of her car at the time of the murder; that

the murder was committed for the purpose of avoiding or preventing a lawful arrest; that the murder was committed for pecuniary gain; and that the murder was cold, calculated, and premeditated without any pretense of moral or legal justification. R 2477-80. It found as a mitigating circumstance that Mr. Wyatt "in his early youth resided in a broken and unstable home provided by his step-father while his mother required constant attention to her mental illness." R 2483. At the state's insistence, the court stated that the felony murder and pecuniary gain circumstances were treated as a single circumstance. R 2381.

SUMMARY OF ARGUMENT

The trial court erred by instructing the jury on flight. It let the state improperly cross-examine the defendant by asking him to comment on the credibility of the state's witnesses and rehashing the state's case under the guise of cross-examination. It was error for the trial court to deny discovery as to an important state witness's drug use. The trial court improperly curbed defense examination of jurors concerning the law and facts of the case while letting the state question jurors on these topics. It erred in permitting the use of an irrelevant and inflammatory autopsy photograph of the decedent and limiting the cross-examination of a state witness. The trial court improperly interjected itself into the proceedings to the prejudice of the defendant. It let the state use improper character evidence and gave an instruction on "reasonable doubt" which violates the Due Process and Cruel and Unusual Punishment Clauses. The prosecutor's

argument to the jury was so inflammatory and improper as to require a new trial.

The trial court's findings respecting sentencing circumstances were improper: the evidence did not support the trial court's factual findings regarding the aggravating circumstances, and the trial court failed to consider or give weight to unrebutted mitigating evidence. The court erred by instructing the jury on the heinousness circumstance. Other jury instructions given to the jury violate the Due Process and Cruel and Unusual Punishment Clauses. The trial court erred in admitting hearsay testimony in violation of the Confrontation Clause and by letting the state introduce photographs and cumulative evidence regarding prior violent felonies committed by Mr. Wyatt. The prosecutor's penalty phase argument requires a new sentencing hearing. Section 921.141, Florida Statutes is unconstitutional.

ARGUMENT

I. GUILT PHASE

A. JURY INSTRUCTION ON FLIGHT

Over defense objection, the trial court instructed the jury on flight. R 1619-20, 2049. It is improper to instruct a jury on flight. Fenelon v. State, 549 So. 2d 292 (Fla. 1992). Given the weakness of the state's case, reversal is required.

B. CROSS-EXAMINATION OF MR. WYATT

Much of the prosecutor's cross-examination of Mr. Wyatt was in the nature of calling upon him to comment on the veracity of the state's witnesses. The defense promptly objected to such questioning, arguing "that's improper cross examination, did you hear this

testimony and would she be mistaken." R 1756. The trial court's response was somewhat ambiguous,[5] but it clarified its ruling when the defense objected again and the court overruled the objection. R 1759. Thus given free rein, the prosecutor used the cross examination to rehash the testimony of the state's witnesses and ask Mr. Wyatt about their veracity. R 1777-78, 1786, 1787, 1794, 1795, 1800, 1806, 1806-1807, 1807-1808, 1820-21, 1826-27.

It is improper to ask any witness, including the defendant to comment on the credibility of other witnesses. Boatwright v. State, 452 So. 2d 666, 668 (Fla. 4th DCA 1984), Gonzalez v. State, 450 So. 2d 585 (Fla. 3rd DCA 1984) (Pearson, J., concurring), U.S. v. Richter, 826 F.2d 206 (2d Cir. 1987), Hernandez v. State, 575 So. 2d 1321 (Fla. 4th DCA 1991) (reversing notwithstanding lack of objection by defense), approved on other grounds 596 So. 2d 671 (Fla. 1992). The improper cross-examination went to the most crucial issue in the case, the credibility of Mr. Wyatt's testimony. Reversal is required.

The trial court's error was also prejudicial as to the penalty phase: the credibility of Mr. Wyatt's version of the facts was a crucial consideration during the penalty proceedings.

C. LIMITATION OF DISCOVERY

Jennifer Oler testified that she saw Mr. Wyatt and Ms. Nydegger leave Club 92 together. She refused to answer defense questions at deposition about her use of drugs on or around that night and several days before. R 592. The trial court ruled such

[5] The court said: "I'll sustain the testimony." R 1756.

questioning irrelevant, and refused to allow the questions. R 595-96; 598.

The scope of a discovery deposition extends to any relevant matter that appears reasonably calculated to lead to the discovery of admissible evidence. Ivester v. State, 398 So. 2d 926 (Fla. 1st DCA 1981). Ms. Oler's drug use on the day of the offense and on the days leading up to it, and discovery of witnesses who could confirm it, were relevant to her credibility and ability to perceive or remember. Inquiry into the matter was reasonably calculated to lead to the discovery of admissible evidence. Hence, the trial court erred in limiting discovery respecting this important state witness.

D. LIMITATION OF VOIR DIRE

Over defense objection, the trial court let the state question the venire about legal and factual issues likely to arise in the trial. R 102-103 (questioning along lines that a person may commit a murder just so the victim cannot tell what she saw or knew about the defendant). After the trial court silenced the defense, the state set out to give the jury its version of the law on principals. R 116. But then the trial court forbade the defense from posing questions concerning the facts or law applicable in the case. R 253. The trial court sustained the state's objection to questioning the jurors as to the sorts of cases in which they might feel the death penalty would be appropriate. R 439-40.

Questioning of jurors regarding "the law" is properly within the scope of voir dire examination. Lavado v. State, 492 So. 2d 1322 (Fla. 1986). The same is true of questioning respecting the

facts. Jackson v. State, 498 So. 2d 406 (Fla. 1986) (proper for prosecutor to question venire to determine whether defendant's gender might affect verdict). Questioning as to predispositions that jurors may have regarding the death penalty is properly within the scope of voir dire examination. Jackson, Morgan v. Illinois, 112 S.Ct. 2222 (1992). Hence the trial court erred in preventing defense examination of the venire on this subject. The court's ruling was prejudicial as to both guilt and penalty phases of the trial.

E. USE OF AUTOPSY PHOTOGRAPH

Over defense objection, the trial court let the state put into evidence an autopsy photograph showing Ms. Nydegger with blood all over her face. R 633-34. The photograph was not relevant to any matter before the jury, and its admission was irrelevant. Czubak v. State, 570 So. 2d 925 (Fla. 1990). Given the impact that such a photograph would have on the jury, a new trial is required. This error was also prejudicial as to penalty proceedings.

F. LIMITATION OF CROSS-EXAMINATION

On direct examination of the manager of the Glen Ellen Motel, the state introduced testimony that Mr. Wyatt and Freddie Fox lived at the motel at the same time. On cross-examination, the trial court sustained the state's objection to questioning of the manager about Mr. Fox's being intoxicated while he lived there, on the ground that it was outside the scope of direct examination. R 815. The trial court erred. The state opened up the fact that the witness was familiar with Mr. Fox, and the defense was therefore entitled to cross-examine him concerning Mr. Fox's condition at

that time. § 90.612(2), Florida Statutes. This limitation of Mr. Wyatt's right of confrontation requires a new trial.

G. JUDICIAL MISCONDUCT

As the defense began to question Fred Fox on re-cross examination, the trial court abruptly terminated the questioning without any objection from the state, saying in the jury's presence: "Now, the repetition in this case has gotten beyond all -- members of the jury, we're going to recess for the evening." R 875. During the cross-examination of Mr. Wyatt, the trial court said in the jury's presence that Mr. Wyatt was "being kind of smart" in responding to repetitive questioning. R 1759-60. It is improper for a judge to inject himself in this way into a trial to the prejudice of a party before the jury. See Amos v. State, No. 76,061 (Fla. Mar. 18, 1993). A new trial is required before a different judge. The court's conduct was also prejudicial as to penalty proceedings, as it communicated to the jury disapproval of Mr. Wyatt and his counsel.

H. IMPROPER CHARACTER EVIDENCE

Irrelevant character evidence generally, and evidence specifically suggesting the defendant's commission of other serious crimes warrant reversal of a conviction. See Jackson v. State, 451 So. 2d 458 (Fla. 1984) (evidence that defendant may have attempted to assault another person and statement that defendant was "thoroughbred killer"). Here the state presented, over objection, evidence that Mr. Wyatt contemplated killing an

arresting officer,[6] that he had hit a neighbor of Larry Bouchette on the head with a bottle,[7] that his alter ego "Jim" had hurt many people,[8] and that Mr. Wyatt feigned a conversion to Christianity.[9] The trial court also overruled the defense objection to evidence that Mr. McCoombs (and, by implication, Mr. Wyatt) had lived by a convict code of manipulating "the system."[10] The trial court erred in overruling these objections, and this Court should order a new trial. The trial court's errors were also prejudicial as to the penalty proceedings, as they presented to the jury improper evidence of Mr. Wyatt's character which it necessarily considered when voting to sentence him to death.

I. THE REASONABLE DOUBT INSTRUCTION

In Woods v. State, 596 So. 2d 156 (Fla. 4th DCA 1992) the court found proper Florida's standard jury instruction defining a reasonable doubt as "not a possible doubt, speculative, imaginary or forced doubt."[11] The court reached the merits notwithstanding that there was no objection to the instruction at trial. (Bennett v. State, 173 So. 817 (Fla. 1937) approved reaching the merits of an instruction on reasonable doubt notwithstanding the failure to

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[6] The trial court permitted the state to present evidence that Mr. Wyatt told Trooper Scott Robinson, the arresting officer that: "You know, it turns out you're pretty nice, I'm glad I didn't have a gun when you stopped me." R 1250-61.

[7] R 1226-27.

[8] R 1292-93, 1311.

[9] R 1359-61.

[10] R 1476, 1483.

[11] The same instruction was used at bar, without defense objection. R 2048-49.

preserve the issue for appeal.) Woods was wrongly decided on the merits.

A. The Supreme Court has long disapproved instructions defining "reasonable doubt." Miles v. United States, 103 U.S. 304, 312, 26 L.Ed. 481 (1881). It has approved of only one definition of the term: in Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150 (1954), while disapproving an instruction given by the trial court, 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 following 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.

It is safe to say that speculation and the force of imagination come into play when one is determining to act in the most important of one's affairs, and that a doubt founded on speculation or an imaginary or forced doubt will cause one to hesitate to act. Hence, our standard instruction is unconstitutional. Thus, in Haager v. State, 83 Fla. 41, 90 So. 812, 816 (1922), the 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."

But in Smith v. State, 135 Fla. 737, 186 So. 203, 206 (1939), the court approved of an instruction using the "shadowy, flimsy doubt" versus "substantial doubt" phraseology without analysis and without any mention of Haager.[12]

B. Woods is also incorrect in another regard. There, discussing Cage v. Louisiana, 111 S.Ct. 328 (1990), this 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 applies an incorrect legal standard for determination of the adequacy of a jury instruction. The correct standard is whether there is "a reasonable likelihood" that the jury applied the instruction in an unconstitu-

[12] For whatever reason, West Publishing Company assigned no key number to the discussion in Haager, which may explain this oversight in Smith.

tional manner. 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. Hence, Woods was wrongly decided.

In view of the foregoing, the trial court gave an erroneous instruction relieving the state of its burden of proving guilt beyond a reasonable doubt. The instruction violated due process. Accordingly, this Court should order a new trial.

The improper instruction was independently prejudicial as to penalty proceedings, for it resulted in the jury's use of an improper standard in determining the existence of aggravating circumstances.

J. THE STATE'S GUILT-PHASE ARGUMENT TO THE JURY

The prosecutor argued to the jury, without defense objection:

A. Mr. Wyatt's testimony was "made up after the State's case was heard," 1908, and was the product of perjurious collusion with defense counsel -- the defense attorneys conspired with Mr. Wyatt to present perjured testimony after the state rested. R 1913-14, 1925-26, R 1974 ("He didn't make up his story until after the State presented his case. They didn't do anything until then. After that an opening statement was made and then he testified. They cross-examined these people, the list goes on and on, and then he ends up admitting the very things they attack the witnesses on. They waited to hear the State's case, what could be proved before Mr. Wyatt constructed these stories to try to get around it.").

The defense attorneys, unlike the ethical prosecutors, concealed evidence from the jury. R 1982 ("They try to leave things dangle to make it appear what's not, like they did with Trooper Robinson. Folks, we take great pride in what we do here in presenting everything good for the State, bad for the State, what we presented was everything. That's what the State did, we're not going to be accused of somehow or other not being up front and they are.").

B. There may have been drugs in the briefcase so that Mr. Wyatt and Lovette had to go back and get it. 1926. Ms. Nydegger was kidnapped or raped, 1956, 1985, and drugged. R 1985 ("I don't care what she was, she was a human being and she didn't deserve to die, she didn't deserve to have a gun placed on the top of her head and have her brains blown out. We don't know how the cocaine got in her system, 17 times higher than the medical examiner had seen. Does that sound like she was doing it because she wanted to?").

C. Mr. Wyatt is a con; in his testimony, he was trying to pull the biggest con of all. His entire interaction with people as he moved along was nothing but a con. He was trying to pull a con on the jury. 1961. He is a proven liar who steals at the drop of a hat. 1961-62. He tried to lie to the jury. 1964. He is the master of deceit, a master of con. 1965. "The defendant is trying to pull his greatest con, he's conned continuously all down through. He's a 21-time convicted felon, he's trying to sell you a story. He's trying to play you off for a sucker like he did all these people along the way, but you listen to this testimony and you are not going to buy it." 1987.

D. Mr. Wyatt failed to give details of the 21 crimes of which he has been convicted. 1983. "One thing for sure, he's a proven liar even when he has no motives, he's a 21-time convict, he's cold, calm and calculated, always. I'm not going to be able to get back up and address you all. You know the motives and character of the defendant, you know what kind of person he is regardless of what the defense lawyer says." 1986.

E. The defense failed to challenge the expertise of the state's witnesses. 1928-9. Defense counsel failed to cross-examine the Myrtle Beach police officer. 1969.

F. The defendant's taking the stand was an admission that the state had proved its case. 1960-61.

G. "I suggest to you that Wyatt, in fact, told him [Freddy Fox] that, I killed somebody with this gun." 1968.

H. Deputy Payne (the officer who arrest Mr. Wyatt) is an honest person. 1970. The defense cross examination of Mr. McCoombs was not extensive. 1979.

I. The police believed that the arson and the Nydegger murder were related. R 1904.

"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).

It is improper for a prosecutor in argument to the jury to:

° use epithets regarding the defendant, 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");

° make assertions of personal belief in the defendant's guilt, Jones v. State, 449 So. 2d 313 (Fla. 5th DCA 1984), or in the veracity of the witnesses, Jones v. State, 449 So. 2d 313 (Fla. 5th DCA 1984), or directly or indirectly vouch for a witness's credibility, U.S. v. Eyster, 948 F.2d 1196 (11th Cir. 1991);

° comment on matters not in evidence, Duque v. State, 460 So. 2d 416 (Fla. 2d DCA 1984), Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984), U.S. v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991) (government may not "allude to evidence not formally before the jury");

° elicit sympathy for the decedent, the complaining witness, or their families, 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"), Bush v. State, 461 So. 2d 936, 942 (Fla. 1984) (Ehrlich, J., concurring) ("I can imagine no set of facts on which this would be proper argument");

° attack or denigrate witnesses, Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) (aspersions on witness's home town of Detroit), Carnival Cruise Lines, Inc. v. Rosania, 546 So. 2d 736 (Fla. 3d DCA

1989) ("[They] have a doctor, the best that money could buy. They went out and got a doctor.");

° make personal attacks on counsel, U.S. v. Friedman, 909 F.2d 705 (2nd Cir. 1990), Ryan;

° suggest that law enforcement officers think the defendant is guilty, Ryan;

° attack the theory of defense, U.S. v. Boldt, 929 F.2d 35, 40 (1st Cir. 1991) ("favorite defense tactic"), Waters v. State, 486 So. 2d 614 (Fla. 5th DCA 1986) (smoke screen), Carnival Cruise Lines, Inc. v. Rosania, 546 So. 2d 736 (3d DCA 1989) ("they're going to put up roadblock after roadblock"; "putting up roadblocks such as we've seen here through this entire trial"; "And think about how Carnival Cruise Lines defended this particular case.");

° directly or indirectly argue that the exercise of a constitutional right is an indication of guilt, Ryan.

The state's argument at bar violated all of these principles. Although there was no objection, the argument, taken as a whole, was so improper that neither rebuke nor retraction could have cured its effect so that it constituted fundamental error and reversal is required. Ryan.

The prosecutor's argument was independently prejudicial as to the jury's penalty verdict. The guilt-phase argument was a wholescale attack on Mr. Wyatt's character, so that the jury that deliberated his fate had before it an ample of highly improper considerations before it.

II. PENALTY PHASE

A. FINDINGS OF AGGRAVATING CIRCUMSTANCES

In finding the "avoiding arrest" aggravating circumstance, the trial court wrote: "Defendant, in relating to his cell mate in South Carolina in great detail concerning this killing, said that the victim was killed so that there could be no identification later." R 2479. The evidence does not support this finding. Mr. McCoombs gave no such testimony.

In finding the felony murder circumstance, the trial court wrote: "The evidence was ample and was relayed from the defendant's own mouth by his cell mate in South Carolina and proved that defendant committed a robbery upon the victim, Cathy Nydegger, to take her motor vehicle and murdered her to aid him in the commission of that robbery." R 2479. The evidence does not support this finding. Mr. McCoombs gave no such testimony.

In finding the coldness circumstance, the trial court wrote: "The testimony proved that the defendant and his accomplice after having met the victim in a bar outside of Tampa, got into the victim's car and drove across the state on S. R. 60 to the lonely road on which they have [sic] left a briefcase and which they wanted to retrieve. The testimony further indicated that while defendant's accomplice had sex with the victim, the defendant told his cell mate that she was nothing but a bar-fly and he decided to kill her, which he did in execution style. The killing was cold, calculated and premeditated, and was certainly foreseen by the victim during that long ride to the east coast of Indian River County. The Court cannot find nor imagine any moral or legal

justification nor the pretense there for, nor was any shown or intimated by the evidence or argument of counsel." R 2479-80.

The record does not support this finding. Mr. McCoombs' testimony was that the murder was the result of a spur-of-the-minute decision. The record does not show that the murder was foreseen by the decedent (who was apparently highly intoxicated), and, in any event, such evidence would be irrelevant to this circumstance.

Given these errors, resentencing is required.

B. FAILURE TO CONSIDER OR WEIGH MITIGATION

"We have held that in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." Hitchcock v. Dugger, 481 U.S. 393, 394 (1987) (internal quotation marks omitted). "When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence ... ." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) (footnotes and citations omitted). "Moreover, ... the trial court is under an obligation to consider and weigh each and every mitigating factor apparent on the record, whether statutory or nonstatutory." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). "Thus, when a reasonable quantum of competent, uncontroverted

evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). "[T]he trial court's obligation is to both find and weigh all valid mitigating evidence available anywhere in the record at the conclusion of the penalty phase." Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991). "[E]very mitigating factor apparent in the entire record before the court at sentencing, both statutory and nonstatutory, must be considered and weighed in the sentencing process.... The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor." Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992).

At bar, the trial court failed to consider, or gave no mitigating weight to, unrebutted evidence that Mr. Wyatt saved a young child's life, pulled a woman and four children from a car wreck, performed exemplary work with severely retarded persons and taught a genetically deformed child to eat and swallow while in a juvenile facility, was sexually abused by a teacher, was abused and beaten by his father, was lame and clumsy as a child, was shuffled from relative to relative (rather than being housed by the step-father), was at one point abandoned, saw his father strangling his mother, was traumatized by the death of his baby, had chronic substance abuse problems, and behaved in exemplary fashion while on death row. The trial court's error requires resentencing.

C. JURY INSTRUCTIONS

1. At the penalty-phase charge conference, the defense objected to instruction of the jury on the heinousness circumstance:

> [Defense counsel]: Judge, all of this looks okay, however, I would object to the aggravating circumstance of heinous, atrocious and cruel be given, particularly since under the definitions that have been handed down intended to be included as heinous, atrocious and cruel is one accompanied by additional acts to show the crime was conscienceless, pitiless and was unnecessarily tortuous [sic] to the victim. I don't think that has been supported by the evidence and I would object to the heinous, atrocious and cruel being given.
>
> [Prosecutor]: We intend to argue to the jury this was an execution style killing and in his own words he shot the bitch to watch her die.
>
> THE COURT: Not only that, you know that the ultimate is what the Court finds and the Court may not find that. I think he's entitled to argue it, just like one of yours. You may not -- your evidence may not reach the dignity of that in the charge but you're entitled to have that charge and you're entitled to argue it.

R 2203.

The trial court erred in accepting the state's erroneous construction of the circumstance. The circumstance does not apply to execution-style murders. See e.g., Porter v. State, 564 So. 2d 1060 (Fla. 1990). Further, the trial court's ruling that instruction on an improper circumstance was alright, because the trial court was the ultimate sentencer, was incorrect. Espinosa v. Florida, 112 S.Ct. 2926 (1992). The trial court incorrectly placed its imprimatur on argument urging the jury's consideration of

irrelevant and unconstitutional sentencing considerations. Resentencing is required.

2. Other jury instructions, not objected to by the defense, also resulted in the jury's consideration of aggravating circumstances in violation of the Cruel and Unusual Punishment Clauses of the state and federal constitutions. The jury instruction on the "avoid arrest" circumstance[13] did not inform the jury that, where the decedent is not a law enforcement officer, there must be strong proof that the dominant or only motive for the murder was the elimination of a witness, and that the mere fact that the decedent knew and could have identified the assailant is insufficient to prove intent to kill to avoid lawful arrest.[14] The standard instruction on the pecuniary gain circumstance[15] failed to recite that the circumstance applies only where "the murder is an integral step in obtaining some sought-after specific gain."[16]

The instruction on the coldness circumstance[17] did not inform the jury of the various constructions and limitations this Court has made. See Porter v. State, 564 So. 2d 1060, 1063-64 (Fla.

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[13] § 921.141(5)(e), Fla. Stat. The instruction: "The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody". R 2358

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

[15] § 921.141(5)(f), Fla. Stat. The jury instruction: "The crime for which the defendant is to be sentenced was committed for financial gain". R 2358.

[16] Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988).

[17] § 921.141(5)(i), Fla. Stat. The instruction: "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." R 2358-59.

1990) (circumstance unconstitutional without limiting construction). These include: The evidence "must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder before the crime began."[18] The coldness element requires "calm and cool reflection."[19] The calculation element requires "heightened premeditation" involving "a careful plan or prearranged design to kill."[20] The circumstance does not apply where the "actions took place over one continuous period of physical attack."[21] The circumstance does not apply where the evidence "is susceptible to conclusions other than finding [the crime] was committed in a cold, calculated, and premeditated manner."[22] "[A]n intent to rob is not indicative of heightened premeditation".[23] The state has the burden of proving beyond a reasonable doubt the absence of a "pretense of justification."[24] A "'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide."[25] A pretense of moral or legal justification exists where the defendant

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[18] Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990).

[19] Richardson v. State, 604 So.2d 1107 (Fla.1992) ("the element of coldness, i.e., calm and cool reflection, is not present here").

[20] Rogers v. State, 511 So. 2d 526 (Fla. 1987).

[21] Campbell v. State, 571 So. 2d 415 (Fla. 1990).

[22] Harmon v. State, 527 So. 2d 182, 188 (Fla. 1988).

[23] Jackson v. State, 498 So. 2d 906, 911 (Fla. 1986).

[24] Banda v. State, 536 So. 2d 221, 224 (Fla. 1988).

[25] Id. 225.

consistently has made statements that he had killed the victim only after the victim jumped at him and where no other evidence existed to disprove this claim.[26]

The instructions minimized the role of the jury, referring to the penalty verdict as "advisory" without mentioning that the trial court must put great weight on the verdict. This Court has rejected such a Caldwell v. Mississippi[27] argument on the ground that the judge is the sentencer,[28] but must revisit the issue in view of the holding of Espinosa that the "sentencer" is both the judge and the jury.

The sentencing decision is not to be made simply on the basis of toting up the aggravating and mitigating circumstances and seeing which list is longer.[29] Yet the instructions used here did not forbid such a practice in the jury room. Further the instructions did not tell the jury that it may not refuse to consider

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[26] Id.

[27] 472 U.S. 320 (1985) (condemning argument diminishing role of sentencing jury).

[28] Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988). But see Garcia v. State, 492 So. 2d 360, 367 (Fla.), cert. denied, 479 U.S. 1022 (1986) ("It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and Tedder v. State, 322 So. 2d 908 (Fla. 1975).").

[29] Hargrave v. State, 366 So. 2d 1, 5 (Fla. 1978) ("the statute does not comprehend a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum").

mitigating factors:[30] it merely said that the jury "may consider" mitigating circumstances established by the evidence.

A more general problem with the instructions is found in the following brief discussion in Waterhouse v. State:[31]

> Waterhouse claims that the jury instructions failed to specify that each juror should make an individual determination as to the existence of any mitigating circumstance. These issues have been waived because counsel did not object to the instruction. [Cit.] In any event, Florida law does not require such an instruction.

The questions comes to mind: what does Florida law require respecting the finding of mitigation and aggravation? Are sentencing circumstances to be determined individually by each juror, or are they subject to majority vote, or must they be found unanimously? In Mills v. Maryland,[32] the Court declared unconstitutional a jury instruction on the ground that jurors could have taken it as preventing consideration of a mitigating circumstance unless the jurors unanimously found the circumstance to exist. In McKoy v. North Carolina,[33] the Court explained that "Mills requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." Noting that "each juror must be allowed to consider all mitigating evidence," it concluded that

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[30] Hitchcock v. Dugger, 481 U.S. 393, 394 ("We have held that in capital cases, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence.") (internal quotation marks omitted).

[31] 596 So. 2d 1008, 1017 (Fla. 1992).

[32] 486 U.S. 367 (1988).

[33] 110 S.Ct. 1227, 1233 (1990).

"such consideration of mitigating evidence may not be foreclosed by one or more jurors' failure to find a mitigating circumstance". The instructions used at bar gave the jury no clue as to the requirements of McKoy and Mills, and invited arbitrary application of aggravating circumstances and failure to consider mitigating evidence.

If jurors could reasonably construe the standard instructions as requiring a majority vote on mitigating circumstances (a not unreasonable construction), then the instructions violate Mills and McKoy.

The jury instructions did not inform the jury that it was unconstitutional to give double consideration to the felony murder and pecuniary gain circumstances, insuring that the thumb rested on the scale in favor of death.

The instructions failed to inform the jury that the law forbids speculation as a basis for applying aggravating circumstances.[34]

D. CONFRONTATION CLAUSE AND CUMULATIVE EVIDENCE

During the penalty phase, the state presented hearsay testimony from various police officers concerning the details of violent felonies[35] of which Mr. Wyatt had been previously convicted. The trial court overruled the defense objection to the use of such testimony. R 2072, 2110, 2136. It also let the state use, over defense objections, photographs of the victims of the prior

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

[35] The murder of the three employees at Domino's, and the robbery and kidnapping of a man in South Carolina.

felonies and cumulative evidence dwelling on the details of those offenses. R 2100, 2155-56, 2184-94.

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.

The use of cumulative evidence of prior violent felonies, such as photographs, prejudices the defense so that its admission is improper. Elledge v. State, 613 So.2d 434 (Fla. 1993).

E. THE PROSECUTOR'S PENALTY PHASE ARGUMENT

In his penalty phase argument to the jury, without objection from the defense, the prosecutor argued:

A. As to the heinousness circumstance: The murder was atrocious "particularly given how he carried it out and what he said about it afterward, was clearly atrocious." R 2326. He urged the jurors to imagine that they saw a picture of Ms. Nydegger:

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

> ... she's 26 years old, in this bar having a good time. Mr. Wyatt, the same way Mr. Wyatt had done consistently with Mr. Hollar and other people that he had accosted and committed crimes against, she runs into Thomas Wyatt. He pays attention to her, just imagine that. As he pays attention to her he talks her into leaving the bar. So they leave. She's taken in that car across State 60 towards Indian River County. And then at some point she knows she's never going to see the light of day. Just imagine ... at night as you're traveling down this deserted highway, this two-lane highway with canals -- and pull over with canals on either side. Imagine that she's led on a death march, a death walk to wherever -- to the location of where she was killed, and you saw the photographs there. Imagine that she is made to kneel -- he didn't have to do that -- she's made to kneel -- but it sounds familiar, doesn't it -- imagine that she's made to bow her head, just imagine that she feels the cold steel of that gun against her head. Remember, it was in close contact with her head. Just imagine the terror, the mental anguish and terror that went through her mind. She must have begged, she must have pleaded with him. That's all too familiar as well. But he pulled the trigger and killed her just to watch her die.

R 2327-28. "His own statements, his bragging about it telling people -- telling Patrick McCoombs, she wasn't nothing but a bitch, wasn't nothing but a barfly" shows he was "totally uncaring about the killing." R 2328. "Think in her mind, I'm going to die, the same thing Mr. Hollar must have had, Mr. Kwok must have had. But then Mr. and Mrs. Edwards and Mr. Bornoush had, but they died along with Cathy Nydegger. That shows no conscience, no pity and no caring." R 2329.

B. In arguing for application of the coldness circumstance, the state contrasted Ms. Nydegger with Mr. Wyatt, who had a fair trial with the presumption of innocence and two skilled attorneys, and argued: "One man decided her fate, one man sitting right over

there. What was the penalty he imposed? Death." R 2330. The state argued that there was no legal or moral justification "particularly" because he just killed three people in Domino's two and a half days earlier. "Wouldn't he have said what have I done if there was any human feeling there? No. He relished in it when he put that cold steel to her head and pulled the trigger. He did it for the heck of it, for the thrill of it. That's what the evidence shows, the facts show." Id.

C. The state urged sympathy for the decedent and pointed to the defendant's lack of remorse. R 2341.

D. The prosecutor argued that, "[u]nlike Tommy Wyatt, you have a conscience, you care about doing what's right," adding that the jurors could "almost feel the pain and misery of her life and her death." R 2341.

E. The state urged consideration of lack of remorse for the killings at Domino's Pizza: "Because he relished in his crimes and he enjoys them." R 2341. "It may be an important day for Thomas Wyatt, but it's also an important day for Cathy Nydegger. She's remained silent because of what he did, she's remained silent throughout the course of this trial. But *now, folks*, that voice is crying out for justice and you folks have the ability to do that." R 2342.

F. As to the pecuniary gain circumstance: "Now, although they're already enriched, illegally enriched with money or other property from Mr. Kwok and from the Taco Bell and from Domino's, they now enrich themselves illegally with her car. This aggravating circumstances does not just apply to money, it applies to any

object taken to enrich yourself illegally. That's exactly what they did." R 2325. The robbery satisfied this circumstance. R 2325.

G. As to the aggravating circumstance of avoiding or preventing lawful arrest or effecting escape from custody: Mr. Wyatt killed Ms. Nydegger because she "knew too much," she "saw the briefcase and heard whatever story, whatever story was given to her, she heard as to why they were coming back for that briefcase. Wyatt could not afford to be identified, and this is a person that doesn't need a reason to kill, no doubt about that. Because of that he eliminated her. It was simple, it was easy, he eliminated her. The evidence shows this was one more thing he did to avoid arrest and continue his escape from custody. I submit this aggravating circumstance has also been proved beyond a reasonable doubt." R 2324-25.

H. Mr. Wyatt's trial testimony was false. R 2313.

I. Mr. Wyatt kills for the thrill of it. R 2322.

J. Mr. Wyatt robbed Ms. Nydegger in the course of killing her, robbed her of her car; the area back where the briefcase was "literally crawling with police officers and the publicity was wide in that area of the state. We know when he no longer needed her he robbed her of her car and killed her. It's that simple." R 2323-24.

K. The state argued that the jury should consider the mitigating evidence from Mr. Wyatt's family in aggravation: "But as you sat there and listened to that testimony and were sympathetic towards them I submit you ought to feel anger towards him.

He's the one that put them through this, it's his actions that caused this hurt. You see, he has torn up lives of people all the way from North Carolina to Florida. He's torn up a family's life." R 2337. "You can feel sympathetic toward them, but you should feel anger towards Thomas Wyatt." R 2337.

L. The state also urged the jury to disregard the mitigating effect of the defense evidence: "No amount of crying or impassioned pleas or cries for mercy should interfere with your duty to look at the facts and apply them to the law. Cries for mercy from a man who heard four people cry for mercy and chose instead to shoot them in the head. He wants to live, he wants to do what they cannot do." R 2341.

M. The killing of Ms. Nydegger was the worst of the defendant's crimes. R 2341.

In final argument to the jury at the penalty proceeding, it is improper for the state to:

° Invite the jury to imagine decedent's final pain, terror, and defenselessness: Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) ("can anyone imagine more pain and any more anguish than this woman must have gone through in the last few minutes of her life, no lawyers to beg for her life."), Garron v. State, 528 So. 2d 353, 358-59 (Fla. 1988) ("you can just imagine the pain this young girl was going through as she was laying there on the ground dying").

° Make golden rule arguments: Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989) (improper for prosecutor to ask jurors "to try to place themselves in the hotel during the victim's murder").

° Argue that actions after the murder show heinousness: Rhodes (improper to argue "that the fact that the victim's body was transported by dump truck from the hotel where she was killed to the dump where she was found supported the aggravating factor that the murder was heinous, atrocious, and cruel").

° Engage in name calling: Rhodes, 547 So. 2d at 1206 (Fla. 1989) ("the prosecutor insisted that Rhodes acted like a vampire"). See also Cochran (prosecutor called defendant a liar during cross-examination).

° Argue that the jury should treat the defendant as the defendant treated the deceased: Rhodes (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. This argument was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation.").

° Vouch for the credibility of the state's case and witnesses: Pope v. Wainwright, 496 So. 2d 798, 802-803 (Fla. 1986) ("I'm certainly familiar with the evidence over the last year and certainly familiar with Miss Susan Eckerd. I have met her on more than one occasion than when she was on the stand. I believed in the case I presented"; prosecutor's remarks "clearly improper").

° Argue that the defendant had shown no remorse: Pope v. Wainwright, 496 So. 2d 798, 802-803 (Fla. 1986) (comment "clearly improper").

° Argue that mercy plays no role in sentencing: Presnell v. Zant, 959 F.2d 1524 (11th Cir. 1992) ("improper suggestion that the jury must exclude any consideration of mercy from its sentencing

decision ... in effect deprived petitioner of his only remaining plea for life").

° Argue that, unlike the decedent, the defendant enjoys life in prison: Hodges v. State, 595 So. 2d 929 (Fla. 1992) (citing cases); Taylor v. State, 583 So. 2d 323 (Fla. 1991), Jackson v. State, 522 So. 2d 802 (Fla. 1988).

° Point to the effect of the killing on the decedent's family: Bush v. State, 461 So. 2d 936 (Fla. 1984) (Ehrlich, J., concurring) ("I can imagine no set of facts on which this would be proper argument."). See also Burns v. State, 18 Fla. L. Weekly S35 (Fla. Dec. 24, 1992).

The prosecutor's argument violated all of these principles. Further, it urged the jury to speculate on the facts in applying the circumstances, implied that Mr. Wyatt was guilty of additional crimes not charged, and used mitigation as aggravation, and was otherwise improper. The improprieties were so extensive and pungent that neither rebuke or retraction could have removed their sting. Hence, a new sentencing hearing is required.

F. 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 are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

i. Heinous, atrocious, or cruel

The instruction 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 "new" instruction in the present case violates the Eight Amendment and due process. The HAC circumstance is constitutional where limited to only the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Espinosa, supra. Instructions defining "heinous," "atrocious," or "cruel" in terms of the instruction given in this case are unconstitutionally vague. Shell, supra. While the instruction given in this case states that the "conscienceless or pitiless crime which is unnecessarily torturous" is "intended to be included," it does not limit the circumstance only to such crimes. Thus, there is the likelihood that juries, given little direction by the instruction, will apply this factor arbitrarily and freakishly.

The instruction also violates due process. The instruction relieves the state of its burden of proving the elements of the circumstances as developed in the case law.[37]

ii. Cold, calculated, and premeditated

[37] 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").

The same applies to the "cold, calculated, and premeditated" circumstance. The standard instruction simply tracks the statute.[38] 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 (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.

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[38] 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."

Hence, the instruction violates the Cruel and Unusual Punishment and Due Process clauses of the state and federal constitutions.

b. Majority verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates due process and the Cruel and Unusual Punishment Clauses. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate due process. See Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), and Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979). It stands to reason that the same principle applies to capital sentencing so that our statute is unconstitutional because it authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates due process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. 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.[39] 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

[39] 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.

(1965). When racial discrimination trenches on the right to vote, it violates the Fifteenth Amendment as well.[40]

The election of circuit judges in circuit-wide races was first instituted in Florida in 1942,[41] 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, 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).[42]

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

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

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

[42] 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.

circuit judgeships, none of whom are black. Single Member Districts, supra.

Florida's history of racially polarized voting, discrimination and[43] disenfranchisement,[44] 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 due process in selection of the decision makers in a criminal trial.[45] 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).

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

[44] 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."

[45] 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).

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 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).[46]

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

c. Appellate reweighing

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

d. Procedural technicalities

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[46] 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).

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

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[48] 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).

e. Tedder

[48] 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.

The failure of the Florida appellate review process is highlighted by the Tedder[49] 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 necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the eighth amendment.

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

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[49] 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.")

state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting a similar Sixth Amendment argument.

b. No power to mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17, and 22 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution. It also violates equal protection of the laws as an irrational distinction trenching on the fundamental right to live.

c. Florida creates a presumption of death

Florida law creates a presumption of death where but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case)[50]. 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

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

so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[51] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the Federal Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to due process and the heightened due process requirements in a death sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

d. Florida unconstitutionally instructs juries not to consider sympathy.

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

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

should closely follow the law on finding mitigation. A jury would have believed in reasonable likelihood that much of the weight of the early life experiences of Appellant should be ignored. This instruction violated the Lockett principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

e. Electrocution is cruel and unusual.

Electrocution is cruel and unusual punishment in light of evolving standards of decency and the availability of less cruel but equally effective methods of execution. It violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indignities -- An Eight Amendment Assessment of Methods of Inflicting Capital Punishment, 39 OHIO STATE L.J. 96, 125 n.217 (1978) (hereinafter cited, "Gardner"). Malfunctions in the electric chair cause unspeakable torture. See Louisiana ex rel. Frances v. Resweber, 329 U.S. 459, 480 n.2 (1947); Buenoano v. State, 565 So. 2d 309 (Fla. 1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

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

CONCLUSION

This Court should reverse the conviction and death sentence or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier June 2, 1993.

Of Counsel