IN THE SUPREME COURT OF FLORIDA

JIMMY LEE EADDY,

Appellant,

v. CASE NO. 79,987

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR NO. 271543

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IN THE SUPREME COURT OF FLORIDA

JIMMY LEE EADDY, :

Appellant, :

v. : CASE NO. 79,987

STATE OF FLORIDA, :

Appellee. :

_____:

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is a capital case. Jimmy Eaddy is the Appellant. The record on appeal consists of 41 volumes, most of which are skinny. Page references to the record will be indicated by the letter "R" while Transcript references will have the usual "T" preceeding the page number.

STATEMENT OF THE CASE

An information filed in the Circuit Court for Duval County on March 5, 1990, charged James Eaddy with committing a second degree murder thirteen years earlier, in 1977 (R 3). Almost two months later, an indictment upgraded the homicide to first degree murder and it additionally charged him with one count of robbery with a weapon (R 18-19). He pled not guilty (T 15), and the case proceeded in the normal fashion for matters such as this. In particular, Eaddy filed the following motions with the court:

1. Motion to Prohibit Instruction on Aggravating factors 5(h) and 5(i) (R 117). Denied (R 188).

2. Motion to Declare Sections 921.141(5)(h) Fla. Stat. Unconstitutional (R 166). Denied (R 204).

3. Motion to Dismiss Count I of the Indictment (R 208). Denied (R 225).

4. Motion to Dismiss Count II(robbery) of the Indictment (R 213). Granted (R 227).

Eaddy proceeded to trial before the honorable John Cox, and the jury found the defendant guilty of first degree murder (R 248), the robbery charge having been previously dismissed. He proceeded to the penalty phase portion of the trial, and after he presented evidence to mitigate a death sentence, the jury recommended death (R 257).

The court followed that advisory verdict. In aggravation it found that:

1. Eaddy committed the murder during the

course of a robbery.

2. The murder was committed in an especially heinous, atrocious, or cruel manner.

(R 282-83).

The court found nothing in mitigation (R 285).

This appeal follows.

STATEMENT OF THE FACTS

James Eaddy was hitchhiking north around Jacksonville in January 1977 trying to get a ride to South Carolina where he lived. At some point on January 16, Thomas Edmonds and a friend known only as Rob picked him up and took him to Edmonds' house (T 972). They drank some beer, but Eaddy wanted to get home so he left as the two other men were arguing (T 972-73). A short time later, Rob drove by and picked up Eaddy, and the two men traveled north together. They stopped twice for gas, and the defendant started to sign his name to the credit card receipt, but then signed Edmonds' (T 975).[1] Rob eventually dropped Eaddy with some relatives of the defendant and never was heard of again (T 979).

Edmonds had agreed to pick up a neighbor, Dr. Raymond Smith, from the airport in Jacksonville at about 10 p.m. on the evening of January 16, 1977 (T 446). He did not, and when Smith eventually returned home that evening, he discussed the matter with his wife and a friend of Edmonds. After a while, they agreed that the friend should go to Edmonds' apartment to see if anything had happened. She did so, and inside she found Edmonds' bloody body on his bed (T 429). As later determined, he had been hit in the back of the head with a blunt object and stabbed 11 times, with most of the wounds on the left side of

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[1]The court excluded Eaddy's testimony that Rob had told him to sign Edmonds' name (T 975). See Issue V.

the body in the vicinity of the heart (T 611). There were no defensive wounds, and the victim could have been unconscious when stabbed (T 637-38).

The police began their investigation during the course of which they uncovered several facts. About 9:30 on the night of the murder, a neighbor in the adjoining apartment heard a loud rhythmic thumping coming from Edmonds' apartment (T 478). She also heard two men engaging in a loud discussion. They were not angry, just loud (T 493). Also sometime during the evening, she also heard loud, hysterical laughter that suddenly stopped (T 483).

The police found a knife near the bed where Edmonds' body lay, and they recovered one fingerprint (among several lifts taken) from an ashtray. The pockets of Edmonds' pants had been turned out, but a gold chain and a gold ring were not taken (T 652, 583-84). Later, the victim's father received credit card receipts from gas stations in Georgia and South Carolina indicating that someone had used his son's credit card after the murder (T 659-60). The victim's car had also been stolen, and its burned hull was found in South Carolina (T 665). There the case remained until 1990.

In that year, the police, using recent innovations in computer technology, matched the fingerprint found on the ashtray with Eaddy's prints (T 705-16). He was arrested, returned to Duval County, and put in a cell with several other inmates, including one Ismael Lopez (T 855). When questioned by the police, the defendant denied being in Florida in 1977,

and he remained adamant when confronted with the fingerprint evidence (T 746). Even when the police suggested he may have been drunk or that Eaddy had killed Edmonds in anger when the victim approached him for sex the defendant did not change his story (T 742, 745).

Ismael Lopez was in jail charged with either first or second degree murder (T 853, 872). He said that Eaddy had told him that Edmonds had picked him up while hitchhiking and had taken him to the victim's house where he drank a couple of beers (T 859-60). At some point, the victim had approached the defendant, wanting sex (T 858). Eaddy, apparently angered by the homosexual advances, killed Edmonds (T 859-60).

SUMMARY OF THE ARGUMENTS

Eaddy presents an unusually large number of issues for this court to review: nine guilt phase questions and six penalty phase issues. Although as might be expected, some are stronger than others, all have merit and this court should grant Eaddy the relief requested in his conclusion.

ISSUE I. During voir dire, the state and counsel for Eaddy asked the prospective jurors about their views on the death penalty. The prosecutor asked only general questions on this subject while Eaddy's lawyer probed the positions each member of the venire had on imposing this punishment. One of them, Mr. Williams said that death was always "sufficient" if the defendant had taken someone else's life regardless of the mitigation. Mr. Lambert, another member of the panel strongly favored the death penalty, the mitigation would have to be "pretty strong" for him to recommend life, and most significantly, it would be very difficult to follow the court's instructions if it differed from what he thought was right. Finally, Mr. Watson, like Mr. Williams, favored the death penalty when someone killed another, and he could not recommend life if that was the law.

Eaddy challenged Williams and Lambert for cause, which the court denied, and he peremptorily excused Mr. Watson. After exhausting his peremptory challenges and asking for more, he told the court, he would have used an additional challenge on Mr. Williams who actually sat as a juror at Eaddy's trial.

The court should have excused each of the three prospective jurors challenged under state and federal constitutional standards. Each of them gave responses creating a reasonable doubt that they could have rendered an impartial verdict based solely on the evidence presented at trial. Mr. Lambert's responses, though providing a closer question, nevertheless weigh in favor of excusal. A prospective juror should be excused who will guarantee only that he will try to be fair.

ISSUE II. During voir dire the court sustained an objection to the defendant's voir dire that sought to determine if the death penalty should be applied to every homicide case. The court reasoned that Eaddy was "seeking to obtain a commitment from this jury on a premature basis" and should only ask if they could follow the court's instructions. Meaningful questioning of the jury ensures the defendant will receive a fair trial. Detailed questioning on pertinent issues helps achieve that goal because it informs the court and the parties about those who will give the defendant a fair trial.

The scope of voir dire depends on the nature of the case and the issues involved. In this case, where death was a possible sentence, the defendant should have been able to probe the prospective juror's views regarding when that penalty should be imposed. That such was needed is obvious from the responses of the prospective jurors discussed in the previous issue. Even if the answers given would not have supported a cause challenge, they may have given the defendant significant

insight into the jurors to help him make a prudent selection of whom to peremptorily challenge. Limiting Eaddy to asking them if they could follow the law emasculated the voir dire and prevented him from adequately determining the views of the prospective jurors on imposing the death penalty.

ISSUE III. The state had an insufficient case Eaddy murdered Thomas Edmonds until Ismael Lopez came forward and testified that the defendant had confessed to him that he had stabbed the victim. On cross-examination, Eaddy developed that this witness shared a jail cell with the defendant and was awaiting sentencing on a second degree murder charge. The court prevented him from exposing the facts of Lopez's crime which bore striking similarities to those this informant said Eaddy had told him regarding his killing of Edmonds. The court refused this inquiry because it did not see any similarities between the two offenses.

The court erred because the defense questions would have cast doubt on Lopez's credibility, always a relevant issue. Without Eaddy's inquiry the jury was led to believe that what Lopez told them had no similarity with his case, or rather they would have had no idea this witness may have sung so clearly because the melody was so familiar. The prohibited questions would have cast doubt on the veracity of this witness.

ISSUE IV. This court has held that evidence a defendant has been hypnotized may be admitted at his trial. Eaddy had been hypnotized, yet the court peremptorily refused to let him tell the jury that or what he had recalled as a result.

Refusing to conduct a hearing to determine what procedural prejudice the state may have suffered was per se reversible error. The court compounded that mistake by totally excluding this evidence, a sanction this court has held should be rarely used.

ISSUE V. At trial Eaddy admitted that he had signed Edmonds' name to the credit card receipts which the the state had introduced during its case in chief. He testified that Rob, the person who had been in Edmonds' car when the victim picked up Eaddy, had given him a ride to South Carolina after the defendant had left Edmonds' home. Eaddy, who claimed he had no familiarity with credit cards, started to sign his name but wrote Edmonds' instead. The court refused to let him tell the jury that Rob had told him to sign the victim's name because it was hearsay. Such was not because it explained why the defendant did what he did, what his intent was. As such, his explanation did not fit within the traditional definition of hearsay.

ISSUE VI. The key fact in this case is that the murder occurred in 1977, but Eaddy was not charged with that crime until 1990. By law, he could only have been charged with first degree murder because all of the lesser offenses were barred by the statute of limitations. At the charge conference in his trial, Eaddy, through counsel, waived that barrier and wanted the court to instruct the jury on the lesser offenses. The court refused apparently believing that the defendant could not waive the benefits of the statute. That was error.

Under state law, a defendant can waive application of the statute of limitations if he does so knowingly, intelligently and voluntarily. Here, at a hearing in the defendant's presence, counsel made the request the court denied.

Moreover, under federal constitutional law, refusing to instruct on the lesser offenses enhanced the risk of an unwarranted conviction for first degree murder. With the jury having only a choice between convicting Eaddy as charged or completely exonerating him of any criminality, the likely result would be for that body to return a guilty verdict. Such a result, however, is constitutionally unacceptable.

The state had charged Eaddy with robbery of Edmonds, but the court dismissed that charge because the statute of limitations barred its prosecution. The state argued Eaddy had to be consistent in using that barrier. If it barred the state from using it to prosecute the robbery it should prevent the court from instructing on lesser offenses. The statute, however, was created for the defendant's benefit, and he should have the freedom to invoke it however he saw fit.

ISSUE VII. Statutes of limitation, as this court has held, provides an "absolute protection against prosecution or conviction" for time barred crimes. In this case, even though the court had dismissed the robbery charge against Eaddy, the state presented evidence of it, argued he had committed that crime, and the court instructed the jury on it. Moreover, the court, in sentencing Eaddy to death found that he had committed the murder during the course of the robbery. Eaddy concedes

that evidence of the robbery could have been presented as part of the context of the murder. The state could not, if the defendant was to be given the protection this court guaranteed the statute provided, have argued it to the jury. Nor could the court have instructed that body on it or used it to justify a death sentence.

The First District Court of Appeal has, however, ruled just the opposite because statutes of limitation have "no effect upon the question of whether such crime was committed" and such statutes affect only the right to relief and not the penalty. The court's rationale fails because the statute precludes even the prosecution for the crime, the only legal way to establish the existence of the offense. Second, the First District relied on civil cases for the latter justification. In a civil context, contracting parties look forward to the execution of their agreement not its breach. Thus, they have no particular interest in claiming a statute of limitation as a defense since it arises only when a party seeks to avoid the terms of the contract.

The relationship between the defendant and the prosecutor is anything but a contractual one. There is, therefore, no reason to rely on the civil rationale. In a criminal context, the defendant has a vested right to invoke the statute of limitations at least when the charged crime becomes time barred.

ISSUE VIII. The previous issue assumes the state had sufficient evidence Eaddy had robbed Edmonds to charge him with

that crime. This issue disputes that presumption. The evidence shows only that Eaddy took some items from the victim (and left some obviously valuable jewelry) and that the victim was murdered. The state never presented the required causal connection that the taking occurred during the murder to convert a theft into a robbery. A mere temporal proximity between the taking and a murder does not make the former crime into a robbery.

In this case, the circumstantial evidence, viewed in the light most favorable to the state, proved only that after Eaddy killed Edmonds he stole his credit cards and car. That was not part of the murder, and the required causal connection between the murder and subsequent theft is missing.

ISSUE IX. During Eaddy's closing argument, the court refused to let the defendant tell the jury that the state had provided no motive why he had killed Edmonds. On the other hand, it allowed the state to say Eaddy had fabricated his story and lied to the jury. The court erred in both rulings because it precluded the defendant from arguing the state's failure to present evidence concerning a legitimate trial issue, and the state's argument injected the opinion of the prosecutor about Eaddy's guilt and denigrated his defense.

ISSUE X. In sentencing Eaddy to death, the court found that he had killed Edmonds in an especially heinous, atrocious, or cruel manner. Of course, stabbings often qualify as such, but in this case two facts prevent its application. First, and most important, Edmonds may have been unconscious when stabbed.

He could have been unaware of the attack on him. Second, this conclusion finds support from the lack of any defensive wounds on his body. Thus, while a stabbing may indicate physical torture, the lack of the victim's awareness of his impending death indicates a lack of mental torture. In order for this aggravating factor to apply the murder must have both of these qualities. The victim must have physically and mentally suffered far beyond that found in the norm of capital murders.

ISSUE XI. The court instructed the jury on the aggravating factor that the murder was committed in a cold, calculated, and premeditated manner without any moral or legal justification. In sentencing Eaddy to death, it did not, however, justify this punishment for that reason. It did not for the good reason that the murder occurred during, as the court put it, a "killing frenzy." This aggravating factor does not apply for murders committed in such manner. Instead, killings which show careful planning or prearranged designs to kill qualify for this aggravating factor. Here, the state presented insufficient evidence it applied, and the court erred in instructing the jury on it.

ISSUE XII. Compounding the court's error, the instruction on the cold, calculating, and premeditated aggravating factor merely tracked the statutory language, and was woefully short of adequately informing the jury of the limits this court has placed on it. It was not told, for example, that the defendant needed to have a heightened premeditation. Nor was it informed that whatever level of intent Eaddy may have had to rob Edmonds

was irrelevant in determining if he had the requisite desire to kill him in a cold, calculated manner. It mentioned nothing about a careful plan or pre-arranged designed this court has also required. Without such limiting and clarifying guidance, the jury was led by the state into believing the robbery was evidence of a calculating mind bent on committing murder. If the jury's recommendation must be given "great weight" as this court has held and the United States Supreme Court has recognized, the jury must be as fully apprised of penalty phase law as the sentencing court. The jury in this case had only the bare outlines of the law on this aggravating factor, which was error.

ISSUE XIII. The murder occurred in 1977, two years before the legislature added the cold, calculated, and premeditated aggravating factor to the capital sentencing statute. This court, in earlier cases, has held that it can be applied retroactively, and that is what happened here. Under state or federal constitutional law those earlier decisions should be abandoned. The change in the law attached legal consequences to the crime before it took effect, and it detrimentally affected Eaddy.

Additionally, Article X, section 9 of the Florida Constitution explicitly prohibits changes in the law from affecting the prosecution or punishment for any crime previously committed. Applying the cold, calculated, and premeditated aggravating factor as was done here violates to clear and plain language of this section of our state's

fundamental law. The court erred in instructing the jury on this aggravating factor.

ISSUE XIV. Under a proportionality review, Eaddy does not deserve a death sentence. Except for the murder, during his adult life he has had no convictions more serious than drunkenness. Additionally, he had a harsh youth that led to his alcoholism. He managed to recover from that addiction. The universal testimony was that he was a loving father to his son and step-son and a well respected neighbor and friend that willingly helped those about him recover from the devastation wreaked by Hurricane Hugo.

The only thing arguably elevating this murder beyond the norm of capital felonies was the manner of death: multiple stabbings. That single factor, however, does not make this a death case in light of any other significant aggravation and the abundance of mitigation presented.

ISSUE XV. The court found nothing to mitigate a death sentence. It could have and should have found more because the defendant presented an abundance of mitigating evidence at the sentencing portion of his trial.

ARGUMENT

ISSUE I

THE COURT ERRED IN DENYING EADDY'S CAUSE CHALLENGES OF TWO PROSPECTIVE JURORS, AND IT COMPOUNDED THAT ERROR BY REFUSING TO GIVE THE DEFENDANT MORE PEREMPTORY CHALLENGES AS HE REQUESTED, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

During voir dire, the state and counsel for Eaddy asked the prospective jurors about their views on the death penalty. The prosecution's questions were directed to the venire, and it did no individual questioning about capital punishment. Eaddy's counsel, on the other hand, probed the extent of each member of the venire regarding his or her views on this subject. This is how three of them responded:

> MRS. SASSER:. . . Let me ask you, Mr. Williams, do you have any strong feelings about the death penalty?
>
> A VENIREMAN: Well, I believe in it.
>
> * * *
>
> MRS. SASSER: And do you feel that it should always be given?
>
> A VENIREMAN: Well, under the circumstances, I believe if you take someone else's life and if the death penalty is given to you, I think that's sufficient.
>
> * * *
>
> MRS. SASSER: Do you think it should always be given in every case?
>
> A VENIREMAN: If you take someone's else's life?
>
> MRS. SASSER: Uh-huh.
>
> A VENIREMAN: Yes, I believe you are due the death penalty if that's what's

recommended.

* * *

MRS. SASSER: All right. If--well, let me rephrase the question then, to you-- any time someone is killed as a result of a homicide, do you think that the death penalty should be given regardless of any mitigation or--

A VENIREMAN: Regardless of mitigation?

MRS. SASSER: Yes.

A VENIREMAN: I think once they are found guilty without a reasonable doubt, I think they are due the death penalty.

MRS. SASSER:. . . Is there any circumstance where you would not recommend the death penalty?

A VENIREMAN: No, not really.

(T 296-98).[2]

Mr. Lambert, another potential juror, said that he was "strongly in favor" of the death penalty, and the "mitigating circumstance would have to be pretty strong" for him to recommend life. Significantly, when asked if he would follow

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[2]Another Mr. Williams was also called, and while he did not give answers that particularly thrilled Eaddy (T 315), this issue focuses on Russell R. Williams, the second person called to sit in this jury and the first Williams (T 166). The second Williams, like several other jurors, would have reluctantly recommended a life sentence, but they also made their feelings quite clear that they preferred a death sentence for one who had committed a first degree murder. e.g. Mrs. Armstrong. Could she return a life sentence? "I would prefer not to." (T 318) Mrs. Walker. Same question. "Do What?. No way." (T 320) Mr. Joyner and Plummer, "strongly" supported the death penalty (TR 345, 347). This issue does not focus on these members of the venire.

the law as given to him by the court, Mr. Lambert said "If it differed from mine, it would be very difficult." (T 342)

Similarly, Mr. Watson "favored" the death penalty, and believed that if a person committed a premeditated, first degree murder, it was an appropriate punishment (T 342-43). When asked if he could recommend a life sentence if the mitigating factors outweighed the aggravating factors, he replied "Not if that was the law." (T 343)

The state made no attempt to rehabilitate these two prospective jurors, and the court vaguely did so by asking the jurors "If. . . any member of this jury panel who feels that you could not follow the law that the Court will instruct you . . . in the guilt or innocence portion of this trial and in the recommendations to the Court as to the sentencing portion of this trial." (T 350-51) No one responded.

Defense counsel challenged both Mr. Williams and Mr. Lambert for cause, which the court denied. He also peremptorily excused Mr. Watson as an alternate juror (T 375). Williams sat as a juror (T 357, 363-64).[3]

Challenging a trial court's exercise of its discretion in refusing to remove these two prospective jurors should pose a

---

[3]Counsel later exhausted all the peremptory challenges allotted, requested more, and said that remaining on the jury [was] still a person we would like to excuse that we tried to challenge for cause." (T 371) Specifically, she wanted to excuse Mr. Williams (T 372). Eaddy has satisfied this court's requirements announced in Trotter v. State, 576 So. 2d 691 (Fla. 1990) to preserve this issue for review.

significant problem to Eaddy because this court has often held that it will order a new trial only if the lower court had manifestly abused its discretion in denying a defendant's cause challenge. Davis v. State, 461 So. 2d 67 (Fla. 1984). The judge will have abused that freedom whenever a juror's responses showed that the juror could not lay aside any bias or prejudice and "render his verdict solely upon the evidence presented and the instructions on the law as given to him by the court." Lusk v. State, 446 So. 2d 1038, 1041 (Fla. 1984). Said another way,

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on motion of a party, or the court on its own motion.

Singer v. State, 109 So. 2d 7, 22-23 (Fla. 1959); accord, Moore v. State, 525 So. 2d 870 (Fla. 1988); Hill v. State, 477 So. 2d 553 (Fla. 1985). Jurors, in short, must not only be impartial, they should be above "even the suspicion of partiality." O'Connor v. State, 9 Fla. 215, 222 (1860). If any question remains regarding a juror's fairness, the court should excuse him or her. Sydleman v. Benson, 463 So. 2d 533 (Fla. 4th DCA 1985).

Mr. Williams clearly met the various tests this court has articulated. He said he would recommend death for a defendant whom the jury had found guilty of first degree murder, regardless of whatever mitigation he presented (R 296-98). At

no time did he temper that position or in any way indicate he could recommend a life sentence. The court should have excused him for cause.

In Hill, supra, prospective juror Johnson said he would vote for a death sentence if the defendant had committed a premeditated killing or felony murder. This court reversed Hill's sentence of death because a reasonable doubt existed that this juror had the state of mind necessary to render an impartial sentencing recommendation. Similarly, in Thomas v. State, 403 So. 2d 371 (Fla. 1981), a juror, as in Hill, said that under no circumstances could he recommend a life sentence if the defendant was guilty. This court reversed, relying on the rule established in Singer. At least a reasonable doubt existed about that jurors impartiality.

If this court ordered new proceedings in Hill and Thomas, it should do so here because Williams unequivocally maintained and never modified his intention to recommend death for any defendant convicted of first degree murder. Such bias raised far more than a reasonable doubt about his ability to weigh the aggravating and mitigating evidence in this case. This court should reverse the trial court's judgment and sentence and remand for a new trial.

Mr. Watson's refusal to follow the law and recommend life if the mitigating outweighed the aggravating similarly should have alerted the trial court that he was unqualified to sit as a juror in a capital case.

Mr. Lambert's responses provide a closer question, but even with him there is a reasonable basis to believe that he would view Eaddy's mitigation with a fatal suspicion. By themselves, his initial responses that he strongly favored the death penalty and that the mitigation would have to be "pretty strong" for him to recommend life, probably would not satisfy this court's "abuse of discretion" standard. The balance must tip in Eaddy's favor, however, when this prospective juror said that if the law differed from his interpretation, "it would be very difficult" for him to recommend life (T 342).

In Robinson v. State, 506 So. 2d 1070 (Fla. 5th DCA 1987) several prospective jurors promised to try to be fair and impartial although they were unsure of their ability to be so. Such equivocal assurances of fairness raised the reasonable doubt this court in Singer held justified excusing a member of the venire from service. Accord, Imbimbo v. State, 555 So. 2d 954 (Fla. 4th DCA 1990). Here Lambert's inability to assure the trial court that it would follow its instructions on the law without reservation rendered him ineligible to sit as a juror in this capital case, and the court erred in not excusing him for cause.

In Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court articulated the constitutional standard for determining when prospective jurors may be excused for cause because of their views on the capital punishment:

> That standard is whether the juror's views

> would "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction in his."

Witt, at 424. (footnote omitted.)

This standard applies with equal force to prospective jurors who, as in this case, favor the death penalty to the point that they would impose it regardless of the mitigation's weight. Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80, 88 (1988).[4] Bryant v. State, 601 So. 2d 529 (Fla. 1992). Lambert and particularly Williams held such partial views on who should receive a death sentence that their performance as jurors would have been substantially impaired.

Finally, the trial court's vague question posed at the end of the voir dire asking the venire if they had any problem with following the law as the court would give them in the guilt or penalty phase of the trial was inadequate. In Bryant, this court held that the trial court or the prosecutor should rehabilitate a prospective juror whom the defense may object to. Id. at 532. While it did not say how the court should do this, a blanket, nebulous inquiry of the entire panel should be insufficient. Instead, the court should ask the specific, questionable jurors detailed questions about their ability to follow the law. In that way, the court can satisfy itself and

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[4]Ross also required that an objectionable juror must have actually sat before the court's error in not excusing him or her for cause reaches constitutional proportions. Id. at 86. Eaddy has jumped that hurdle because Williams sat in his case (T 372, 379).

this court that a particular juror has the appropriate mindset to fairly and impartially determine a defendant's fate. Without such specificity the problem jurors may underestimate the court's concern and determine for themselves that they can be fair and impartial. The law, however, requires the court to make that decision, and without a probing inquiry of the individual jurors regarding their impartiality, neither this court or the trial judge can say with any ease of conscience that the prospective jurors could be fair and impartial.

Under state law or the United States Constitution, the trial court erred in refusing to grant Eaddy's motion to excuse the two prospective jurors. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN LIMITING EADDY'S RIGHT TO QUESTION THE PROSPECTIVE JURORS ABOUT THEIR VIEWS ON THE DEATH PENALTY, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

As voir dire proceeded in the normal course of such events, Eaddy's counsel asked a question of the genre designed to expose a prospective juror's attitudes towards capital punishment. The state, however, had problems with that line of inquiry:

> MRS. SASSER [defense counsel]: If-- in a homicide case where the death penalty is a potential penalty, do you think it should be applied in all of those cases?
>
> MS. COREY [the prosecutor]: And, Your Honor, I'm sorry, but I must object because the law in the State of Florida is very clear that there is a standard before the jury can even think about imposing the death penalty. . . My objection, Judge, is that--that the death penalty is reserved for cases where the aggravation outweighs the mitigation. Mrs. Sasser is completely ignoring that standard of the bifurcated system in Florida and going straight to do you think all homicides should get the death penalty. And that completely ignores two things, one that it's reserved for first degree murder and, two, it's reserved for first degree murders where the State has aggravation that outweighs the mitigation.

The court sustained the state's objection, reasoning that it thought Eaddy was "seeking to obtain a commitment from this jury on a premature basis . . . " (T 301). It also indicated that the appropriate inquiry was simply to ask them if they could follow the court's instructions and the law on whether death should be imposed (T 302).

Shocked at the court's limitation of voir dire, counsel asked for a mistrial, because it had "limited my questioning of these people about the feelings of the death penalty and that they have deprived my client of his constitutional rights under by (sic) the Florida Constitution, the United States Constitution. . ." (T 302-303) Predictably, the court denied the motion, but it erred in doing so (T 303).

Judge Pearson's dissent in Lavado v. State, 469 So. 2d 917 (Fla. 3rd DCA 1985), which this court adopted in Lavado v. State, 492 So. 2d 1322 (Fla. 1986) provides a primer on the purposes underlying the voir dire of prospective jurors. Meaningful examination helps ensure the defendant a fair and impartial jury. Without detailed questioning on pertinent subjects, the trial court cannot know who among the venire is impartial towards the defendant, and he cannot use his peremptory challenges with any degree of confidence.

The scope and specificity of voir dire then depends on the nature of the case. For example in Lavado, "the single thing that defense counsel needed to know was whether the prospective jurors could fairly and impartially consider the defense of voluntary intoxication." Lavado at 469 So. 2d 919. For the defendant in that case, it was a pertinent inquiry because his defense to a charge of armed robbery was that he lacked the specific intent to commit that crime because he was drunk. In Moses v. State, 535 So. 2d 350 (Fla. 4th DCA 1988), during voir dire, defense counsel told the jury that Moses had a felony

record.[5] When he tried to find out if that would affect the prospective jurors' impartiality, the court refused to let do so. That was error the Fourth District held because it denied the defendant the opportunity to conduct a meaningful inquiry of any biases or prejudices members of the venire might have to felons. On the other hand, inquiries into lifestyle such as religion, politics, hobbies, bumper stickers, and the like have only a general relevance at best and can be properly prohibited. State v. Thayer, 528 So. 2d 67 (Fla. 4th DCA 1988).

What Eaddy wanted to ask fell into the class of cases exemplified by Lavado and Moses. His prohibited questions dealt with the prospective jurors' views on the imposition of the death penalty. That certainly was a relevant inquiry because if their opinions would have substantially interfered with their ability to weight the aggravation and mitigation then they would have been excused for cause. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Even if the defendant could not have won a cause challenge because a juror's support of the death penalty was too hardline he nevertheless would have gained valuable insight to use in evaluating whether to expend a peremptory challenge on a particular prospective juror.

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[5]He probably raised this issue at voir dire because he anticipated the defendant taking the stand.

Limiting defense counsel to asking merely if the jurors could apply the law as the court would instruct them emasculated the power of the voir dire. After all, how many jurors will say "No, I won't follow the law?" Common sense dictates the obvious conclusion that most of the venire will, when under the pressure of a direct inquiry, deny any inability to apply the law fairly.

Eaddy's questioning of Mrs. Harrison, one of the prospective jurors, illustrates the prejudice the defendant suffered. Immediately before the state's objection, he had learned that she believed that if someone had been found guilty of murder, he should be sentenced to death. She admitted she might change her mind if mitigation was presented, but it was a weak concession. "I guess it would have to depend upon the circumstances." (T 299)

After the court's ruling, defense counsel tried to glean Mrs. Harrison's attitude, but now it was significantly more difficult. The prospective juror still held to her view that if guilt was proven, death was appropriate and that if instructed she could return a life recommendation. She evidently had problems though because as counsel observed "Are you sure about that because you looked real doubtful about it?" (T 304).

Thus, without being able to ask direct questions about Mrs. Harrison's position on capital punishment, counsel could determine her view on this crucial subject based almost solely on her demeanor. Eaddy's lawyer, however, should not have been

so limited, and this court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE III

THE COURT ERRED IN PROHIBITING EADDY FROM ASKING THE STATE'S KEY WITNESS, ISMAEL LOPEZ, ABOUT THE FACTS OF THE CRIME HE HAD COMMITTED, WHICH BORE A STRIKING SIMILARITY TO THOSE FACTS HE CLAIMED EADDY HAD TOLD HIM ABOUT THE MURDER HE WAS CHARGED WITH COMMITTING, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONT HIS ACCUSER.

Until Eaddy was arrested, the only evidence the police had that he had murdered Edmonds was his fingerprint that had been found on an ashtray in the victim's house. When questioned, Eaddy at first denied having been in Jacksonville thirteen years earlier. He later admitted that Edmonds and another person, known only as Rob, had picked him up while hitch hiking through north Florida and had taken him to Edmonds' home where he had drank a beer and then left (T 972-73). A short while later, Rob picked Eaddy up, and the pair drove to South Carolina (T 974, 977). On the way, Eaddy apparently bought some gas with Edmonds' credit card (T 975-77).

Such evidence certainly raised a suspicion about Eaddy, but it would still have been insufficient to sustain a murder conviction. Thus, Ismael Lopez became the state's key witness. He shared a cell with Eaddy and claimed that during the months they stayed together, the defendant confessed to murdering the victim (T 860). Lopez admitted that he had been charged with first and second degree murder (T 853, 872), but the court refused to let Eaddy's counsel cross-examine him regarding the facts of his case. Such inquiry was relevant, counsel argued, for the usual purpose of showing that Lopez wanted to curry

favor with the state to get a more lenient sentence in his case (T 842). Also, and this becomes the focus of this issue, counsel wanted to develop that "the exact same thing that he says that my client confessed to is exactly what happened in his case, more or less, in that he was a hitchhiker, got picked up and robbed someone." (T 842) The court allowed some cross-examination of the witness, but prohibited Eaddy from asking any questions about the facts of Lopez's crime: "But the Court will further rule that in so doing, and under the guise of so doing, defense counsel may not go into all of the facts and details and circumstances surrounding the charge made against the witness Lopez." (T 849) Seeking further clarification, counsel asked,

> MRS. SASSER: Then, Your Honor, are you limiting me from asking any questions about the death of the person he [Lopez] killed?
>
> THE COURT: Yes. I don't see that that has any relevancy whatsoever in this case.
>
> MRS. SASSER: Even though what I would proffer to the Court is that he killed someone, robbed them and then hitchhiked and it was just exactly what happened to him is what he is saying Mr. Eaddy did?
>
> THE COURT: I don't see any similarities between the two.

(T 851).

The court erred in limiting Eaddy's right to cross-examine the state's key witness in this capital case about the facts of his case.

The law in this area is simple and straightforward. A criminal defendant has an absolute right to cross-examine

witnesses the state has presented. The extent of that inquiry, however, has limits subject to the trial court's discretion. See, Ehrdardt, Florida Evidence, 1992 Edition, Section 612.2.

Sections 90.401 and 90.402 Fla. Stats. (1991) provide that any evidence which tends to prove or disprove a material fact is admissible. This court has further said that relevancy is the test of admissibility. Ruffin v. State, 397 So. 2d 277 (Fla. 1981). From Eaddy's point of view, the court should have admitted his evidence of Lopez's murder if it tended, in any way, either directly or indirectly, to establish a reasonable doubt he did not commit the murder in this case. Rivera v. State, 561 So. 2d 536 (Fla. 1990). The leading case in this area, Coxwell v. State, 361 So. 2d 148 (Fla. 1978) and its predecessor, Coco v. State, 52 So. 2d 892, 895 (Fla. 1953) laid the foundation for what this court said in Rivera. In a capital case, while confronting and cross-examining witnesses against him, a defendant can inquire into matters germain to direct examination and plausibly relevant to the defense.

In this case, Lopez became the state's key witness, and interest naturally focussed on the validity of the story he claimed Eaddy told him while the two shared a cell in the Duval County jail. In short, how believable was Lopez? Could Eaddy attack his credibility by showing that the witness had used the facts of his own case to fabricate a story implicating Eaddy in a murder that had occurred over 13 years earlier?

Under the rationale of Rivera, the answer is yes. Eaddy wanted to weaken Lopez's testimony by showing the strange

coincidence of facts between this witness's crime and the one he claimed the defendant had confessed to committing. Their similarity certainly raised a reasonable concern that Lopez had fabricated his story from his own case, and either directly or indirectly, such an attack could have raised a doubt about the truth of what he told the jury.

Without Eaddy's questions the jury was led to believe that what Lopez told them had no similarity with his case, or rather they would have had no idea that Lopez may have sung so clearly because he had practiced the melody. In McCrae v. State, 395 So. 2d 1145 (Fla. 1981), the defendant had admitted to committing several misdemeanors and a felony. Through skillful questioning, this testimony on direct examination could have led the jury to believe the felony conviction-assault with intent to commit murder-was no more serious that the misdemeanors. "Consequently, the state was entitled to interrogate appellant regarding the nature of his prior felony in order to negate the delusive innuendoes of his counsel." Id. at 1152. Similarly here, a thorough cross-examination would have exposed the weakness of Lopez's testimony.

> [Q]uestions which are intended to fill up designed or accidental omissions of the witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate cross-examination.

4 Jones on Evidence Cross Examination of Witnesses §25:3 (6th Ed. 1972) Quoted with approval in McCrae, supra, at 1152.

In Morrell v. State, 335 So. 2d 836, 838 (Fla. 1st DCA 1976) the court improperly limited the defendant's cross-examination of the alleged victim of a sexual battery concerning her drug use at trial and when the crime supposedly occurred. Error occurred even though Morrell had presented no conclusive proof she had used drugs at those times.

In this case, the facts of Lopez' murder were not so speculative as in Morrell, yet the court here similarly erred by limiting Eaddy's cross-examination because the similarities between what Lopez said Eaddy did and his own murder were so striking that the jury could reasonably have discounted this witness' testimony. It would have in any event tended to raise a reasonable doubt concerning the veracity of his story. That is all this court in Rivera required for admissibility.

At trial the state cited three cases to support the court's ruling. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Livingston v. State, 565 So. 2d 1288 (Fla. 1988); Alvarez v. State, 467 So. 2d 455 (Fla. 3rd DCA 1985). It claimed those cases held that when a witness testifies the defense can "explore a potential bias or preferential treatment but that the actual facts of the crime for which the witness is incarcerated are not subject to cross examination by defense counsel." (T 839-40) Those cases do not say any such thing. In Livingston, for example, the trial court erred (though harmlessly) in refusing to let the defendant cross-examine a state witness about whether he currently had charges pending against him. In Alvarez, the

trial court erred when it told Alvarez he could not question the state's key witness about the deal he had reached with the prosecution for his testimony. Neither case stands for what the state claimed they did. To the contrary, they support Eaddy's argument as is readily apparent from the Alvarez court's quote from one of its earlier cases: "The vital importance of full and searching cross-examination is even clearer when, as here, the prosecution's case stands or falls on the jury's assessment of the credibility of the key witnesses." Porter v. State, 386 So. 2d 1209 (Fla. 3rd DCA 1980).

Apparently the state drew from these cases that if the defendant can question a state witness about his criminal convictions and deals with the state that is all he can do. Neither Livingston or Alvarez hold or even suggest that conclusion. In light of Rivera and the other cases cited earlier it could not flow from the holdings of those cases. If evidence suggested that Lopez may have fabricated his story implicating Eaddy in the Edmonds' murder, the court should have admitted it. That it did not was constitutional error, and this court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV

THE COURT ERRED IN REFUSING TO LET EADDY ELICIT ANY TESTIMONY THAT WAS REFRESHED OR RECALLED AS A RESULT OF UNDERGOING HYPNOSIS, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

In Bundy v. State, 471 So. 2d 9, 18 (Fla. 1985) this court held "that hypnotically refreshed testimony is per se inadmissible in a criminal trial in this state. . . ." In Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) the United States Supreme Court rejected the automatic exclusion of all hypnotically refreshed testimony of a defendant. Recognizing Rock, this court in Morgan v. State, 537 So. 2d 973, 976 (Fla. 1989) receded from Bundy "only as it pertains to the defendant as a witness." It also suggested "that reasonable notice be given to the opposing party. Additionally, the hypnotic session should be recorded to ensure compliance with proper procedures and practices." Id.

Eaddy testified in his defense, and during the direct examination his lawyer asked:

> Q. Did you have difficulty remembering what happened on those two days?
>
> A. Yes, ma'am.
>
> Q. As a result of that, did you have any kind of--undergo any kind of hypnotic refreshment?
>
> A. Yes, ma'am.
>
> MR. TYSON: Your Honor I am going to object. And I would like to approach.
>
> * * *
>
> MS. COREY: First, we want Mrs. Sasser held

> in contempt. She knows that is an improper question to bring hypnosis into a trial.
>
> This is the first we've ever heard of it. We don't know what she's talking about. But she knows the case law is clear that hypnosis has no place in the courtroom. And she knows better than to ask that question. That is the most--
>
> THE COURT: Well, don't fuss at her. Tell me what's the ground for your objection?
>
> MS. COREY: Judge, that it's completely irrelevant, it is an improper question and it's prejudicial. And it is in violation of every case I've ever read about hypnosis.
>
> THE COURT: All right. Let me hear from you, Mrs. Sasser.
>
> MRS. SASSER: Well, it's true that hypnotic testimony is on occasion allowed in court. I do think it is also an issue.

(T 979-80).

The court subsequently sustained the state's objection and told the jury to disregard the question and answer about Eaddy having been hypnotized (T 981). Under this court's holding in Morgan and the United States Supreme Court's ruling in Rock that was error. During the penalty phase of the trial, it also told defense counsel that "There will be no mention of hypnosis during the course of trial either by the State or by the defense." (T 1157)

Although the record clearly shows neither the state, the court, or defense counsel were aware of this court's ruling in Morgan, did the trial court nevertheless rule correctly albeit for the right reason? In other words, assuming Eaddy gave no

notice of anticipated use of the hypnosis, was the trial court correct in excluding it because of that failure?

The issue arguably involves a discovery violation, and the law requires a "Richardson" hearing whenever one side has violated the provisions of Rule 3.220 Fla. R. Crim. P. Under the procedure announced in Richardson v. State, 246 So. 2d 771 (Fla. 1971), the trial court must conduct a hearing to determine if the violation was willful or inadvertent, trivial or substantial, and what prejudice, if any, occurred. Failure to conduct a hearing to determine the procedural prejudice the state, in this case, suffered is per se reversible error. Smith v. State, 500 So. 2d 125, 126 (Fla. 1986).

Here, the court held no Richardson hearing but peremptorily sustained the state's objection, in effect, totally excluding any testimony that Eaddy had been hypnotized and the evidence was gained through that technique. Under this court's ruling in Smith, failure to conduct the required inquiry should warrant a new trial for Eaddy. Strengthening this position, the law in this area discourages the sanction of completely excluding evidence. See, State v. Theriault, 590 So. 2d 993 (Fla. 5th DCA 1991). Penalties should be tailored to the case, and in this instance, a continuance so the state could prepare to meet this testimony would have been more appropriate. This is especially true when the exclusion limited Eaddy's right to present a defense as guaranteed by the Sixth Amendment. Rock, supra.

The court, therefore, erred in failing to conduct the required hearing, and it compounded that error by completely excluding any evidence that Eaddy had been hypnotized and the evidence he gained. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE V

THE COURT ERRED IN EXCLUDING, FOR HEARSAY REASONS, EVIDENCE THAT THE PERSON WHO TOOK EADDY TO SOUTH CAROLINA AFTER HE LEFT EDMONDS' HOUSE TOLD HIM TO SIGN EDMONDS' NAME TO THE CREDIT CARD RECEIPT WHEN THEY HAD STOPPED TO BUY GAS, IN VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO PRESENT A DEFENSE AND TO A FAIR TRIAL.

At trial, the state presented evidence that Eaddy had signed Thomas Edmonds' name to credit card receipts at gas stations in Georgia and South Carolina. On one of the receipts Eaddy started to write his name but signed "Thomas Edmonds." (T 975) Aside from the alleged statement Eaddy made to Ismael Lopez, this evidence was the strongest link between the defendant and the victim, showing that sometime after the murder, Eaddy had possession of Edmonds' credit card. As such, the natural suspicion arises that he may have stolen the card, and during the theft/robbery killed Edmonds. The state, in its closing argument, played on that reasonable conclusion in arguing Eaddy committed a murder.

Eaddy told the jury that Edmonds and another fellow, whom he had known only as Rob, had picked him up while he was hitchhiking back to Florida (T 971). They took him home in Edmonds' car, and after having a couple of beers with the two men, the defendant left (T 972-73). A short while later, Edmonds' companion picked Eaddy up and the two traveled to South Carolina. Along the way, they stopped twice at a gas station. As Rob pumped the gas, he told Eaddy to use Edmonds' credit card to pay for it (T 975). Unfamiliar with credit

buying, the defendant started to sign his name to the credit slip, signed Edmonds' instead (T 975).

At trial, the court refused to let Eaddy explain why he had signed Edmonds' name.

> A. We went to straight up 17 or 95, I think, it's Brunswick, Georgia. And we stopped and got gas.
>
> Q. And what happened when you stopped and got gas?
>
> A. I got out and was pumping the gas in the car. And he got out and handed me a credit card and asked me to sign the name on it or sign it because his hand was cut.
>
> Q. Do you recall where his hand was cut?
>
> A. No, ma'am, not really.
>
> Q. And then what happened.
>
> A. Then when I was signing the card, I've never had a credit card before, I never signed one before, I was putting my name on it. Then I realized I couldn't put my name on it.
>
> Q. Did anyone advise you what name to put on it?
>
> A. He told me to put Mr. Edmonds.
>
> MR. TYSON: Objection, Your Honor, it calls for hearsay.
>
> THE COURT: The objections is sustained. The answer of the witness will be stricken from the record. You will disregard it in arriving at a verdict.
>
> MRS. SASSER: Your Honor, it's not offered for the matter of the truth asserted but merely to show why he did what he did.

(T 974-75).

The court erred because what Eaddy wanted to say was not hearsay. The excluded statement would have explained his motive or reason for signing Edmonds' name to the receipt. When so used, what he would have said did not amount to hearsay.

Hearsay, as defined by Section 90.801(1)(c) Fla. Stat. (1991) is

> a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Logically, if a statement does not intend to prove the matter asserted, it is not hearsay. Specifically, if the testimony is offered to show the state of mind of the hearer, it is admissible. Koon v. State, 513 So. 2d 1255 (Fla. 1987). For example, in Koon, a witness said that at a preliminary hearing on counterfeiting charges the defendant faced, a U.S. magistrate told Koon she would have dismissed the charges against him if there had only been one witness. That out of court statement was admissible this court held because it was not "offered to prove the truth of the magistrate's statement but rather to show that having heard the statement, Koon could have formed the motive for eliminating one of the two prosecuting witnesses." Id. at 1255. That is, the witness' testimony offered an explanation for why Koon committed a murder. Accord. Breedlove v. State, 413 So. 2d 1, 7 (Fla. 1982). In E.B. v. State, 531 So. 2d 1053 (Fla. 3d DCA 1988), the trial court erred in exlcuding statements from the

defendant's school principal that the defendant should leave campus because his life was in danger. Such evidence was not hearsay because it showed the effect it had on E.B.'s mind, that he had a reason to fear the victim.

In this case, the evidence that Eaddy was told to sign Edmonds' name explained why he did so and should have been admitted for that purpose. Eaddy, who had no familiarity with credit cards, intended to sign his own name, but he realized that he could not do that, Whose name, then, should he sign? His travelling companion said he should sign "Thomas Edmonds." This last testimony explained why he acted as he did, it provided a motive or reason for signing the victim's name. It was not hearsay, and should have been admitted.

But was it harmless error? This court, in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) said the state has the burden on appeal to show an error's harmless. That means the error is presumed harmful unless the state can show otherwise. In this case, the state had a weak case. Ismael Lopez provided the strongest evidence of guilt, but his credibility was shaky. Eaddy, who for 13 years had not said a word to his wife, friends, or anyone about killing Edmonds, suddenly confessed all to a stranger he happened to share a jail cell with and who may have seen the police reports in Eaddy's case (T 895). In addition, as discussed more fully in Issue III, Lopez may have used the facts in his case to fabricate a story implicating the defendant.

Besides Lopez, the state presented evidence of Eaddy's fingerprint on an ashtray and of course, the credit card receipts. The fingerprint, however, tied the defendant to the house, but not necessarily the murder. The credit card receipts provide a stronger link to the homicide, and one must ask why he would sign the victim's name on the receipt. Obviously, if he had stolen the card, as the state alleged, he would forge the name. On the other hand, if Eaddy did not commit the murder, was generally ignorant of how credit cards worked, and did not know one should not sign another's name, then it is understandable why he signed Edmonds' name when Rob told him to do so. It would have strengthened his defense and concomitantly weakened the force of the state's argument in favor of guilt. This court cannot say that the weight of the excluding evidence was so negligible that it was harmless beyond a reasonable doubt.

This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VI

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES TO FIRST DEGREE MURDER, IN VIOLATION OF HIS FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The key fact in this case is that the murder occurred in 1977, but Eaddy was not charged with that crime until 1990, over thirteen years after it had occurred (R 18). The statute of limitation as defined in section 775.15 Fla. Stat. (1991) precluded the state from either prosecuting or convicting Eaddy of robbery as charged (T 157), but that same statute had no similar restriction for the first degree murder charge. Neither Eaddy or the state had much problem with that. They did, however, strongly disagree about whether they jury could convict him of any lesser included offense of first degree murder for which the time provided for in that section had expired. Specifically, Eaddy was willing to waive the statute of limitations for the lesser included offenses of first degree murder (T 1026). The state countered by saying that he could not because he had invoked the statute to prevent the state from prosecuting the robbery, so he could not waive it for the lesser included offenses (T 1028).

The trial court apparently believing the defendant could not waive the statute of limitations for the lesser included offenses, followed the holding of a First District Court of Appeal case which held that a trial court need not instruct on any lesser offense which are time barred (T 1028). That was error.

Section 775.15 provides the foundation for this issue, and it says in relevant part:

> 775.15 Time Limitations
> (1) A prosecution for a capital or life felony may be commenced at any time. . .
> (2) Except as otherwise provided in this section, prosecutions for other offense are subject to the following periods of limitation:
> (a) a prosecution for a felony of the first degree must be commenced within 4 years after it is committed.
> (b) A prosecution for any other felony must be commenced within 3 years after it is committed.
>
> * * *
>
> (6) The period of limitation does not run during any time when the defendant is continuously absent from the state or has no reasonably ascertainable place of abode or work within the state, but in no case shall this provision extend the period limitation otherwise applicable by more than 3 years.

Because Eaddy lived in South Carolina after the 1977 murder was committed, the state had 7 years to prosecute him. Since it did not do so, all the offenses they could have tried him for, except the capital murder, were barred.[6]

Statutes of limitation are for the defendant's benefit, and if he wants to waive their application to a particular charge he can do so. Tucker v. State, 459 So. 2d 306, 309 (Fla. 1984). A defendant does not, however, waive this absolute defense by simply requesting jury instructions on

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[6]The state originally arrested him for and charged him with second degree murder (R 1-3) but soon dropped that charge and indicted him for first degree murder (R 18-20).

lesser included offenses. Id. It must, as this court said, be "knowingly, intelligently and voluntarily made." Id.

A defendant meets this test by either the court personally examining the defendant or when counsel, in his presence, waives the statute of limitations. Tucker v. State, 417 So. 2d 1006, 1013 (Fla. 3rd DCA 1982). Affirmed, Tucker v. State, supra. In this case, the latter scenario occurred. After telling the court that at least two appellate courts had ruled that a trial court need not give instructions on time barred offenses, it said:

> We are asking, though, for the Court to give them anyway because Mr. Eaddy at this point is willing to waive his right to be convicted on lesser includeds to murder.

(T 1026).

The court, rather than letting Eaddy waive the statute, felt bound by a First District holding. Counsel, seeking to clarify and preserve the issue then said:

> Well, we feel that the Defendant is willing --on the lesser includeds to murder, willing to waive or he is willing to waive his right to the statute of limitations. And were the jury to return a verdict on a lesser included, he is willing to abide by that conviction and would waive any rights under the statute of limitations. . . . However, we feel that if the courts do not allow him to have the lesser includeds on the murder, that that takes away the possibility of any kind of jury pardon to a lesser offense which would be a very real possibility in this case. . . .

(T 1026-27)[7].

After hearing argument from the state, the court denied the defendant's request (T 1028). Clearly, Eaddy had indicated through counsel that he wanted to waive the statute of limitations, and the court with equal clarity refused to let him do so. Eaddy adequately waived application of the statute of limitations to the lesser included offenses. Rembert v. Dugger, 842 F.2d 301 (11th Cir. 1988).

In another sense, though, the waiver issue is a red herring because the court believed that it was bound by the First District's ruling that the statute of limitations barred instructing the jury on lesser included offenses. It simply refused to acknowledge the possibility of a defense waiver, despite counsel's repeated efforts, so Eaddy's attempt to get the desired instructions were, in the court's mind, not on point. If it considered the waiver, it should have said so, and it is unfair for the state and court to preclude review of this issue, especially when the stakes are so high, by hiding behind a shroud of silence. To the extent the court believed this way, it erred. Tucker, supra.

The court's ruling also had constitutional implications because it not only instructed the jury on first degree pre-meditated murder, it told them, over defense objection, they could find Eaddy guilty under a felony-murder theory (T

[7]Eaddy was present during this argument (T 1024).

1035). In Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), state law defined felony murder as a lesser included offense of the capital crime robbery-intentional killing. When a defendant was charged with that death eligible crime, state law prohibited the trial court from instructing the jury on felony murder as a lesser included offense of the capital crime. The jury, in other words, had to either convict him of the capital crime or acquit him of committing any offense. The United States Supreme Court reversed Beck's subsequent conviction, and in justifying that conclusion, it made some comments pertinent to this case:

> [A] defendant is entitled to a lesser offense instruction-in this context or any other-precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Id. at 634. (Emphasis in opinion.)

> Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury.

Id. at 638.

The nation's high court in Beck thus created a substantive, constitutional right in capital cases to an instruction on lesser included offenses, and it gave the defendant the choice of whether to waive that right. Spaziano

v. Florida, 468 U.S. 447, 455 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

> [T]he question is whether Beck requires that a lesser included offense instruction be given, with the defendant being forced to waive the expired statute of limitations on those offense, or whether the defendant should be given a choice between having the benefit of the lesser included offense instruction or asserting the statute of limitations on the lesser included offenses. We think the better option is that the defendant be given the choice.

Spaziano, supra, at 456.

There is, however, a presumption against defendants waiving such rights, especially by silence, Johnson v. Zerbst, 304 U.S. 458r 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Hence, even if this court should find that defense counsel's waiver (in Eaddy's presence) of the statute of limitations unconvincing, the trial court still erred in not giving the defendant the choice of whether to waive an instruction on the lesser included offenses.

In this case, by refusing the defendant's request to instruct the jurors on the lesser offenses, the trial court committed the same error as the Alabama court did: it precluded, as trial counsel argued, the jury from partially pardoning the defendant.[8] That was error because it enhanced the risk that Eaddy would be convicted of first degree murder.

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[8] State v. Terry, 336 So. 2d 65 (Fla, 1976) recognizes the jury pardon.

The jury when faced with such a drastic "either or" choice was more prone to convict than acquit.

This court has also recognized that failure to instruct the jury on the "necessarily lesser included" offenses is fundamental error not subject to the harmless error rule.[9]

> This Court has consistently held that, upon a proper request, a trial judge must give jury instructions on necessarily included lesser offenses, that a refusal of such a request constitutes fundamental error when properly preserved for appeal by timely objection under Florida Rule of Criminal Procedure 3.390(d), and that the harmless error rule does not apply.

Harris v. State, 438 So. 2d 787, 796 (Fla. 1983).

The state's response amounted essentially to one of waiver: by invoking the statute of limitations to preclude prosecution for the robbery, Eaddy had waived its application to the lesser included offenses of the murder (T 1028). The First District Court of Appeal in Rembert v. State, 476 So. 2d 721, 722 (Fla. 1st DCA 1985) supported that position under facts similar to this case. "To permit such 'on again, off again' pleading and waiver of the statute of limitations would,

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[9] In this case, the necessarily included lesser offenses would have been second degree murder (depraved mind) and manslaughter. Fla. Std. Jury Instr. (Crim) Schedule of Lesser Included Offenses. In Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049, 72 L.E.2d 367 (1982) the nation's high court ruled that there was no Eighth Amendment violation when the trial court refused to instruct the jury on lesser included offenses for which there was no evidence warranting such instructions. That case has no applicability in this case at least to the extent that the trial court was required to instruct on necessarily lesser included offenses.

in our opinion, contravene the public policy reasons motivating the statute."

Rembert took his case to the federal system, and eventually the Eleventh Circuit Court of Appeals considered it. Rembert v. Dugger, 842 F.2d 301 (11th Cir. 1988). That court rejected the First District's ruling, finding that "Beck [v. Alabama] is unequivocal in setting forth the requirement that as long as there is a possibility of a death sentence, a defendant has a constitutional right to the relevant lesser included instructions." Id. at 303[10]. The court, however, denied the defendant any relief because he was eventually sentenced to life, so the concerns articulated by the United States Supreme Court in Beck had no relevance in Rembert's case.

Such obviously is not the case here since Eaddy has been sentenced to death.

Moreover, as to the First District's rationale, allowing "such 'on again, off again' pleading and waiver" does not contravene public policy. Statutes of limitation are solely for the defendant's benefit by curtailing the state from hampering the defense in preparing for trial. Garofalo v. State, 453 so. 2d 905 (Fla. 4th DCA 1984). They should also be liberally construed for the defendant's benefit. State v.

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[10]The court also found that Rembert "repeatedly sought to waive the applicable statute of limitations through his appointed counsel." Id.

King, 275 So. 2d 274 (Fla. 3d DCA 1973), affirmed 282 So. 2d 162.

If they are for his benefit, then in this case Eaddy should have exclusive control over the extent to which he can invoke them. He should not be placed in the position of having to choose between being tried for robbery so he could have the jury instructed on lesser included offenses or waiving those instruction so he could claim the statute's application to the robbery. Moreover, the state suffered no prejudice, particularly when it presented evidence of the robbery and had the jury instructed on that crime as part of its felony murder theory and as an aggravator in the penalty phase.

For the several reasons articulated, the court erred in refusing to instruct the jury on the lesser included offenses to first degree murder, and this court should remand for a new trial.

ISSUE VII

THE COURT ERRED IN INSTRUCTING THE JURY ON FELONY MURDER AND THAT, IN CONSIDERING WHAT SENTENCE TO RECOMMEND, IT COULD CONSIDER EADDY HAD COMMITTED THE MURDER DURING THE COURSE OF A ROBBERY BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE HE HAD ROBBED THE VICTIM.

Taken in the light most favorable to the state, the evidence presented in this case shows that Edmonds picked up Eaddy and took him to his house for beer and sex (T 857-58). During the defendant's short stay in the house, he stabbed him when Edmonds suggested they have sex (T 859). He then fled, taking the defendant's car and two credit cards (T 861). He left behind several pieces of jewelry and other valuable items (T 583-84). The question that arises under this court's duty to review the evidence is whether the state sufficiently proved Eaddy had robbed Edmonds. As argued here, it did not, and at most the taking of the victim's property was an afterthought to the murder, a theft, but certainly not a robbery.

As defined by the standard jury instructions for criminal cases, a defendant can be found guilty of felony murder if "The death occurred as a consequence of and while he was engaged in the commission of a robbery." The key is that the murder must be causally related to the robbery. A mere temporal or spatial proximity provides an insufficient connection. In short, the defendant must have the intent to commit a robbery at the time he murdered the victim. See, Bruno v. State, 574 So. 2d 76 (Fla. 1991).

Complicating the state's case here, the prosecution had to rely exclusively on circumstantial evidence that Eaddy took Edmonds' property and during the course of the taking, used force or violence. Section 812.13(1) Fla. Stat. (1977). Such proof can establish guilt but only if the state has excluded every reasonable hypothesis of innocence. State v. Law, 559 so. 2d 187 (Fla. 1990). If a reasonable alternative explanation other than guilt exists, this court must accept it and reject the state's theory, no matter how plausible it may appear.

In this case, the jail house snitch, Ismael Lopez, provided the key incriminating evidence about the murder. When asked what Eaddy did after stabbing the victim, he testified only that "[Eaddy] said he took the car and went and left." (T 861) He never said Eaddy killed Edmonds during his efforts to steal the vehicle. To the contrary, Lopez' testimony shows with equal clarity that the theft was an afterthought to the killing. There is no evidence he killed the victim to steal his car.

In Hill v. State, 549 So. 2d 179 (Fla. 1989) state proved Hill had taken money in the victim's purse after the murder, but such proof failed to establish he had killed the victim to get the money. It was not, in short, the motivating reason for the killing, and the evidence supported the equally plausible theory that Hill had taken the cash as an afterthought.

Similarly, in Scull v. State, 533 So. 2d 1137 (Fla. 1988). Scull took the victim's car after the murder, but equally

reasonably was that he had taken it to escape rather than to improve his net worth.

Finally, in Peek v. State, 395 So. 2d 492 (Fla. 1981) Peek ransacked the victim's house and took her car. He had taken nothing else, and as this court reasoned, he could have stolen the car to ease his escape.

Although the three cases just mentioned focus on the aggravating factor that the murder was committed for pecuniary gain, they illustrate the problem the state had in this case. The circumstantial evidence Eaddy robbed the victim could as easily be interpreted in his favor. He stole the car and credit cards after the murder and only as an after thought to the crime and not as the reason for committing the homicide. If robbery was his intent when he killed Edmonds, why did he leave several other valuable items in the house? That he took only what he needed to facilitate his return to South Carolina supports the notion that after killing Edmonds, he rummaged through his wallet and stole his car to get what he needed to flee. There is no evidence that during a robbery to get the credit cards and car keys he killed the victim. To the contrary, the evidence shows that the murder was committed, at least by Lopez' testimony, in reaction to Edmonds' request/demand for sex (T 859).

The problem with this wonderful argument is the harm Eaddy suffered. Afterall, the court granted his motion to dismiss the robbery charge because the statute of limitations barred prosecution. That prohibition, however, posed no hindrance to

the state proving Eaddy committed the murder on a felony murder theory. Thus, in order to prove its case, it had to establish he robbed Edmonds, and it certainly argued the felony murder theory in closing (T 1061-63), and the court instructed them on it (R 236-38).

The court, therefore, erred in instructing the jury on robbery committed in the course of a murder.

ISSUE VIII

THE COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD CONVICT EADDY UNDER A FELONY MURDER THEORY BECAUSE THE STATE COULD NEITHER PROSECUTE OR CONVICT THE DEFENDANT ON THE UNDERLYING FELONY, ROBBERY, BECAUSE THE STATUTE OF LIMITATIONS PRECLUDED IT.

Before trial, the court granted a defense motion to dismiss count II of the indictment because it charged Eaddy with robbing Edmonds (T 157). It correctly ruled because the statute of limitations as defined by Section 775.15(2) Fla. Stat. (1991) precluded prosecution for that offense, Undeterred, the state presented evidence of the robbery, and over defense objection (T 1029, 1035), the court instructed that it could convict Eaddy under a felony murder theory if it found that he had committed the murder during the course of a robbery (R 236-38).[11] Aggravating this error, the court instructed the jury during the penalty phase of the trial on the aggravating factor that the defendant committed the murder during the course of a robbery (T 1311). Finally, the court justified its death sentence in part on that factor (R 282). Those acts were errors because statutes of limitation prevents not only the conviction for time barred crimes, it also precludes their prosecution.

The fundamental question posed by this issue is what does the statute of limitations, section 775.15, mean? What can the

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[11]The court also defined robbery (R 237-38).

state do with evidence that suggests the defendant committed a crime which is now barred from prosecution by time? In Tucker v. State, 459 So. 2d 306, 309 (Fla. 1984) this court said "The statute of limitations defense is an absolute protection against prosecution or conviction." (emphasis supplied.) Liberally construing this language, State v. King, 275 So. 2d 274 (Fla. 3d DCA 1973), means that at least the court should not instruct the jury on the underlying felony of a capital felony murder charge.

To "prosecute" according to Black's Law Dictionary means "not merely to commence [a judicial proceeding], but includes following it to an ultimate conclusion." In this case, the lack of a charging document alleging Eaddy robbed Edmonds did not prevent the state from prosecuting him for that crime. It presented evidence of it, argued it to the jury, and requested the court instruct on felony murder (which the court did). The state could not have done more to prosecute Eaddy for the robbery. Yet, if the statute of limitations provides an absolute protection against prosecution, it should preclude what occurred in this case. This does not mean that evidence of the robbery should have been excluded. If it was admissible for other reasons, such as to put the murder in context, Smith v. State, 365 So. 2d 704 (Fla. 1978), the court could have properly admitted it. The state could not, however, have argued Eaddy committed it even though he was not charged with that offense. In order to afford the defendant an absolute protection from prosecution, the statute of limitations

necessarily requires the court to refuse give the jury a felony murder instruction.

If the state can do what it did in this case, the protections afforded by the statute of limitations do little. The basis for allowing even admittedly guilty persons to escape conviction and punishment because they avoided prosecution for a number of years arises from the due process notion that it is unfair to expect defendants to defend against crimes allegedly committed in the distant past. Memories fade, witnesses disappear, and evidence is destroyed. Regardless of the state's reason for failing to prosecute the defendant, he is prejudiced by the inordinate delay.

This rationale found justification here. Eaddy's parents were the only ones who had seen Rob when he dropped their son off in South Carolina. By 1991, 13 years after the murder, they were dead (T 978), and with their deaths, strong corroboration of the defendant's story also died.

The First District Court of Appeal, contrary to what Eaddy argues here, has held that the state can prosecute a defendant on a felony murder theory even though the statute of limitations precludes prosecution for the underlying felony. Jackson v. State, 513 So. 2d 1093 (Fla. 1st DCA 1987). In that case the defendant tried to rob a restaurant in Tallahassee, and in the course of doing so, he killed two people. He fled and was not arrested for almost four years. The state charged him with two counts of first degree murder, one count of kidnapping, and one count of attempted robbery. This last

offense apparently formed the basis for the felony murder theory of prosecution. Pretrial the court dismissed the attempted robbery charge because its prosecution was barred by the statute of limitations. It refused to dismiss the murder indictments because because the underlying felony had been dismissed.

The First District approved the trial court's ruling for two reasons: 1) "The mere preclusion of the state's capacity to prosecute the subordinate crime because of a time limitation has no effect upon the question of whether such crime was committed." 2) Statutes of limitation "affect only the right to relief or, as we conclude here, the imposition of a penalty." Id. at 1095.

As to the first reason, within the truism it merely states is the assumption that a crime was committed. The only way that can be established in a way cognizable by the law is by proof at trial. The only way that proof can be established is by the state presenting evidence of it, yet it cannot do so because as this court held in Tucker, the statute of limitations is an absolute bar to the prosecution or conviction to time barred offenses. The statute of limitations, in short, does have an effect on the question of whether a crime was committed because it prevents the state from proving it.

As to the second reason, the First District has chosen to narrowly construe the statute of limitations, yet as the Third District held (relying on cases from this court) such laws should be given broad interpretation to benefit the accused.

State v. King, 275 So. 2d 274 (Fla. 3rd DCA 1973). It did so by relying on Walter Denson & Son v. Nelson, 88 So. 2d 120, 122 (Fla. 1956), a civil case that upon scrutiny has no relevant bearing on resolution of the issue presented here. In that case, Nelson was awarded a 12 1/2 percent permanent partial disability award as a settlement in a worker's compensation claim. By the law existing at the time of the award, he had only one year to petition for a modification, but within the year, the legislature extended the period to two years, and he filed for a modification within the latter period. An additional 12 1/2 percent disability payment was granted.

Rejecting the employer's argument that Nelson could not benefit from a retroactive application of the statute change, the First District noted that statutes of limitation in contracts apply only to remedies and not to substantive rights. This is so because in a contract parties look forward to the performance of the agreement and not its breach. They, therefore, have no particular interest in statute of limitation type laws existing at the time of the agreement.

However sound the court's logic in Denson may have been, it has scant relevance here. First, this case does not involve the question of retroactive application of a change in the statute of limitations. Second, the state and a criminal defendant hardly are contracting parties at the time a crime allegedly occurs. They have reached no agreement, and to the contrary are adversaries before arrest and subsequently. One is justly trying to apprehend, prosecute, and convict the law

breaker while the other seeks to avoid arrest, prosecution, and conviction. If the statute of limitations, a legislatively provided defense, absolutely bars prosecution, it is one that arises at the time the crime becomes time barred, and it is one a defendant can look forward to invoking. The presumptions, in short, acknowledged by the court in Denson, are irrelevant in a criminal context. This court should reject Jackson and rule that the state cannot prosecute Eaddy for robbery if it is barred by the statute of limitations. Further, this court should find the state could not argue, and the court could not find Eaddy committed the murder during the course of an armed robbery as an aggravating factor.

ISSUE IX

THE COURT ERRED IN REFUSING TO LET EADDY ARGUE IN CLOSING THAT THE STATE HAD PRESENTED NO EVIDENCE ON THE MOTIVE FOR THE MURDER AND IN ALLOWING THE STATE TO CALL HIM A LIAR, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL.

The state had the initial closing argument in this case, and this is how it started:

> MS. COREY: May it please the Court? How dare that man come into this courtroom and take that **stand** and tell you the package of lies that he told you.
>
> MRS. SASSER: Objection, Your Honor.
>
> THE COURT: Objection is sustained. Please refrain from using that type of language, Counsel. You can talk about the facts.
>
> MS. COREY: He took that stand and he sat in that chair after swearing to tell the truth and all he did was tie this crime up in a neat, little package and toss it at you to try to make you believe that he's not guilty of this crime.
>
> But, Ladies and Gentlemen, before he heard what all of the witnesses said, before he took that stand, before he even knew he was going to be arrested for this crime, his signature was all over the crime.
>
> Before he had a chance to fabricate that defense that I submit to you insults the intelligence of every person--
>
> MRS. SASSER: Objection, Your Honor, that's beyond the bound of argument.
>
> THE COURT: The objection is overruled.

(T 1056-57).

Later, when Eaddy's counsel presented her closing argument, she said:

> Now, I would submit to you is there

> any reason put forth why Mr. Eaddy would kill Mr. Edmonds? None, none at all.
>
> MS. COREY: Your Honor, I am going to object because the State is not required to prove motive.
>
> THE COURT: The objection is sustained. YOU will disregard that portion of the argument during your deliberations, members of the jury.

(T 1094).

The court erred in both rulings because the state's argument injected the opinion of the prosecutor about Eaddy's guilt and denigrated his defense, and it precluded the defendant from arguing the state's failure to present evidence concerning a legitimate trial issue.

The law in this area is simple, and its application straight forward. Closing argument should assist the jury in analyzing and applying the evidence presented at trial. United States v. Door, 636 F.2d 117, 120 (5th Cir. 1981). It does not provide a forum for either party to inflame the jury so that it returns a verdict based more on emotion than logical analysis. Bertolotti v. State, 476 So. 2d 130 (Fla. 1985). While the trial court has considerable discretion to control counsel's argument, it will have been abused when it allows the state to give its opinion that the defendant has fabricated or lied in presenting its case. Huff v. State, 544 So. 2d 1143 (Fla. 4th DCA 1989). Such attacks on the defendant personally are condemned in contrast to attacks on defenses which are not unless the state denigrates the legality of presenting one. Blaylock v. State, 537 So. 2d 1103 (Fla. 3d DCA 1988)(based on

evidence, defendant's insanity defense was incredible); Rosso v. State, 505 So. 2d 611 (Fla. 3d DCA 1987)(attacks legitimacy of an insanity defense in general). They divert the jury's attention from finding facts and weighing credibility to responding in an irrelevant emotional manner.

Clearly, the prosecutor should never have opened her closing argument by accusing Eaddy of lying. Huff, supra; Riley v. State, 560 So. 2d 279 (Fla. 3d DCA 1990) (accusations of defendant's lying improper) That it did so fairly shouts from the record: "How dare that man come into this courtroom and take that stand and tell you the package of lies that he told you." Obviously the state was indignant, and it wanted similarly to inflame the jurors, to get them as outraged about what it perceived Eaddy had done as it was.

Shifting the case to an emotional level had the advantage for the state of diverting attention from the weaknesses of its case. Besides the fingerprint on an ashtray found in Edmonds' house and Eaddy's signature on the credit card slips, the state had only Ismael Lopez's claim Eaddy had confessed to him about the murder. Why he would confess to a stranger when he had managed to keep quiet about it for 13 years remained an unanswered question. Nevertheless, without the jail house informant's testimony, which was inherently suspect, the state would have had an insufficient case. What it presented to the jury had serious flaws and significant weaknesses. The state, in short, presented a weak case, and the comment could only have fatally encouraged the jury to ignore its duty to

dispassionately evaluate the state's case. Hill v. State, 477 So. 2d 553 (Fla. 1985)(improper prosecutorial comment warrants a new trial where the evidence of guilt is weak.)

Of course, the court sustained Eaddy's first objection to what the state said, but it allowed essentially the same argument when the state resumed. Thus, the error remained unchecked. Further even sustaining Eaddy's objection inadequately apprised the jury of the seriousness of the prosecutor's error, particularly when it did not even give a curative instruction.[12] As this court said years ago:

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

Deas v. State, 119 Fla. 839, 161 So. 729, 731 (Fla. 1935).

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[12]The court's failure to give a curative instruction would probably have had no effect on the jury anyway as this court recognized in Geralds v. State, 601 So. 2d 1157 (Fla. 1992).

The state's error was egregious, its case weak, and the court's tolerance of it inexcusable. This court should reverse.

It also should remand for a new trial because it precluded Eaddy from arguing the state had not presented any evidence of a motive for the Edmonds' killing. Evidence of a defendant's motive for killing, of course, is admissible. Jackson v. State, 545 so. 2d 260, 264 (Fla. 1989); Toole v. State, 479 So. 2d 731 (Fla. 1985). If the state presented any explanation why the defendant killed Edmonds it could have argued his motive in its closing argument. Logically, therefore, if the state could have used such evidence to prove his motive Eaddy should have been able to argue the absence of that evidence showed there was no motive for the murder. That he could not was error that the court only compounded when it told the jury to ignore the lack of motive in its deliberations of Eaddy's guilt.

If this court had any hesitation about reversing for the court's error in allowing the state to proceed unchecked in its argument, such reluctance should evaporate in the light of the second error. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE X

THE COURT ERRED IN FINDING THIS MURDER TO HAVE BEEN COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL MANNER.

Appellant is in a strange position. It could be argued that he only benefitted from the trial court's sentencing order in which it found that he committed the murder in an especially heinous, atrocious, or cruel manner. Afterall, it never instructed the jury on this factor, so he should have nothing to complain about that the court found it applicable. It was, after all, the sentencer. While there is a superficial appeal to this view, it fails to satisfy.

Primarily, it does so because the factor does not apply. Of course, a murder in which the victim was stabbed several times often is especially heinous, atrocious, or cruel. Such victims may have defensive wounds on their arms or hands showing that they had an awareness of their impending deaths. Roberts v. State, 510 So. 2d 885, 894 (Fla. 1987). This evidence would support a finding of this aggravating factor. In this case Edmonds had no such wounds, so the question of the applicability of this aggravating factor becomes much closer.

This sentencing consideration fails to pass final muster because there is no indication the victim was awake or conscious when stabbed. What is done to the victim's body after death or at least after the victim has lost consciousness has no relevance to whether the murder was especially heinous, atrocious, or cruel. See, Halliwell v. State, 323 So. 2d 557 (Fla. 1975). This in turn is important because it strongly

indicates the degree of the defendant's "utter indifference to, or even enjoyment of, the suffering of others." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). The analysis, in short, focusses on the physical and mental suffering the victim consciously suffered before death. Without both components a particular murder falls outside the category of homicides for which this aggravating factor applies. Richardson v. State, 604 So. 2d 1197 (Fla. 1992).

The evidence supporting the court's finding of this aggravating factor is circumstantial, and as such, if there is any reasonable hypothesis supporting its non-applicability, this court must accept it and reject the trial court's finding that it applied, C.f., State v. Law, 559 So. 2d 187 (Fla. 1990). Eaddy's theory is simply that the defendant knocked Edmonds unconscious before the victim realized he was about to be stabbed. The medical examiner found a wound to the back of Edmonds' head which he admitted could have rendered Edmonds unconscious (T 611). This witness also could not provide any sequence of blows or stabs to the victim. A reasonable explanation of the murder, therefore, arises that Eaddy knocked Edmonds unconscious, and then stabbed him. He, thus, had no idea of his impending death, and the murder was not especially heinous, atrocious, or cruel.

Additionally, until the court read its sentencing order, Eaddy had no idea it planned to find this aggravating factor. It had not instructed the jury on it, so the defendant could have reasonably believed the court would not find it. Even

when he objected to the court's finding because of a lack of notice, the court ignored him (and the state's attempt to correct it (T 1378)) and found this aggravating factor applicable.

Of course, Eaddy is not entitled to a list of aggravating factors the state intends to prove. But, it seems unfair for the court to lead him along by not instructing the jury on this aggravating factor and then spring it on him without any input from him about its applicability in this case. The trial court ambushed Eaddy, and this court should reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE XI

THE COURT ERRED IN INSTRUCTING THE JURY ON THE COLD, CALCULATED, AND PREMEDITATED **AGGRAVATING FACTOR.**

The sentencing proceeding in this case is unusual. The court, over defense objection (T 1255) instructed the jury on the "cold, calculated, and premeditated aggravating factor, section 921.141 (5)(i) Fla. Stat. (1991), but it ignored it in justifying its death sentence. On the other hand, the court never told the jury about the "heinous, atrocious, or cruel" aggravating factor, yet it applied it, again over defense objection (T 1378), in sentencing the defendant to death. This issue deals with the first oddity, the appropriateness of instructing on the cold, calculated, and premeditated aggravation, and leaves to another issue the propriety of finding the murder to have been especially heinous, atrocious, or cruel.

Over the past several years, this court has defined or clarified what the legislature meant when it added the 5(i) aggravating factor to the list of aggravation a jury and the sentencer can consider in determining if a defendant should live or die. To establish the heightened premeditation necessary for a finding of this aggravating factor, the evidence must show that the defendant had "a careful plan or prearranged design to kill." Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). It was intended to apply to executions, contract murders, or homicides to eliminate witnesses. Green v. State, 583 So. 2d 647, 652 (Fla. 1991). Implicitly, it has

no application to murders committed in a rage or "killing frenzy." Mitchell v. State, 527 So. 2d 179 (Fla. 1988). Similarly, committing a murder during the course of a felony such as robbery does not mean this aggravating factor applies. To the contrary, the premeditation, even the heightened intent, a defendant may have to commit a robbery does not supply the requisite intent to prove the murder was committed in a cold, calculated, or premeditated manner.

Of course, a defendant who murdered someone during the course of a robbery could have had this elevated premeditation, but there is usually some additional evidence to show the cold deliberation required. In Jones v. State, 569 So. 2d 1234 (Fla. 1990), the defendant had discussed killing the victims so he could steal their truck before doing so. Similarly in Haliburton v. State, 561 So. 2d 248 (Fla. 1990), Haliburton broke into the victim's house while he slept and killed him. He did it, he said, to see if he could kill. Both murders were committed in the course of a felony, and both were cold, calculated, and premeditated.

More often than not, however, killings done during a robbery or other felony fail to have the requisite level of deliberation to qualify for this aggravating factor. In Mitchell, supra, the defendant killed the victim during the course of a burglary. He killed the victim in a rage, which this court held was inconsistent with being done in a cold, calculated, or premeditated manner. In Harmon v. State, 527 so. 2d 182, 188 (Fla. 1988), Harmon murdered the victim during

a robbery. In the course of rejecting the trial court's finding that he had done so in a cold, calculated, and premeditated manner, this court found that other explanations than the one posited by the state forced it to reject application of this factor.

In this case, the prosecution argued that the murder had the required level of heightened premeditation. As the court said, Eaddy committed it during a "killing frenzy," which of course is contrary to the cold, calculated and premeditated intent necessary for this aggravating factor to apply (R 283). The numerous stab wounds and especially those in the legs also suggests that Eaddy killed in an unchecked emotional fury rather than with cold precision. Unlike Haliburton, we have no evidence the defendant took any great delight or interest in killing the victim. To the contrary, like the defendant in Mitchell, it appears that the cause of death was a homosexual rage killing. Also, although the evidence suggests he robbed Edmonds, whatever intent he had to do that crime does not imply he also had a cold desire to kill the victim. Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984) (A planned robbery cannot support this aggravating factor.) Finally, even the trial court recognized this aggravating factor was inapplicable because its sentencing order makes no mention of it (R 282-83).

There was, in short, insufficient evidence to support instructing the jury on this aggravating factor, and the court erred in doing so. This court should reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE XII

THE COURT'S INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR INADEQUATELY LIMITED THEIR DISCRETION IN APPLYING IT TO THIS CASE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Before trial, Eaddy filed a motion to declare section 921.141(5)(i) Fla. Stat. (1991) unconstitutional on the grounds that the statute was vague and undefined (R 141-166). He drew support from the United States Supreme Court's decision in Maynard v. Cartwright, 466 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) which held that Oklahoma's version of the "especially heinous, atrocious, or cruel" aggravating factor was unconstitutional without a narrowing construction. Specifically, Eaddy argued that the terms "cold" and "calculated" have so many differing and subjective meanings as to defy any limiting instruction (R 148-52), and at the charge conference he objected to the court instructing the jury on that aggravating factor (T 1256-59). The court denied that objection (T 1262), and instructed the jury on this aggravating factor:

> The aggravating circumstances that you may consider are limited to but any of the following that are established by the evidence: First, the Defendant in committing the crime for which he is to be sentenced was engaged or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of robbery; second, 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.

(T 1311).

The instruction on the cold, calculated, and premeditated aggravating factor merely tracked the statutory language, and was in any event woefully short of adequately informing them of the limits this court has placed on it. It was not told, for example, that the defendant needed to have a heightened premeditation for this aggravation to apply. Jent v. State, 408 So. 2d 1024, 1028 (Fla. 1982) Nor was it told that whatever level of intent Eaddy may have had to rob Edmonds was irrelevant in determining if he had the requisite desire to kill him in a cold, calculated, and premeditated manner. Hardwick v. State, 461 So. 2d 79, 91 (Fla. 1984) It did not seek to guide their discretion by telling them that this aggravating factor required the defendant to have had a careful plan to kill, and the murder must have arisen from a pre-arranged design. Rogers v. State, 511 So. 2d 526 (Fla. 1987); Campbell v. State, 571 So. 2d 415 (Fla. 1990). Without such limiting and clarifying guidance, the jury was led by the state into believing that the robbery was evidence of a calculating mind bent on committing murder (T 1288). Evidently, the court did not believe the murder qualified for this aggravating factor because it refused to find it.

The United States Supreme Court's opinion in Espinosa v. Florida, 505 U.S. , 112 S.Ct. , 120 L.Ed.2d 854 (1992) indicates the path this court should follow in resolving this issue. In that case, the nation's high court accepted at face

value what this court had said in Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975): "that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give 'great weight' the the jury's recommendation, whether that recommendation be life . . . or death." Espinosa, at 120 L.Ed.2d 859. That death penalty truism did not create any problem. What did was the conclusions the Supreme Court drew from it. Instead of viewing our statute as placing the decision of whether to sentence a defendant to death exclusively in the trial judge, as Section 921.141 Fla. Stat. (1991) seems to do, it viewed our scheme as having two sentencers: the jury first, with the trial court having a veto power only in the rarest of circumstances. This subtle emphasis on the importance of the jury's sentencing verdict has profound consequences.

If the jury's recommendation is given "great weight" the court must properly instruct the jury on the applicable law, otherwise the trial court may give its advice more consideration than it deserves. This tacitly rejects this court's view in State v. Dixon, 283 So, 2d 1 (Fla. 1973) that the trial court will correct any jury errors. Rather than checking jury excesses, the Espinosa court said the Florida trial judge must follow that recommendation in most cases. Hence the jury must receive instructions that adequately and thoroughly explain the law on the various aggravating factors. As a "co-sentencer" with the court, the jury must be as well informed on the law as the court presumably is.

The jury, in this case, had only the barest outline of the law on this aggravating factor. It had no knowledge of the refinements this court has made over the years. That shortcoming fatally infected this jury's deliberations so much that the resulting recommendation is unreliable. This court should reverse the trial court's sentence and remand for a new sentencing hearing.

ISSUE XIII

THE COURT ERRED IN APPLYING THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR EX POST FACTO TO THIS CASE, IN VIOLATION OF ARTICLE I SECTION 9 OF THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10 AND ARTICLE X, SECTION 9 OF THE FLORIDA CONSTITUTION.

Many years ago, when appellate counsel had more hair and less weight, he stumbled on an issue which had the smell of "sure win." In those days of naivety and innocence, he argued to this court that the then new aggravating factor defined by section 921.141(5)(i) Fla. Stats. (1979) could not be retroactively applied to a murder that had occurred before it had been enacted, The logic seemed to his simple mind as simple and unassailable. The murder had occurred before the legislature had created the cold, calculated, and premeditated aggravating factor and it clearly (at least in his mind) made the likelihood of a death sentence greater, so it stood to reason that it had been applied after the fact to him, which the United States Constitution prohibited.

The argument became stronger when the Florida Constitution was invoked. Article I, Section 10 has a similar ex post facto prohibition as the United States Constitution, but Article X, Section 9 has a specific, unique prohibition applicable to criminal prosecutions:

> Section 9. Repeal of criminal statutes. -Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

There was even a case, Castle v. State, 330 So. 2d 10 (Fla. 1976), which held that the defendant was not entitled to the benefit of a new, reduced penalty for arson because the statute decreasing the amount of punishment had been passed after the crime had been committed.

Counsel's shock, therefore was total and his surprise complete when this court rejected what he thought had been brilliant argument. In Combs v. State, 403 So. 2d 418 (Fla. 1981) this court held "Paragraph (i) in effect adds nothing new to the elements of the crimes for which petitioner stands convicted but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant." Id. at 421. In dissent, Justices Sundberg, England, and McDonald found it "beyond my powers of comprehension to understand how the majority can seriously contend that the addition of subsection (i) as an aggravating circumstance inure[s] to the benefit of a defendant." Id. at 422. footnote 3.

Appellate counsel, stunned at the court's reasoning, repeated the same argument in Justus v. State, 438 So. 2d 358 (Fla. 1983), thinking surely this was an aberration. But, no, the court reaffirmed Combs, and went further. Despite the plain meaning of Article X, section 9 of the Florida Constitution, that section also did not prevent an after the fact application of this aggravating factor, and it cited Dobbert v. State, 375 So. 2d 1069 (Fla. 1979) to support rejecting that applicability of that part of the Florida's

fundamental law to his case. Dobbert, however, provided scant rationale because when this court considered a similar argument in that case, all it said was, in effect, "Sorry, you lose."[13]

If this aggravating factor "inures" to the defendant's benefit, logic dictates that one charged with a crime should be able to waive it. In Johnson v. State, 438 So. 2d 774, 779 (Fla. 1983), the defendant tried to do that, but this court, caught in the net of the Combs logic, wriggled free by claiming that the "inures to the benefit" language in that opinion was "in response to the claim that all premeditated murders will automatically start with one aggravating factor," Combs, of course, had made no such argument, and this court's opinion in his case never intimated that concern when it rejected his ex post facto argument.

If, as Justice Oliver Wendell Holmes said, the life of the law is not logic but experience, appellate counsel in the intervening years has felt the faint coursing of blood through his frame, but the hope raised by logic has not completely abated. He realizes that this court has adhered to Combs, Dougan v. State, 595 So. 2d 1,3 (Fla. 1992), but perhaps it has

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[13]At least two justices of the United States Supreme Court were as baffled by this court's reasoning in Justus as the dissent was in Combs. Justus v. Florida, 465 U.S. 1052, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984) "The detrimental effect of 1979 Fla. Laws, ch 79-353, on petitioner is in no way ameliorated by the fact that premeditation was an element of petitioner's underlying conviction." (Marshall, dissenting from the denial of certiorari.)

done so without rethinking that case's rationale. He now asks this court to finally reject Combs, and find that in this case the trial court erroneously allowed the jury to consider the 5(i) aggravating factor.

That is, the murder here occurred in 1977 and the cold, calculated, and premeditated aggravating factor was not enacted until 1979, two years after the crime. It was therefore applied retro-actively, and the only question is whether such use violated the United States and Florida prohibitions against such actions. For the reasons Justice Sundberg articulated in his dissent in Combs, Eaddy claims that new aggravating factor was improperly applied here. That is, under the rationale of Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), this change in the law 1. attached legal consequences to the crime before it took affect, and 2) it affected Eaddy in a disadvantageous fashion. Specifically, the likelihood he would receive a death sentence significantly increased because it was only one of two aggravating factors the jury had to consider. The other, that the murder was committed during the course of a robbery, does not have as much inherent damning punch as the "cold, calculated, and premeditated" factor. Here, the state spent barely three pages discussing the "robbery" aggravating factor (T 1280-83) but five pages on the "cold, calculated, and premeditated" aggravation. Clearly, it was a consideration experience dictates the jury must have used in returning its death recommendation.

This court should, therefore, reverse the trial court's sentence and remand for a new trial.

ISSUE XIV

UNDER A PROPORTIONALITY REVIEW, EADDY DOES NOT DESERVE A DEATH SENTENCE.

As part of its review process, this court conducts a proportionality review of death sentences in particular instances with those in other similar cases.

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

Porter v. State, 564 So. 2d 1060 (Fla. 1990). This duty has several state constitutional bases, but the fundamental rationale for undertaking such an unusual task arises from the notion that in capital sentencing, uniformity should have a predominate consideration in this court's review. Tilman v. State, 591 so. 2d 167, 169 (Fla. 1991).

Cases in which the defendant has had a significant drinking problem, has killed a relative, or some combination of these two factors were initially the ones benefitting from proportionality analysis. Ross v. State, 474 So. 2d 1170 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Caruthers v. State, 465 So. 2d 496 (Fla. 1985).

Later defendants have benefitted from this intensive judicial scrutiny when the victim was stabbed or beaten to death, Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Nibert v. State, 574 so. 2d 1059 (Fla. 1990). On the other hand, defendants who committed similar crimes as others who had their

sentences reduced to life had their death sentences affirmed because they had violent criminal backgrounds and committed additional violent crimes after the murder for which they had been sentenced to death. Mason v. State, 438 So. 2d 374 (Fla. 1983). That the defendant had essentially no significant history of criminal activity, particularly violent crime, has been an important consideration in proportionality review. Proffitt; Lloyd v. State, 524 So. 2d 396 (Fla. 1988). The murder for which the defendant faces a death sentences becomes an aberration, an "explosion of total criminality" that does not warrant the extinction of life.

In this case, had Eaddy shot Edmonds, he would not have received a death sentence, or it would not have withstood this court's review. His background, both before the 1977 killing and after, does not reveal the defendant as one with violent criminal propensities who was on a prolonged rampage through society. To the contrary, except for some forgeries and a burglary when he was a juvenile or young adult, Eaddy's rare contacts with the law have been usually alcohol related offenses. (See Presentence Investigation Report, pp. 3-4.)[14] These crimes underscore Eaddy's chronic alcoholism that afflicted him for a large portion of his adult life (T 1180).

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[14]Several of the crimes listed in the PSI have no information about what happened to them and have been ignored by appellate counsel. Even if they were considered, they only underscore Eaddy's problems with alcohol and not society's fundamental command to reframe from violent behavior.

At some point, he recognized his addiction, and through Alcoholics Anonymous was able to recover from it (T 1180).

Why the defendant turned to alcoholism remains unclear, but his battered childhood may provide some explanation. His father apparently also was alcoholic, and he regularly beat his wife and children (T 1205). One time he knocked Eaddy unconscious (T 1207). At other times he threatened to beat him with a belt. Indicative of a a truly sick mind, Eaddy's father made a small casket and threatened to cut their mother into pieces and put them in it (T 1210). Predictably, the defendant became chronically depressed, angry, and resentful, but these negative emotions obviously did not erupt into criminal behavior, and the defendant basically was a peaceful person (T 1181-82).

Moreover, although the defendant has a low average intelligence and dropped out of school in the third grade (T 1177), he has sufficient insight into his problems that he has learned to control his impulses (T 1182). In short, he has rehabilitated himself and that is all the more impressive because he did so through self-awareness rather than the walls and bars of prison.

Over the years, Eaddy's natural good will and helpfulness has emerged. He had a good relationship with his son and was close to him (T 1214, 1233). He befriended an elderly gentleman, was always kind to him, and earned his trust and respect (T 1226). When Hurricane Hugo hit the Charleston area where he was living, Eaddy unselfishly help friends and

neighbors recover from that natural disaster (T 1227). Thus, what we have is a 42 year old man who was permanently crippled in his childhood but who nevertheless has overcome significant addictions and problems to become a respected and contributing member of society. His background is more like Charles Proffitt's than Oscar Mason's. He has demonstrated his ability to rehabilitate himself. Significantly, technology caught Eaddy and not some new crime which he may have committed. When arrested he had a steady job and was leading a law abiding life.

Thus, except for the stabbing, as mentioned, Eaddy does not deserve to die. The means of death, however, does not make this a death worthy case as Nibert and Rembert, discussed above, illustrate. Placing this single "explosion of total criminality" in the context of his otherwise nonviolent life reveals that death is an unwarranted punishment.

ISSUE XV

THE COURT ERRED IN CONSIDERING THE ABUNDANCE OF MITIGATION EADDY PRESENTED TO THE COURT AND JURY.

From the preceding issue Eaddy obviously presented much evidence to mitigate a death sentence. The court, however, found no statutory mitigation, and as to the nonstatutory factors, it said only:

> FACT:
> The defendant testified that he had only completed the Third Grade of School, but he also claimed to be a self employed painter with an income of approximately $2,000 per month. However, there was also evidence that Eaddy would absent himself from home for varying periods of time, with his wife not knowing his whereabouts, thus indicating that he was far from an ideal family man. There was no evidence presented of any mental disorders or deficiencies on the part of the defendant.
>
> CONCLUSION:
> This is not a Mitigating Circumstance.

(R 283-84).

First, there is no evidence in this record "that Eaddy would absent himself from home for varying periods of time, with his wife not knowing his whereabouts, thus indicating that he was far from an ideal family man." The only evidence arguably supporting that finding came from Eaddy's former wife who said she could not remember where the defendant was on January 16 or 17, 1977 (T 959). Of course, that was 15 years earlier, and if nothing exciting happened that would cause her to remember it, we would normally not expect her to say, "Ah yes, he was in Jacksonville on that day."

As to the conclusion drawn from that "fact" that he "was far from an ideal family man" the unrefuted evidence shows that the defendant dearly loved his son. As Mrs. Eaddy disclosed, Eaddy was a good father. He was close to their son and very proud of him (T 1233). The defendant also treated his step-son with love and kindness, and the young man told his mother that Eaddy was "the best of any kind of father" he had ever had. Even after Eaddy and his wife divorced, he kept close contact with both boys (T 1234). Thus, if a divorce makes a father "far from an ideal family man" all divorced fathers are in deep trouble if they ever face a death sentence.

As to the mental disorders, Dr. Leggum presented unrebutted evidence that Eaddy was alcoholic for a significant period of his life. He also said he was "highly depressed." (T 1181) This expert diagnosed him as having a passive aggressive personality disorder with the main characteristic of it being an inability to assert himself (T 1181). This meant, besides having a low self esteem, that he was not an angry, violent, or hostile person: one who was "characteristically disposed to hurt others as a means of dealing with frustrations, anger, other difficulties in life (T 1181-82). Eaddy had, however, improved so that he probably now suffered from only a neurosis (T 1182).

If the court was incorrect about what mitigation it did mention, it compounded its error by failing to mention or expressly consider the other mitigation Eaddy presented. This court in Campbell v. State, 571 So. 2d 415 (Fla. 1990) said

that sentencing courts had to discuss, in their sentencing orders, all the mitigating evidence the defendant presented. Here, the court omitted any discussion about the following mitigation:

> 1. Eaddy's physically and psychologically abused childhood. Nibert v. State, 574 So. 2d 1059 (Fla. 1990).
>
> 2. His alcoholism and demonstrated potential to rehabilitate himself. Brown v. State, 526 So. 2d 903, 908 (Fla. 1988).
>
> 3. The lack of any history of committing violent crimes, and for the last 20 years no significant history of any criminal activity.
>
> 4. His close relationship with his son and step-son.
>
> 5. The trust and respect he had earned from friends (T 1226).
>
> 6. His willingness to help others in times of distress (T 1226).
>
> 7. His steady employment.
>
> 8. A diagnosis that he suffered a passive aggressive personality as a youth, but over the years he had improved.

Thus, the court erred in ignoring the wealth of mitigation presented, and this court should reverse the trial court's sentence of death and remand for the trial court to reconsider it and resentence Eaddy accordingly.

CONCLUSION

Based on the arguments presented in this brief, the Appellant, Jimmy Eaddy, respectfully asks this honorable court to either reverse the trial court's judgment and sentence and remand for a new trial, or reverse the trial court's sentence and remand 1) for imposition of a life sentence or 2) a new sentencing hearing before a new jury.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender
Fla. Bar No. 271543
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Carolyn Snurkowski, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, JIMMY LEE EADDY, #301788 Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083, on this 21st day of April, 1993.

DAVID A. DAVIS