IN THE

SUPREME COURT OF FLORIDA

JOSEPH BESARABA, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 80,016

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. In this brief the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal

"1SR" Supplemental Record (received May, 1993)

"2SR" Second Supplemental Record (received August, 1993)

STATEMENT OF THE CASE

On August 20, 1989, Appellant, Joseph Besaraba, was charged by indictment with: two counts of premeditated murder in the first degree; one count of attempted murder in the first degree; one count of robbery with a firearm; and one count of carrying a firearm during the commission of a felony (R2553-55). Jury selection began on January 15, 1992. At the close of the state's case, and at the close of all the evidence, Appellant moved for judgments of acquittal (R1779,1870). Appellant's motions were denied (R1779,1870). Appellant was found guilty as charged of two counts of murder in the first degree (R3336). Appellant was found guilty of attempted murder as charged (R3336). Appellant was found guilty of robbery as charged (R3336). The trial court arrested judgment for the offense of carrying a firearm during the commission of a felony (R3352).

The jury recommendation was 7-5 for the death penalty (R2504). The trial court sentenced Appellant to death for the two murder convictions (R3341,3344). The trial court entered its sentencing order (Appendix,R3353-73). The trial court departed from the recommended guideline sentence of 12-17 years (R3340) and sentenced Appellant to

life imprisonment for the attempted murder (R3347) and life imprisonment for the robbery (R3350). All sentences are to run consecutively (R2546,3346,3349,3352). A timely notice of appeal was filed (R3377).

STATEMENT OF THE FACTS

GUILT PHASE

The relevant facts are as follows. Roseanne Bethea testified that on July 23, 1989, she was riding a bus to work (R1617). The bus stopped before its scheduled stop at Ft. Lauderdale airport (R1620). There was no bus stop at this location (R1624). The bus driver went to the back of the bus and started yelling at a man seated in the back (R1621). Bethea did not see this man in court (R1621), however, in an out-of-court lineup, Bethea had identified Appellant as the man (R1621, 1742). The bus driver told Appellant that he didn't want any drinking in his bus and that he had to take the drink out of his bus (R1624). Appellant said, "I won't. I won't get rid of my can. Go without, but I will hold it" (R1624-25). The bus driver didn't want Appellant to hold the can; he wanted Appellant to get the can out of his bus (R1625). The bus driver was "very loud, yelling, angry" (R1625). Appellant said he just wanted to hold the drink and he didn't want to throw it out (R1625). Appellant said that he wouldn't drink it (R1625). The bus driver kept yelling that he didn't want the can on his bus and to get it out (R1625). Appellant exited the bus (R1625). Bethea believed that the confrontation occurred sometime between 11:00 a.m. and 1:00 p.m. (R1630). After the confrontation it took 15 to 20 minutes to reach the bus terminal (R1631). Bethea arrived at work around 1:00 p.m. (R1631). Approximately a half hour later, Bethea heard on the radio that the bus driver had been shot (R1644). Bethea

told her boss that it was "strange that I was on the bus" and "there was a man arguing with the bus driver" (R1644).

Gregory Austing testified that he was a bus operator for Broward County Mass Transit (R1646). On July 23, 1989, Austing's bus traveled a route that was always 40 minutes behind the route of Sidney Granger's bus (R1650). At 12:32 p.m., Austing was heading southbound and picked up Appellant just outside the airport (R1660-61). The area where Appellant was picked up was kind of desolate (R1702-03,1709). Appellant and another person were at the stop (R1664). Appellant had a white plastic bag in his left hand and his right arm was straightened out inside the bag (R1664). It also appeared that Appellant was carrying a bag behind his back (R1665). Sidney Granger's bus would have passed the stop where Appellant was picked up by Austing (R1673). If Granger had put Appellant off the bus before the airport while heading in a northerly direction, Appellant would have time to be picked up by Granger 40 minutes later (R1674). Appellant purchased a transfer and sat down (R1665). The bus left the airport at 12:35 p.m. and headed south (R1659). The bus arrived at Young Circle a few minutes prior to 1:00 p.m. (R1674). Appellant exited the bus at this point (R1675). Young Circle is the hub of bus activity in the south end of Broward County (R1705). The bus transfer Appellant purchased is a pass that one could use to ride a bus at a transfer point (R1666). The bus transfer cannot be used on a bus using the same route (R1701). The bus transfer would not get Appellant on Sidney Granger's bus (R1701).

Delbert Thomas testified that on July 23, 1989, he had gotten off work at 12:45 p.m. and caught a bus to Young circle where he was going to transfer to another bus to go home (R1788). Thomas was at Young

Circle for approximately 10 to 15 minutes before his bus arrived (R1788). Thomas noticed Appellant sitting on a bus bench with a duffle bag (R1790). Appellant was drinking out of a plain brown bag (R1791). Thomas could see a neck of a bottle coming from the bag (R1791). The neck was consistent with Exhibit #61 -- a Bushmill Whiskey bottle (R1791,1248). Thomas thought it was a wine bottle (R1794).

Thomas testified that he boarded the bus and started walking 4 or 5 feet from the driver when he heard a "pop" (R1792). Thomas turned and saw Appellant shoot the bus driver (R1792). Appellant was standing on the sidewalk when he fired the shot (R1796). Appellant then turned at a slight angle and shot through the window hitting a passenger in the back (R1793). Thomas jumped to the floor (R1793). In what seemed like a couple of minutes later, Thomas heard some more pops (R1793).

Donald Kocher testified that he boarded the bus to go to Dania (R1397). Kocher paid his fare and sat down three or four feet from the driver (R1399-1400). A half minute later Kocher heard shots (R1399-1400). Kocher looked at the bus driver and noticed that he was full of blood (R1400). The bus driver toppled half on the floor and half on Kocher (R1400). Kocher saw a man on the sidewalk shoot (R1403). The man never boarded the bus (R1406). There were two more shots (R1400). One shot came through the window from the outside (R1401-02). It passed by Kocher's head (R1401). Kocher pushed the driver off him and ran off the bus (R1401). No one was sitting near Kocher when the bus driver was shot (R1405-06). Kocher did not see Wesley Anderson when the shooting occurred (R1406).

Paul Fellers testified he was sitting at a gas station at Young Circle when he heard three shots (R1142-43). Fellers looked over and saw Appellant holding a gun in front of a bus (R1143,1151-52).

Appellant fired three more shots and then walked over to Tyler Street (R1143). Fellers called 911 (R1154). Approximately one minute had elapsed since the first shot (R1148). Appellant forced a man out of his car (R1143). Appellant drove away.

Susan Miller testified she was at the Publix at approximately 1:30 p.m. (R1093). Miller was told that there was man with a gun and that shots had been heard (R1094). Miller then saw a man with a gun (R1095). He was walking slowly and did not try to conceal his face (R1103). The man walked up to a car and tapped the window with the gun (R1098). Miller turned away for a minute and turned back and saw the man fire three shots (R1098). The incident happened very fast (R1098). It seemed like a matter of seconds (R1098).

David Bilkis was at the Publix supermarket when he heard 2 or 3 shots (R1107,1109). Bilkis saw Appellant walking with a gun in his hand (R1108,1115). Appellant held the gun in the air and turned around a couple of times (R1111). Appellant peeked into one car and approached another car -- a silver gray color Dodge (R1112). The car was the third or fourth in line at a red light (R1112). Appellant said, "I just killed two people. I'm going to kill you. Give me your car" (R1112). The occupant exited the car (R1112). The man placed his hands in the air and was shot three times (R1112). Bilkis claimed that he helped the man who was shot, Scott Yaguda, get down to the ground (R1113). The whole event occurred in a minute and a half to two minutes (R1113).

Roseanne Rossi testified that on July 23, 1989, she was driving to Publix when she stopped at a red light (R1252-53). Rossi saw Appellant approach the car in front of her and point a gun at the man in the car (R1253,1256). The man exited the car and was walking away

with his hands up when Appellant shot him (R1254,1256). From what Rossi had seen, Rossi concluded that Appellant had "panicked and he just shot him" (R1257). The man stood for a second and then collapsed (R1258). No one was near the man when he fell (R1262). Appellant got in the man's car and sped away (R1258).

Scott Yaguda testified that he was in his car at a traffic light at Tyler Street and Young Circle (R1411). Three or four cars were in front of Yaguda's car (R1412). Yaguda's car was boxed in the traffic line (R1424). Yaguda saw Appellant walking down the street with a gun (R1413,1420). Appellant was very unkempt (R1420). Appellant tapped on the window of Yaguda's car and said that he had just killed two people and that he would kill Yaguda if he didn't get out of the car (R1415). Yaguda got out of the car and began to walk away (R1416). Appellant shot Yaguda three times (R1416,1423).

William Sorrells testified that he is the superintendent of safety and training for Broward County Transit (R1714). Sorrells identified Sydney Granger as the bus driver who was killed (R1716). There were four buses traveling on Granger's route that day (R1718). Granger's bus would be going north from the airport at 11:15 a.m. (R1724). Granger would approach the airport going south at 11:55 a.m. (R1724-25). Granger would next reach Young Circle going north at 12:35 p.m. (R1725). Drinking and smoking is prohibited on the buses (R1726). The policy is for the driver, in a conventional tone, to advise the passenger not to drink (R1726). The driver should not stop the bus (R1725).

Officer Richard Allen of the Hollywood Police Department testified that he was called to the scene of the shooting at 1:30 p.m. on July 23, 1989 (R995). Allen arrived two minutes later (R1006).

Allen discovered two men aboard the bus (R997,1007). The two men were deceased (R1007). Another man was found laying at the northeast corner of Young Circle (R999). Twenty five to thirty people were gathered at the scene (R1002). Allen asked five or six people what had happened and he received conflicting reports (R1002).

Ruth Garcia, a crime scene technician with the Hollywood Police Department, testified that she examined and photographed the crime scene area (R1009-10). Two duffle bags and a bottle were found in the bus shelter terminal (R1032). Inside the bags were a can of WD40, a flashlight, a plastic bag with shaving mirror, a plastic ziplock bag containing nail clippings, paperback books, miscellaneous medical papers, two cans of pork and beans, and bus schedules (R1050). Also found in a duffle bag was a bottle of Bushmill Irish Whiskey in a brown paper bag (R1081). Five bullet casings were found on the sidewalk (R1037). Six pieces of projectiles were collected from the bus (R1037,1075). One of the bullets was imbedded in the side of the bus (R1077). There was a bullet hole through the side window of the bus (R1078). The casings were found at the north side of Young Circle (R1037).

Tom Romeo of the Hollywood Police Department testified that he also examined the duffle bags found at the scene (R1159,1168). Among the items Romeo recovered were four traveler's checks which had been used (R1175). No currency was found (R1176). A bottle of Bushmill was found and an empty bottle of Seven-Up was found near the bags (R1170,1172).

Clinton Vanderpool testified that he owns AA Lock and Gun (R1597). The business includes safety training on the use of firearms (R1597). Appellant completed the gun safety course on April 30, 1988

(R1598). This was well over a year before the shooting (R1612). Based on the fact that Appellant purchased 9 millimeter ammunition and because the business does not loan out guns, Appellant had the 9 millimeter weapon at the time he took the safety course in 1988 (R1612-13).

Deputy Richard Cook of Keith County, Nebraska, testified that he was patrolling with Deputy Joseph Jara on July 26, 1989, when they saw a vehicle parked off the interstate (R1462). After running the license plate, the officers were informed that the vehicle had been stolen and was possibly in possession of a homicide suspect (R1463). Appellant was found inside the vehicle (R1464,67). The officers ordered Appellant out of the vehicle (R1466-67). Appellant was arrested (R1467-71). Cook testified to the details of the arrest (R1467-71). Appellant and the vehicle were searched. The officers collected a bag and gun that had been in Appellant's possession (R1471). Cook collected the following items from Appellant which were felt during the pat down search: bus tickets, eight keys, a bottle of lotion, two passports, one California and two Florida driver's licenses, a black comb, a package of Rolaids, a lighter, a Casio watch, a blade, a cough drop, a nail clipper, a small knife, five dollars and 55 cents in change, $450.00 in traveler's checks, an ten dollar bill, and ID car in the name of Joseph Myers, a AA Lock and Gun receipt, a state of Florida receipt for $146.00, a booklet pertaining to the use of deadly force, a receipt for $250.00 for traveler's checks, four Holt Cough drops, an American Cyanamid subject information consent, one application for concealed weapon, one Hazelton Laboratory study, a plastic bag of pills, a list of Bush-Cadman appointments, four copies of California driver's licenses, one copy of an article on the higher form of

kipping, three nose pads, four pages of an article, one card for a medical test, one receipt for a driver's license, one gun purchase receipt dated 4/15/88, one concealed weapon license, three can openers, a black billfold, and lots of miscellaneous papers (R1488-92). A number of items were collected from the vehicle including a bottle of Seagrams whiskey, five cans of Coors beer, one empty Coors can and a pair of glasses (R1493). Inside the plastic bag that the gun was in was one magazine of 9 millimeter ammunition, a silver hollow point bullet, a vinyl gun case, a box of Winchester 9 millimeter bullets, a newspaper, a pair of rubber gloves, two gauze pads, and one silver packet (R1494). The jailer collected 3 bullets from Appellant's watch pocket (R1495).

Officer Joseph Jara of the Keith County Sheriff's Office in Nebraska testified that on July 26, 1989, he and fellow officer Richard Cook observed a parked car on the side of the road (R1438-39). The officers pulled behind the vehicle and ran the license plate (R1440-41). A report came back that the vehicle was stolen and that a possible homicide suspect could possibly be inside the vehicle (R1443). The officers ordered Appellant out of the vehicle (R1448). Appellant was arrested (R1449-56). Jara testified to the details of the arrest (R1449-56). Jara testified that he did not participate in the investigation concerning the shooting on July 23, 1989, at Young Circle (R1460).

The associate medical examiner for Broward County, Dr. Michael Bell, testified that he investigated the deaths of Sydney Granger and Wesley Anderson (R1285). Bell performed the autopsies on the two men (R1292). Granger died from a single gunshot wound to the neck (R1291,1306). It was a distant wound, rather then a contact or

immediate wound (R1299-1300). There were no other injuries to Granger (R1302). Wesley Anderson died from a wound to the back (R1324). It was a distant shot (R1321,1330). There were no other injuries to Anderson. The bullet found in Anderson was not consistent with going through glass (R1335).

Maxine Florence identified her brother, Wesley Anderson, as the passenger who had been killed on the bus (R1692).

Patrick Garland, an expert in the field of firearms identification, testified that the bullets removed from Wesley Anderson, Sidney Granger, and Scott Yaguda were fired from State's Exhibit 72 -- a semi-automatic 9 millimeter gun (R1563,1577-80).

Howard Migs testified that he knows Appellant and did a drug study with him on Biscayne Boulevard (R1782). Experimental drugs were given to people so that the FDA would approve them (R1782). Migs and Appellant would get paid for volunteering (R1783). Since the experiment, Migs and Appellant became friends and Migs had Appellant over at his apartment (R1783-84). Appellant would constantly keep his duffle bag with him and would never let the bag out of his sight (R1784). Appellant kept a firearm because he said he felt safer with a gun (R1785). Appellant was living on the streets (R1785).

James Concannon was declared an expert in the field of psychopharmacology -- the study of the interaction between drugs and behavior (R1808-10). Concannon spent between 50 and 60 hours reviewing this case (R1811). The review included review of clinical trial data from drug companies about certain drugs that were given to Appellant -- over 400 pages (R1811). Concannon also reviewed hospital records and a series of psychological evaluations of Appellant along with police reports relating to the July 23 incident (R1811-12). Concannon

reviewed 4 psychological exams that were done post July of 1989 (R1814). The exams showed that Appellant has some paranoid tendencies (R1815). This conclusion is reinforced by other information (R1815). There were also suggestions that Appellant has organic brain damage (R1815).

Concannon testified that the Boston medical records were from late 1985 to late 1987 (R1816). Time and time again Appellant visited different sections of the hospital for different types of complaints (R1818). Appellant had sleep apnea which is interruption of breathing while one is sleeping (R1818-19). This sleep disturbance can affect behavior (R1818-19). One medical doctor reported rather psychotic or paranoid behavior (R1819). Appellant was in counseling in reference to alcohol (R1819).

Concannon testified that he received records from at least five pharmaceutical labs -- Peninsula, University of Miami, South Florida Bioavailabilty, Hazelton, Clinical Pharmacology Associates -- regarding Appellant (R1821). The latest record was July 20, 1989 (R1821). During the 18 month period prior to the incident Appellant went in for 40 days of testing (R1822). Appellant's biochemical condition became much worse during this period (R1824). Appellant was anemic (R1825). This condition appeared to be due to the loss of too much blood during these experiments (R1825). Appellant also had Epithelia cells which means his body is breaking down and the thin coverings of various organs in the body are winding up in the urine where they don't belong (R1826). In 1989, Appellant was rejected by the Clinical Pharmacology Associates lab due to his anemia (R1826-27). Appellant had urea -- a breakdown product of proteins (R1827). This indicated liver or kidney damage (R1828). Hazelton lab looked at Appellant on

July 20, 1989 (R1828). Appellant was clearly anemic associated with extreme blood loss (R1828). Concannon saw indications of alcohol abuse (R1828). An anemic person drinking alcohol will be affected to a greater degree thana normal person (R1829). Also, an improper functioning liver will exacerbate the effects of alcohol consumption (R1829).

Concannon also testified that the materials indirectly indicated evidence of the inability to perceive and process information completely -- i.e. delirium (R1830). The consumption of alcohol increases the probability of delirium (R1830). Appellant had moderate to serious memory problems (R1836). The records indicated that Appellant was an alcoholic (R1843). Combining the consumption of alcohol, anemia, sleep apnea and other characteristics associated with Appellant, including the wasting away of vital tissues, these factors indicate a suffering from delirium (R1844). These factors cause it in most cases (R1844).

Appellant read a statement saying that he has been under surveillance since he was a child and that different chemicals were used on him as part of the surveillance (R2108). The surveillance had been by government agents (R2109). The chemical substances were used for unknown reasons (R2109). The chemicals were illegally and unknowingly foisted upon Appellant (R2109). As a result of the chemicals, Appellant has a memory loss of the events that led to his arrest (R2109). Appellant believes that the government kept records of the dosages of drugs they used on him and through the Freedom of Information Act he will be vindicated (R2109-10).

PENALTY PHASE

Appellant's father, Joseph Besaraba, Sr., testified that the Besarabas came to the United States from Germany in 1949 (R2291,2309). When World War II broke out Besaraba, Sr., joined the Polish underground army against the Nazis (R2292). He was captured by the Nazis and placed in forced labor (R2292-93). Besaraba, Sr., would escape and marry Sophia before being captured again (R2295). The Nazis allowed them to live together (R2297). There was much terror by the Nazis and the SS (R2293-94). The Besarabas were assigned to an abandoned building (R2298). Due to the war only enough food was rationed for one to stay alive (R2298). Mrs. Besaraba gave birth to a girl, Monica, in 1943 (R2297). Appellant was born on Christmas Day of 1944 (R2294). It was a very difficult birth (R2299). During this time the Germans were still fighting and the area was under attack (R2300). A bazooka shot hit Besaraba Sr. and he lost his left eye and his knee split (R2300).

Besaraba Sr. testified that after the liberation the family stayed in Germany for 6 months because they were afraid to go to Poland because the communists took it over (R2300). Eventually they went to Poland where they lived with other family members for 6 months (R2301). They had to leave because there was not enough room (R2301). The situation was very difficult (R2302). Besaraba Sr. sold things on the black market for food and to keep his family alive (R2302). Besaraba Sr. could not get a job because he was not a member of the communist party (R2302). The Besarabas decided to leave Poland (R2302).

Besaraba Sr. testified that the family's goal was to get to America where they had relatives (R2303). They had to cross borders which was very risky and slow (R2303). Appellant was 13 months old

(R2303). Mrs. Besaraba would carry Appellant on her back when going through the mountains (R2303). They crossed 80 miles on foot to the Russian border (R2303-04). Farmers helped them cross the borders which had guards with machine guns on both sides of the borders (R2305). After two months they were able to reach the American zone (R2305). They were placed in military barracks with approximately 800 other people (R2306). They lived in the barracks for 2 years and then were transferred to Bremerhaven which was a port on the North Sea where they would wait with other nationalities to go to the United States (R2308). The Holocaust survivors would be the first to leave (R2308).

Besaraba Sr. testified that they family finally made it to the United States on August 7, 1949 (R2309). Appellant was about 5 years old (R2309). They went to Brooklyn to a relative's apartment (R2309). Besaraba Sr. found a job in a German bakery where he worked 12 hours a day (R2309). The family would move every several years (R2311). Besaraba Sr. eventually bought a pastry business where Appellant would help out (R2312). When Appellant was sixteen, his sister Monica collapsed and was diagnosed as having a brain tumor (R2313,2314). Monica was sick for the next two years until she died (R2313-14). Appellant visited Monica in the hospital several times each week (R2314). The last two months Monica lived like a vegetable (R2313). Sophia Besaraba was upset due to trouble with the family's business and her daughter's death (R2316). She started gambling (R2316). Things got worse and worse and Mr. Besaraba Sr. sold the house (R2316). Appellant worked, but was not able to keep any job very long (R2316). When Appellant was 18 years old he hurt his head in a car accident (R2328). He was unconscious for two days (R2328). He spent six weeks in the hospital (R2328). Appellant later went to Europe for a half

year (R2316). When he returned he moved back home (R2317). It was Appellant's mother who first noticed that he was acting unusual (R2318). Appellant was talking nonsense and acting strange (R2318). He became pale (R2318). The Besarabas had Appellant hospitalized (R2318). Appellant was transferred to a larger hospital (R2319). He stayed there for over a week before being released (R2319). Mr. Besaraba Sr. was never told what was wrong with Appellant (R2319).

Besaraba Sr. testified that Appellant left the house and moved to California (R2319). Besaraba Sr. did not see Appellant for a few years (R2319). In 1974, Sophia Besaraba died in a car accident (R2320). Appellant found out about his mother's death a half year after her funeral (R2321-22). Appellant took the death very hard and moved back with Besaraba Sr. (R2322). Appellant also tried to lift the spirits of his father (R2322). Appellant would drive his father to and from work (R2323). Later, Appellant would move to Boston (R2324). Besaraba Sr. would later remarry (R2324). Appellant would occasionally write to Besaraba Sr. (R2324). One time Appellant became very excited and told his father that the underground was after him (R2325). On April 25, 1987, Besaraba Sr. received the following letter from Appellant stating that he was violently ill because an individual had been breaking into his apartment and had been trying to poison him and that the police should be given the letter should he die:

> Dear mom and dad. This is not a letter I want to send you but I am feeling very ill and there are things I must tell you. I have been violently ill for about two months. I'm now certain that another tenant here, Bill Crostofoli (phonetic), has been and is again breaking into my room and now into my basement apartment. He's been spraying some deadly poison on the furniture, bedding, kitchenware, my clothes and my personal possessions.

> I accuse Bill Crostofoli of causing me serious bodily harm and my possible death. If I die contact the Brookline Police Department and send them a copy of this letter.
>
> I know some of the other tenants here have been aware of what he's been doing, what he's been up to, but have been afraid to say anything to the police. Love you both. Joseph Besaraba, Jr., 1754 Beacon Street, Brookline, Massachusetts.

(R2326-27). Besaraba Sr. has not seen Appellant since the time of the letter (R2327).

Alfred Osborn testified that he has known Appellant for over thirty years back to the days when they were both growing up in the same neighborhood (R2341). They were very good friends for a lot of years (R2342). Appellant and his sister, Monica, were very close and they helped care for each other (R2343). Appellant did some drinking, but not a lot (R2344). He was also involved in drugs (R2344). Beginning at the age of 18, Appellant would move in and out of his family's house (R2344). While everyone else settled down, Appellant did not settle (R2347). Appellant was hospitalized because of their fear of his doing harm to himself (R2345). There may have been some hallucinations involved (R2345). This happened around 1970 (R2345). Osborn has never known Appellant to be violent (R2348).

Lawrence Grupp testified that he met Appellant in 1980 after he had been recommended as a carpenter and painter (R2350). Appellant did painting and carpentry for Grupp over a four year period (R2351). Grupp was pleased with Appellant's work (R2351). Due to his expertise and his caring, Appellant took a long time (R2351). Money was not the main motivation for Appellant's work (R2354). It was a unique situation where the customer (Grupp) had to prod the worker (Appellant) to charge more for his services (R2354). When Grupp hired Appellant, Appellant told Grupp about his background including a somewhat troubled

childhood (R2352). There was a time where Appellant disappeared for a few months (R2355).

Grupp testified that Appellant began to change (R2353). He became less tolerant (R2353). He became jumpy and less patient, but there were no signs of violence (R2353). Appellant disappeared in 1984 (R2355). He called three years later asking for some money and stating that someone was after him (R2355).

Rhonda Grupp testified that she met Appellant when he came to work on her house (R2357). Grupp had never seen anybody with such a work ethic or who cared so much about what they did (R2357). Appellant was wonderful around the children and became part of the Grupp family during the four years he worked for them (R2359). Appellant admitted to being on drugs in his younger days (R2359). The last time Grupp saw Appellant was in 1984 (R2360). A couple of years later he called from California and asked for $300.00 (R2360). Grupp felt that if the money were for drugs Appellant would hurt himself (R2360).

Gerald Scullion testified that he met Appellant about 10 years ago (R2363). They became friends (R2363). Scullion is 84 years old and has arthritis in his right hip and left knee (R2364). Appellant would help out Scullion and would drive him back and forth to school (R2363). Appellant would see Scullion 3 or 4 times a week and 3 or 4 hours at a time (R2365). Appellant would not accept any money for his deeds (R2364). Scullion noticed that Appellant had a persecution complex (R2365). Appellant once phoned Scullion and asked him to meet him 20 miles away and to bring $200.00 (R2366). Appellant had to get out of town because he felt that some people were going to get him (R2366). Appellant indicated that it was a "matter of life and death" (R2366). This occurred about five years ago (R2366). Later, Appellant

and Scullion were walking side by side and another man walked in the opposite direction (R2366-67). The man asked Appellant how he was (R2367). Appellant slowed up and got behind Scullion (R2367). In a hoarse whisper, Appellant said, "That's one of them" (R2367). The two men hurried away (R2367). Scullion law saw Appellant three years ago (R2367).

Dr. Ross Seligson was declared an expert in forensic psychology and clinical psychology (R2375). Dr. Seligson reviewed: the statements and depositions of the witnesses in this case, the medical and educational records of Appellant, the pharmaceutical lab records involving Appellant, other doctors' reports on Appellant (R2375-76). Dr. Seligson did a psychological history evaluation as well as a mental status evaluation of Appellant (R2376). As an infant Appellant suffered from malaria (R2378). In 1985, he was diagnosed with alcohol hepatitis which would be the result of ingesting large quantities of alcohol for a long period of time (R2378). Appellant has an enlarged spleen (R2378). He has been spitting up blood (R2378). The medical records, as well as people who know him, indicate that Appellant has lost a tremendous amount of weight and he appears to be malnourished (R2378). Appellant has an extensive history of alcohol abuse since the age of 13 (R2378). Appellant also has a history of medical problems (R2378).

Dr. Seligson testified that Appellant has been diagnosed with sleep apnea (R2379). When this occurs over a period of time the person can suffer from psychotic symptoms (R2379). Appellant's physical problems, alcohol and drug abuse, as well as the drugs ingested during the 15 to 20 lab studies resulted in a bad state of health and malnourishment (R2379). The physical stresses combined with the

psychological stresses in Appellant's life resulted in Appellant being a very fragile person who suffers from a mental illness (R2380). Appellant suffers from a paranoid type of schizophrenia (R2380).

Dr. Seligson testified that Appellant suffered from paranoid ideations that people were after him (R2381). Seligson noted that Dr. Spencer's evaluation also concluded that Appellant "suffers from rather insidious mental difficulties with a diagnosis of paranoid schizophrenia" (R2381). Dr. Ruth Latimer indicated that Appellant had staring spells and in her finding she suggests there is probably organic brain syndrome (R2382). That would possibly be related to all the drugs Appellant has taken over the years including LSD, marijuana, and amphetamines (R2382). People with paranoid delusions will often times take drugs so they won't exhibit their feelings or emotions (R2382). In 1968 Appellant was admitted to a hospital for treatment due to confusions and delusions (R2382).

Dr. Seligson testified that indications of Appellant's schizophrenia include his bizarre delusions and decrease in functioning (R2383). Early school records show that Appellant did rather well, but there was no consistency in his life (R2383). There was a lot of moving around (R2383). There was a history of withdrawal (R23838). There was difficulty in being able to hold a job for a period of time (R2383). Appellant wound up as a homeless person (R2383). It is not unusual for schizophrenics to have physical complaints (R2383). In 1987 Appellant sought medical attention because he feared he had the same brain tumor his sister had (R2384). At this time, Dr. Floman did a psychiatric evaluation and found a positive sign of somatic concerns which are nearly delusional (R2384-85). There is also documentation of hallucinations concerning voices, paranoid ideations, anxiety, and

symptoms of depression (R2385). There was sleep apnea which Dr. Floman believed to contribute to Appellant's paranoid thinking (R2385).

Dr. Seligson testified that Appellants history shows certain causes to develop delusions that people were out to get him (R2385). From the time he was an infant in World War II, he was subjected to his family's having to run from the Nazis and then from the communists (R2385). This would help plant the seed that people were out to get him (R2385). Although Appellant's father tried hard to do the best for his family, today a child living under those circumstances would be taken away by the state (R2386). The anxiety level parents go through can relate back to the person diagnosed as schizophrenic (R2387). Here the environment of escaping to Poland, being shifted back and forth to relatives, then escaping over 80 miles on foot runs this risk of causing lasting damage to a child (R2387).

Dr. Seligson testified that there was a history of mental illness on the maternal side of Appellant's family (R2388). There is also a history of alcoholism and an uncle who was hospitalized for murdering his wife (R2388). Since his arrest in this case Appellant has earned a GED (R2389). One of the few consistent relationships in Appellant's life was with his sister Monica (R2390). Other than Monica, Appellant was not able to really relate with people which is consistent with schizophrenia (R2390). Appellant's employment record is also consistent with schizophrenia (R2390). Based on all the materials, Appellant had difficulties living in society (R2391). He was unable to grow up and take on responsibilities (R2391). Relationships got shorter and shorter (R2391). Appellant had a total disregard for himself, and lack of self-esteem, as shown by his selling himself to lab drug companies for experiments (R2392). He tried to do so even

when the labs rejected him (R2392). Appellant did not adequately grieve for his sister and mother (R2393). These deaths had a tremendous impact on him (R2392). It was more difficult for Appellant due to his delusions (R2393). Appellant was a homeless person prior to coming to Florida (R2394). He had left the New England area because he felt people wanted to harm him (R2393).

Dr. Seligson read the witnesses' accounts of the shooting and how Appellant walked away (R2395). A person diagnosed as having schizophrenia can be in psychological shock and can appear very cold on the outside (R2395). They become robotic in some instances (R2396). Appellant was coherent enough to know what he had done and what he was doing when he spoke to Mr. Yaguda (R2396). Appellant's act of shooting Yaguda is consistent with the diagnosis of schizophrenia (R2396-97). It is not unlikely that Appellant believed Yaguda was going to find someone to stop him (R2397). Appellant's choosing the fourth car in line doesn't show a rational thought process (R2397). The Nebraska incident was consistent with the diagnosis because people in a psychotic episode can be very strong regardless of their size (R2379). Appellant's psychiatric illness, along with his ingestion of alcohol, would compromise his ability to recognize right and wrong (R2400). Dr. Seligson would classify Appellant as chronic with acute exacerbation (R2401). Appellant would have reemerging psychotic symptoms (R2401). People would have pleasant memories of Appellant because he would withdraw from relationships when he was having these episodes (R2401). It was during these times Appellant would medicate himself through drugs or alcohol (R2401). Schizophrenia is a blood disorder where there is a separation between what a person feels and what he displays to others (R2404). Appellant's schizophrenia is an extreme mental or

emotional disturbance (R2433). Appellant was legally insane (R2434). In Dr. Seligson's opinion, Appellant did not appreciate what he had done after shooting two people (R2437).

Dr. Seligson testified that Appellant could function in a controlled environment such as a prison or jail and would not be a threat to others (R2403).

SUMMARY OF THE ARGUMENT

1. It was error to find the cold, calculated and premeditated (CCP) aggravating circumstance. The facts did not show beyond a reasonable doubt the heightened premeditation and careful planning required for CCP. This is especially true where Appellant was under the influence of a great mental or emotional disturbance. Nor can it be said that the killing was cold instead of the result of emotion. There was also a reasonable hypothesis that Appellant was acting with a pretense of moral justification. It was error to find CCP. The error was not harmless.

2. The trial court's rejection of the mitigating circumstance, that Appellant had a disadvantaged and unstable childhood, based on the standard that it was not the fault of Appellant's parents, is clearly wrong. Appellant still experienced a disadvantaged and unstable childhood even though it was caused by something other than parental abuse -- i.e. the extraordinary circumstances of Nazi Germany. It was error to reject this uncontroverted and significant mitigating circumstance.

3. Death is not proportionally warranted in this case.

4. Appellant objected to the jury instructions on mitigating circumstances requiring "extreme" mental or emotional disturbance and "substantial" impairment. Mitigating circumstances cannot be

restricted by the use of such modifiers. Thus, it was reversible error to require that mental or emotional disturbance be "extreme" or that impairment be "substantial."

5. It was error for the trial court to instruct the jury that flight is a circumstance of guilt. The error was not harmless.

6. It was error to admit evidence of Officer Jara's state of mind which was not relevant. The error was not harmless.

7. It was error to admit irrelevant evidence of Appellant's fighting with police in Nebraska three days after the incident. Such evidence was unfairly prejudicial to Appellant's case.

8. Where Appellant's only felony conviction in his life was part of the same episode involving the homicide, it was error to find the prior violent felony aggravating circumstance.

9. By allowing a death recommendation by a mere 7 to 5 vote, Florida's capital sentencing scheme is unconstitutional.

10. The jury panel was tainted by a psychologist's testimony during voir dire regarding mental impairment. It was error not to strike the panel.

11. The prosecutor improperly violated the rule of sequestration by informing its witness of the contents of what another witness testified to.

12. The prosecutor improperly violated the 10-day notice requirement for introduction of collateral crime evidence. The trial court erred in not making the required inquiry into the violation.

13. The prosecutor violated a stipulation that it had entered into with the defense.

14. The prosecutor's improper and prejudicial comments during closing argument deprived Appellant of due process and a fair trial.

15. The prosecutor's improper and prejudicial comments during the sentencing deprived Appellant of due process and a fair, reliable sentencing.

16. The prosecution utilized the Nebraska incident as a nonstatutory aggravating factor in the sentencing phase.

17. The instruction given to the jury on premeditated murder impermissibly relieved the state of its burdens of persuasion and proof as to an element of premeditated murder.

18. The instruction on reasonable doubt denied Appellant due process and a fair trial.

19. If mitigating evidence is found, it must be given some weight. It was error to deny an instruction informing the jury that mitigation cannot be given no weight.

20. The trial court erred in failing to adequately define nonstatutory mitigating circumstances as requested by Appellant.

21. It was reversible error to give a vague instruction on the cold, calculated and premeditated aggravating factor.

22. It was error to deny Appellant's requested instruction that mitigating evidence does not have to be found unanimously.

23. It was error to fail to instruct the jury on the correct burden of proof for the sentencing phase.

24. In opening argument, defense counsel admitted Appellant's guilt without his consent. Appellant was denied due process, his right to a jury trial, and assistance of counsel.

25. It was error to deny Appellant's motion to disqualify the trial judge.

26. By failing to inform Appellant that he had the right to represent himself, the trial court failed to conduct a proper inquiry when Appellant moved to discharge his counsel.

27. Florida' death penalty is unconstitutional.

28. The aggravating circumstances used in this case are unconstitutional.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FINDING THAT THE KILLING WAS COLD, CALCULATED AND PREMEDITATED.

The aggravating circumstance that the crime was committed in a "cold, calculated and premeditated" manner, hereinafter "CCP", was not shown beyond a reasonable doubt in this case. This aggravator "ordinarily applies in those murders which are characterized as executions or contract murders." McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988). While such examples are not deemed to be all-inclusive, they do represent the type of heightened premeditation and coldness required for the CCP aggravator. The instant case meets neither the spirit nor the literal requirements for this aggravator.

In order for this aggravating circumstance to apply, "heightened premeditation" is required. Jackson v. State, 599 So. 2d 103, 109 (Fla. 1992). That is, the defendant must have had "a careful plan or prearranged design" to kill. Id. A suspicion of heightened premeditation will not be sufficient. Lloyd v. State, 524 So. 2d 396, 403 (Fla. 1988). This aggravator must be proven beyond a reasonable doubt. Lloyd, supra, at 403 (although evidence might created "suspicion" of a contract killing, that fact was not established beyond a

reasonable doubt). The killing in this case was not done with the heightened premeditation or coldness required for CCP.

The trial court inferred CCP from Appellant's possible use of bus schedules after his confrontation with Sidney Granger (R3358).[1] This crime was allegedly CCP based on the inference that Appellant utilized bus schedules[2] to plan to meet Granger's bus at the Young Circle bus terminal (R3358). Thus, the trial court concluded that the killings were carefully planned. However, the evidence shows the lack of any careful planning so as to qualify the killing as CCP. First, after the confrontation with Granger, Appellant boarded another bus and purchased a bus transfer. Bus officials testified that the transfer could be used to transfer aboard a bus on another route, but could not be used to reboard Granger's bus (R1701). The purchase of a bus transfer, which could not be used to board Granger's bus, simply does not evidence a "careful plan" to board Granger's bus to kill him; it merely shows the intent to board a bus other than Granger's bus. Second, after the confrontation with Granger, Appellant went to the bus stop which was located in an isolated area (R1702-03). Instead of waiting for Granger's bus, which would be scheduled to arrive at the predetermined isolated stop, Appellant boarded another bus and went to the crowded bus terminal which was the hub of activity for Broward

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[1] Roseanne Bethea testified that Granger went to the back of the bus and began yelling at Appellant (R1621). Granger was "very loud" and angry (R1625). He told Appellant that he didn't want any drinking on the bus and Appellant had to take the drink off Granger's bus (R1624). Appellant told Granger that he wouldn't get rid of his drink (R1624-25). The two men continued arguing until Appellant finally exited the bus (R1625).

[2] This inference based on the finding of "stacks of bus schedules from Dade, Broward, and Palm Beach counties" that were found among Appellant's belongings (R3358).

County. This action is inconsistent with CCP.[3] Third, Appellant made absolutely no effort to conceal or safely store his personal belongings. These were his only possessions in the world, which according to witnesses he would never be without (R1784). Not planning for one's prized possessions to be safely stored is incongruous with the "careful planning" involved with this aggravator. Fourth, despite being in a crowded area during the shooting, Appellant made no effort to conceal or disguise his physical features before, during, or after the shooting. This is incongruous with the "careful planning" required for this aggravator. Fifth, Appellant's means of escape is totally inconsistent with "careful planning." Besides leaving behind much of his personal property, Appellant selected a car that was completely boxed in by stationary traffic as a getaway vehicle (R1424). Clearly, this was spontaneous and not the result of planning. The facts do not show beyond a reasonable doubt that the crime was cold, calculated and premeditated.

Even the state's theory, of a killing based on an emotional confrontation, acknowledges the confrontation where Granger had kicked Appellant off the bus and that the killing occurred 80 minutes later (R1961-62). Actions after an emotional confrontation do not qualify as CCP. It is just as reasonable that after the initial confrontation, and while awaiting another bus, Appellant reached a breaking

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[3] In the past this Court has found CCP where the perpetrator utilized an isolated area to kill the victim. See Roulty v. State, 440 So. 2d 1257, 1265 (Fla. 1983); Smith v. State, 424 So. 2d 726 (Fla. 1982) (victim taken to a wooded area and killed); Combs v. State, 403 So. 2d 418 (Fla. 1981) (victim lured to wooded area and killed). The use of an isolated area is an indicia of careful planning. In the present case, the isolated area was available for the crime, instead a crowded area was the scene of the crime. This has the indicia of a lack of planning.

point upon seeing Granger's bus arrive.[4] Thus, the killing was not CCP. See Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990) (heightened premeditation not shown even though state hypothesized that the defendant planned the killing for 30 minutes, where there was equally reasonable hypothesis that the defendant hit a breaking point after 30 minutes and killed the victim in a fit of rage).

Although witnesses described Appellant as appearing to be very calm after the shooting, Dr. Seligson testified that a person diagnosed as having schizophrenia can be in psychological shock and can appear to be cold and without emotion on the outside (R2395).[5]

In addition, CCP would not apply where Appellant was under the influence of a great mental or emotional disturbance at that time he committed the crime. The trial court found, "by a preponderance of the evidence," the mitigating factor that the crimes were committed while Appellant "was under the influence of great mental or emotional disturbance" (R3361-64).[6] This killing while under the influence of a great mental or emotional disturbance is inconsistent with the requirements of CCP. See Carter v. State, 560 So. 2d 1166, 1169 (Fla. 1990) (psychiatrist testified that the defendant probably suffered

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[4] This emotional response would also explain Appellant's random killing of Wesley Anderson.

[5] Dr. Seligson testified that Appellant suffered from schizophrenia which is an extreme mental or emotional disturbance (R2381, 2433). Due to this condition there is a separation between what a person feels and what he displays to others (R2404).

[6] The trial court made its finding from a combination of facts including: Appellant's long history of emotional disturbance; Dr. Seligson's testimony that Appellant's weakened physical condition combined with the situational stress caused Appellant to become emotionally disturbed; and Appellant's consumption of alcohol (R3361-64).

extreme mental disturbance and that impairment probably would make him unable to engage in the careful planning required for CCP).

Moreover, if the killing is done while the defendant is under the influence of mental or emotional disturbance or due to substance abuse, it will not be CCP even if it is clearly premeditated. See White v. State, 616 So. 2d 21 (Fla. 1993) (even though record clearly established killing was premeditated, evidence showed excessive drug use and that defendant was "high on cocaine" when he committed the crime).

Furthermore, even if the killing is calculated, to be CCP the killing must not have been the result of any emotion. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) (although killing was clearly calculated, it was not the result of "calm and cool reflection" and thus not cold). The shooting in this case occurred not long after the confrontation between Granger and Appellant. As Dr. Seligson testified, and the trial court found, Appellant was under the influence of an emotional disturbance at the time of the shooting (R3361). Assuming arguendo, that the shooting appeared to be calculated, it was not cold so as to qualify as CCP. Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993) (no CCP where after being beaten by victim, the defendant leaves, obtains gun, and returns and shoots victim twice in the back of the head).

Finally, where there is a pretense of moral justification, CCP does not apply. Pretense of moral justification "is any claim of justification or excuse that, though insufficient to reduce the degree of the homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." Banda v. State, 536 So. 2d 221 (Fla. 1988). Here, there is a reasonable scenario that, upon seeing bus

driver Granger pulling up with the bus, Appellant became scared that Granger was after him. Granger had earlier been angrily yelling at Appellant and then kicked Appellant off the bus (R1625). Appellant had a history of delusions that people were out to get him (R2381, 2385,2326-27).[7] These two facts show that, in his mind, Appellant could believe he was in danger from the arrival of Granger. A "colorable claim" exists that the killing was motivated out of some perceived self-defense, although "clearly insufficient to reduce the degree of the crime" or to provide a valid defense. Banda, supra, at 225. Thus, CCP does not apply. Id.

The error cannot be deemed harmless. There were only two aggravating circumstances considered in this case -- CCP and prior violent felony. The prior violent felony circumstance was due to the contemporaneous shootings. The jury could find the single episode was an isolated out-of-character act, instead of a representation of a propensity for violence as a prior separate felony could demonstrate. Once the aggravating circumstance of CCP is eliminated, it cannot be said beyond a reasonable doubt that the jury's recommendation, or the trial judge's decision, would be the same. In fact, this court has consistently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present. E.g. Clark v. State, 609 So. 2d 513 (Fla. 1992); McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Smalley v.

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[7] Dr. Seligson explained that the initial seeds for Appellant's paranoia developed when Appellant, as a small child, was on the run from the Nazis and communists, shifted back and forth with relatives, and then escaping 80 miles on foot. The paranoia continued to grow as shown by his letter explaining that people were placing poison on his possessions and by his eventual homelessness.

State, 546 So. 2d 710, 723 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988).

In this case there were significant mitigating factors present. The trial court found two statutory mitigating circumstances: 1) Appellant has "no significant history of prior criminal activity"[8] and 2) the "crimes for which the Defendant is to be sentenced were committed while he was under the influence of great mental or emotional disturbance"[9] (R3360-64).

The trial court also found a number of nonstatutory mitigating circumstances. Included within these was Appellant's history of alcohol and drug abuse (R3366). The trial court recognized that Appellant had been hospitalized for drug related problems (R3366). In fact, the evidence showed that Appellant diagnosed with alcohol hepatitis which is the result of ingesting a large quantity of alcohol over a long period of time (R2378).

The trial court also recognized that alcohol was consumed just prior to the incident (R3366). The trial court noted that Appellant's actions were not controlled by alcohol and he knew what he was doing.[10]

The trial court recognized Appellant's physical problems as mitigating (R3367). Dr. Seligson testified that Appellant's physical problems, including but not limited to, sleep apnea and malnourishment, contributed to his mental and emotional problems (R2379-80). The drugs ingested during the 15 to 20 lab studies that Appellant participated

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[8] § 921.141(6)(a), Fla. Stat. (1991).

[9] § 921.141(6)(b), Fla. Stat. (1991).

[10] However, while alcohol consumption alone was not the result of Appellant's condition, there was testimony that his alcohol consumption along with his other illnesses, had an impact on Appellant's mental and emotional state (R2400).

in as a human guinea pig didn't help matters (R2379). Appellant's mental condition at the time of the incident is a product of these problems.

The trial court recognized Appellant's good character as a mitigating circumstance (R3368). One example is Appellant's helping out Gerald Scullion, who was 84 years old with severe arthritis, and driving him around (R2363-64). Appellant would not accept any money for his deeds (R2364).

The trial court recognized Appellant's good work record as a mitigating circumstance (R2368). This was exemplified by Appellant's carpentry work for Lawrence Grupp over a four year period (R2351). Grupp testified he was placed in the unique situation of having to prod Appellant to charge more money for the work (R2354).

The trial court recognized Appellant's good conduct in prison and rehabilitation as mitigating circumstances in this case (R3369-70).

While the trial court's order lists some of the nonstatutory mitigating circumstances, it does not place them in the context of this case. The uncontroverted evidence shows that Appellant's parents were captives of the Nazis when Appellant was born in 1944 (R2292-94). The area was under attack when Appellant was born (R2292-94). For the first year of Appellant's life, his family ran to survive and was barely able to get food to stay alive (R2301-02). For example, the Besarabas had to travel 80 miles on foot to the Russian border where farmers helped them cross an area of guards and machine guns (R2303-04). The next two years were spent in military barracks (R2306). Dr. Seligson testified that Appellant's early life of running from the Nazis and communists helped plant the seed in Appellant's mind that people were out to get him (R2385). Thorough the years this would

blossom into a full paranoid schizophrenia (R2378-90). There was also evidence that Appellant suffered from organic brain damage (R2382, 1815).

Due to his paranoia, Appellant began to withdraw from society. First, he began moving around a lot (R2383). Eventually, he wound up homeless (R2383). In addition, Appellant suffered from sleep apnea which contributed to his paranoid thinking (R2385). General and specific incidents of paranoia would occur.[11] Deterioration of Appellant's physical and mental state, and his life as a human guinea pig for drug testing laboratories,[12] continued to contribute to Appellant's mental and emotional downfall (R2379-80). Appellant last went for an experiment with the Hazelton Laboratory on July 20, 1989 -- three days prior to the shootings (R1828).

This is very strong mitigating evidence which shows that Appellant's paranoid emotional and mental condition increased during his whole life right up to the day of the incident. Although his condition does not justify his actions, it does help explain his actions. The error cannot be deemed harmless. The error denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17 of the Florida Constitution, and the

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[11] This is exemplified by Appellant's letter to his father stating that an individual had been breaking into his apartment and spraying some deadly poison on his possessions (R2326-27). There were other specific instances where Appellant had to get out of town because he felt people were after him (R2366,2355).

[12] The drug companies' use of Appellant was extensive for the 18 month period prior to the incident (R1821-23). Appellant became anemic due to the extensive blood loss during the experiments (R1825). There was evidence of liver and kidney damage (R1828). The thin coverings of various organs in Appellant's body were winding up in Appellant's urine where they do not belong (R1826). Some laboratories were rejecting Appellant due to his physical condition (R1826-27).

Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT II

THE TRIAL COURT ERRED IN USING THE WRONG STANDARD AND IN FAILING TO FIND APPELLANT'S UNSTABLE AND DISADVANTAGED CHILDHOOD AS A MITIGATING CIRCUMSTANCE.

As shown by its order, the trial court rejected unstable and disadvantaged childhood as a mitigating circumstance because there was no evidence that Appellant's parents abused Appellant:

> 1. The Defendant's Unstable and Deprived Childhood
>
> A disadvantaged childhood, abusive parents, lack of education and training are valid nonstatutory mitigating circumstances the court may consider. Brown v. State, 526 So. 2d 903 (Fla. 1988) (abrogated in Fenelon v. State, 594 So. 2d 292 (Fla. 1992) on issue of a "flight" instruction).
>
> The defendant's father, Joseph Besaraba, Sr., testified that he had been captured by the Nazis. He escaped several times but was ultimately recaptured.
>
> When the Defendant was approximately a year old the family escaped from Poland to the American zone in Germany. They lived in an army barrack for four (4) years awaiting passage to the United States. Throughout the family's turmoils they were able to stay together.
>
> The Besarabas bought a home and small business in New York in 1960 and the family all worked there together. The witness testified that he never had any problems with the Defendant as a child. There was no evidence of any abusive parenting or a disadvantaged childhood. To the contrary, the Defendant's parents provided a stable environment in the face of extreme circumstances.
>
> The Defendant characterizes his childhood as abusive because his parents worked hard and they were unable to spend time with him. The Defendant ran away from home due to a distant relationship with his family and a lack of a father figure. However, there was no testimony of any abuse. The Court finds that this mitigating factor has not been established.

(R3365-66) (emphasis added). In essence, the trial court's ruling was that an unstable or disadvantaged childhood, as a matter of law, is not a mitigating circumstance unless caused by abuse by the parents. This clearly is not true. An unstable or disadvantaged childhood is a mitigating circumstance even where such is present without intentional abuse by parents. See e.g. Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992) (defendant lived in "rough conditions," "poverty," and "home life unstable throughout his formative years"); Johnson v. Wainwright, 806 F.2d 1479, 1483 (11th Cir. 1986) ("petitioner came from a family which suffered extreme hardship"); Hitchcock v. Dugger, 481 U.S. 393, 397, 107 S.Ct. 1821, 95 L.Ed.2d 347, 352 (1987) (one of seven children in a poor family which earned its living picking cotton). The issue is not whether the parents are to blame. Rather, what is important is whether the child led an unstable or disadvantaged childhood. In the court below, Appellant did not present his argument as an attack on the parents,[13] but as mitigation that the circumstances of Nazi Germany created instability and disadvantaged Appellant during his formative years:

> 2. It is a mitigating factor that Mr. Besaraba had an instable early life. Neary v. State, 384 So. 2d 881 (Fla. 1980); Penry; Eddings; Hitchcock v. Dugger, 107 S.Ct. 1821 (1987); Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Mr. Besaraba had a remarkably instable early life, which was described by his father during the penalty phase proceedings. Living in an abandoned restaurant, constantly being abused and harassed by Nazis, being turned away from his grandfather's house because there was not enough room for his family, being pursued and shot at by Communists as he and his family fled toward freedom, being in a displaced person's camp in

[13] The efforts of the parents were heroic in escaping the Nazis and surviving the extraordinary circumstances.

> post World War II Germany for two and one half years, all was devastatingly stressful. Once, Mr. Besaraba and his family relocated to New York, they lived in an inner city impoverished area, which further reinforced the idea that the world is a hostile environment in which to reside. Finally, once the family had saved enough money to buy their own home and buy a business, and work together to maintain the business, they lost both the home and the business due to financial distress created by circumstances beyond their control, such as the dying daughter's medical bills and the lack of business created by a change in neighborhood dynamics. Mr. Besaraba's early life was a constant series of periods of instability.
>
> 3. It is a mitigating factor that Mr. Besaraba had an exceptionally unhappy and unstable childhood. Burger v. Kemp, 107 S.Ct. 3114 (1987). Mr. Joseph Besaraba had an extensive history of an unhappy and unstable childhood which was negatively impacted upon his emotional development and his ability to adjust to living in society. This history includes living in a displaced person's camp in post World War II Germany. Furthermore, he had a distant relationship with his father who was not emotionally available.

(R3309-10). Clearly, Appellant had an unstable childhood. During his formative years, food was scarce and that food was rationed so that one could stay alive (R2298). The family was harassed and abused by the Nazis (R2293-94,2300). The family traveled 80 miles on foot to escape across the Russian border (R2303-04). Farmers aided them past armed guards (R2305). Appellant suffered from malaria as an infant (R2378). They then lived in a displaced person's camp in post World War II Germany (R2306). This is extremely stressful and certainly qualifies as an unstable and disadvantaged childhood. As Dr. Seligson testified, it was these conditions which would plant the seeds of paranoia in Appellant (R2385).

Appellant did not have the parental care and attention a child needs. Again, this is not the fault of the Besarabas. They were

struggling to survive. They would go to the black market to get whatever they could to survive (R2302). They concentrated on the family's physical safety. Today, putting aside the reason for the necessary conditions Appellant lived under (i.e. World War II), there was testimony that a child would not be allowed to live under these conditions in Florida today (R2386). The child would be a ward of the state (R2386). Even when the family relocated to America, it was to an inner city impoverished area where it was still a struggle to survive (R2309). When the family finally managed to save some money, the oldest daughter became sick and eventually died from a brain tumor (R2313-14). Appellant's mother then began gambling and the family lost its home (R2316). It cannot be said that Appellant did not come from an unstable and deprived background. It was reversible error for the trial court to utilize the wrong standard to avoid finding Appellant's unstable and disadvantaged childhood as a mitigating factor. See Mines v. State, 390 So. 2d 332, 337 (Fla. 1980) (trial court improperly used "sanity" standard in rejecting mental mitigator of being under extreme mental or emotional disturbance); Campbell v. State, 571 So. 2d 415, 418-19 (Fla. 1990) (trial court improperly used "sanity" standard in rejecting "impaired capacity" as a mitigator); Ferguson v. State, 417 So. 2d 639, 644-45 (Fla. 1982). The error denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17, of the Florida Constitution, and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT III

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). Its application is reserved for "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

As explained in Point I, the cold, calculated and premeditated aggravator is not legitimately applicable in this case. This leaves, at best, only one aggravating circumstance -- the prior violent felony which was due to the contemporaneous shootings. See Point VIII. As noted in McKinney v. State, 579 So. 2d 80, 81 (Fla. 1991), the death sentence will be affirmed in cases supported by one aggravating circumstance only where there is either nothing or very little in mitigation:

> Having found that two aggravating circumstances are unsupported by the record, this death sentence is now supported by just one aggravating circumstance -- that the murder was committed during the course of a violent felony. As we have previously noted, "this Court has affirmed death sentences supported by one aggravating circumstance only in cases involving 'either nothing or very little in mitigation.'" *Nibert v. State*, 574 So. 2d 1059, 1063 (Fla. 1990) (quoting *Songer v. State*, 544 So. 2d 1010, 1011 (Fla. 1989)). Here, the trial court found as a statutory mitigating circumstance that McKinney had no significant history of prior criminal activity. In addition, McKinney presented substantial mitigating evidence relating to his mental deficiencies and alcohol and drug history. In light of the existence of only one valid aggravating circumstance present here, the sentence of death is disproportional when compared with other capital cases where this Court has vacated the death sentence and imposed life imprisonment. *See Lloyd*, 524 So. 2d at 403 (and cases cited therein).

See also Clark v. State, 609 So. 2d 513 (Fla. 1992); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d at 1011; Smalley v. State, 546 So. 2d 710, 723 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988).

In this case there were significant mitigating factors present. The trial court found two statutory mitigating circumstances: 1) Appellant has "no significant history of prior criminal activity"[14] and 2) the "crimes for which the Defendant is to be sentenced were committed while he was under the influence of great mental or emotional disturbance"[15] (R3360-64). The trial court also found a number of nonstatutory mitigating circumstances which included: Appellant had a history of drug and alcohol abuse; Appellant had physical and emotional problems; Appellant's good character and reliable work record; Appellant's conduct and adjustment to prison (R3366-69). In addition, Appellant's unstable and deprived childhood should be considered in mitigation. See Point II, supra. In light of the existence of only one valid aggravating circumstance, as well as the statutory and nonstatutory mitigating evidence present here, the sentence of death is disproportional. Id.

Assuming arguendo that the CCP aggravator is valid in this case, the death sentence would still be disproportional. Proportionality analysis is not based solely on the number of aggravating factors. See Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (although five aggravating factors, including prior violent felony but excluding HAC and CCP, existed -- death was not proportionally warranted); Living-

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[14] § 921.141(6)(a), Fla. Stat. (1991).

[15] § 921.141(6)(b), Fla. Stat. (1991).

ston v. State, 565 So. 2d 1288, 1292 (Fla. 1988) (death disproportionate when proportional review of two aggravating factors, including a prior violent felony, against mitigating factors). Rather, proportionality review is also based on the quantity and quality of the mitigating evidence. There was substantial mitigation present to make death disproportional. See Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990). As explained in Points I and II, the trial court found that Appellant has no significant history of criminal activity and that the crimes for which he is to be sentenced were committed while he was under the influence of great mental or emotional disturbance (3360-64). Also, mitigating factors were present including Appellant's drug and alcohol abuse, Appellant's physical and emotional problems, Appellant's good character and reliable work record, Appellant's unstable and disadvantaged childhood and his conduct and adjustment to prison. As in other cases, the substantial mitigation takes this case from the group of the most unmitigated cases for which the death penalty is reserved. Kramer v. State, 18 Fla. L. Weekly S266 (Fla. April 29, 1993) (death not proportional where two aggravators [prior violent felony and HAC] where mitigators of alcoholism, mental stress, loss of emotional control, good worker, adjustment to prison, were present); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (death not proportional where two aggravators [prior violent felony and during the commission of felony] where mitigators of low intelligence, cocaine and marijuana abuse, and abusive childhood were present); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) (death not proportional despite 5 aggravators found); Jackson v. State, 575 So. 2d 181 (Fla. 1991) (death not proportional despite two aggravators including prior violent felony). The death sentence in this case

violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT IV

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE JURY INSTRUCTIONS ON MITIGATING CIRCUMSTANCES REQUIRING "EXTREME" MENTAL OR EMOTIONAL DISTURBANCE AND "SUBSTANTIAL" IMPAIRMENT.

Appellant requested the jury be instructed on the mitigating circumstances of the offense being committed while Appellant was under the influence of "extreme" mental or emotional disturbance, and that the capacity of Appellant to conform his conduct was "substantially" impaired, without the modifiers "extreme" or "substantially" (R2177-78,SR91). The trial court denied Appellant's request (R2178). This was error.

The refusal to instruct without the modifiers could lead to rejection of unrebutted mitigating circumstances when viewed under the strict statutory definition of "extreme" mental or emotional disturbance or "substantially" impaired. The limitation of the jury's consideration of mitigating circumstances by use of modifiers "extreme" or "substantially" violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

In Cheshire v. State, 568 So. 2d 908 (Fla. 1990) this Court held it was error to restrict consideration of mitigating circumstances by the use of the "extreme" modifier despite the language of the statute:

> Florida's capital sentencing statute does in fact require that emotional disturbance be "extreme." However, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, *any* emotional

> disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. *Lockett; Rogers*. Any other rule would render Florida's death penalty statute unconstitutional. *Lockett*.

568 So.2d at 912.

The instant scenario presents the extreme of vague sentencing criteria, where the use of such modifiers can be viewed by the jury as preventing consideration of valid mitigation unless it rises to some ethereal benchmark specified by statute. Unless the evidence shows that the independent considerations constitute "substantial" impairment, the jury summarily rejects valid mitigation and affords the facts no weight in the sentencing process. The addition of the term "extreme" prevents consideration of compelling emotional or mental influences as valid mitigation unless the perpetrator is psychotic, and, perhaps, even then. See Provenzano v. State, 497 So. 2d 1177, 1184 (Fla. 1986) (defendant not under influence of "extreme" mental or emotional distress, even though two of five psychiatrists testified that defendant was legally insane at the time of offense). The modifiers unduly restrict the categories that may be considered as mitigation, and their use violates the Eighth and Fourteenth Amendments by making consideration of valid mitigation inconsistent, arbitrary and capricious.

Here, the instructions with the modifiers of "extreme" and "substantially" could prevent the jury from considering such things, for example, as Appellant's consumption of alcohol or his distressed mental state. Instead of considering whether Appellant was mentally or emotionally disturbed to some degree, or whether Appellant's capacity to conform his conduct was merely impaired to some degree, the instruction confined the statutory mitigating factor to an

"extreme" disturbance or a "substantial" impairment. In this regard, the statutory limitations of the extent of mental or emotional disturbance, or the extent of impairment, that must be present before it can be considered to affect an aggravating factor impermissibly violates the teaching of Skipper v. South Carolina, 476 U.S. 1 (1986) and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Article I, Sections 9 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT V

THE TRIAL COURT ERRED IN GIVING A FLIGHT INSTRUCTION OVER APPELLANT'S OBJECTION.

Over Appellant's objection (R1912), the trial court gave the following instruction on flight:

> Flight is considered to exist when an accused departs from the vicinity of the crime under circumstances such as to indicate a sense of fear or of guilt or to avoid arrest.
>
> Flight is only a circumstance of guilt which you should consider and weigh if you find evidence of flight by the defendant in connection with all the other evidence in the case and give it weight as in your judgment it's fairly entitled to receive.

(R2088). It was error to give an instruction on flight. Fenelon v. State, 594 So. 2d 292 (Fla. 1992).

It cannot be said beyond a reasonable doubt that the flight instruction was harmless. The instruction is a judicial comment on flight's value as a circumstance of guilt. The prosecutor told the jury that the judge would tell them to look at flight and that flight was evidence of Appellant's state of mind showing premeditation (R1966). The sole issue in this case was Appellant's state of mind at the time of the offenses. The flight instruction was a judicial

endorsement of the state's use of flight toward proving guilt. The instruction could have tipped the scales toward the jury accepting the state's argument thus finding Appellant guilty of the crimes charged rather than of the lesser included offenses. It cannot be legitimately said that the error was harmless.

The error in giving the flight instruction denied Appellant due process and a fair trial contrary to the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT VI

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OFFICER JARA'S STATE OF MIND OVER APPELLANT'S OBJECTION.

Over Appellant's objections (R1201-02,1203,1381), the state introduced evidence that, three days after the incident involving the crimes charged, Appellant struggled and fought with the Nebraska police during his arrest. See Point VII. During the trial, Deputy John Jara testified not merely to what had occurred during the struggle, but also to his own state of mind (R1454-55). Specifically, that Jara thought to himself that Appellant was trying to kill him (R1454-55).[16] Appellant objected to this testimony (R1455). The trial court ruled that the evidence showed Jara's state of mind and over-ruled the objection (R1455). This was error.

The issue in this case was Appellant's state of mind at the time he shot Sidney Granger and Wesley Anderson in Florida. A Nebraska

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[16] JARA: ... "For some reason I thought to myself why am I being such a nice guy. This guy is trying to kill me."

(R1454-55).

police officer's state of mind three days later is totally irrelevant toward that issue. It was error to introduce evidence of Jara's state of mind when it was not relevant. See Castro v. State, 547 So. 2d 111, 115 (Fla. 1989) (evidence as to McKnight's state of mind was not relevant and only showed defendant's bad character and propensity for violence); Sommerville v. State, 584 So. 2d 200, 201-202 (Fla. 1st DCA 1991) (improper to use witness's state of mind to prove the defendant's state of mind); Rigdon v. State, 621 So. 2d 475, 478-79 (Fla. 4th DCA 1993) (error to introduce evidence relating to Catherine Rigdon's state of mind where her state of mind was not at issue); Kennedy v. State, 385 So. 2d 1020, 1022 (Fla. 5th DCA 1980) (extrajudicial statements not admissible where victim's state of mind was not in issue).

The error cannot be deemed harmless. Jara's testimony, that in his mind he thought Appellant was trying to kill him, could be improperly used to convey Appellant's state of mind -- that Appellant was trying to kill. "[T]he rule is well established that a witness is not permitted to testify as to the undisclosed intention or motive of a third person; that the witness must be confined to a statement of facts leaving it to the jury to draw the proper inferences as to what were the party's intentions or motives." Branch v. State, 96 Fla. 307, 118 So. 13, 15 (Fla. 1928). Yet, the state used this irrelevant evidence in its closing argument to convey that Appellant was in a killing state of mind in Florida as is demonstrated in Nebraska by Jara's thought that Appellant was trying to kill him:

> MR. MORTON: ... Flight and what happened in Nebraska when he was caught tells you his state of mind. What does he have? A killing state of mind back in Hollywood where he left. He got to Nebraska. He was about to be handcuffed, dives right back into the car for this bag and they struggled over the gun and you heard the descrip-

> tions of what happened, what the police had to go through.
>
> There's some conflicts but no one is looking at the other as to what they are doing. They are fighting for their lives. As Sergeant Jara told you, I'm here and I'm trying to get this gun and suddenly I'm thinking to myself this man is trying to kill me, kill us. Why am I being so nice? I grabbed his hair and put my knee. That's what I had to do just to get him, make him let go of the gun.
>
> State of mind. Killing. Specific intent. Back in Hollywood as he got away.

(R1967) (emphasis added). The only contested issue in this case was Appellant's state of mind. Clearly, where the prosecutor is heavily relying on the improper evidence for its argument on the main issue in this case, the error cannot be deemed harmless.

The error denied Appellant due process and a fair trial contrary to Article I, Sections 9 and 16 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It cannot be said beyond a reasonable doubt that the error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT VII

THE TRIAL COURT ERRED IN ADMITTING COLLATERAL CRIME EVIDENCE OVER APPELLANT'S OBJECTION.

During trial, over Appellant's objections (R1201-03,1203,1381, 1451), the state introduced details of Appellant's fighting and struggling with police at the time of his arrest in Nebraska (R1449-56,1467-71). It was error to overrule Appellant's objections and to allow the admission of this evidence.

Circumstances of an arrest are generally not relevant to proving the crime charged:

> Although it does not appear that Postell objected to the testimony on the grounds of relevancy, we are compelled to point out that the arrest of the defendant is not an element of the crime to be proved, and proof concerning the fact that it occurred, the circumstances of it, and the reasons for it is ordinarily irrelevant. We recognize that it could be argued that the time and place of Postell's arrest, for example, would tend to disprove any contention that Postell was in Philadelphia within an hour of the crime. However, in the present case, Postell's defense was that he was at home in Miami. *See State v. Bankston, supra; People v. Wilkins*, 408 Mich. 69, 288 N.W.2d 583 (1980).

Postell v. State, 398 So. 2d 851, 855 fn.7 (Fla. 3d DCA 1981) (emphasis added). The only point of the Nebraska incident with any relevance was the fact that Appellant was found in possession of Scott Yaguda's car and a gun in Nebraska. The details of Appellant's fighting with police officers simply is not relevant other than to show bad character and propensity for violence.

It is permissible to show the fact that Appellant had fled to Nebraska and was in possession of the car and gun which were from Florida. However, as noted in Fasenmyer v. State, 383 So. 2d 706 (Fla. 1st DCA 1980), the details of the collateral act are not relevant toward proving the identity of the property:

> We would caution however that the state should not on retrial be allowed to question Van Shrauss generally about other burglaries, and that any such questions should be specifically related to the identity of the gun allegedly used in the Oltmann's burglary. Thus questions asking whether the defendant and Van Shrauss stole guns during other burglaries are not relevant to any issue concerning the identity of the gun used in the crime charged, and could constitute reversible error.

383 So. 2d at 708 (emphasis added). Moreover, even if there is some relevance to the collateral acts, as explained in Bryan v. State, 533 So. 2d 744 (Fla. 1988), the details of the acts would not be admissible because the prejudice would outweigh the probative value:

> Only on this last point de we find error. Although the picture of Appellant with a sawed-off shotgun committing a bank robbery was relevant to possession of the murder weapon prior to the crimes here, we believe that any evidence of the bank robbery or the picture's probative value was substantially outweighed by the danger of unfair prejudice. § 90,403, Fla. Stat. (1983). The state had a plethora of other evidence showing that Appellant owned and possessed the murder weapon prior to, during, and following the murder here. Introducing the picture of the bank robbery added little to this evidence but unfair prejudice.

533 So. 2d at 777 (emphasis added). Likewise, in Taylor v. State, 508 So. 2d 1265 (Fla. 1st DCA 1987), the general fact of the collateral offense was admissible, but not the specifics:

> In the prosecution of cases such as this one, the evidentiary relevance of the specific criminal charges must be weighed against their prejudicial effect. While the general fact that appellant was charged with a crime is relevant to appellant's motive in tampering with a witness, any relevance of the specific criminal allegations of sexually deviant behavior is far outweighed by its prejudicial effect.

508 So. 2d at 1267 (emphasis added).

Likewise, in the instant case the state introduced specific details of a collateral incident that were not relevant to prove any material issue and the prejudice of this evidence outweighs any probative value it may have had. The collateral act is presumptively prejudicial. Straight v. State, 397 So. 2d 903 (Fla. 1981). Especially in the present case where the collateral act of violence against a police officer is inflammatory. Where there is a close and genuine issue as to Appellant's state of mind at the time of the

charged offenses, it cannot be said beyond a reasonable doubt that the inflammatory evidence could not have influenced the jury. Thus, the error was not harmless. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). The error denied Appellant due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, United States Constitution; Article I, §§ 9 and 16, Florida Constitution. Appellant's convictions and sentences must be reviewed and this cause must be remanded for a new trial free from the inflammatory evidence.

POINT VIII

THE TRIAL COURT ERRED BY FINDING THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR WHERE THE ONLY OTHER CONVICTIONS OF A PRIOR FELONY WERE CONTEMPORANEOUS TO THE HOMICIDE CONVICTION.

Appellant challenged the finding of the prior violent felony aggravator where the only prior felonies occurred during the episode for which Appellant was being sentenced (R3293). However, the trial court found that Appellant had been convicted of a prior violent felony based on the contemporaneous felonies committed by Appellant (R3357). It was error to find the prior violent felony aggravator in this case.

This aggravator is defined in Section 921.141(5)(b) of the Florida Statutes as follows:

> The defendant was **previously convicted** of another capital felony or of a felony involving the use or threat of violence to the person.

(emphasis added). Appellant's contemporaneous convictions cannot be legitimately construed as the defendant being "previously convicted" so as to qualify Appellant for this aggravating circumstance. Such an interpretation would render the word "previously" totally without meaning.

The word "convicted," within the term "previously convicted," is the past tense of conviction. The plain meaning of the word "convicted" by itself in Section 921.141(5)(b) permits any conviction occurring prior to the sentencing to qualify the accused for this aggravator. This is the same manner in which the present aggravator is construed due to the term "previously convicted." In other words, "previously convicted" has been interpreted to mean the same as "convicted." Thus, because of the present interpretation of "previously convicted" the word "previously" has been interpreted as mere surplusage -- i.e. useless language. This is contrary to the rule of statutory construction that statutes do not employ "useless language." Johnson v. Feder, 485 So. 2d 409, 411 (Fla. 1986). The word "previously" must be given some meaning other than what the past tense word "convicted" signifies. The legislature obviously intended to modify "convicted" with the adverb "previously."

The only legitimate interpretation of "previously convicted" in this context is that the defendant have a conviction prior to sentencing [i.e. "convicted"] and that the conviction be prior to the convictions for which the defendant is being sentenced [i.e. "previously"].[17] The term "previously convicted" obviously does not permit this aggravator to be based on contemporaneous convictions.[18] It was error to find this aggravator based on the contemporaneous convictions.

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[17] This interpretation is consistent with the requirement that penal statutes be construed in favor of the person against whom a penalty is to be imposed. Ferguson v. State, 377 So. 2d 709, 711 (Fla. 1979). This interpretation is also consistent with the legislature's reference to convictions rather than a reference to crimes.

[18] When convictions are contemporaneous, neither conviction occurred prior to the other.

Admittedly, it has been held that contemporaneous convictions can be used to establish the prior violent felony aggravating factor where there was more than one victim. Wasko v. State, 505 So. 2d 1314 (Fla. 1987).

On the other hand, contemporaneous convictions may not be used to support the prior violent felony aggravator when the convictions were for crimes committed against the murder victim in the course of the action leading up to the murder. Wasko, 505 So. 2d at 1318 (in effect overruling Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984)). Although the Wasko court factually distinguished these cases from cases holding that contemporaneous convictions of crimes against different victims could be used as prior violent felonies, no reason for making the distinction was given. There is no valid reason for such a distinction. Moreover, correct interpretation of the term "previously convicted" makes such a distinction unnecessary.

In Elledge v. State, 346 So. 2d 998 (Fla. 1977), it was stated that the purpose of considering aggravating and mitigating factors was to engage in character analysis to ascertain whether death was appropriate. Whether the defendant exhibited a propensity to commit violent crime was relevant. 346 So. 2d at 1001. The defendant who has previously committed a violent crime prior to the crime charged would seem to have a propensity to commit such crimes. Contemporaneous crimes do not suggest that the defendant has a propensity for violence.

Propensity for violence is shown by the fact that prior to the episode for which the defendant is being sentenced, the defendant had been involved in violent behavior, and despite a conviction for this prior violence, the defendant continues to use violence.

Inclusion of contemporaneous offenses adds nothing to show the propensity for violence. Prior to the day of the incident, Appellant never perpetrated any violence. The only violence in Appellant's life was his childhood in Nazi Germany and his lifelong perception that people were after him. The once in a lifetime incidence of violence does not place Appellant in a category to which the aggravator is meant to apply -- those who had shown a propensity for violence through their prior felonies. These violent individuals never learned from their previous crimes and show a willingness to continue their violent ways. Appellant, with no criminal past, is not among those to which this category is meant to apply. The error in finding this circumstance, and in instructing the jury, denied Appellant of due process and a fair trial and reliable sentencing. Fifth, Eighth and Fourteenth Amendments, U.S. Const.; Art. I, §§ 9 and 17, Fla. Const. Appellant's death sentences must be vacated.

POINT IX

FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL BY ALLOWING A DEATH RECOMMENDATION BY A MERE 7 TO 5 VOTE.

In the court below, Appellant filed a motion challenging Florida's capital sentencing scheme on the ground that it permitted a death recommendation on less than a unanimous vote (R2714). The motion was denied (R3086). The jury recommended death by a vote of 7 to 5 (R2534). By allowing a death recommendation by a bare majority, Florida's capital sentencing scheme violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In the penalty phase, the jury is a co-sentencer. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). The jury's recommendation is "an integral part of the death sentencing process," and "[i]f the

jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley v. Wainwright, 517 So. 2d 656, 657, 659 (Fla. 1987). When a state provides a penalty jury, it cannot dispense with the applicable constitutional protections that apply to jury proceedings. See Morgan v. Illinois, 504 U.S. ___, 112 S.Ct. 2222, 119 L.Ed.2d 492, 500 (1992).

It has been said that a jury represents the "conscience of the community." This may be true when it is unanimous. However, a 7 to 5 vote is hardly the "conscience of the community." Permitting a bare majority jury recommendation for death, rather than unanimity, violates the safeguards of reliability required by the Eighth and Fourteenth Amendments.[19] State v. Daniels, 542 A.2d 306, 314-15 (Conn. 1988) (holding that jury verdicts in the penalty phase of a capital case must comport with the standards for valid general jury verdicts -- including unanimity);[20] People v. Durre, 690 P.2d 165, 172-73 (Colo.

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[19] The Eighth and Fourteenth Amendments to the United States Constitution require a heightened degree of reliability for imposition of the death penalty. Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Sumner v. Shuman, 483 U.S. 66, 72, 107 S.Ct. 2716, 2720, 97 L.Ed.2d 56 (1987).

[20] The Court in Daniels specifically noted:

> ... we perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict.... The "heightened reliability demanded by the Eighth Amendment in the determination of whether the death penalty is appropriate" ... convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing.... These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only

1984) (unanimity enhances reliability and because the penalty of death is unique, the need for reliability in a capital sentencing proceeding takes on added significance).

Although not dealing directly with this issue, United States Supreme Court cases also lend support for the requirement of unanimity rather than a bare majority. See Duncan v. Louisiana, 391 U.S. 145, 159 (1968) (observing that the penalty may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment); Burch v. Louisiana, 441 U.S. 130 (1979) (non-unanimous verdict by six person jury violates federal constitution); Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (upholding statute which allows less-than-unanimous verdict (9-3) in non-capital cases [406 U.S. at 356, n. 1] noting that the statute required nine jurors -- "a substantial majority of the jury" -- be convinced by the evidence [406 U.S. at 362]).[21]

> assist the capital sentencing jury in reaching such a reasoned decision.

542 A.2d at 314-15.

[21] Johnson, supra, was a 5-4 decision. Justice Blackmun wrote in a concurring opinion:

> I do not hesitate to say ... that a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty. As Mr. Justice White points out, ... "a substantial majority of the jury" are to be convinced. That is all that is before us in these cases.

92 S.Ct. at 1635.

In the State of Florida, the validity of a bare majority verdict has been questioned, even when unanimity is waived by the defendant. Flanning v. State, 597 So. 2d 864, 868 (Fla. 3d DCA 1992).[22]

The non-unanimous majority jury recommendation was in violation of Appellant's right under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution. Appellant's death sentences must be vacated.

POINT X

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE JURY PANEL.

The trial court denied Appellant's motion for individual, sequestered voir dire (R3087,257,260,2717-20,2738-40). Thus, the prospective jurors were questioned in one another's presence. During the questioning at voir dire, the jurors were exposed to Dr. Lane Roosa. Dr. Roosa is a psychologist (R558). Dr. Roosa explained that he was skeptical about associating mental impairment to criminal behavior (R558-59). Dr. Roosa also explained that he directs a

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[22] In Flanning, supra, the court stated:

> [W]e have considerable doubt whether the right to a unanimous jury verdict could be validly waived so as to accept a plurality verdict, especially as to a six-person jury; this is so because the resultant plurality verdict may not legally constitute the verdict of a jury at all. Moreover, a similar waiver to accept a bar 4-2 [or 7-5] majority verdict my arguably be fraught with similar problems. We need not reach such issues in this case, however, because we think a super majority verdict of 5-1, when validly accepted form the defendant in accord with the Sanchez requirements, legally constitutes the verdict of a jury and may therefore be accepted by the court. Compare Burch; Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978).

597 So. 2d at 868.

department of 76 other psychologists (R563). Because of Dr. Roosa's opinion, he was excused from the jury by the trial court.

Appellant moved to strike the jury panel on the ground that they were tainted by Dr. Roosa's skepticism of using psychological evidence to explain criminal behavior (R857). Appellant specifically pointed out that the jury could be influenced by Dr. Roosa's comments -- especially in light of the fact that he had expertise in psychology as shown by his heading up a group of 76 psychologists (R857). The trial court denied Appellant's motion (R864). This was error.

Obviously, Dr. Roosa's comments would be prejudicial to Appellant's cause in the sentencing phase where he presented evidence of mental impairment in mitigation. The comments would also be prejudicial in the guilt phase when the jury was to consider James Concannon's testimony. Nothing magical about a voir dire transforms prejudicial information into harmless information. Due to Dr. Roosa's expertise in psychology, his comments in this area are likely to be considered by the other jurors. The refusal of a court in a capital case to conduct voir dire individually and sequestered upon request, runs the risk that just this kind of prejudicial information will infect the jury. It denies a defendant an impartial decision-maker contrary to due process, guaranteed by the Federal Constitution's Fourteenth Amendment. It also violates the heightened reliability required in death sentencing proceedings. Cf. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) (heightened reliability requires probing voir dire on racial prejudice in capital trial involving interracial killing). The error denied Appellant due process, a fair trial and a fair and reliable sentencing. Fifth, Eighth and Fourteenth Amendments, U.S. Const., Art. I, §§ 9, 16 and

17, Fla. Const. Appellant's sentences must be reversed and this cause remanded for a new jury sentencing.

POINT XI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO HAVE EVIDENCE STRICKEN WHERE THE PROSECUTOR HAD VIOLATED THE RULE OF SEQUESTRATION.

Appellant objected during the testimony of Detective Hoffman when it was revealed that the prosecutor had relayed the conclusions that the medical examiner made, during his testimony, to Hoffman:

> MR. BAILEY: Judge, as the Court is aware the rule was invoked in this case. This witness just indicated that he had spoken to another witness about the facts of this case within the last several days.
>
> THE COURT: He didn't say that.
>
> THE WITNESS [Hoffman]: I didn't say a witness.
>
> THE COURT: He didn't' say that.
>
> MR. BAILEY: How do you know that?
>
> THE WITNESS: From Mr. Morton.
>
> THE COURT: What did he tell you?
>
> THE WITNESS: Mr. Morton told me that it was the Medical Examiner's conclusion that the bullet that killed Mr. Anderson did not go through any portion of the bus.
>
> MR. BAILEY: Which was testimony in this trial. So Mr. Morton is telling this witness about testimony at trial. That's a violation of the rule.
>
> MR. MORTON: Excuse me, Judge. That's not a violation of the rule. I can meet with any witness, discuss my case with any witness.

(R1757). The trial court overruled the objection because the prosecutor had not told Hoffman that this information had come from the medical examiner's testimony (R1762). The trial court erred in this conclusion.

The rule of sequestration was designed to prevent a witness from "coloring his testimony by that which he has heard from other witnesses who have preceded him on the stand." Gore v. State, 599 So. 2d 978, 986 (Fla. 1992), quoting Spencer v. State, 133 So. 2d 729, 731 (Fla. 1961), cert. den. 369 U.S. 800 and cert. den. 372 U.S. 904 (1963). A violation of the rule occurs where the prosecutor discusses the contents of the testimony of one witness with another witness.

Of course, it does not matter what label the prosecutor gives this information when he relays it to the witnesses. The rule is still violated even when the prosecutor does not tell the witness that the information he is receiving is from testimony. The trial court erred in concluding otherwise.

The error is not harmless where Detective Hoffman admitted that his testimony was influenced by the information received from the prosecutor (R1755-56). The prosecutor's violation denied Appellant a fair trial and a fair and reliable sentencing contrary to the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution.

POINT XII

THE TRIAL COURT ERRED IN FAILING TO MAKE THE REQUIRED FINDINGS WHERE THE STATE FAILED TO COMPLY WITH THE TEN DAY NOTICE REQUIREMENT OF SECTION 90.404(2)(b), OF THE FLORIDA STATUTES.

As noted in Point VII, the state introduced collateral crime evidence of Appellant's alleged violence toward police officers. Appellant also objected on the ground that the state failed to give proper ten day notice as required by Section 90.404(2)(b) of the Florida Statutes (R3176,1192,936). The state gave the following notice pursuant to Section 90.404(2)(b) of the collateral bad character evidence:

> COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and pursuant to Section 90.404(2)(b)(1) of the Florida Evidence Code files this Notice of Intent to offer evidence of other criminal offenses of the Defendant, more particularly described as follows:
>
> > The flight, resisting arrest, and attempted murder conduct of the defendant when he was arrested outside of Brule, Nebraska, on or about July 26, 1989, by Joseph Jara and Richard Cook of the Keith County Sheriff's Office.

(R3091). The trial court ruled that the notice was defective and inadequate (R1191,1193).[23] The trial court erred in admitting the evidence without making findings as to the willfulness of the defective notice. See Fedd v. State, 461 So. 2d 1384 (Fla. 1st DCA 1984) (even though no discovery violation under Fla.R.Crim.P. 3.220, it was reversible error for the trial court to fail to conduct a Richardson[24] inquiry and make findings into the failure to comply with other rules requiring notification).

The trial court made no findings as to whether the violation of the notice requirement was: willful or inadvertent; trivial or substantial; prejudicial to the other party in preparing for trial.[25] Instead, although ruling the notice was defective, the trial court ruled that the evidence of violence in Nebraska was inseparable from the charged crime in Florida and notice was not required (R1185,1198). This was incorrect.

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[23] Section 90.404(2)(b) requires that the notice describe the acts alleged with the particularity of a charging document.

[24] 246 So. 2d 771 (Fla. 1971).

[25] These are the required findings for a proper inquiry. Raffone v. State, 483 So. 2d 761, 763 (Fla. 4th DCA 1986).

Clearly, Appellant's actions of fighting with police officers in Nebraska were in no sense of the word inseparable from the charged crimes in Florida. Arrest scenes do not constitute inseparable crime evidence so as to be admissible. In fact, arrest scenes are generally considered to be irrelevant and inadmissible. Postell v. State, 398 So. 2d 851, 855 fn.7 (Fla. 3d DCA 1981); see also St. Louis v. State, 584 So. 2d 180, 182 (Fla. 4th DCA 1991) (defendant's actions occurring after the charged crime were not inseparable crime evidence).

The state was required to give notice of the collateral acts in Nebraska. The state did so, but its notice was deficient -- as the trial court ruled. The trial court failed to make the required findings after the state failed to give proper notice. Failure to make the required findings involving the prosecutor's violation of the notice requirement is per se reversible error and Appellant's convictions and sentences must be reversed and this cause remanded for a new trial. Cf. Smith v. State, 500 So. 2d 125 (Fla. 1986); Cumbie v. State, 345 So. 2d 1061 (Fla. 1977).

POINT XIII

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO VIOLATE HIS STIPULATION.

Prior to trial the prosecutor and Appellant entered into the following stipulation that Scott Yaguda's taped testimony would be used as his testimony during trial:

> The attorneys in the case, myself and Mr. Bailey, have agreed to perpetuate or to allow Mr. Yaguda to testify in this case by virtue of this video taped sworn statement. The statement will be presented in court at the time of the trial and it will be used as testimony at the time of the trial.

(R1277,3253-54). At the trial, over Appellant's objections (R1268, 1280,3253-58), the prosecutor violated the stipulation and presented

the live testimony of Scott Yaguda (R1409-24). The trial court erred[26] in allowing the prosecutor to violate the stipulation over Appellant's objection.

A prosecutor for the state has the power to enter into a binding stipulation with opposing counsel. James v. State, 305 So. 2d 829 (Fla. 1st DCA 1975); Arrington v. State, 233 So. 2d 634 (Fla. 1970). It has long been held by this Court that stipulations are to be enforced by the courts and cannot merely be ignored:

> In order to obtain relief against a stipulation, the regular course is not simply to ignore or attempt to evade it, but to make a seasonable and affirmative application by formal motion to the court, or notice, and supported by affidavit for its withdrawal or revocation.
>
> The court will enforce valid stipulations, unless some good cause be shown for declining to do so, especially where the stipulation has been acted upon so that the parties cannot be placed in status quo.

Smith v. Smith, 107 So. 257, 260 (Fla. 1925) (citations omitted). To avoid the consequences of a valid stipulation, a party must show the agreement was obtained by fraud, misrepresentation or mistake of fact. Groover v. Groover, 383 So. 2d 280 (Fla. 5th DCA 1980). In this case, the prosecutor never sought relief from the stipulation -- he merely ignored it. In addition, there was no claim, or evidence, that the stipulation was obtained by fraud, misrepresentation or mistake of fact. It was error to overrule Appellant's objection and to permit the prosecutor to violate the stipulation.

The error cannot be deemed harmless where Appellant cross-examined Yaguda during the taped statement that was stipulated to be used as evidence. The prosecutor purposely violated the stipulation

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[26] The trial court overruled Appellant's objection (R1381).

thus having the tactical advantage of knowing Appellant's cross-examination of Yaguda. In addition, the violation would affect Appellant's opening argument in preparing the jury for Yaguda. The error denied Appellant due process and a fair trial in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution.

POINT XIV

THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL.

The prosecutor made a number of improper and prejudicial comments during the closing argument. These comments, individually and cumulatively, denied Appellant due process of law and a fair trial in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution.

Over Appellant's objection (R1973-74), the prosecutor made comments that "another bus driver" other than Sydney Granger could have been killed. As Appellant noted, the prosecutor in effect told the "jury if they don't put him away for this bus driver we are going to end up with another dead bus driver" (R1973). This type of argument is clearly improper. See Grant v. State, 194 So. 2d 612, 615 (Fla. 1967). It was error to overrule Appellant's objection.

Over Appellant's objection (R2033), the prosecutor used hypotheticals of facts not involved in the case to claim that this could not be an unpremeditated murder. It is improper to make comments based on facts which are not part of the case. Huff v. State, 437 So. 2d 1087 (Fla. 1983).

Here, the prosecutor gave the hypothetical of individuals fighting, facts not involved in this case, to show lack of premeditation (R2033). The comments which do not involve the facts in this case mislead the jury as to the proof required to show lack of premeditation. The jury is to evaluate this case on the basis of the evidence in the case, and not by hypothetical facts as the prosecutor was trying to do. It was error to overrule Appellant's objection.

In defending the credibility of its witness, the prosecutor commented that he could have called another witness to support his witness:

> I called Sergeant Hoffman. He's another lead detective who worked with Doyle and everything for the purpose, for the specific purpose of what was wrong. I could have called the lead detective and rehashed everything in this case.

(R2027) (emphasis added). It is improper for a party to bolster its case by stating that it could have produced other or additional witnesses. Richardson v. State, 335 So. 2d 835, 836 (Fla. 4th DCA 1976) (comment that "could have brought in a lot of police officers" improper); Thompson v. State, 318 So. 2d 549 (Fla. 4th DCA 1975).

Finally, the prosecutor improperly denigrated defense counsel's attempt to defend Appellant as trying to pull a "rabbit out of a hat":

> No matter how glib you are. No matter how smooth you are. No matter how sharp you are. One thing you can't do. You can't change the facts. You may talk about them. Interpret them differently. Try to interpret them differently. The bottom line is you can't change the facts. Mr. Bailey can't pull a rabbit out of a hat for you. Mr. Bailey can't make 12 reasonable people who see black say that it's white or who see white say that it's black.

(R1948) (emphasis added). The prosecutor also argued that the defense was trying to "... muddy the waters, spread out dark ink, just hope that you can escape and get away" (R2028). These types of prejudicial

attacks against opposing counsel have been deemed improper. See e.g. Waters v. State, 486 So. 2d 614 (Fla. 5th DCA 1986) (characterization of defense as smoke screen error depriving defendant of fair and impartial trial); Redish v. State, 525 So. 2d 928, 931 (Fla. 1st DCA 1988) (referring to defense counsel as using "cheap tricks" is improper argument); Murray v. State, 425 So. 2d 157 (Fla. 4th DCA 1983) (comment about defense bending and twisting law improper).

The prosecutor's comments divert the jury from their true task and prompt the jury to consider matters extraneous to the evidence. See Boatwright v. State, 452 So. 2d 666, 667 (Fla. 4th DCA 1984). While the prosecutor may prosecute with vigor, he is not free to strike foul blows. Id.

The prosecutor's comments, individually and cumulatively, denied Appellant due process of law and a fair trial. Appellants convictions and sentences must be reversed and this cause remanded for a new trial.

POINT XV

THE PROSECUTOR'S COMMENTS TO THE JURY DURING SENTENCING DEPRIVED APPELLANT DUE PROCESS AND A FAIR AND RELIABLE SENTENCING.

The prosecutor made a number of improper and prejudicial comments to the jury during the sentencing phase of this case. These comments, individually and cumulatively, denied Appellant due process and a fair and reliable sentencing in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

In arguing to the jury that Appellant should be sentenced to death, the prosecutor claimed that the community calls for the maximum punishment:

> The maximum crime has been committed under the circumstances Mr. Besaraba has committed and the community calls for the maximum punishment.

(R2469) (emphasis added), and that in its deliberations the jury is entitled to consider the community's wishes:

> ... for the first time you as jurors are entitled to consider not only the rights of Joseph Besaraba but the kind of crime you are dealing with, and the right and need of the people of our community to make the punishment fit that crime.

(R2443) (emphasis added). Although the jury is supposed to ultimately represent the conscience of the community, each individual juror must decide the sentence based on the law, and not what he or she believes the community's sentiment is toward the defendant. The prosecutor's comments urging a sentence based on the community's wishes are inflammatory and prejudicial. See Chavez v. State, 215 So. 2d 750 (Fla. 2d DCA 1968) (comment "this is your community" improper); Keith v. State, 709 P.2d 1066 (Okl.Cr. 1985) (characterization of jury's function to be to "serve as the conscience of the community" was improper); Boatwright v. State, 452 So. 2d 666 (Fla. 4th DCA 1984).

The prosecutor also made comments comparing Appellant's fate if he should receive a life sentence to the fate of the victims:

> In spite of that kind of aggravating conduct essentially that argument boils down to we will now give him a comfortable life. Let him die perhaps in prison. Something he denied Sydney Granger and Wesley Anderson. They didn't have the opportunity to die comfortably.

(R2458). This Court has condemned such an argument as improper and inflammatory. Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988) (argument that defendant could read books and see sun rise while victim couldn't, improper because it urged consideration of matters outside the proper scope of deliberation); Taylor v. State, 583 So. 2d 323, 329 (Fla. 1991).

As mentioned in the previous point, the prosecutor is at liberty to strike hard blows, but he is not free to strike foul blows. The prosecutor should not seek to receive a death recommendation on matters which are clearly outside the proper scope of the jury deliberations. Although there was no objection to the comments above, the egregious nature of the comments constitute fundamental error.

The comments were such to destroy Appellant's right to a fair and impartial sentencing and constitute fundamental error. See Pait v. State, 112 So. 2d 380 (Fla. 1959); Wilson v. State, 294 So. 2d 327 (Fla. 1974); Peterson v. State, 376 So. 2d 1230 (Fla. 4th DCA 1979), cert. den., 386 So. 2d 642 (Fla. 1980) ("Thus, the record presents fundamental error which reaches into the very heart of the proceeding and which would therefore mandate a new trial even in the total absence if timely preservation below." Id., at 1234).

POINT XVI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S OBJECTION TO THE USE OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES IN THE PENALTY PHASE.

Appellant objected to the use of evidence of the Nebraska incident in the sentencing phase (R2221). The trial court overruled Appellant's objection (R2223-24). This was error.

In the sentencing phase, the prosecutor argued to the jury that the Nebraska incident showed Appellant's violence (R2451-52). Consideration of those actions constitutes consideration of a nonstatutory aggravating circumstance. Appellant's actions three days after the incident for which he was on trial do not prove to a layman Appellant's state of mind at the time of the incident. See Garron v. State, 528 So. 2d 353, 357 (Fla. 1988) (opinions based on observations one day after the incident is not admissible to show the defendant's

state of mind on the day of the incident).[27] Such actions could only become relevant once explained by experts in the field of psychiatry. Id. Thus, it was error for the trial court to overrule Appellant's objection and to allow the prosecutor to use the Nebraska incident in the sentencing phase. The error denied Appellant due process and a fair and reliable sentencing. Fifth, Eighth and Fourteenth Amendments, U.S. Const.; Art. I, §§ 9, 17, Fla. Const. This cause must be remanded for a new sentencing.

POINT XVII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED INSTRUCTION ON PREMEDITATED MURDER WHICH IMPERMISSIBLY RELIEVES THE STATE OF THE BURDENS OF PERSUASION AND PROOF AS TO AN ELEMENT OF FIRST DEGREE MURDER.

Over Appellant's objections (R1879,1SR82-83), the trial court instructed the jury on premeditated murder as follows:

> A killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
>
> The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

(R2054,2059). This instruction impermissibly relieves the state of the burdens of persuasion and proof as to an element of first degree

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[27] Likewise, the jury's opinion of Appellant's state of mind cannot be based on observations of Appellant three days later. Thus, the observations are not relevant.

murder. It was reversible error to overrule Appellant's objection and to give the flawed instruction.

Section 782.04(1)(1), Florida Statutes, defines murder from a premeditated design as follows:

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

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

> A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection ***and deliberation***, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit some reflection ***and deliberation*** on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.[28]

In Owen v. State, 441 So. 2d 1111, 1113 n.4 (Fla. 3d DCA 1983), the Court noted the distinction between "premeditation" and "deliberation":

> Deliberation is the element which distinguishes first and second degree murder. [Cit.] ***It is defined as a prolonged premeditation and so is even stronger than premeditation.*** [Cit.]

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

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

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

The jury instruction on first degree murder given in this case does not explicitly state that "a premeditated design" is an element of first degree murder.

A jury instruction that relieves the state of the burden of proof or of persuasion as to an element of the offense is unconstitutional. Mullaney v. Wilbur, 421 So. 2d 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (instruction that element of malice was to be implied unless defendant proved heat of passion); Sandstrom v. Montana, 442 U.S. 510, 524, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (discussing Mullaney).

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

Additionally, the instruction relieves the state of the burdens of proof and persuasion as to the requirement that the premeditated design be fully formed before the killing. While the standard

instruction stated that "killing with premeditation" is killing after consciously deciding to do so, it relieves the state of its burden by creating a presumption: ***"It will be sufficient*** proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt ***of the premeditation at the time of the killing.***" Thus, the jury is told that it need only find premeditation (defined by the instruction as a conscious decision to kill) at the time of the killing. Also, it does not instruct the jury that the premeditated design element, carrying with it the element of deliberation, requires more than a conscious intent to kill. In Polk v. State, 179 So. 2d 236 (Fla. 2d DCA 1965) it was held to be error to fail to give a jury instruction with these requirements.

Finally, the part of the instruction that is "sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation" is inaccurate and unconstitutional. The instruction treats the "circumstances of the killing" and "the conduct of the accused" as conclusive proof of premeditation without regard to other evidence which shows a lack of premeditation. Sandstrom v. Montana, supra, condemned such instructions as an "irrebuttable directions by the court to find intent once convinced of the facts triggering the presumption":

> ... and given the lack of qualifying instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury may have interposed the instruction in either of two more stringent ways.
>
> First, a reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the

> jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their "ordinary" consequences), unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence -- thus effectively shifting the burden of persuasion on the element of intent. Numerous federal and state courts have warned that instructions given here can be interpreted in just these ways.

99 S.Ct. at 2455-56 (citations omitted). Likewise, in this case the instruction placed a limitation of the evidence to consider when evaluating whether a premeditated design existed.

Evidence of premeditation is not limited to the circumstances of the killing and the conduct of the accused. The jury should be allowed to consider other evidence in deciding whether the accused was acting from a premeditated design. Events prior to the incident, not involving the killing or the conduct of the accused, may relate to the accused's state of mind at the time of the killing. Yet, the instruction directs the jury that premeditation is proven merely from the "circumstances of the killing" and "the conduct of the accused" without mentioning that other evidence can be considered in deciding the issue of premeditation.[29]

The instruction is unconstitutional because it has no language indicating evidence other than the "circumstances of the killing" and "the conduct of the accused" can be considered in determining whether premeditation exists. See Sandstrom v. Montana, 442 U.S. 510, 512, 99 S.Ct. 1450, 1455, 61 L.Ed.2d 39 (1979) (instruction that law presumes

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[29] In fact, the instruction excludes the most important evidence of premeditation -- the accused's state of mind. The accused could take the stand and testify as to what he was thinking at the time of the killing; yet that testimony might not be considered because of the instruction that the circumstances of the killing and the conduct of the accused were sufficient proof of premeditation.

a person intends the ordinary consequences of his actions invalid where jurors "were not told that the presumption could be rebutted"); Wilhelm v. State, 568 So. 2d 1, 3 (Fla. 1990) (no language in the instruction to inform the jury that the presumption of prima facie evidence could be rebutted). Because a reasonable juror could interpret the instruction to mean that evidence of premeditation is sufficient based on the circumstances of the killing and the conduct of the accused without consideration of other evidence, the instruction is unconstitutional.

It was reversible error here to deny Appellant's requested instruction (1SR82-83), and to give the improper instruction. The error denied Appellant due process and a fair trial contrary to the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT XVIII

THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S OBJECTION TO THE INSTRUCTION ON REASONABLE DOUBT WHICH DENIED APPELLANT DUE PROCESS AND A FAIR TRIAL.

Over Appellant's objections (R287-89,3107-14), the trial court instructed the jury that a reasonable doubt is not a "possible doubt," a "speculative doubt," or an "imaginary doubt" (R2082).[30] In Woods v. State, 596 So. 2d 156 (Fla. 4th DCA 1992), such an instruction was found proper. Woods was wrongly decided on the merits.

[30] Appellant offered an alternative instruction without this language (R3107-14,2SR28-29). The trial court had overruled Appellant's objections and offer of an alternative instruction (R1185,1916, 3184).

The Supreme Court has long disapproved instructions defining "reasonable doubt." Miles v. United States, 103 U.S. 304, 312, 26 L.Ed. 481 (1881). It has approved of only one definition of the term: in Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150 (1954), while disapproving an instruction given by the trial court, it wrote that "the instruction should have been in terms of the kind of doubt that would make a person hesitate to act". Hence, the following instruction approved in United States v. Turk, 526 F.2d 654, 669 (5th Cir. 1976):

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

It is safe to say that speculation and the force of imagination come into play when one is determining to act in the most important of one's affairs, and that a doubt founded on speculation or an imaginary or forced doubt will cause one to hesitate to act. Hence, our standard instruction is unconstitutional. Thus, in Haager v. State, 83 Fla. 41, 90 So. 812, 816 (1922), the court disapproved of an instruction that a reasonable doubt could not be "a mere shadowy, flimsy doubt." But in Smith v. State, 135 Fla. 737, 186 So. 203, 206 (1939), the court approved of an instruction using the "shadowy, flimsy doubt" versus "substantial doubt" phraseology without analysis and without any mention of Haager.[31]

Woods, supra, is also incorrect in applying an incorrect legal standard for determination of the adequacy of a jury instruction. The

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

correct standard is whether there is "a reasonable likelihood" that the jury applied the instruction in an unconstitutional manner. Wilhelm v. State, 568 So. 2d 1, 3 (Fla. 1990); Estelle v. McGuire, 112 S.Ct. 475, 482 (1991).

In view of the foregoing, the trial court gave an erroneous instruction relieving the state of its burden of proving guilt beyond a reasonable doubt. The instruction violated Appellant's right to due process and a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Accordingly, this Court should order a new trial.

The improper instruction was independently prejudicial as to penalty proceedings, for it resulted in the jury's use of an improper standard in determining the existence of aggravating circumstances in violation of Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT XIX

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED PENALTY INSTRUCTION THAT IF A MITIGATING CIRCUMSTANCE IS FOUND IT CANNOT BE GIVEN NO WEIGHT.

Appellant requested the following instruction, that if a mitigating circumstance is found it cannot be given no weight, at the penalty phase:

> You must consider all evidence of mitigation. The weight which you give to a particular mitigating circumstance is a matter for your moral, factual, and legal judgment. However, you may not refuse to consider any evidence of mitigation and thereby give it no weight.

(SR90,R2174). The trial court disagreed with the instruction and ruled that there "... could be a mitigating factor but you don't have to give it any weight" (R2174). The trial court denied the requested instruction (R2174). This was error.

Contrary to the trial court's ruling, once a mitigating circumstance is found it cannot be given no weight. Ellis v. State, 18 Fla. L. Weekly S417, 420 (Fla. July 1, 1993) (trial court is directed to "expressly find, consider, and weigh" all mitigating evidence) (emphasis added); Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990) ("... the trial court is under an obligation to consider and weigh each and every mitigating factor apparent from the record ...").

As the requested instruction points out, the particular weight, whether it be little or great, to give to the circumstance is solely the judgment of the jury. However, if found, the circumstance cannot be given no weight.

A jury must be fully and specifically instructed on the applicable law if it is to properly carry out its function. See e.g. Riley v. Wainwright, 517 So. 2d 656, 658 (Fla. 1987) ("improper, incomplete, or confusing instructions relative to the consideration of both statutory and nonstatutory mitigating evidence does violence to the sentencing scheme and to the jury's fundamental role in that scheme"); Hitchcock v. Dugger, 481 U.S. 393 (1987) (defendant entitled to have jury fully instructed on consideration of mitigating circumstances). It was error not to give Appellant's requested instruction. In addition, an attorney's argument will not substitute for a proper jury instruction. See Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981).

In the past, trial judges have failed to give weight to mitigating circumstances that were present. See Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990) ("As this case demonstrates, our state courts continue to experience difficult in uniformly addressing mitigating circumstances ..."). Certainly, if trial judges, who are trained in the law, have difficulty following this rule, it cannot be said that jurors, without the guidance of instruction, will follow the rule. The failure to give the instruction denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17, of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Appellant's death sentences must be reversed and this cause remanded for resentencing.

POINT XX

THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY DEFINE NONSTATUTORY MITIGATING CIRCUMSTANCES.

Defense counsel moved the trial court to give a number of special jury instructions defining nonstatutory mitigating circumstances which were applicable to this case. For example, defense counsel submitted a special written instruction explaining that the jury could consider: the defendant was under the influence of alcohol at the time of the homicide; the defendant suffered a deprived childhood to the detriment of his personal development; environmental influences and pressures saddled the defendant with emotional handicaps; the defendant was in ill health at the time of the homicide; the defendant has been known as a person of good character; the defendant has no prior criminal conviction for violent felonies; it is unlikely that the defendant will endanger others while serving a sentence of life in prison (SR91,R2179). The trial court denied all the special instruction

(SR2179). Failing to instruct on special nonstatutory mitigating circumstances on motion of defense violates due process and the Eighth Amendment requirement that all mitigating evidence be considered in a death sentencing proceeding.

The trial court told defense counsel that the potential nonstatutory mitigating circumstances would not be instructed on, but that they could be argued to the jury by the defense (R2180). However, an attorney's argument will not substitute for a proper jury instruction. See Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981). During voir dire the prosecutor told the jury that the trial court's instructions would define the mitigating circumstances they could consider and the trial court added that they would have to follow the instruction (R837). Due to the abstract nature of the instructions on mitigating circumstances, the prosecutor was able to argue to the jury that an alternative sentence of life imprisonment without the possibility of parole for 50 years is not to be considered mitigating (R2459), when such a claim is not true. Jones v. State, 569 So. 2d 1234, 1239 (Fla. 1990). Abstract instructions relating to a defense theory are insufficient; such instructions must be "precise and specific rather than general and abstract." United States v. Mena, 863 F.2d 1522 (11th Cir. 1989). This is true even where standard jury instructions are involved. See Harvey v. State, 448 So. 2d 578, 580-81 (Fla. 5th DCA 1984) (error to blindly adhere to standard instructions as they are "no immutable postulates from Olympus"). Jurors will only be properly able to understand what specific nonstatutory mitigating evidence is being offered if they are given instructions on such evidence.

This Court has held that it cannot be presumed that a trial judge knows what mitigating circumstances are being offered. Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). Likewise, a lay jury cannot be presumed to adequately understand what is being offered as mitigation without the proper instruction to guide it.[32] An attorney's argument will not substitute for a proper jury instruction. See Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981).

Parker v. Dugger, 111 S.Ct. 731 (1991), also supports the proposition that juries must be told what the nonstatutory mitigation is upon request. In Parker, the Supreme Court found the appellate review inadequate because this Court failed to consider the nonstatutory evidence in declaring error harmless and finding the jury override valid. The Court noted the difficulty in defining nonstatutory mitigation:

> Nonstatutory evidence, precisely because it does not fall into any predefined category, is considerably more difficult to organize into a coherent discussion; even though a more complete explanation is obviously helpful to a reviewing court, from the trial judge's perspective it is simpler merely to conclude, in those cases where it is true, that such evidence ... does not outweigh the aggravating circumstances.

Parker, 111 S.Ct. at 738. It is error not to give the defendant's requested written instructions on possible mitigating circumstances. State v. Cummings, 389 S.E.2d 80 (N.C. 1990).[33]

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[32] Certainly, if a trial judge with training and experience needs guidance, a lay jury would require more guidance.

[33] The Court in Cummings noted that because the non-statutory mitigating circumstances "were not presented on an equal footing" with the statutory circumstances the jury "could easily believe that the unwritten circumstances were not as worthy as those in writing." 389 S.E.2d at 81. It was also noted that "jurors, as well as all people, are apt to treat written documents more seriously than items verbally related to them. Had the circumstances been required to directly address each of them." Id.

Given the lack of clarity in defining nonstatutory mitigation as recognized in Parker, putting this issue before the jury in lump form, with no instructions on what can mitigate, invites the jury to decide for itself what is mitigating. The refusal to instruct on the nonstatutory mitigators rendered a reasonable probability of the jury ignoring relevant mitigating evidence contrary to the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9, 16 and 17 of the Florida Constitution.

POINT XXI

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON THE VAGUE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED.

Over Appellant's objection to the vagueness of the jury instruction (R2150), the trial court instructed the jury on the aggravating circumstance of cold, calculated and premeditated (R2496). This was error.

It is well-established that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty "under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980); U.S. Const. amends VIII and XIV. The state "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Id., 446 U.S. at 428, 64 L.Ed.2d at 406 (footnotes omitted). "[T]he channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 108

S.Ct. 1853, 486 U.S. 356, 100 L.Ed.2d 372 (1988). As a consequence, when the jury is involved in the sentencing process, "It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511, 528 (1990).

The instruction given was vague. The jury is given absolutely no guidance in seeking to apply the CCP factor. As a result, the jury is left to its own devices concerning the application of this aggravating factor and may very well find it applicable to any premeditated murder, despite this Court's efforts to properly limit application of the factor to more specifically defined groups of cases.

Because the instruction on CCP is too vague to guide the jury in determining its sentencing recommendation, it must be presumed that the jury relied upon an invalid aggravating circumstance. Espinosa v. Florida, 112 S.Ct. 2926, 2928, 120 L.Ed.2d 854 (1992). The prosecutor aggressively argued to the jury that CCP applied. It must also be presumed that the trial court gave great weight to the jury's recommendation of death. Id. Thus, the trial court indirectly weighed the invalid circumstance and violated the Eighth and Fourteenth Amendments. Id.

The United States Supreme Court has applied Espinosa to Florida's CCP aggravating circumstance when it remanded Hodges v. State, 595 So. 2d 929 (Fla. 1992). Hodges v. Florida, ___ U.S. ___, 113 S.Ct. 33, 121 L.Ed.2d 6 (1992). By Hodges, the United States Supreme Court acknowledged the flaws in the CCP instruction.

The error at bar violated the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections

9 and 17 of the Florida Constitution. Appellant's sentence must be vacated.

POINT XXII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION THAT MITIGATING EVIDENCE DOES NOT HAVE TO BE FOUND UNANIMOUSLY.

Appellant requested the following jury instruction:

> Unanimity is not required for the finding of a mitigating circumstance; each juror may individually determine whether he or she believes a mitigating circumstance exists.

(R2193,SR92). The trial court denied the instruction (R2193). This was error.

It is well-settled that the jury must be prevented from believing their decisions as to finding mitigating circumstances must be unanimous. Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988). The lack of an instruction on this matter leaves the jury without any indication that they can individually consider the mitigating factors:

> No instruction was given indicating what the jury should do if some but not all of the jurors were willing to recognize something about petitioner, his background, or the circumstances of the crime, as a mitigating factor.

Mills, supra, 108 S.Ct. at 1868. Consequently, it was error to deny Appellant's requested instruction. The error denied Appellant due process and a fair sentencing. Article I, Sections 2, 9, 16 and 17, Florida Constitution; Fifth, Eighth and Fourteenth Amendments, United States Constitution. Appellant's sentence must be reversed and this cause remanded for a new sentencing.

POINT XXIII

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE CORRECT BURDEN OF PROOF IN THE PENALTY PHASE.

Appellant requested the jury be instructed on the burden of proof for the penalty phase requires that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt (SR85,R2128-30). The instruction was denied and the jury was instructed that the mitigating circumstances must outweigh the aggravating circumstances in order for a life sentence to be imposed (SR2253, 2289). Of course, due process requires that the state has the burden of proof. Arango v. State, 411 So. 2d 172, 174 (Fla. 1982). The instruction given in this case incorrectly states the burden of proof and thus violates Article I, Sections 9 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT XXIV

APPELLANT WAS DENIED DUE PROCESS, THE ASSISTANCE OF COUNSEL, AND HIS RIGHT TO TRIAL BY JURY WHEN DEFENSE COUNSEL CONCEDED HIS GUILT IN OPENING STATEMENT.

During the opening argument, defense counsel affirmatively told the jury that Appellant did the shootings and was guilty of murder in the second degree (R974,986). Appellant objected to his counsel's actions on the basis that he had never agreed to admit his guilt to any crime (R1055-56). Appellant's conviction following this confession of guilt by defense counsel after Appellant had pled not guilty violated Appellant's rights to due process, the assistance of counsel, and to a jury trial guaranteed by Article I, §§ 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

By pleading not guilty, Appellant invoked his right to a fair trial and to put the government to its burden of proof; his lawyer could not waive those rights by pleading his client guilty before the jury without Appellant's consent. See Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981); Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), cert. denied, 470 U.S. 1059 (1985); State v. Harbison, 315 N.C. 175, 377 S.E.2d 504 (1985); see also Nixon v. State, 572 So. 2d 1336, 1339 (Fla. 1991) (refusing to rule on the claim on the record presented, but apparently accepting principle that plea of guilt without client's consent is per se ineffective assistance of counsel).

In Harbison, the North Carolina Supreme Court held a new trial was required where the defendant was charged with murder in the first degree and his counsel conceded guilt to a lesser charge of manslaughter without the defendant's consent:

> When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Harbison, 337 S.E.2d at 507. Advancing an admission of guilt without the consent of the defendant is per se reversible error. See Dawson v. State, 585 So. 2d 443, 444 (Fla. 4th DCA 1991) (admitting evidence of offer to plead is per se reversible error); Toth v. State, 297 So. 2d 53 (Fla. 1974) (admission of such evidence is reversible error). Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT XXV

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO DISQUALIFY.

Pretrial, Appellant filed a motion, along with two affidavits, to disqualify the trial judge (R2979-2992). The trial judge denied the motion; ruling the allegations to be insufficient to state a grounds for recusal (R135). The trial court erred in denying the motion.

If a reasonably prudent person faced with the alleged facts would fear that he would not receive a fair trial, the motion to recuse should be granted. Hayslip v. Douglas, 400 So. 2d 553, 556 (Fla. 4th DCA 1981). As this Court has consistently recognized:

> Prejudice of a judge is a delicate question to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge against whom raised, should be prompted to recuse himself. No judge under any circumstances is warranted in sitting in a trial of a cause whose neutrality is shadowed or even questioned.

Livingston v. State, 441 So. 2d 1083, 1085 (Fla. 1983) quoting Dickenson v. Parks, 104 Fla. 577, 582-84, 140 So. 459, 462 (1932). If the grounds presented are not frivolous or fanciful, they must be deemed sufficient to support a Motion to Disqualify on the ground of prejudice. Gieseke v. Grossman, 418 So. 2d 1055 (Fla. 4th DCA 1982); Brewton v. Kelly, 166 So. 2d 834 (Fla. 2d DCA 1964).

In the present case, based on the allegations and facts set forth in the motion to recuse and supporting affidavits, a reasonable person would be in fear of not receiving a fair trial from the trial judge (R2979-2992). Appellant's affidavit alleges bias from the judge's facial expressions and eye contact conveying scorn and disdain (R2983). This by itself may be said to merely show a subjective fear by Appellant. However, the sworn affidavit of an objective and

independent witness,[34] shows that there were objective signs of bias rather than merely a subjective fear by Appellant, as is shown in the sworn affidavit noting that the trial court's demeanor shows that the trial judge believed Appellant to be guilty:

> That on April 19, 1990, a hearing was held in State of Florida v. Joseph Besaraba, in open court wherein all sides were called upon to announce whether they were ready for trial. I was present in the courtroom during the course of the hearing.
>
> * * *
>
> What struck me, during the course of this hearing, was how the Judge acted toward Mr. Besaraba. He seemed very angry at Mr. Besaraba. From his demeanor, I was left with the distinct impression that Judge Kaplan had already decided that Joseph Besaraba was guilty; that he had prejudiced the case.
>
> It was during this April 19, 1990, pretrial conference that I witnesses personal animosity on the Judge's part toward Joseph Besaraba.
>
> Based upon my observations in open court, I am convinced that this man, Joseph Besaraba, cannot get a fair trial from Judge Kaplan.

(R2979-80). This is sufficient to warrant a reasonable fear that Appellant would not receive a fair trial. In addition, an affidavit also shows that the trial court commented during a motion to withdraw in an "extremely derisive manner to the effect that nobody else would want this case" (R2983).

The allegations taken as a whole were sufficient to prompt a reasonably prudent person to fear that he would not receive a fair trial. It was error to deny the motion to disqualify. The error denied Appellant due process and a fair trial contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the Untied States Constitu-

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[34] Mr. Mains, who was a courtroom spectator when Appellant's case was before the trial court on a pretrial motion (R2979-80).

tion and Article I, Sections 9, 16 and 17 of the Florida Constitution. Appellant's convictions and sentences must be reversed and this cause remanded for a new trial.

POINT XXVI

THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE INQUIRY WHERE APPELLANT ADVISED THE COURT THAT HE WISHED TO DISCHARGE COURT APPOINTED COUNSEL.

If there is no lawful reason to discharge counsel, the trial court should make that finding of record and "advise the defendant that if he discharges his appointed counsel the state is not required to appoint a substitute." Black v. State, 545 So. 2d 498, 499 (Fla. 4th DCA 1989). As the First District Court of Appeal held in Taylor v. State, 557 So. 2d 138, 143 (Fla. 1st DCA 1990) as part of the inquiry the defendant must be informed of the right to represent himself:

> In the case before us, the trial court made a sufficient inquiry into the reason Taylor desired to discharge his counsel and found that the attorney was rendering effective assistance in the case (footnote omitted). However, a determination of competency of counsel does not fully satisfy the duties imposed on the trial court. The trial judge erred in failing to advise Taylor that his attorney could be discharged but the state would not be required to appoint substitute counsel and that Taylor had the right to represent himself.

(citations omitted) (emphasis added).

At bar, Appellant moved to discharge his attorney due to the serious allegation that the attorney conceded Appellant's guilt of murder in the second degree in the opening statement without Appellant's consent (R1055-56). The trial court inquired into this allegation and denied Appellant's motion (R1140), but never advised Appellant of his right to proceed pro se. This omission constitutes reversible error. Perkins v. State, 585 So. 2d at 392 (appellate

court held that even if a proper competency inquiry had been held, the trial judge was remiss because he did not advise the defendant of his right to self-representation should he choose to discharge legally competent counsel).

POINT XXVII

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Appellant submitted motions (R2638-45,2671-2716,2721-37,2743-54,2767-73), and argued the motions to the trial court (R223-240), that Florida's capital sentencing scheme is unconstitutional. The trial court denied Appellant's motions (R3085-86).

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

1. The jury

a. Standard jury instructions

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

i. Felony murder

The standard jury instruction on felony murder does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least aggravated form of first degree murder. In this regard, the following discussion of the premeditation aggravating circumstance in Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990) (footnote omitted) is especially pertinent:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the

> defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder.

The same logic applies to the felony murder aggravating circumstance. It violates the teachings of Zant v. Stephens by turning the offense of felony murder, without more, into an aggravating circumstance. It applies an aggravating circumstance to every first degree felony murder. Further, the instruction turns the mitigating circumstance of lack of intent to kill[35] into an aggravating circumstance. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process clauses of the state and federal constitutions.

ii. Cold, calculated and premeditated

The same applies to the "cold, calculated and premeditated" circumstance. The standard instruction simply tracks the statute.[36] Since the statutory language is subject to a variety of constructions, the absence of any clear standard instruction ensures arbitrary application. See Rogers v. State, 511 So. 2d 526 (Fla. 1987) (condemning prior construction as too broad). Jurors are prone to like errors. The standard instruction invites arbitrary and uneven application. It results in improper application of the circumstance. Since the statutory language is subject to a variety of constructions,

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[35] See Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (death penalty statute unconstitutional where it did not provide for full consideration of, inter alia, mitigating factor of lack of intent to cause death).

[36] The instruction is: "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." This instruction and the others discussed in this section are taken from West's Florida Criminal Laws and Rules 1990, at 859.

the standard instruction ensures arbitrary application. Since CCP is vague on its face, the instruction based on it also is too vague to provide the constitutionally required guidance. Any holding that jury instructions in Florida capital sentencing proceedings need not be definite would directly conflict with the Cruel and Unusual Punishment Clauses of the state and federal constitutions. These clauses require accurate jury instructions during the sentencing phase of a capital case. See Cartwright, supra.

iii. Heinous, atrocious, or cruel

Pope v. State, 441 So. 2d 1073 (Fla. 1983) bars jury instructions limiting and defining the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application of in violation of the dictates of Maynard v. Cartwright, 108 S.Ct. 1853 (1988). Since, as shown below, this circumstance has not been applied by the courts consistently, there is every likelihood that juries, given no direction in its use, apply it arbitrarily and freakishly.

b. Florida allows an element of the crime to be found by a majority of the jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. See State v. Dixon, 283 So. 2d at 9. The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution. See Adamson v. Rickets, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 109 S.Ct. 2055 (1989).

c. Advisory role

The standard instructions do not inform the jury of the great importance of its penalty verdict. In violation of the teachings of

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) the jury is told that its verdict is just "advisory."

2. Counsel

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the defendant has no say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through to the present. See, e.g., Elledge v. State, 346 So. 2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance).

Failure of the courts to supply adequate counsel in capital cases, and use of judge-created inadequacy of counsel as a procedural bar to review on the merits of capital claims, cause freakish and uneven application of the death penalty.

Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases. The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. The trial judge

a. The role of the judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So. 2d 908 (Fla. 1975). On the other, it is considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored under, e.g., Smalley v. State, 546 So. 2d 720 (Fla. 1989). This ambiguity and like problems prevent evenhanded application of the death penalty.

That our law forbids special verdicts as to theories of homicide and as to aggravating and mitigating circumstances makes problematic the judge's role in deciding whether to override the penalty verdict. The judge has no clue of which factors the jury considered or how it applied them, and has no way of knowing whether the jury acquitted the defendant of premeditated murder (so that a sentencing order finding of cold, calculated and premeditated murder would be improper), or whether it acquitted him of felony murder (so that a finding of killing during the course of a felony would be inappropriate).[37] Similarly, if the jury found the defendant guilty of felony murder, and not of premeditated murder, application of the felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons as required by the eighth amendment under, e.g., Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

b. The Florida Judicial System

The judge was selected by a system designed to exclude Blacks from participation as circuit judges,[38] contrary to the equal protection of the laws, the right to vote, due process of law, the prohibition against slavery, and the prohibition against cruel and unusual punishment.[39] Because Appellant was sentenced by a judge selected by

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[37] See Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (double jeopardy precluded use of felony murder aggravating circumstance where it appeared that defendant was acquitted of felony murder at first trial).

[38] This is demonstrated through the fact that none of Broward County's 43 circuit judges are black even though Blacks comprise 13.5% of the people in Broward County.

[39] These rights are guaranteed by the Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments to the Federal Constitution, and Article I, Sections 1, 2, 9, 16, 17, and 21 of the Florida Constitution.

a racially discriminatory system this Court must declare this system unconstitutional and vacate the penalty.

4. Appellate review

a. Proffitt

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259.

Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (eighth amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious, or

cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death eligible persons, or channel discretion as required by Lowenfield v. Phelps, 108 S.Ct. 546, 554-55 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So. 2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So. 2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So. 2d 988 (Fla. 1989) (reinterpreting Herring).

As to HAC, compare Raulerson v. State, 358 So. 2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So. 2d 567 (Fla. 1982) (rejecting HAC on same facts).[40]

Similarly, the "great risk of death to many persons" factor has been inconsistently applied and construed. Compare King v. State, 390 So. 2d 315, 320 (Fla. 1980) (aggravator found where defendant set house on fire; defendant could have "reasonably foreseen" that the fire would pose a great risk) with King v. State, 514 So. 2d 354 (Fla. 1987) (rejecting aggravator on same facts) with White v. State, 403 So. 2d 331, 337 (Fla. 1981) (factor could not be applied "for what might have occurred," but must rest on "what in fact occurred").

The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict construction in favor of the accused would be that the circumstance should apply only

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[40] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L. Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L. Rev. 523 (1984).

where the prior felony conviction (or at least the prior felony) occurred before the killing. The cases have instead adopted a construction favorable to the state, ruling that the factor applies even to contemporaneous violent felonies. See Lucas v. State, 376 So. 2d 1149 (Fla. 1979).

The "under sentence of imprisonment" factor has similarly been construed in violation of the rule of lenity. It has been applied to persons who had been released from prison on parole. See Aldridge v. State, 351 So. 2d 942 (Fla. 1977). It has been indicated that it applies to persons in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). See Peek v. State, 395 So. 2d 492, 499 (Fla. 1981).

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So. 2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[41] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So. 2d 719 (Fla. 1982).

c. Appellate reweighing

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So. 2d 894, 901 (Fla. 1981) ("the decision of whether a

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

particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So. 2d 1200 (Fla. 1986).

d. Procedural technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[42] See, e.g., Rutherford v. State, 545 So. 2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So. 2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of eighth amendment); and Smalley v. State, 546 So. 2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated eighth amendment). Use of retroactivity principles works similar mischief.

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[43] cases. As this Court admitted in Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

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[42] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the special scope of review violates the eighth amendment under Proffitt.

[43] Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

5. Other problems with the statute

a. Lack of special verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found because the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the eighth amendment.

Our law in effect makes the aggravating circumstances into elements of the crime so as to make the defendant death eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc).

b. No power to mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17 and 22 of the state constitution and the Fifth, Sixth, Eighth

and Fourteenth Amendments to the Federal Constitution. It also violates equal protection of the laws as an irrational distinction trenching on the fundamental right to live.

c. Florida creates a presumption of death

Florida law creates a presumption of death where but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case[44]). In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[45] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the Federal Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to due process and the heightened due process requirements in a death sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

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

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

6. Electrocution is cruel and unusual.

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

This unnecessary pain and anguish shows that electrocution violates the Eight Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977). A punishment which was constitutionally permissible in the past becomes unconstitutionally cruel when less painful methods of execution are developed. Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J., dissenting). Electrocution violates the Eighth Amendment and the Florida Constitution, for it has no become nothing more than the purposeless and needless imposition of pain and suffering. Coker, 433 U.S. at 592.

POINT XXVIII

THE AGGRAVATING CIRCUMSTANCES USED AT BAR ARE UNCONSTITUTIONAL.

1. Cold, calculated and premeditated

This circumstance was adopted in 1979 "to include execution-type killings as one of the enumerated aggravating circumstances." Senate Staff Analysis and Economic Impact Statement, SB 523 (May 9, 1979, revised). See also Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 936-37 (1989).

This factor has not been strictly construed to conform to its legislative purpose. The standard construction is that it "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." E.g. McCray v. State, 416 So. 2d 804, 807 (Fla. 1982). The qualifier "ordinarily" saps the circumstance of power to narrow the class of death eligible persons, and permits application to situations far removed from the intent of the Legislature. It has not been strictly construed as required. See Bifulco v. United States, 447 U.S. 381 (1980). It fails to genuinely narrow the class of persons eligible for the death penalty as required. See Maynard v. Cartwright, 486 U.S. 356 (1988). It is not rationally related to its purpose as required. See Reed v. Reed, 404 U.S. 71 (1971). Hence, it is unconstitutional.

2. Prior violent felony

As already noted, this circumstance has been broadly construed in violation of the rule of lenity. A strict construction in favor of the defendant would be that the circumstance should apply only where the prior felony convictions (or at least the prior felony) occurred before the killing. The cases have instead adopted a construction

favorable to the state, ruling that the factor applies even to contemporaneous violent felonies. See Lucas v. State, 376 So. 2d 1149 (Fla. 1979). Further, construction has permitted juvenile adjudications of delinquency to satisfy this aggravating circumstance contrary to the usual construction of "conviction" as not including juvenile adjudications. See Campbell v. State, 571 So. 2d 415, 418 (Fla. 1990). Due to such a construction, the silence of the statute is used against the defense rather than the state. This manner of statutory construction is contrary to the Due Process and Cruel and Unusual Punishment Clauses.

CONCLUSION

Based on the foregoing arguments, this Court should vacate Appellant's convictions, and vacate or reduce his sentences, and remand this cause for a new trial or grant relief as it deems appropriate.

Respectfully submitted,

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Jeffrey L. Anderson
JEFFREY L. ANDERSON
Assistant Public Defender
Florida Bar No. 374407

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 29th day of October, 1993.

Jeffrey L. Anderson
Of Counsel

A P P E N D I X

Sentencing Order

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

CASE NO.: 89-17748CF10A

JUDGE: KAPLAN

STATE OF FLORIDA,

Plaintiff,

vs.

JOSEPH A. BESARABA,JR.,

Defendant.

SENTENCE

On the 5th day of February, 1992, JOSEPH A.BESARABA,JR. was found guilty by a Jury of the crimes of Murder in the First Degree of Sydney Granger and Wesley Anderson. Additional convictions of Attempted First Degree Murder, Armed Robbery and Possession of a Firearm During the Commission of a Felony were also rendered by the trial Jury.

On February 28, 1992, a separate sentencing proceeding was conducted by the trial Jury for the purpose of advising this Court whether the Defendant should be sentenced to death or life imprisonment without the possibility of parole for twenty-five (25) years. Assistant State Attorney, Charles B. Morton, Jr., argued to the Jury for the imposition of the death penalty. Attorneys Dennis D. Bailey

and Jane Fishman, argued for the imposition of a life imprisonment sentence.

The Jury advised this Court by a vote of seven (7) to five (5) to impose the death penalty.

On July 23, 1989, at approximately 11:15 a.m., Sidney Granger was driving his bus in a northerly direction on U.S. 1 (Federal Highway) near the Fort Lauderdale/Hollywood International Airport. The Defendant was a passenger on the bus. Granger pulled off the highway because he believed the Defendant was drinking an alcoholic beverage on the bus. Granger warned the Defendant not to drink on the bus and to either get rid of the drink or get off the bus. The Defendant refused to get rid of the drink and chose to get off the bus after a brief verbal exchange between the two.

Approximately eighty (80) minutes after the Defendant's verbal confrontation with Granger and ejection from the bus, the Defendant reversed his northerly direction of travel. He began traveling south on the same bus route. He waited at a bus stop near the location where he was ejected. At approximately 12:35 p.m. the Defendant got onto a bus driven by Greg Austing. Austing testified that the Defendant was carrying a plastic bag when he got on the bus. The bag had the name "Martin, North Dade Gun and Pawn Shop" printed on it and the Defendant had one hand in the bag. The evidence established that the Defendant was carrying the murder weapon in the same plastic bag when he was arrested.

The Defendant traveled for approximately twenty five (25) minutes to the Young Circle Bus Terminal in the city of Hollywood, Florida. He arrived shortly before 1:00 p.m. and exited Austing's bus. Young Circle was a "time point" on Granger's bus route. A "time point" is a location where a bus must stop and stay until a designated time unlike other stops on a route. The Defendant waited at the Young Circle Terminal for approximately thirty (30) minutes until Granger's bus arrived. Before Granger's arrival, four other buses arrived at the terminal where the Defendant waited. The Defendant did not approach, shoot at or into any of these buses.

When Granger's bus arrived shortly before 1:35 p.m., the Defendant immediately walked up to that bus with his gun drawn. He fired a volley of shots at the outside of the bus. Bullets entered the side panel and the bus window. The Defendant then walked to the front door of the bus and pointed his gun inside.

One round was fired into Granger's throat at very close range. After shooting and killing Sydney Granger, the Defendant shot and killed a passenger, Wesley Anderson, by firing another round into his back, also at close range.

After killing Granger and Anderson, the Defendant walked calmly away from the bus and down the street to Scott Yaguda's car. Yaguda was waiting at a traffic light. At gun point, the Defendant ordered Yaguda to get out and give him the car stating, "I've just killed two people,... I'll

kill you too." As Scott Yaguda walked away, the Defendant shot him in the back three times at point-blank range. The Defendant then fled the scene in Yaguda's car.

On July 26, 1989, law enforcement officers observed a motor vehicle pulled off the side of an interstate highway just south of Brule, Nebraska. They did not see any one in the car and noticed the Florida license plate. While still in their vehicle, the police radioed the identity of the Florida licence tag to dispatch and were informed that the car was stolen during a double homicide in Florida.

The officers approached the car with their weapons drawn and found the Defendant asleep in the back seat. One officer tapped his weapon on the window to wake up the Defendant. The officer instructed the Defendant to get out of the car with his hands up. The Defendant complied, but upon learning that he would be handcuffed, he dove back into the car and reached his right hand under the seat.

The officer threw himself on top the the Defendant and struggled to control the Defendant's hand under the seat. The other officer dragged both of them out of Yaguda's car by their feet. When the Defendant and the officer were lying on the roadside, the plastic bag covering the Defendant's hand dislodged during the struggle. The officers then observed a firearm in the Defendant's right hand. Both officers had to use physical force to disarm and arrest the Defendant. A plastic bag bearing the name "Martin, North Dade Gun and Pawn Shop" was recovered from

the arrest scene. At trial, Greg Austing identified it as the same bag the Defendant was carrying when he boarded the bus headed to Young Circle.

Pursuant to the provisions of Florida Statutes 921.141(3) this Court hereby makes the following findings:

AGGRAVATING CIRCUMSTANCES

The State presents two aggravating circumstances to consider:

1. The Court finds beyond a reasonable doubt that the Defendant has been previously convicted of another capital offense or felony involving the use of or threat of violence to some person:

a. The crime of murder in the first degree is a capital felony. The Defendant was convicted of murdering Sydney Granger and Wesley Anderson.

b. The crimes of attempted murder in the first degree and robbery with a firearm are felonies involving the use of or threat of violence to another person. The Defendant was convicted of the attempted murder, and armed robbery of Scott Yaguda.

2. This Court finds beyond a reasonable doubt that the capital felony 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. This aggravating circumstance applies when the crime exhibits a heightened premeditation beyond that which is required for a

conviction at the trial on First Degree Murder, Jent v. State, 408 So.2d 1024 (Fla.1981).

Such heightened premeditation can be demonstrated by evidence which shows that the Defendant planned or prearranged to commit murder before the crime began. Rogers v. State, 511 So.2d 526 (Fla.1987); Hamblen v. State, 527 So.2d 800 (Fla.1988); Thompson v. State, 565 So.2d 1311 (Fla.1990). The evidence in the case at bar established a heightened premeditated and a calculated or prearranged design to murder Sydney Granger. The Defendant's murder of Sydney Granger and Wesley Anderson was not a random act.

The evidence showed that there was an initial confrontation on the bus between the Defendant and the bus driver, Sidney Granger. From this point until the time of the murders, the Defendant engaged in a series of actions over a period of approximately two hours which demonstrate a cold, calculated and heightened premeditated design to murder Sidney Granger.

The Defendant was extremely familiar with the Broward County bus system and it's many bus routes. Stacks of bus schedules from Dade, Broward and Palm Beach Counties were found with the Defendant at the time of his capture and among his belongings left behind at the bus shelter.

On the day of the murders, Sidney Granger was driving his bus in a northerly direction on U.S. 1. Granger stopped because he believed the Defendant was drinking alcohol on the bus. The Defendant refused to get rid of the drink and

chose to get off the bus after a verbal exchange with Granger.

Thereafter, the Defendant reversed his northerly direction of travel and began traveling south. He traveled back to the Young Circle Bus Terminal in the city of Hollywood, Florida. He waited there for Granger's bus to arrive knowing that this was a place where the bus must stop. Prior to Granger's arrival, four other buses arrived at the terminal but the Defendant did not approach or fire at or into any of these buses.

When Granger's bus finally arrived, the Defendant walked up to that bus with his gun drawn. He fired shots at the outside of the bus, into the side panel and through a bus window. The Defendant then went to the front door of the bus and fired his gun inside.

One shot was fired into Granger's throat at very close range, another into Wesley Anderson's back, also at close range. The Defendant then walked calmly away from the bus and down the street to Scott Yaguda's car where Yaguda was waiting at a traffic light. At gun point, the Defendant ordered Yaguda to get out and give him the car stating, "I've just killed two people,... I'll kill you too." As Scott Yaguda walked away, the Defendant shot him in the back three times at point-blank range. The Defendant then fled the scene in Yaguda's car.

This type of behavior satisfies the requirement of highly premeditated conduct by the Defendant. Phillips v.

State, 476 So.2d 194 (Fla.1985). The heightened premeditation does not have to be directed toward a specific victim so long as the evidence shows that the Defendant planned or prearranged to commit murder before the crime began. Provenzano v. State, 497 So.2d 1177 (Fla.1986). Wesley Anderson may not initially have been the Defendant's intended victim, but in the course of the premeditated murder of Granger, he became a victim as a matter of circumstance.

The killings were committed in a "cold manner", without any emotion or passion. There was no evidence that the Defendant's acts were prompted by wild emotion. Rather, the evidence established the Defendant's mental state to be highly unemotional and contemplative. There was a substantial period of reflection and thought by the Defendant followed by a particularly lengthy and methodical planning period. There was no pretense of moral or legal justification for the Defendant's conduct.

MITIGATING CIRCUMSTANCES

The law requires a reasonable quantum of proof before mitigating circumstances can be said to have been established. See Nibert v. State, 574 So.2d 1059 (Fla.1990). The Defendant in this case offered evidence of three (3) statutory mitigating circumstances:

1. The Defendant has no significant history of prior criminal activity. The record demonstrates that, prior to the day of the killings, the Defendant had been arrested and

convicted for driving a motor vehicle while intoxicated and arrested for simple battery (the disposition of the battery arrest was never established). This Court is reasonably convinced that this factor has been established. See Bello v. State, 547 So.2d 914 (Fla.1989); Cook v. State, 542 So.2d 964 (Fla.1989); and Scull v. State, 533 So.2d 1137 (Fla.1988). The Court has considered this factor and accords it some weight.

2. The crimes for which the Defendant is to be sentenced were committed while he was under the influence of great mental or emotional disturbance.

In order to establish this factor, the Defendant is not required to prove insanity. Ferguson v. State, 417 So.2d 631 (Fla.1982). The standard required to establish this factor is less than insanity but more than the emotions of an average man, however inflamed. State v. Dixon, 283 So.2d 1 (Fla.1973).

The Defendant presented the testimony of Dr. M. Ross Seligson, a psychologist. The doctor stated that at the time of the murders, the Defendant was experiencing a psychotic episode and was unaware of his actions. The situational stress of the prior confrontation between the Defendant and the victim Sydney Granger caused the Defendant to be publicly humiliated and this triggered the episode. Dr. Seligson also stated that the Defendant's weakened physical state at the time of the murders caused him to be emotionally disturbed.

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Evidence of the Defendant's past emotional disturbances was presented. A letter sent to Mr. Besaraba, Sr. from the Defendant in November, 1987, was introduced into evidence at the Penalty Phase of the trial. In the letter, the Defendant told his father that the "FBI" was trying to poison him by spreading chemicals on his clothes and furniture.

Further, the Defendant telephoned his former employer Lawrence Grupp in 1987. He asked Grupp to send money so that he could get out of town because someone was after him. A past friend, Gerard Scullian, testified that he also received a phone call in 1987. The Defendant asked Scullian for money stating that "it was a matter of life or death" although never informing either witness who was after him or why.

Mr. Scullian also described the Defendant as having a "persecution complex". When walking together one afternoon, the Defendant crouched behind Mr. Scullian when a man walking past said hello to the Defendant. The Defendant told Mr. Scullian, "That was one of them". When asked for an explanation, the Defendant could not recall the incident.

Additional evidence relied on by the Defendant to establish this circumstance was that he used alcohol on the day in question. There was a confrontation with Sydney Granger, the bus driver, because Granger accused the Defendant of drinking alcohol on the bus. A witness testified that he sat next to the Defendant at Young Circle

while the Defendant waited for Granger's bus to arrive. The witness saw the Defendant drinking from a bottle wrapped in a paper bag.

During an investigation of the scene of the murders, a bottle of partially consumed whiskey in a paper bag was found packed in the Defendant's abandoned duffel bag at Young Circle. However, an empty soda bottle wrapped in a paper bag was also found at the bus shelter. The Defendant's finger prints were found on the soft drink bottle and wrapper.

Finally, at the time of the murders it was established that the Defendant was living as a homeless person with no means to support himself.

The presence of some alcohol consumption at the time of the crime, without more, does not require a finding that the Defendant was intoxicated. Nevertheless, the Court does find that the Defendant did consume alcohol prior to, and at the time of, the murders. The Defendant was thrown off of Granger's bus for drinking alcohol and a witness observed him drinking just prior to the murders.

Further, in Provenzano, supra., the court held that the testimony of various psychiatrists about the defendant's emotional disturbance, where the disturbance occurred many years before the murder, standing alone, did not require the court to find this to be a mitigating circumstance.

Standing alone, none of the above-mentioned factors presented to this Court establish this mitigating

circumstance. The combination of the evidence, however, establishes this mitigating circumstance by a preponderance of the evidence and the Court accords some weight to this mitigating circumstance.

3. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. F.S. 921.141(6)(f).

Dr. Seligson's opinion that the Defendant was having a psychotic episode and was unaware of his actions at the time of the murders is clearly contrary to the Defendant's statements and actions on the day of the crimes.

Scott Yaguda testified that the Defendant approached him while he was in his car and told him that he had just killed two (2) people, and to get out of the car or he would be killed also. Yaguda got out - walked away and was shot three times in the back. The Defendant commandeered the car and fled to get away.

When the Defendant was captured in Nebraska, he again tried to escape realizing he would have to face the consequences of his actions in Florida.

Additionally, it was shown that the gun used in the murders legally belong to the Defendant. He had purchased the weapon two years earlier. He was skilled in its use and was licensed to carry the gun.

This Court finds that this mitigating circumstance has not been established.

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The Defense presented numerous non-statutory mitigating factors in accordance with Rogers v. State, 511 So.2d 526 (Fla.1987).

1. The Defendant's Unstable and Deprived Childhood

A disadvantaged childhood, abusive parents, lack of education and training are valid non-statutory mitigating circumstances the court may consider. Brown v. State, 526 So.2d 903 (Fla.1988)(abrogated in Fenelon v. State, 594 So.2d 292 (Fla.1992) on issue of a "flight" instruction).

The Defendant's father, Joseph Besaraba, Sr. testified that he had been captured by the Nazis. He escaped several times but was ultimately recaptured.

When the Defendant was approximately a year old the family escaped from Poland to the American zone in Germany. They lived in an army barrack for four (4) years awaiting passage to the United States. Throughout the family's turmoils they were able to stay together.

The Besarabas bought a home and small business in New York in 1960 and the family all worked there together. The witness testified that he never had any problems with the Defendant as a child. There was no evidence of any abusive parenting or a disadvantaged childhood. To the contrary, the Defendant's parents provided a stable environment in the face of extreme circumstances.

The Defendant characterizes his childhood as abusive because his parents worked hard and they were unable to spend time with him. The Defendant ran away from home due

to a distant relationship with his family and lack of a father figure. However, there was no testimony of any abuse. The Court finds that this mitigating factor has not been established.

2. **The Defendant's Alcohol/Drug Usage, Physical and Emotional Problems**

Mr. Besaraba, Sr., testified that in 1968 the Defendant was hospitalized because he had been acting strangely. Other witnesses later testified that the incident was due to drugs.

Alfred Osborne, a childhood friend from New York testified that he was aware of the Defendant's usage of marijuana and alcohol in 1969. Osborne was also aware of the fact that the Defendant had been hospitalized around that same time for a drug related problem. Osborne last saw the Defendant in the late 1970s.

Alcohol was involved in this incident and an alcohol problem was established, but there was no evidence that the Defendant's actions were controlled by it, or that it play a major role in the murders. This Defendant knew what he was doing. He methodically planned to kill Sidney Granger and carried out that plan. The Defendant worked his way to a place where he knew he could find Granger. He specifically waited for Sidney Granger. After killing Granger and Anderson, the Defendant commandeered Scott Yaguda's car and escaped.

Tragically, when the Defendant was 18 years old, his elder sister died due to a brain tumor at the age of 20. Shortly thereafter, the Defendant was in a automobile accident and sustained head injuries. He was hospitalized for approximately six (6) weeks. Some time after this, the Defendant quit high school just a few months before graduation.

In 1973, the Defendant's mother was killed in a car accident while she was visiting Poland. At the time, the Defendant had been living in California and it took his father six (6) months to find and inform the Defendant of his mother's death.

In addition to having a personality disorder as described by Dr. Seligson, the Defendant argues that he is emotionally immature and has low self-esteem due to his traumas. Mr. Besaraba, Sr. testified to a history of some mental illness in his family. A maternal uncle murdered his wife for no apparent reason.

The Defendant's medical history revealed that he has suffered from numerous maladies. Records indicate the Defendant has been treated for malaria, a broken shoulder, alcoholic hepatitis, an enlarged spleen, hemorrhoids, irritable bowel syndrome, weight loss, alcohol abuse, spitting up blood, a back injury, sleep apnia, sleep deprivation, and psychotic symptoms. His participation in 15 to 20 laboratory research studies over a 2 to 3 year period revealed an overall bad state of health.

This evidence in its entirety established that the overall result of the aforementioned traumas produced an effect upon the Defendant relevant to his character by a preponderance of the evidence. Therefore, this mitigating factor has been established. The Court, however, accords it little weight.

3. **The Defendant's Good Character and Reliable Work Record**

The Defendant's employment history and the fact that he was a good worker is a valid non-statutory mitigating circumstance that this Court has considered. Holsworth v. State, 522 So.2d 348 (Fla.1988); Nibert v. State, supra.

The Defendant quit high-school months before he was due to graduate and subsequently worked as a skilled craftsman.

The Defendant's former employer, Lawrence Grupp met the Defendant in 1980. The Defendant worked as a handyman/painter for Grupp in Boston, Massachusetts for approximately four (4) years. Mr. Grupp was satisfied and impressed with the Defendant's work and never observed any unusual behavior. Grupp stated that the Defendant had always been friendly, respectful, and never exhibited violence.

Mr. Grupp further testified that the Defendant disappeared in 1984. Prior to that, he had only been absent for a two (2) month period. The Defendant confided in Grupp that he had been incarcerated during that period for drunk driving.

Another witness, Rhonda Grupp confirmed her husband's testimony. She stated that the Defendant exhibited patience with her small children and was considered "family". The Defendant confided in her about his family. Lastly, he told her of his earlier use of drugs but did not specify what type, when, or how much.

Gerald Scullian testified to the Defendant's good character. Scullian met the Defendant in 1980 when he and the Defendant lived above a shoe shop in Boston. The Defendant would drive Mr. Scullian to night school. They would drink together three (3) or four (4) nights a week.

However, there was further testimony that since his departure from Boston in approximately 1985, the Defendant did not hold a steady job and lived as a homeless person.

Although there is no indication that the Defendant had any employment recently, based on the evidence of his past record, this Court considers this mitigating circumstance established by a preponderance of the evidence, but accords it very little weight.

4. **The Defendant's Conduct in Prison.**

Rehabilitation, good behavior while in jail, and future adjustment to jail are appropriate mitigating circumstances this Court has considered. Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct 1669 (1986); Francis v. Dugger, 514 So.2d 1097 (Fla.1987); and Valle v. State, 502 So.2d 1225 (Fla.1987).

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The Defendant's expert, Dr. Seligson, testified to the Defendant's adjustment to prison. Since his incarceration in August of 1989, the Defendant has acquired his GED. Seligson testified that with proper medication, supervision, a structured environment and medical treatment, the Defendant can be rehabilitated. Also, the Defendant has established positive relationships with other inmates and authorities.

Based upon this testimony and the lack of any conflicting evidence from the State, this mitigating circumstance has been established by a preponderance of the evidence and is accorded some weight.

5. **Age of the Defendant**

The Defendant is 47 years old at the time of sentencing. In Eutzy v. State, 458 So.2d 755 (Fla.1984), the court held that one who has attained an age of responsibility cannot reasonably raise as a shield against the death penalty the fact that, 25 years hence, he will no longer be young.

No evidence has been presented to establish this mitigating factor. The Defendant suggests that he would probably not live through the mandatory minimum of his sentence if sentenced consecutively. Therefore, the Court finds that this mitigating factor has not been established by a preponderance of the evidence.

This Court heard everything at the penalty phase that the Defendant chose to present. In summary, the Court finds

that there are two (2) aggravating circumstances applicable to this case. As to mitigating circumstances, the Court finds two (2) statutory and three (3) non-statutory mitigating circumstances have been established, considered and weighed.

After independently evaluating all of the evidence presented, it is this Court's reasoned judgment that the mitigating circumstances do not outweigh the aggravating factors.

The jury recommended that this Court impose the death penalty upon JOSEPH BESARABA, JR. by a majority of seven (7) to five (5). This Court must give great weight to the Jury's sentencing recommendation. Tedder v. State, 322 So.2d 908 (Fla.1975). Death is presumed to be the proper penalty when one (1) or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances. White v. State, 403 So.2d 331 (Fla.1981).

The ultimate decision as to whether the death penalty should be imposed rests with the trial judge. Hoy v. State, 353 So.2d 826 (Fla.1977). Additionally, the sentencing scheme requires more than a mere counting of the aggravating and mitigating circumstances. It requires the Court to make a reasoned judgment as to what factual situations require the imposition of the death penalty, and which can be satisfied by life imprisonment, in light of the totality of the circumstances. Floyd v. State, 569 So.2d 1225 (Fla.1990); Jackson v. State, 498 So.2d 406 (Fla.1986).

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Based upon the analysis set-forth above, it is therefore the sentence of this Court that you, JOSEPH A. BESARABA, JR., be sentenced to death for the murders of Sydney Granger and Wesley Anderson.

It is further ordered that you, JOSEPH A. BESARABA, JR., be confined by the Department of Corrections and be kept in close confinement until the day of your execution, and that on that day you be put to death by electrocution, which is the manner prescribed by law.

It is further ordered, regarding sentencing for Count III, Attempted Murder in the First Degree with a firearm, the Court sentences you to life imprisonment, with a mandatory minimum of three (3) years. As to Count IV, Robbery with a Firearm, the Court sentences you to life imprisonment with a mandatory minimum of three (3) years. Lastly, as to Count V, Possession of a Firearm during the commission of a felony, the Court grants the Motion For Arrest of Judgement. See Cleveland v. State, 587 So.2d 1145, 1146 (Fla.1991). All sentences are to be served consecutively including the sentences for Count I and II.

It is further ordered that you, JOSEPH A. BESARABA, JR., are hereby notified that your have thirty (30) days from this date in which to appeal the Judgment and Sentence of this Court. The Judgment of conviction and the sentence of death is subject to automatic review by the Supreme Court of Florida. You are further advised that you have the right to assistance of counsel in the filing and preparation of your

appeal. If you cannot afford your own attorney you should advise the Court and an attorney will be appointed for you.

DONE AND ORDERED in Open Court, Broward County Courthouse, Fort Lauderdale, Florida, this 5 day of June, 1992.

STANTON S. KAPLAN,
CIRCUIT COURT JUDGE

cc: Counsel of Record

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 29th day of October, 1993.

Jeffrey J. Anderson

Of Counsel