IN THE SUPREME COURT OF FLORIDA

PERRY TAYLOR, :

Appellant, :

vs. : Case No. 80,121

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, PERRY TAYLOR, was the defendant in the trial court, and will be referred to this brief as appellant or by name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. The record on appeal for the new penalty phase and resentencing will be referred to by use of the symbol "R." The record of appellant's 1989 trial will be referred to by the symbol "OR." All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE

Perry Taylor was charged by indictment filed November 16, 1988 with first degree murder and sexual battery of Geraldine Birch (R670-73). After a trial on May 8-11, 1989 before Circuit Judge M. William Graybill and a jury, appellant was found guilty as charged on both counts (OR663,1173). The verdict form, as to first degree murder, was a general one, and did not specify whether the jury was finding felony murder, premeditated murder, or both (OR663,1173). After the penalty phase, the jury recommended the death penalty, and on May 12, 1989 the trial judge sentenced appellant to death (OR776,786-87,1179-81;R677).[1]

In an opinion issued June 27, 1991, this Court affirmed appellant's convictions, but reversed the death sentence and remanded for resentencing before a new jury (R681-97). Taylor v. State, 583 So. 2d 323 (Fla. 1991).

A new penalty trial was held on May 18-21, 1992 before Circuit Judge Diana Allen and a jury. The jury, by a 8-4 vote, recommended the death penalty (R599,799). On June 23, 1992, in accordance with the jury's recommendation, the trial judge imposed a sentence of death (R647-54,806-10,812-17) The judge found three aggravating factors and five nonstatutory mitigating factors, but accorded

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[1] A sentence of life imprisonment was imposed on the sexual battery count (OR787-88,1181,1187;R679).

little weight to three of the mitigating circumstances (R813-16, 648-53). [2]

[2] The aggravating circumstances found were (1) appellant was previously convicted of a felony involving the use or threat of violence; 2) the capital felony occurred during the commission of a sexual battery; and (3) the capital felony was especially heinous, atrocious or cruel. The judge found and gave some weight to the mitigating circumstances of (1) appellant's deprived family background; and (2) the abuse he suffered as a child. The judge found but gave very little weight to the mitigating circumstances of (3) appellant's remorse; (4) the testimony of Dr. Berland that he suffers from organic brain injury; and (5) his good conduct in jail prior to the incident on June 19, 1992 (R813-16,648-53).

STATEMENT OF THE FACTS

The following is a summary of the evidence presented in the new penalty trial.

Tampa police officer Edward Batson received a call on the morning of October 24, 1988 pertaining to a female passed out in a baseball dugout. He arrived at the Belmont Heights Little League field, where he found the dead, partially-clothed body of a black female lying on her back in the dugout. He secured the scene and notified homicide detectives (R194-98).

Sergeant Louis Potenziano responded to the scene, where he directed the collection of evidence and taking of photographs (R102-18), He noticed drag marks from about three quarters of the way from one end of the dugout to the other, leading to the body (R211-12). There was dirt on the heel area of the deceased's feet (R212). Several sneaker impressions were found outside the dugout; in one of these the word Adidas was impressed into the sand (R215-16). Photographs were taken and casts were made of the shoe prints (R216,219).

Detective George McNamara, the lead detective in this investigation, took the photos and casts of the shoe impressions to an FDLE crime scene analyst (R225-26). He interviewed people in the neighborhood of the Little League field, and spoke with appellant the day after the body was found (R226-27). Appellant had heard about it from people in the neighborhood (R228-29). McNamara asked him what he had done the night before the homicide, and appellant told him that he and some friends had gone to the Manila Bar, and

had returned to the area known as "the cut" (R229-31). He retrieved a picture from Reggie Marcus' car, talked with a man known as Blue, and then went back to his mother's house (R230). In response to McNamara's question, appellant told him he was wearing blue jeans, a sweatshirt, and a pair or Adidas tennis shoes (R231). McNamara asked if had been in the area of the Little League field; appellant said he had not been over there in the six weeks he'd been staying in the area (R231). McNamara told him that footprints had been found at the scene, and asked him again if he'd been in the area (R231). Appellant repeated that he hadn't (R231). McNamara asked him if he would voluntarily provide the clothing and shoes for testing (R231-32,262). After appellant agreed, the detectives drove him to his mother's house; he went inside and brought the clothing and shoes out to them (R231-32). On parting, Detective McNamara asked appellant to call him if he heard anything, and appellant said he would (R232-33). The next day, the shoes were turned over to the FDLE analyst (R233-34).

On October 27, 1988, while en route to appellant's residence to see if he'd heard anything, Detective McNamara received information on the police radio that appellant's shoes matched the impressions (R237,251-52). Appellant drove up to the house, and was asked if he would accompany the detectives back to the police department (R238). He was taken to an interview room and advised of his constitutional rights (R238-39). Asked what he had done on the night before the death of Geraldine Birch, appellant recounted the same sequence of events he'd told them two days earlier, except

that when McNamara asked him if he'd gone up to the area of the ballpark, he stated that on the preceding Friday he had gone to the outfield portion of the ballpark and had sex with a female (R241). At this point, the detectives told him that his shoes had matched the impressions in the dirt near the victim's body (R241-42). Appellant paused momentarily and began to tear up (R242). He said that it was an accident; he didn't mean for it to happen (R242). He told McNamara that the woman (whom he did not know) walked by when he was in the area of the cut, and she had agreed to have sex with him. In the dugout, she began to perform oral sex, and as she did it harder she was causing an irritation. He asked her to stop, and he attempted to pull his penis out of her mouth. Upon doing so, she bit down hard on his penis. He could not pull it from her mouth, and he started choking her with both hands for two or three minutes; then struck her several times about the face. He dragged her body to the other end of the dugout, laid her down, kicked her in the upper torso, and stomped on her chest. He then left the dugout and returned home (R242-433,245,247). Toward the end of his statement, McNamara testified, appellant was visibly upset and started to cry (R245).

When McNamara asked appellant if he had had vaginal sex with the woman, he said he had not (R243,245,258). Shortly thereafter, he told Detectives Duran and Bell that they did have vaginal sex (R259).

After the interview, appellant voluntarily signed a consent form for the collecting of head and pubic hair samples and saliva (R244). He was then turned over to the custody of Detective Duran.

Detective Henry Duran obtain hair and saliva samples from appellant, and examined his penis (R266-68,271). Appellant said it was so sore he hadn't washed it for several days (R267). Duran observed a small white dot at the base of the head of the penis, but saw no scabs, lacerations, nor anything that looked to him like teeth marks (R268,270). At Duran's direction an ID technician photographed it (R267-70,893-96).

Duran asked appellant if he and the woman had had penis to vagina sex. Appellant said they did, but mentioned to Duran that he had told Detective McNamara they did not (R271-72,277-79,280-81). They had had vaginal sex for just about a minute; then she said she didn't want to do it any more, and began performing oral sex (R272). She was scratching and hurting him, and he told her to quit about three times (R272-73). Instead, she bit down on the head of his penis (R273). He pushed her away, and began choking her with both hands (R273). He then hit her three or four times with his fist, and when she was on the ground he kicked her two or three times in the ribs and stomped her once (R273,275).

Associate medical examiner Lee Miller observed the body of Geraldine Birch in the dugout, and later performed an autopsy (R284-85). The cause of death was massive blunt injury to the head, neck, chest, and abdomen (R286,300,325-27). Her internal organs were severely damaged, and according to Dr. Miller great

force would have been required to inflict these injuries (R305-10). Numerous ribs were fractured, as was her larynx (R301,309-10). There was a pattern injury on the right side of the front of her waist near the rib cage, which Dr. Miller stated was consistent with her being stomped by a person wearing tennis shoes (R301-02). Another bruise, a circular injury on her left forearm, appeared to Dr. Miller to be characteristic of a human bite mark (R317). Ms. Birch's lower dental plate was out of her mouth. (It had been recovered on the ground in the dugout)(R297-98).

Dr. Miller testified that there was one large tear and a couple of smaller ones on the perineum (the skin between the vagina and the anus), and about ten smaller tears circumferentially around the external opening of the vagina (R292,311). There were no deep injuries to the vagina (R314). According to Miller, it was possible, but unlikely, that these injuries were caused by penis to vagina intercourse (R312-13,321). More likely, he believed, they were caused by an object or a hand (R312-14). The larger tear, on the outside of the vagina was "not really typical of something being inserted" because it was too far away, although it was a possibility (R313). Asked whether that injury could have been caused by a kick, he first said he had no opinion within a reasonable medical certainty; then said he could not exclude the possibility but didn't think it was likely (R314,321-23).

In Dr. Miller's opinion, it would have taken at least ten and probably more blows to cause these injuries (R318-19). Ms. Birch could not have survived very long with these injuries, and she

would have been dead by the time the last one was inflicted (R318). Death was not instantaneous (R320). However, she might well have been rendered unconscious from being choked, and if so she probably would not have regained consciousness while the other injuries were being inflicted (R322).

Through the testimony of Detective George Hill of the Hillsborough County Sheriff's Office, the state introduced appellant's 1982 conviction of the sexual battery of Tracy Barchie (R343-44, 891-92). Appellant was sixteen at the time; Ms. Barchie twelve (R339-40). Appellant had given a statement (consistent with Ms. Barchie's account) in which he admitted to removing her clothing, penetrating her with his finger, and placing his penis against her vagina, although he did not put it all the way in (R341-43). He told her he would kill her if she told anyone (R342,244-45). Appellant pled no contest and was sentenced as a youthful offender (R892).

The defense presented the testimony of Noel Borgas,[3] Sharon Smith, and Tammy Kirk, detention deputies at the Hillsborough County Jail West, who supervised appellant at various times in 1988 and 1991-92. He was polite, cooperative, and never caused any disciplinary problems (R360-61,363,369,376-77). When he was eligible, under the policies that existed in 1988, he was a trustee (R359). He is a practicing Muslim, and appears to be sincere in

[3] Or Borhoss (see R759,356).

his faith (R361-63). Sergeant Kirk described him as "definitely one of our better inmates" (R376).[4]

Otis Allen, a friend and neighbor of appellant, testified that in the early morning hours of October 24, 1988 he was with appellant and Pop Marcus when a woman (Geraldine Birch) came across the street and approached them (R380-81,383,388-89). Allen had known her for a couple or three years; "[s]he moved around, though" (R383). She asked if anybody had any crack, and she wanted a trick or something (R384,386-87). "Trick," Allen explained, meant sex for crack cocaine, and there was no doubt in his mind he heard her say that (R384,386-87,396). Appellant and Ms. Birch then left together, walking toward the Belmont Heights Little League field around the corner (R384).

On cross-examination, Allen stated that when he spoke with Detective McNamara during the police investigation, he told him that Ms. Birch has offered sex for crack (R386-88,395-96). He also told McNamara that appellant was wearing jeans and a pair of tennis shoes (R387).

Alvin Thomas knew appellant when they were both children in a foster home run by Mr. and Mrs. Rutledge (R404-06). Both appellant and Thomas had bedwetting problems. Every time they wet the bed, Mrs. Rutledge would beat them with her hand or a switch (R406-07). She would also beat appellant for no reason at all (R407).

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[4] On June 19, 1992, after the jury was discharged, the state presented to the trial judge as rebuttal the testimony of jail deputy Charles Kelly. Kelly testified that on June 9 appellant attacked him without provocation. See Issue VII, infra.

Appellant's grandmother Ollie May Rutledge[5] (no relation to the foster parents, R414), and his older half-brother, Stanley Graham, testified that appellant's mother, Edwina, had a brain hemorrhage as a young child (R410,420). She had to leave school in the second grade and she cannot read or write (R410,420). She had nine children (R411). Appellant's father never lived at home or helped support the family at all (R422). When appellant was seven years old he was placed in a foster home, where he remained except for brief intervals until he was sixteen (R411,413,417,423-34,426-28). His grandmother did not visit him in the foster home because it was too painful for her (R413-14). Stanley would see him in school, but only on one occasion did he visit him in the foster home; "it just tore me up and I just didn't want to face him in foster care" (R424) According to Stanley, appellant never spent Christmas at home between the ages of seven and sixteen, and he only remembered one time when he was allowed to come home for a birthday or holiday (R424).

Both his brother and grandmother testified that appellant had expressed his remorse for what had happened (R415-16,424-25). Stanley is a Pentecost preacher, while appellant has recently become a Muslim. While Stanley does not believe in the Muslim religion, he testified that appellant has good knowledge of the Bible in his way (R425-26). His grandmother stated that appellant has been a beautiful grandson, who has done whatever he could for her, and never wanted money (R415). She has visited him once in

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[5] Or Rutlage (see R759,409)

jail, and he calls her once or twice a week. She has seen a great change in him, and she believes he could lead a productive life even though in prison (R416-17)

Dr. Robert Berland, a forensic psychologist, conducted a diagnostic evaluation of appellant, which included psychological and intelligence testing, interviewing appellant and lay witnesses, and reviewing medical, school and HRS records and police reports (R437-40,443,450,460). The psychological testing indicated that appellant was trying to hide or minimize his mental problems, but they came through anyway (R445,454,457,477). His IQ was average or just slightly above, but there were great disparities on the various subtests (R463,468,484-85,488). In some areas he was functioning like a person of high average intelligence, while in other areas he was functioning below the level of retardation (R468). This pattern was highly indicative of head injury and organic brain damage (R464-65,468-69,472,474,489). Dr. Berland testified that there was no doubt in his mind that appellant suffers from brain damage (R489).

School records and HRS documents indicated extreme levels of behavioral disturbance from a very young age, which, according to Dr. Berland, was typical of a youthful brain injured person (R469-71). He likened it to the kinds of problems which are now seen in "cocaine babies" (R471). When appellant was seven years old, he was essentially non-verbal, and was described by several different people as communicating primarily with animal grunts and grimaces (R481). Appellant's experience in foster care would also have

certainly been a negative influence on his emotional development (R474-75).

While appellant suffers from brain damage and the effects of a disturbed childhood and family background, Dr. Berland was of the opinion that he was not legally insane at the time of the offense, and that he has some sociopathic thinking (R472,486-88).

The state recalled Detective McNamara, who testified in rebuttal that, when he interviewed Otis Allen the week after Geraldine Birch's death, Allen did not tell him that Ms. Birch had offered sex for rocks (R501-03). According to McNamara, Allen told him that Ms. Birch had asked for a ride, and then appellant said he was going to catch a trick (meaning pay for sex or have sex) (R502,504-05).

SUMMARY OF THE ARGUMENT

[Issue I] To avoid arbitrary and capricious punishment, an aggravating factor "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, 867 (1983). Florida's felony murder aggravating circumstance merely repeats an element of first degree murder, and in no way narrows the class of persons eligible for the death penalty. It therefore violates the Eighth and Fourteenth Amendments to the U.S. Constitution. See State v. Middlebrooks, 840 S.W. 2d 317 (Tenn. 1992), cert.granted, ___U.S.___ (53 CrL 3013) (1993). Because Florida is a "weighing state", and because the narrowing process occurs in the penalty phase, Lowenfield v. Phelps, 484 U.S. 231 (1988) does not apply. See Stringer v. Black, 503 U.S. ___, 112 S.Ct.___, 117 L. Ed. 2d 367 (1992).

[Issues II and III] To the extent that Florida's death penalty statute, Fla. Stat. § 921.141, allows a death recommendation to be returned by a bare majority vote of the jury, it violates the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution. See Johnson v. Louisiana, 406 U.S. 356 (1972) (Blackmun, J., concurring, and Powell, J., concurring); State v. Daniels, 542 A. 2d 306, 314-15 (Conn. 1988). Moreover, matters relating to jury unanimity or non-unanimity are procedural within the meaning of Article V, Section 2(a) of the Florida Constitution. Florida Rule of Criminal Procedure 3.440 provides that no verdict

may be returned unless all of the jurors concur in it. The Florida Rules of Criminal Procedure govern all criminal procedure in the state courts, State v. Garcia, 229 So. 2d 236 (Fla. 1969), and when there is conflict between a statute and a Rule on a matter of practice and procedure, the Rule controls, and the statute is unconstitutional to the extent of the conflict. Garcia; Haven Federal Savings and Loan Assoc. v. Kirian, 579 So. 2d 730 (Fla. 1991).

[Issue IV] The exclusion for cause of prospective juror Arnaiz after she indicated that, notwithstanding her personal views about the death penalty, she probably could follow the law in weighing the aggravating and mitigating circumstances, violated the standard of Adams v. Texas, 448 U.S. 38 (1980); Wainwright v. Witt, 469 U.S. 412 (1985); and Gray v. Mississippi, 481 U.S. 648 (1987). If even one prospective juror is barred from jury service because of her views on capital punishment on any broader basis than inability to follow the law or abide by her oath, the death sentence cannot constitutionally be carried out. Adams, 448 U.S. at 48. The erroneous exclusion of a juror under this standard can never be treated as harmless error. Gray, 481 U.S. at 659-68; Davis v. Georgia, 429 U.S. 122 (1976).

[Issue V] The trial judge committed reversible error when, over defense objection, she failed to conduct a Neil inquiry as to the state's peremptory excusal of a black juror, based on her misapprehension of law that the presence of other blacks on the panel negated the likelihood of discrimination. See Stubbs v. State, 540 So. 2d 255 (Fla. 2d DCA 1989); Williams v. State, 551

So. 2d 492 (Fla. 1st DCA 1989); Smith v. State, 571 So. 2d 16 (Fla. 2d DCA 1990). As this Court said in Joiner v. State, ___So.2d___ (Fla. 1993) [18 FLW S 280] (rejecting the state's argument that as long as an improperly challenged juror is replaced by a member of the same minority group the constitutional error is cured), "Jurors are not fungible. Each juror has a constitutional right to serve free of discrimination. The striking of a single African-American juror for racial reasons violates the Equal Protection Clause."

[Issue VI] The state was improperly allowed to introduce a graphic and inflammatory close-up photograph of the victim's vagina being opened by a hand in a surgical glove. The probative value, if any, was minimal, while the prejudicial effect was extreme. See Henry v. State, 574 So. 2d 73 (Fla. 1991); Czubak v. State, 570 So. 2d 925 (Fla. 1990); Hoffert v. State, 559 So. 2d 1246 (Fla. 4th DCA 1990).

[Issue VII] The trial court erroneously allowed the state to introduce as rebuttal evidence the testimony of a jail deputy, concerning an incident which took place subsequent to the penalty proceeding before the jury. Florida's death penalty procedure contemplates that the judge and jury will hear the same evidence. Corbett v. State, 602 So. 2d 1240 (Fla. 1992). Nothing in the statute purports to authorize the trial court to hear additional evidence or rebuttal evidence after the jury has been discharged.

[Issue VIII] To establish the HAC aggravating factor, it is not sufficient to show that the victim in fact suffered great pain; rather, the state must prove that the defendant intended to torture

the victim, or that the crime was meant to be deliberately and extraordinarily painful. Porter v. State, 564 So. 2d 1060 (Fla. 1990). The trial court reversibly erred in refusing to give a requested jury instruction on the intent element of the HAC aggravating factor. She also erred in finding this aggravating factor, as the requisite intent was not proven beyond a reasonable doubt.

[Issue IX] The trial judge erred in refusing to instruct the jury on the specific nonstatutory mitigating factors of deprived childhood and family background, organic brain damage, potential for rehabilitation, and remorse.

[Issue X] Because only one valid aggravating factor (prior conviction of a felony involving the use or threat of violence) exists in this case, and because there were substantial mitigating circumstances (including appellant's deprived childhood and family background, and the fact that he has suffered from organic brain damage from a very early age), the death penalty is disproportionate. See Kramer v. State, ___So. 2d___ (Fla. 1993) [18 FLW S 266]; DeAngelo v. State, ___So. 2d___ (Fla. 1993) [18 FLW S 236]; Songer v. State, 544 So. 2d 1010 (Fla. 1989).

ARGUMENT

ISSUE I

FLORIDA'S "FELONY MURDER" AGGRAVATING CIRCUMSTANCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE IT MERELY REPEATS AN ELEMENT OF FIRST DEGREE MURDER, AND BECAUSE IT DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

Prior to the resentencing proceeding, appellant moved to declare the "felony murder" aggravating circumstance enumerated in Fla. Stat. § 921.141(5)(d) invalid, on the ground that it does not meet the constitutional requirement of narrowing the class of persons eligible for the death penalty, and that it in fact has the opposite effect by creating a presumption that death is the appropriate sentence in cases of felony murder (R722-29). The trial court denied the motion (R613,729).[6] The prosecutor argued this aggravating circumstance to the jurors in urging them to return a death recommendation (R546-50), and the trial judge instructed them that they could consider as an aggravating factor that the crime was committed while appellant was engaged in the commission of a sexual battery (R586). The jury recommended the death penalty by a vote of 8 - 4 (R599,799). The trial judge, in her order sentencing appellant to death, found as an aggravating circumstance that the capital felony occurred during the commission of a sexual

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[6] Defense counsel renewed his pre-trial motions just before closing arguments, and the trial judge adhered to her prior rulings (R537,539).

battery, noting that "[t]he Defendant was convicted by the previous jury on May 12, 1989, of sexual battery with great force, Hillsborough County, Florida, Case No. 88-15525, affirmed in Taylor v. State, 583 So. 2d 323 (Fla. 1991) (R649,813).[7]

By considering, and allowing the jury to consider, as an aggravating circumstance weighing in favor of a death sentence a factor which merely repeats an element of first degree murder, and which in no way narrows the class of persons eligible for the death penalty, the trial judge impermissibly skewed her own -- and the jury's -- weighing process, and in effect put a thumb on death's side of the scale. See Stringer v. Black, 503 U.S. ___, 112 S. Ct. ___, 117 L. Ed. 2d 367, 379 (1992). In a case like this one, where a mere two votes made the difference between a death recommendation and one of life imprisonment, that thumb may well have determined the outcome.

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[7] The jury in the 1989 trial found appellant guilty of first degree murder (upon a general verdict) and sexual battery (OR663, 1173). The jury had been instructed both on felony murder and premeditated murder as alternative methods of proof. Since the jury convicted appellant of sexual battery, it is a fair assumption that it also found that the killing occurred in the commission of a sexual battery, and therefore he was guilty of felony murder. Whether the jury also found that the killing was premeditated, or whether the jury found that premeditation was not proven, cannot be determined from their verdict. [This Court's opinion in Taylor v. State, 583 So. 2d at 329, holds only that the evidence of premeditation (like the evidence of nonconsensual sexual intercourse) was legally sufficient to submit the question to the jury. Therefore, while the jurors may have found that the killing was premeditated, it is at least as likely that they rejected the theory of premeditation, and instead based their verdict on the finding that the killing occurred during the commission of a sexual battery].

While this Court has previously rejected constitutional challenges to the felony murder aggravating circumstance,[8] several more recent decisions of the U.S. Supreme Court and this Court compel reexamination of the issue, and strongly suggest the opposite result. These decisions include Stringer v. Black, supra [distinguishing Lowenfield v. Phelps, 484 U.S. 231 (1988)]; Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. ____, 120 L. Ed. 2d 854 (1992); Arave v. Creech, ___ U.S. ___ (1993)(Case No. 91-1160, decided March 30, 1993)(52 Cr.L. 2373, 2376); and Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). Moreover, the U.S. Supreme Court has granted certiorari in Tennessee v. Middlebrooks (case no. 92-989) (53 CrL 3013), which concerns the constitutionality of Tennessee's felony murder aggravating circumstance, and which may resolve the question of whether the holding in Lowenfield v. Phelps, supra (that Louisiana's use of a felony murder aggravator in the penalty phase does not violate the Eighth Amendment, because the narrowing function under that state's capital sentencing scheme is performed in the guilt phase) has any applicability in a state like Tennessee (or Florida) where the narrowing function is performed in the penalty phase.[9] The Supreme Courts of three states (North Carolina

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[8] See e.g. Menendez v. State, 419 So. 2d 312, 314-15 (Fla. 1982); Clark v. State, 443 So. 2d 973, 978 (Fla. 1983); Mills v. State, 476 So. 2d 172, 178 (Fla. 1985). See also Stewart v. State, 588 So. 2d 972, 973 (Fla. 1991) (rejecting argument without discussion based on earlier cases; citing Menendez).

[9] The U.S. Supreme Court declined to decide this question in Lockhart v. Fretwell, 506 U.S. ___, 113 S. Ct. ____, 122 L. Ed. 2d 180, 190 n.4 (1993) because the respondent had failed to present in his opposition to the petition for certiorari his claim that (continued...)

prior to Lowenfield; Wyoming and Tennessee post-Lowenfield) have ruled similar "felony murder" aggravating circumstances unconstitutional. State v. Cherry, 257 S.E. 2d 551 (N.C. 1979); cert. den. 446 U.S. 941 (1980); Engberg v. Meyer, 820 P. 2d 70 (Wyo. 1991); State v. Middlebrooks, 840 S.W. 2d 317 (Tenn. 1992), cert. granted ___U.S.___ (53 CrL 3013)(1993). This Court should do the same.

To avoid arbitrary and capricious punishment, an 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, 867 (1983); Lewis v. Jeffers, 497 U.S. 764, 776 (1990); Arave v. Creech, ___U.S.___ (1993) (52 CrL 2373, 2376); Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). As the U.S. Supreme Court recently explained in Arave v. Creech:

> When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so.

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[9](...continued)
Collins v. Lockhart, 754 F. 2d 258 (8th Cir. 1985), cert.den., 474 U.S. 1013 (1985) was still good law notwithstanding Lowenfield. [Collins had held that Arkansas' use of an aggravating factor which merely duplicates an element of the crime violates the Eighth Amendment]. The questions involving the non-applicability of Lowenfield to states whose capital sentencing schemes in no way resemble Louisiana's may be answered in Middlebrooks. See also Stringer v. Black, supra, 117 L. Ed. 2d at 380-81, emphasizing the critical differences, for purposes of Eighth Amendment analysis, between capital sentencing schemes (such as Louisiana and Texas) which define capital murder through statutory criteria which the jury must decide in the guilt phase, and those (such as Mississippi and Florida) where the constitutionally required narrowing occurs in the penalty phase.

> [Citations omitted]. If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.

52 CrL at 2376 (emphasis in opinion).

This principle has been recognized by this Court in adapting its narrowing construction of the "cold, calculated, and premeditated" aggravating factor. In Herring v. State, 446 S. 2d 1049, 1057 (Fla. 1984), this Court upheld a finding of CCP based solely on the fact that a second gunshot was fired after the store clerk had fallen to the floor. Justice Ehrlich, dissenting in part, observed that the "very significant distinction" between the simple premeditation needed for a conviction and the heightened premeditation necessary to establish the aggravating circumstance was being gradually eroded; and warned that "[l]oss of that distinction would bring into question the constitutionality of that aggravating factor, and, perhaps, the constitutionality, as applied, of Florida's death penalty statute." 446 So. 2d at 1058 (Emphasis in opinion). Subsequently, in Rogers v. State, 511 So. 2d 526, 533 (Fla. 1982), this Court receded from its holding in Herring, and defined "calculation" as "a careful plan or prearranged design." The Court has specifically recognized that the phrase "heightened premeditation" was adopted "to distinguish [the CCP] aggravating circumstance from the premeditation element of first-degree murder." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990); Thompson v. State, 565 So. 2d 1311, 1317 (Fla. 1990). As further explained in Porter, at 1063-64:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of person 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, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983) (footnote omitted). Since premeditation already is present in 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. Therefore, section 921.141(5)(i) must apply to murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder. [Footnotes omitted].

The same logic demonstrates the constitutional invalidity of the "felony murder" aggravating factor. The factor applies to every Florida defendant found guilty of murder during the commission, attempt to commit, or flight after any robbery, sexual battery, arson, burglary, kidnapping, aircraft piracy, or bombing.[10] No additional evidence -- and no "heightened" level of culpability -- is required to establish the aggravating factor, beyond that which is necessary to sustain the underlying conviction. Thus, the aggravator neither narrows the class of persons eligible for the death penalty, nor does it reasonably justify the imposition of a more severe sentence on the defendant compared to others found

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[10] There are three offenses (none of which was enumerated in the first degree felony murder statute at the time the current death penalty statute was originally adopted) which are now included in the list of felonies upon which a first degree felony murder conviction can be based (Fla. Stat. § 782,04(1)(a)(2), but which are not included in the definition of the aggravating factor in § 921.141(5)(d). These are escape (which is covered by the (5)(e) aggravating factor), drug trafficking (addressed in a separate death penalty statute, § 921.142) and aggravated child abuse.

guilty of first degree murder. See Zant v. Stephens; Lewis v. Jeffers; Arave v. Creech; Porter v. State, supra. Since, under Florida law, aggravating factors serve to "define those capital felonies which the legislature finds deserving of the death penalty" [Vaught v. State, 410 So. 2d 147, 149 (Fla. 1982)], -- and since aggravating factors (along with mitigating factors) also play a crucial role in the weighing process, by guiding the sentencer's [11] discretion to determine what factual situations require the imposition of death and which can be satisfied by life imprisonment (see e.g. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973); Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977) -- the felony murder aggravating circumstance which merely repeats an element of first degree murder does not provide a principled basis for distinguishing those who deserve capital punishment from those who do not. Arave v. Creech, 52 CrL 2376. See also Stringer v. Black, supra, 117 L. Ed. 2d at 381, characterizing as so evident as to require no discussion that, as a matter of federal constitutional law, "[i]f a State uses aggravating factors in deciding who shall be eligible for the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." Therefore, consideration by the

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[11] Under Florida's hybrid capital sentencing scheme, the jury and the judge are co-sentencers. Johnson v. Singletary, 612 So. 2d 575, (Fla. 1993); see Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. ___, 120 L. Ed. 2d 845 (1992). "If the jury's recommendation, upon which the trial 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, 659 (Fla. 1987). See Espinosa, 120 L. Ed. 2d at 859 (. . . "[I]f a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances").

jury and the judge of the felony murder aggravating factor in their weighing process accomplishes nothing but to place a heavy thumb on death's side of the scale. See Stringer v. Black, 117 L. Ed. 2d at 379.

Black's Law Dictionary defines aggravation as "[a]ny circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself." See Engberg v. Meyer, 820 P. 2d 70, 90 (Wyo. 1991). Even under this elementary definition, the felony murder aggravating factor fails to perform any narrowing function; it merely recycles an element of the underlying offense.

Lowenfield v. Phelps, 484 U.S. 231 (1988) does not save the felony murder aggravator, in the context of the Florida capital sentencing scheme. Lowenfield held only that, under the very different capital punishment scheme employed in Louisiana, the state's use in the penalty phase of a felony murder aggravating factor did not violate the Eighth Amendment. However, as the U.S. Supreme Court made very clear in Stringer v. Black, 117 L. Ed. 2d at 378-83, there are significant differences, for purposes of Eighth Amendment analysis, between the procedures used in such states as Louisiana and Texas, as opposed to those used in such states as Florida and Mississippi. The rationale of Lowenfield, "arising under Louisiana law", was held inapplicable to the Mississippi scheme (and, by extension, to the Florida scheme, since the

Court noted that Mississippi's system operates in the same manner as Florida's). 117 L. Ed. 2d at 380-81.

Louisiana is a "non-weighing" state where the constitutionally required narrowing occurs primarily in the guilt phase of the trial. Lowenfield, 484 U.S. at 241-46. In that state, intentional murder and felony murder are defined as second-degree murder, which is punishable by life imprisonment. Lowenfield, 484 U.S. 241. As explained in Stringer, 117 L. Ed. 2d at 380:

> In Louisiana, a person is not eligible for the death penalty unless found guilty of first-degree homicide, a category more narrow than the general category of homicide. [Lowenfield] 484 US at 241, 98 L Ed 2d 568, 108 S Ct 546. A defendant is guilty of first-degree homicide if the Louisiana jury finds that the killing fits one of five statutory criteria. See id., at 242, 98 L Ed 2d 568, 108 S Ct 546 (quoting La Rev Stat Ann § 14:30A (West 1986)). After determining that a defendant is guilty of first-degree murder, a Louisiana jury next must decide whether there is at least one statutory aggravating circumstance and, after considering any mitigating circumstances, determine whether the death penalty is appropriate. 484 US, at 242, 98 L Ed 2d 568, 108 S Ct 546. Unlike the Mississippi process, in Louisiana the jury is not required to weigh aggravating against mitigating factors.

In contrast, "Florida, like Mississippi, is a weighing State [citation omitted], and the trial judge imposes the sentence based on the recommendation of the jury." Stringer, 117 L. Ed. 2d at 379. The Florida co-sentencers -- jury and judge -- must consider and weigh (and not merely count) all aggravating and mitigating circumstances, in order to arrive at a reasoned judgment as to what factual situations require the imposition of death, and which can

be satisfied by life imprisonment. State v. Dixon, 283 So. 2d 1, 10 (Fla 1973); see e.g. Floyd v. State, 497 So. 2d 1211, 1215 (Fla. 1986); Riley v. Wainwright, 517 So. 2d 656, 658 (Fla. 1987). As this Court stated in Dixon, 283 So. 2d at 8, the jury:

> . . . must hear the new evidence presented at the post-conviction hearing and make a recommendation as to penalty, that is, life or death. With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them -- facts in addition to those necessary to prove the commission of the crime -- whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty.

Moreover, under Florida law, premeditated murder and felony murder are defined as first degree murder, punishable by death or life imprisonment. There is no separate crime of capital murder; and no statutory criteria to determine death eligibility are addressed in the guilt phase. Instead, the list of aggravating factors set forth in § 921.141(5) are intended both to define those capital felonies which the legislature finds deserving of the death penalty [Vaught], and to channel the co-sentencers' discretion via the process of weighing the aggravators against the mitigators. The narrowing process in Florida occurs solely in the penalty phase.

The Lowenfield decision turned on this distinction:

> It seems clear to us . . . that the narrowing function required for a regime of capital

> punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase . . .
>
> Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

484 U.S. at 246.

Since, in Florida, no narrowing occurs in the guilt phase of the trial and since -- unlike Louisiana -- the Florida jury and judge are required to weigh the aggravating factors against the mitigating factors, the rationale of Lowenfield is by its own terms inapplicable. See Stringer v. Black, supra. Under Florida's capital punishment scheme, allowing the co-sentencers to consider and weigh an aggravating factor which merely repeats an element of the crime itself, and which does not genuinely narrow the class of persons eligible for the death penalty, violates the Eighth Amendment and renders appellant's death sentence constitutionally

infirm. See Zant v. Stephens; Arave v. Creech; Porter v. State; see also State v. Cherry; Engberg v. Meyer; State v. Middlebrooks.

When a weighing state places capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh an invalid aggravating factor. Espinosa v. Florida, 120 L. Ed. 2d at 850. See Stringer v. Black, 117 L. Ed. 2d at 379 ("[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale") Because the jury was instructed on an invalid aggravating factor on a theory flawed in law, it must be presumed that this factor was weighed by the jury in reaching its 8-4 death recommendation. See Sochor v. Florida, 504 U.S. ___, 112 S. Ct. ___, 119 L. Ed. 2d 326, 340 (1992); Espinosa v. Florida, supra, 120 L. Ed. 2d at 859. This presumption is buttressed by the fact that the prosecutor strongly argued the felony murder aggravator to the jurors in urging them to vote for death (R546-50). Further, it must be presumed that the trial judge followed Florida law and gave great weight to the resultant death recommendation [see Grossman v. State, 525 So. 2d 833, 839 n. 1 (Fla. 1988)], thereby indirectly weighing the invalid factor. Espinosa, 120 L. Ed. 2d at 859. See also Riley v. Wainwright, supra, 517 So. 2d at 659 ("If 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"). Finally, the trial

judge also directly weighed the invalid aggravator in her order sentencing appellant to death (R649, 813).

Appellant preserved this issue below by unsuccessfully moving the trial court to declare the felony murder aggravating circumstance unconstitutional (R722-29,613). See Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla 1983)(Facial validity of a criminal statute, including an assertion that the statute is infirm because of overbreadth, "can be raised for the first time on appeal even though prudence dictates that it be presented at the trial court level to assure that it will not be considered waived"; while constitutionality of a statute as applied to a particular set of facts must be raised at the trial level). The motion was more than sufficient to apprise the trial judge of the constitutional error and to allow intelligent review on appeal. Castor v. State, 365 So. 2d 701, 703 (Fla. 1978). In view of the facts that (1) a switch of only two votes would have resulted in a jury life recommendation; (2) the trial court found appellant's deprived childhood and separation from his family, and the abuse and mental stress he suffered while in foster care, as a mitigating factor deserving of some weight; and (3) there were several other mitigating factors, including the unrebutted opinion of Dr. Berland that appellant suffers from organic brain damage, to which the jury could reasonably have given significant weight, the state cannot meet its "harmless error" burden of showing beyond a reasonable doubt that the consideration by each of the co-sentencers of the invalid aggravating factor did not contribute to the jury's

recommendation, and had no direct or indirect effect on the sentence imposed by the court. See Sochor; Espinosa; Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Appellant's death sentence must be reversed for a new penalty trial before a newly impaneled jury.

ISSUE II

THE PROVISION OF FLORIDA'S DEATH PENALTY STATUTE WHICH ALLOWS A DEATH RECOMMENDATION TO BE RETURNED BY A BARE MAJORITY VOTE OF THE JURORS VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Under Florida's capital sentencing scheme, the penalty phase jury is a co-sentencer. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); see Espinosa v. Florida, 505 U.S. ___, 112 S.Ct.___, 100 L. Ed. 2d 854, 859 (1992). 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 and 659 (Fla. 1987). The jury's recommendation, whether it be for death or life imprisonment, must be given great weight. Grossman v. State, 525 So. 2d 833, 839 n.1 and 845 (Fla. 1988). A Florida penalty phase is comparable to a trial for double jeopardy purposes, and when the jury reasonably chooses not to recommend a death sentence, it amounts to an acquittal of the death penalty within the meaning of the state's double jeopardy clause. Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991). In the overwhelming majority of capital trials in this state, the jury's recommendation determines the sentence which is ultimately imposed. See Sochor v. Florida, 504 U.S. ___, 112 S. Ct. ___, 119 L. Ed. 2d 326, 349 (1992) (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part).

Therefore, while a state may constitutionally be permitted to place capital sentencing authority in the trial judge alone, Spaziano v. Florida, 468 U.S. 447 (1984), decisions subsequent to Spaziano make it clear that Florida has not done so. Johnson v. Singletary; Wright; Grossman; Riley; Espinosa. Although no state is constitutionally compelled by the Sixth Amendment or otherwise to provide a jury as part of its capital sentencing procedure [Morgan v. Illinois, 504 U.S. ___, 112 ___ S.Ct. ___, 119 L. Ed. 2d 492, 500 (1992) (citing Spaziano)], when a state chooses to provide a penalty jury, it cannot dispense with the constitutional protections applicable to jury proceedings. See Morgan v. Illinois, supra. To the extent that Florida's death penalty scheme allows a death recommendation, which has a crucial and often dispositive impact on the resulting death sentence, to be returned by a bare majority vote of the jury, it violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[12]

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[12] Appellant moved below to declare Fla. Stat. § 921.141 unconstitutional because a death recommendation can be returned by a bare majority of the jurors (R700-02). He also moved to declare the statute unconstitutional for failure to provide the jury adequate guidance in the finding of aggravating and mitigating circumstances (R703-16), contending inter alia that its failure to require either unanimous agreement or even "substantial majority" agreement of the jurors in order to return a death recommendation (or even to find an aggravating circumstance) rendered it constitutionally invalid (R713-16). The trial judge denied these motions (R613-14), and the jury ultimately recommended death by a vote of 8-4 (R599,799). Therefore, this issue is fully preserved for review.

Not only does the Florida procedure fail to require jury unanimity, or even substantial majority agreement,[13] to return a death recommendation; it also fails to require unanimous or even substantial majority agreement as to whether a particular aggravating circumstance has been proven beyond a reasonable doubt, or even as to whether any aggravating circumstance has been proven beyond a reasonable doubt. The United States Supreme Court has repeatedly recognized that the Eighth and Fourteenth Amendments require a heightened degree of reliability when a death sentence is imposed. Lockett v. Ohio, 438 U.S. 586, 604 (1978); Zant v. Stephens, 462 U.S. 862, 884-85 (1983); Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); Sumner v. Shuman, 483 U.S. 66, 72 (1987). Florida's capital sentencing scheme, by permitting bare majority death recommendations, works in the opposite direction. The importance of jury unanimity as a safeguard of reliability was recognized by the Supreme Court of Connecticut in State v. Daniels, 542 A. 2d 306, 314-15 (Conn. 1988), which held that jury verdicts in the penalty phase of a capital case must comport with the guidelines that govern the validity of jury verdicts generally, including the requirement of unanimity. Rejecting the state's argument to the contrary, the court wrote:

> Two principal reasons compel us to disagree with the state. We first are persuaded that the functions performed by guilt and penalty phase juries are sufficiently similar so as to

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[13] Regarding the distinction between "substantial majority" and "bare majority" verdicts, see Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972), and Justice Blackmun's concurring opinion in those cases, discussed infra.

warrant the application of the unanimous verdict rule to the latter. Each jury receives evidence at an adversarial hearing where the chief engine of truth-seeking, the power to cross-examine witnesses, is fully present. At the close of the evidence, each jury is instructed on the law by the court. Finally, in returning a verdict, each jury has the power to "acquit": in the guilt phase, of criminal liability, and in the penalty phase, of the death sentence.[14]

Second, 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. A Spinelli, Connecticut Criminal Procedure (1985) pp. 690-92. The "heightened reliability demanded by the Eighth Amendment in the determination of whether the death penalty is appropriate"; Sumner v. Shuman, ___ U.S. ___, 107 S.Ct. 2716,2720, 97 L.Ed.2d 56 (1987); convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-1970's, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. Beck v. Alabama, 447 U.s. 625, 237-39, 100 S.Ct. 2882, 2388-90, 65 L.Ed.2d 392 (1980); Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978); Gardner v. Florida, 430 U.S. 349, 359-60, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977); Woodson v. North Carolina, supra, 428 U.S. at 306-306, 96 S.Ct. at 2990-91. 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 assist the capital sentencing jury in reaching such a reasoned decision.

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[14] In Wright v. State, supra, 586 So. 2d at 1032, this Court held that a Florida penalty phase is comparable to a trial for double jeopardy purposes, and a jury life recommendation [unless "unreasonable" under the standard of Tedder v. State, 322 So. 2d 908 (Fla. 1975)] operates as an "acquittal" of the death penalty.

See also People v. Durre, 690 P.2d 165, 172-73 (Colo. 1984) (requirement of jury unanimity in capital sentencing proceedings enhances the certainty of the verdict and the reliability of the deliberative process underlying the verdict; because the penalty of death is unique in its severity and irrevocability, the need for reliability in a capital sentencing proceeding takes on added significance).

Appellant recognizes that this Court has previously rejected arguments challenging the imposition of death sentences based on bare majority jury recommendations. See Alvord v. State, 322 So. 2d 533, 536 (Fla. 1975); James v. State, 453 So. 2d 786, 792 (Fla. 1984); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990); Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990). It is appellant's position (1) that these cases were wrongly decided as a matter of federal constitutional law, and should be overruled, and (2) that the issue of whether the Sixth, Eighth, and Fourteenth Amendments require jury unanimity (or at least a substantial majority agreement) in this state's death penalty proceedings is ripe for re-evaluation now that it has become clear that a Florida penalty jury's role is not "merely advisory"; instead, it is a co-sentencer, an integral and often determinative component of the death sentencing process. Johnson v. Singletary; Wright; Espinosa, 120 L. Ed. 2d at 859; Sochor v. Florida, supra, 119 L. Ed. 2d at 336-41 (opinion of court) and 348-49 (opinion of Justices Stevens and Blackmun, concurring and dissenting).

A brief review of the U.S. Supreme Court cases on the subject of jury unanimity is in order. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court (in holding that the Fourteenth Amendment guarantees a state criminal defendant the right to a jury trial in any case which, if tried in a federal court, would require a jury trial under the Sixth Amendment) observed that the penalty authorized for a particular crime may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. 391 U.S. at 159. The Court noted that only two states, Oregon and Louisiana, permitted a less-than-unanimous jury to convict for an offense with a maximum penalty greater than one year. 391 U.S. at 158 n.30.

In Williams v. Florida, 399 U.S. 78 (1970), the Supreme Court held that a state statute providing for a jury of fewer than twelve persons in non-capital cases is not violative of the Sixth and Fourteenth Amendments. The Court noted that no state provided for fewer than twelve jurors in capital cases - "a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." 399 U.S. at 103.

The Supreme Court next decided the companion cases of Johnson v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972). In Johnson, the Court concluded that a Louisiana statute which allowed a less-than-unanimous verdict (9-3) in non-capital cases [406 U.S. at 357, n.1] did not violate the due process clause for failure to satisfy the reasonable doubt standard.

Justice White, writing for the Court, noted that the Louisiana statute required that nine jurors -- "a substantial majority of the jury" -- be convinced by the evidence. 406 U.S. at 362. In Apodaca, the Court decided that an Oregon statute allowing a less-than-unanimous verdict (10-2) in non-capital cases [406 U.S. at 406, n.1] did not violate the right to jury trial secured by the Sixth and Fourteenth Amendments. Johnson and Apodaca were 5-4 decisions. Justices Blackmun and Powell were the swing votes, and each wrote concurring opinions emphasizing the narrow scope of the Court's holdings. Justice Blackmun wrote:

> 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.

406 U.S. at 366.

Similarly, Justice Powell recognized that the Court's approval of the Oregon statute permitting 10-2 verdicts in non-capital cases "does not compel acceptance of all other majority-verdict alternatives. Due process and its mandate of basic fairness often require the drawing of difficult lines." 406 U.S. at 377, n.21.

Some of those lines were drawn in Ballew v. Georgia, 435 U.S. 223 (1978) and Burch v. Louisiana, 441 U.S. 130 (1979). In Ballew, the Supreme Court held that conviction of a non-petty offense by a five-person jury, impaneled pursuant to Georgia statute, violated the defendant's right to jury trial guaranteed by the Sixth and Fourteenth Amendments. In Burch, the Court determined that convic-

tion of a non-petty offense by a non-unanimous six-person jury, as authorized by Louisiana law, abridged the defendant's federal constitutional rights. The Burch Court wrote:

> We are buttressed in this view by the current jury practices of the several States. It appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two [Louisiana and Oklahoma] also allow nonunanimous verdicts [footnote omitted]. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.

441 U.S. at 138.

Of the states which provide for a jury as an integral part of their capital sentencing procedures, only two -- Florida and Delaware -- allow the life or death decision to be made by a bare majority vote.[15] [Until November, 1991, Florida was the only such state. Delaware's new death penalty law, 11 Del. C. § 4209, was expressly patterned after Florida's. State v. Cohen, 604 A. 2d 846, 849 (Del. 1992)].

Interestingly, in Flanning v. State, 597 So. 2d 864, 868 (Fla. 3d DCA 1990), rev. den. 605 So. 2d 1266 (Fla. 1992) (holding that

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[15] One state, Alabama, allows the jury to return a life recommendation by a majority vote, but a decision to recommend death must be based on a vote of at least ten jurors. Ala. Stat. § 13A-5-46(f). Since a death recommendation requires a substantial majority, Alabama's provision arguably comports with the U.S. Supreme Court's decisions. However, the Louisiana and Oregon statutes allowing less-than-unanimous (9-3 and 10-2) jury verdicts, which narrowly passed constitutional muster in Johnson and Apodaca, both specifically excluded capital cases from their scope. The Florida and Delaware procedures, which permit a death verdict to be returned by a bare 7-5 majority, are constitutionally invalid even if the rationale of Johnson and Apodaca were extended to capital cases.

the defendant in a non-capital criminal case may in some circumstances waive his right to a unanimous six person jury verdict and accept a 5-1 majority verdict), the Third District Court of Appeal suggested that a bare majority verdict, even when the defendant purports to accept such a verdict by way of a knowing and intelligent waiver, may be legally invalid:

> [W]e have considerable doubt whether the right to a unanimous jury verdict could be validly waived by a defendant 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 bare 4-2 [or7-5] majority verdict may 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 from 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).

The state may contend that the right to a unanimous jury verdict in a capital case extends only to the guilt phase of the trial. Such an argument would stand the constitutional principle of heightened reliability in capital sentencing on its head. As the Connecticut Supreme Court accurately perceived in State v. Daniels, supra, the functions performed by guilt and penalty phase juries are essentially similar, and -- if anything -- there is a special need for unanimity in capital sentencing. The heightened reliability demanded by the Eighth Amendment convinced the court that "jury unanimity is an especially important safeguard at a capital sentencing hearing." 542 A. 2d at 315. "[T]he requirement

of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict." 542 A. 2d at 315.[16]

Florida's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments because of its failure to require unanimous agreement or even a substantial majority vote of the jurors in order to return a death verdict. It further violates those constitutional guarantees because of its failure to require unanimity or even a substantial majority in order to find that a particular aggravating circumstance exists, or even to find that any aggravating circumstance exists. Under the law of this state, aggravating circumstances substantively define those capital felonies for which the death penalty may be imposed. Vaught v. State, 410 So. 2d 147, 149 (Fla. 1992); State v. Dixon, 283 So. 2d 1,9 (Fla. 1973). See also Zant v. Stephens, 462 U.S. 862, 878 (1982) ("statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition; they circumscribe the class of persons eligible for the death penalty"). An aggravating factor "must be prove beyond a reasonable doubt before being considered by judge or jury." State v. Dixon, 283 So. 2d at 9. See e.g. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983); Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). A death sentence is not legally permissible where the state has not met its

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[16] It has been noted that "unlike the 'historical accident' of jury size, unanimity relates directly [to] the deliberative function of the jury." United States v. Scalzitti, 578 F. 2d 507, 512 (3d Cir. 1978).

burden of proof beyond a reasonable doubt of at least one aggravating factor. Banda v. State, 536 So. 2d 221, 225 (Fla. 1988); Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990). Conversely, "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden" by mitigating circumstances. State v. Dixon, 283 So. 2d at 9; Smith v. State, 407 So. 2d 894, 903 (Fla 1981); White v. State, 446 So. 2d 1031. 1037 (Fla. 1984).[17] Plainly, aggravating circumstances function as essential elements, in the absence of which a death recommendation cannot lawfully be returned, nor a resulting death sentence lawfully be imposed.

However, because neither unanimity nor a substantial majority is required either to bring a death verdict or to find an aggravating circumstance, the Florida procedure allows a death recommendation even if five of the twelve jurors find that no aggravating factors were proved beyond a reasonable doubt; as long as the other seven jurors find one or more aggravators and conclude that these are not outweighed by mitigating circumstances. In fact, the seven jurors voting for death could each find a different aggravating factor (while five jurors found no aggravators at all) and a death

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[17] An exception to this rule exists when the jury recommends life imprisonment. This Court has held that "life imprisonment is the only proper and lawful sentence in a death case when the jury reasonably chooses not to recommend a death sentence." Wright v. State, 586 So. 2d at 1032, citing Tedder v. State, 322 So. 2d 908 (Fla. 1975). Only in the rare case where a jury's life recommendation is demonstrably unreasonable and not based on any significant mitigating factors discernible from the record can the trial judge legally override a jury life recommendation. This further illustrates the critical importance of the jury's penalty verdict under Florida's capital sentencing scheme.

verdict would still be the result, as long as each of the seven determined that his or her aggravator was not outweighed by mitigators. Therefore, a death recommendation is hypothetically possible, under Florida's procedure, even though each aggravating factor submitted might be rejected by eleven out of the twelve jurors.

In Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 494 U.S. 433 (1990), the U. S. Supreme Court was presented with the flip side of the penalty phase unanimity issue. In those cases, the Court held that capital sentencing schemes which precluded[18] (or reasonably could be interpreted by the jury as precluding)[19] consideration of any mitigating factor unless the jury unanimously agreed on its existence violated the Eighth Amendment. With regard to the Maryland procedure, the Court wrote:

> Petitioner's argument is straight-forward, and well illustrated by a hypothetical situation he contends is possible under the Maryland capital-sentencing scheme [footnote omitted]:
>
> > "If eleven jurors agree that there are six mitigating circumstances, the result is that no mitigating circumstance is found. Consequently, there is nothing to weigh against any aggravating circumstance found and the judgment is death even though eleven jurors think the death penalty wholly inappropriate." Brief for Petitioner 11.
>
> The dissent below postulated a situation just [as] intuitively disturbing: All 12 jurors might agree that some mitigating circumstances were present, and even that those mitigating circumstances were significant enough to outweigh any aggravating circumstances found to

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[18] McKoy.

[19] Mills.

> exist. But unless all 12 could agree that the same mitigating circumstance was present, they would never be permitted to engage in the weighing process or any deliberation on the appropriateness of the death penalty. 310 Md, at 79-81, 527 A2d, at 25-26.

Mills v. Maryland, 486 U.S. at 373-74.

The Court stated that it would be "the height of arbitrariness" to permit imposition of the death penalty under such circumstances. 486 U.S. at 374.

In McKoy, the Court rejected North Carolina's contention that requiring unanimity on mitigating circumstances was constitutional so long as the state also required unanimity on aggravating circumstances. Observing that the Maryland scheme which was disapproved in Mills had also required unanimity as to both, the Court emphasized the different functions served by aggravating circumstances and mitigating circumstances. Quoting Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989) and McCleskey v. Kemp, 481 U.S. 279, 304 (1987), the Court said "In contrast to the narrowly defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that cause it to decline to impose the death sentence." 494 U.S. at 443 (emphasis in opinions).

"Consistent treatment" of aggravating circumstances and mitigating circumstances is therefore no guarantee that a capital sentencing scheme is constitutionally sound. See McKoy, 494 U.S. at 443. Aggravating factors, which determine death eligibility and which function as "essential elements" necessary to sustain a death

sentence, are strictly limited to those enumerated by the Legislature,[20] and must be proved beyond a reasonable doubt before they can be considered by the judge or jury.[21] Mitigating factors, on the other hand, are not -- and cannot constitutionally be -- limited to those enumerated in the statute.[22] Any aspect of the defendant's character or the circumstances of the offense may be considered as a mitigating factor.[23] Moreover, mitigating factors need not be proved beyond a reasonable doubt.[24] The constitutional flaw in the Maryland and North Carolina schemes was in the false consistency of requiring unanimity to find mitigating factors as well as aggravating factors. The constitutional flaw in the Florida scheme is in the false consistency of not requiring unanimity (or even a substantial majority) in order to find aggravating factors as well as mitigating factors. The even more egregious defect in the Florida scheme lies in the fact that a verdict recommending death -- a verdict which in all but a few cases determines the ultimate sentence[25] -- can be returned when only seven out of

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[20] Miller v. State, 373 So. 2d 882, 885 (Fla. 1979).

[21] State v. Dixon, 283 So. 2d 1,9 (Fla. 1973).

[22] Lockett v. Ohio, 438 U.S. 586 (1978); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).

[23] Lockett; Riley.

[24] Fla. Std. Jury Instr. (Crim.) at 81; Campbell v. State, 571 So. 2d 656 (Fla. 1987).

[25] The trial judge instructed the jury in the instant case that its recommendation must be given great weight in determining what sentence to impose upon appellant, and "it is only under rare circumstances that the court could impose a different sentence" (continued...)

twelve jurors agree that any aggravating circumstance has been proven.

To recap, the Florida procedure:

> (1) Fails to require unanimous agreement of the jury to return a death recommendation.
>
> (2) Fails to require even a substantial majority vote of the jury to return a death recommendation.
>
> (3) Fails to require unanimous agreement of the jury to find a particular aggravating circumstance.
>
> (4) Fails to require even a substantial majority vote of the jury to find a particular aggravating circumstance.
>
> (5) Fails to require unanimous agreement of the jury that any aggravating circumstance exists. (Note that the existence of a least one aggravating circumstance is a legal prerequisite for a death sentence. Banda).
>
> (6) Fails to require even a substantial majority agreement of the jury that any aggravating circumstance exists.

Johnson v. Louisiana, and Apodaca v. Oregon narrowly approved statutes providing for less-than-unanimous (but more than bare majority) verdicts in non-capital cases. Concurring Justice Powell emphasized that the Court's decisions did not compel acceptance of all other majority-verdict alternatives, and that due process and basis fairness often require the drawing of difficult lines. Concurring Justice Blackmun made the point that while the 9-3 (or 75 percent) substantial majority verdict provided by the Louisiana

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[25](...continued)
(R585). This is a correct statement of Florida law. See Wright; Grossman. See also Johnson v. Singletary; Espinosa.

statute might pass constitutional muster, a 7-5 standard would afford him great difficulty. Burch v. Louisiana recognized that the breadth of acceptance of a particular jury practice provides a useful guide in drawing the lines between those jury practices which are constitutional and those which are not. Only Florida and Delaware (which copied Florida) allow bare majority death recommendations in capital cases.

There is, if anything, under the Eighth Amendment a special need for unanimity in capital sentencing, since it induces a jury to deliberate thoroughly and helps ensure the reliability of the ultimate verdict. State v. Daniels, supra. The State of Florida was not compelled to provide a jury as part of its capital sentencing procedure [Spaziano], but it has chosen to place its capital sentencing authority in two actors rather than one, with the jury as co-sentencer [Johnson v. Singletary; Espinosa]; and to accord the jury's penalty recommendation great (and usually outcome-determinative) weight [Grossman; Wright; see Sochor (Stevens, J., joined by Blackmun, J., concurring and dissenting)]. Because Florida permits such a death verdict to be returned by a bare majority of the jurors, and because it does not require unanimity or even a substantial majority vote in order to (1) recommend death, or (2) find any particular aggravating factor, or (3) find that any aggravating factor exists, this state's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments.

Because appellant unsuccessfully raised this issue below, and because his death sentence was based on an 8-4 jury death recommen-

dation, the sentence cannot constitutionally be carried out. This Court should reverse and remand for imposition of a sentence of life imprisonment.

ISSUE III

THE PROVISION OF FLORIDA'S DEATH PENALTY STATUTE, § 921.141(3), WHICH ALLOWS THE JURY'S SENTENCING RECOMMENDATION TO BE MADE BY MAJORITY VOTE, CONFLICTS WITH FLORIDA RULE OF CRIMINAL PROCEDURE 3.440, WHICH PROVIDES THAT NO VERDICT MAY BE RETURNED UNLESS ALL OF THE JURORS CONCUR IN IT; SINCE THE UNANIMITY REQUIREMENT IS PROCEDURAL, THE RULE CONTROLS AND THE STATUTE IS UNCONSTITUTIONAL TO THE EXTENT OF THE CONFLICT.

A. The Constitutional Principle: Where a Rule and a Statute Conflict Regarding a Matter of Practice and Procedure, the Rule Controls and the Statute is Unconstitutional to the Extent of the Conflict.

The Florida Constitution grants the Supreme Court the exclusive power to regulate matters of practice and procedure in all court of this state. Art. V, § 2(a), Fla. Const.; Haven Federal Savings and Loan Assoc. v. Kirian, 579 So. 2d 730 (Fla. 1991). Matters of substantive law are within the legislature's domain, while matters of procedure are within the domain of the Court. Haven Federal, 579 So. 2d at 732; Johnson v. State, 336 So. 2d 93, 95 (Fla. 1976). "In accordance with this constitutional mandate this Court adopted the Florida Rules of Criminal Procedure which, by express provision, governs the 'procedure of all criminal proceedings in state courts'" State v. Garcia, 229 So. 2d 236, 237 (Fla. 1969); Fla.R.Cr.P. 3.010. [In adopting the revised Rules of Criminal Procedure which became effective February 1, 1973, this Court declared "All conflicting rules and statutes are hereby superseded; statutes not superseded shall remain in effect as rules

promulgated by the Supreme Court." In re Florida Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1972).][26] As was stated in Haven Federal, 579 So. 2d at 732, "Where this Court promulgates rules relating to the practice and procedure of all courts and a statute provides a contrary practice or procedure the statute is unconstitutional to the extent of the conflict." See also State v. Garcia, 229 So. 2d at 238; School Board of Broward County v. Surette, 281 So. 2d 481, 483 (Fla. 1973);[27] Bernhardt v. State, 288 So. 2d 490, 491 (Fla. 1974).

"As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor, while procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished." State v. Garcia, 229 So. 2d at 238; Bernhardt v. State, 288 So. 2d at 497; Smith v. State, 537 So. 2d 982, 985 (Fla. 1989). Practice and procedure concern the method, process, or steps by which litigation is conducted; and has been described as "the machinery of the judicial process as opposed to the product thereof." In re Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring); Bernhardt, 288 So. 2d at 497;

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[26] Similarly, in adopting the Rules of Civil Procedure, which became effective January 1, 1981, the Court stated that all conflicting rules and statutes "are hereby superseded as of their effective date," while any statute not superseded "shall remain in effect as a rule promulgated by the Supreme Court." The Florida Bar, 391 So. 2d 165, 166 (Fla. 1980); see Salvador v. Fennelly, 593 So. 2d 1091, 1093 (Fla. 4th DCA 1992).

[27] School Board v. Surette was receded from on other grounds in School Board of Broward County v. Price, 362 So. 2d 1337 (Fla. 1978). Haven Federal, 579 So. 2d at 732-33.

Benyard v. Wainwright, 322 So. 2d 473, 475 (Fla. 1975); Haven Federal, 579 So. 2d at 732; Military Park Fire Control District No. 4 v. DeMarois, 407 So. 2d 1010 (Fla. 4th DCA 1981). Black's Law Dictionary (5th Ed.) defines these terms as follows:

> **Substantive law**. That part of law which creates, defines, and regulates rights, as opposed to "adjective or remedial law," which prescribes method of enforcing the rights or obtaining redress for their invasion. That which creates duties, rights and obligations, while "procedural or remedial law" prescribes methods of enforcement of rights or obtaining redress. [Citation omitted]. The basic law or rights and duties (contract law, criminal law, tort law, law or wills, etc.) as opposed to procedural law (law of pleading, law of evidence, law of jurisdiction, etc.).
>
> **Procedural law**. That which prescribes method of enforcing rights or obtaining redress for their invasion; machinery for carrying on procedural aspects of civil or criminal action; e.g. Rules of Civil, Criminal, and Appellate Procedure, as adopted by Federal and most state courts. [Citations omitted]. As a general rule, laws which fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are "substantive laws" in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are "procedural laws".

While the legislature is without power to enact or modify rules governing practice and procedure, the state constitution expressly authorizes legislative repeal of such rules by a two-thirds vote of each house. Art. V, § 2(a), Fla. Const.; Johnson v. State, 336 So. 2d at 95. Moreover, it has been held that legislation which addresses procedural matters is not automatically prohibited as an incursion into the rule-making power of the Supreme Court, unless such procedural rules are contrary to those promul-

gated by the Supreme Court. Hayden v. Beese, 596 So. 2d 1207 (Fla. 4th DCA 1992). See Haven Federal, 597 So. 2d at 732; Bernhardt, 288 So. 2d at 496; Garcia, 229 So. 2d at 238; Salvador v. Fennelly, 593 So. 2d 1091, 1093 (Fla. 4th DCA 1992); Williams v. First Union National Bank, 591 So. 2d 1137, 1139 n.1 (Fla. 4th DCA 1992). On the other hand, it is clear that when a statute enacted by the legislature does conflict with a rule of procedure promulgated by the Court regarding a matter of practice and procedure, the rule controls and the statute is unconstitutional to the extent of the conflict. Haven Federal; Bernhardt; Garcia; Hayden v. Beese.

The questions then are: (1) Is the determination of whether jury verdicts must be unanimous or may be non-unanimous a matter of practice and procedure? (2) If so, do the Florida Rules of Criminal Procedure apply to the penalty phase of a capital trial? (3) If so, does the provision of Fla. Stat. § 921.141(3) that the jury's sentencing recommendation may be made by a majority vote conflict with Florida Rule of Criminal Procedure 3.440, which provides that no verdict may be returned unless all of the jurors concur in it? Appellant will show that the answer to all three questions is Yes, and that to the extent of the conflict (i.e., to the extent that it authorizes majority vote penalty verdicts), the death penalty statute violates the Florida Constitution.[28]

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[28] While appellant contended below that the provision of the statute allowing a death recommendation to be made by a bare majority vote of the jurors violated the state and federal constitutions (R700-02), he did not raise this specific ground. However, since appellant's contention in this Point on Appeal is that the statutory provision is constitutionally invalid on its (continued...)

Before addressing the merits, appellant would point out that this issue has never been specifically addressed by this Court. While this Court has summarily rejected broad-based arguments that Section 921.141 as a whole violates Art. V, section 2(a) because it attempts to govern practice and procedure [see e.g. Dobbert v. State, 375 So. 2d 1069, 1071-72 (Fla. 1979); Booker v. State, 397 So. 2d 910, 918 (Fla. 1981); Smith v. State, 407 So. 2d 894, 899 (Fla. 1981); Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1981); Vaught v. State, 410 So. 2d 147, 149 (Fla. 1982); Morgan v. State, 515 So. 2d 6, 11 (Fla. 1982)], these decisions involve challenges to the statute as a whole, or to other provisions of the statute (including the definitions of aggravating circumstances, and the bifurcated nature of the trial. Vaught; Morgan). None of those decisions address the majority vote provision of the death penalty statute; none discuss the unanimity requirement of Rule 3.440; and (while each involves a claim that the statute encroaches upon this Court's rulemaking power), none involves a claim that a provision of the statute actually conflicts with a Rule of Criminal Proce-

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[28](...continued)
face, the issue can properly be considered for the first time on appeal. Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1993). See also State v. Johnson, 616 So. 2d 1 (Fla. 1993) (defendant's constitutional challenge to the 1989 amendments to the habitual felony offender statute, on grounds that it violated the single subject requirement of the State Constitution, went to the facial validity of the statute, and could be raised for the first time on appeal even though not raised before the trial court).

dure. Therefore, this issue appears to be one of first impression.[29]

B. The Question of Whether Jury Verdicts Must be Unanimous or May be Non-Unanimous is a Matter of Practice and Procedure.

Prior to the adoption of the Florida Rules of Criminal Procedure in 1967, the requirement of unanimity in jury verdicts was provided by statute, Fla. Stat. § 919.09. See Dixon v. State, 206 So. 2d 55, 57 (Fla. 4th DCA 1968). This statute was among those related to the conduct of the jury which were repealed by Laws 1970, C 70-339, § 180, after the Rules of Criminal Procedure went into effect.

The revised Florida Rules of Criminal Procedure were adopted by this Court effective February 1, 1973. In re Florida Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1972). Justice Roberts (joined by Justices McCain and Dekle) dissented in part, because he did not approve of Rule 3.440, requiring unanimous jury verdicts. 272 So. 2d at 66. In Justice Roberts' view, juries in misdemeanor

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[29] To the extent that the broad language of Dobbert, Booker, Smith, Jent, Vaught, and Morgan could be taken to preclude all challenges to Florida's death penalty statute based on Art. V, §2(a) of the Florida Constitution, those cases are wrongly (or at least overbroadly) decided, and should be reconsidered in light of the arguments made in this Point on Appeal, and in light of such recent decision bearing on the issue as State v. Ferguson, 556 So. 2d 462 (Fla. 3d DCA 1990), rev.den. 564 So. 2d 1085 (Fla. 1990); Williams v. State, 573 So. 2d 875 (Fla. 4th DCA 1990), quashed in part on other grounds, 595 So. 2d 936 (Fla. 1992); Flanning v. State, 597 So. 2d 864 (Fla. 3d DCA 1992), rev. den. 602 So. 2d 1266 (Fla. 1992); and State v. Cohen, 604 A. 2d 846, 855 (Del. Supr 1992). Each of these decisions is discussed infra.

cases should have been able to reach a verdict with a vote of five out of six jurors. 272 So. 2d at 69.

Florida's post-Furman[30] death penalty statute was enacted in late 1972. A few years later, the U.S. Supreme Court rejected Ernest Dobbert's contention that the new law, as applied to him, violated the Ex Post Facto Clause. The Court held:

> . . . the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.

Dobbert v. Florida, 432 U.S. 282, 293-94 (1977).

Appellant acknowledges that what is "procedural" or "ameliorative" [see Dobbert, 432 U.S. at 294] for purposes of ex post facto analysis may not necessarily be deemed coextensive with what is "procedural" within the meaning of Article V, section 2(a). See Dobbert v. State, 375 So. 2d at 1071; Vaught v. State, 410 So. 2d at 149. However, as appellant will show, the rules relating to jury unanimity or non-unanimity are procedural for both purposes. The Legislature implicitly recognized as much when it repealed § 919.09 after the adoption of the Rules of Criminal Procedure. The requirement of unanimous jury verdicts, or the authorization of less than unanimous verdicts, has nothing to do with the definition of what acts are crimes (or what circumstances warrant imposition of the death penalty), or the quantum of punishment. Rather, it

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[30] Furman v. Georgia, 408 U.S. 238 (1972).

involves the method or process of conducting criminal (including capital) litigation. See Garcia; Bernhardt.

Matters relating to the impanelment and conduct of the jury, and the method of determining its verdict, have consistently been held to be procedural within the meaning of Art. V, § 2(a), in both capital and non-capital cases. In Lee v. State, 294 So. 2d 305 (Fla. 1974), for example, this Court was confronted with the question of what should be done when, due to impossibility or inability, the jury which determined guilt in a capital case was unable to reconvene for the penalty phase. The statute did not then address this circumstance, but the Court held that "[s]ince the question raised is one of the procedure to be used for the imposition of sentence, it is properly within the constitutional authority for determination by this Court . . . "[citing in a footnote Florida Constitution, Art. V, Section 2(a)(1972)]. 294 So. 2d at 308. The Court held that a new jury could be impaneled for the penalty phase.

In State v. Garcia, 229 So. 2d 236 (Fla. 1969), the issue was whether a defendant charged with a capital offense to which he had not pleaded guilty was entitled to waive a jury trial. At the time, Rule 1.260 Cr. P. R. provided that a defendant may, in writing, waive a jury trial with the approval of the court and the consent of the state.[31] The statute then in effect, Fla. Stat. § 912.01 (subsequently repealed by Laws 1970, C 70-339, § 180) provided that "[i]n all cases except where a sentence of death may be

[31] Present Rule 3.260 no longer requires the approval of the trial judge.

imposed trial by jury may be waived by the defendant." (Emphasis in Garcia opinion). This Court, noting that the Florida Constitution requires that the practice and procedure in all courts be governed by rules adopted by the Supreme Court, 229 So. 2d at 237, resolved the conflict by holding:

> The rule, having been adopted pursuant to the constitutional provision, supersedes any legislative enactment governing practice and procedure to the extent that the statute and the rule may be inconsistent.

229 So. 2d at 238.

> The waiver of a jury trial is a procedural matter, and Rule 1.260, Cr.P.R., sets forth the manner in which this is accomplished. The Rule supersedes the Statute and controls in capital cases for, by operation of Rule. 1.010, the rules govern all criminal procedure in state courts.

229 So. 2d at 239 (emphasis in opinion).

The present Florida Rule of Criminal Procedure 3.260 states that "[a] defendant may in writing waive a jury trial with the consent of the State." The defendant (a juvenile tried as an adult) in State v. Ferguson, 556 So. 2d 462 (Fla. 2d DCA 1990), rev. den. 564 So. 2d 1085 (Fla. 1990), was convicted after a jury trial of first degree felony murder and other offenses. The trial judge, agreeing with the defendant that death would not be an appropriate penalty in the case, discharged the jury over the state's objection, and scheduled sentencing for a future date. The state then sought a writ of common law certiorari or a writ of prohibition to compel the trial court to conduct a penalty phase

proceeding before a jury. The Second District Court of Appeal granted the writ, and said:

> Assuming that the language of section 921.141 permits the waiver of a jury for the penalty phase after a jury has been employed for the guilt phase, the statutory language cannot override the procedural right given to the state in Florida Rule of Criminal Procedure 3.260. That rule clearly specifies that the defendant can only waive trial by jury "with the consent of the State." The legislature has no authority to create a conflicting rule of procedure in section 921.141, Florida Statutes (1987). Only the Florida Supreme Court has the power to adopt rules of practice and procedure for Florida's courts. Art. V, § 2(a), Fla. Const.; Markert v. Johnston, 367 So.2d 1003 (Fla. 1978); Military Park Fire Control Tax Dist. v. DeMarois, 407 So.2d 1020 (Fla. 4th DCA 1981); Johnson v. State, 308 So. 2d 127 (Fla. 1st DCA 1975), aff'd, 346 So.2d 66 (Fla. 1977). Rules relating to waiver of jury trial are procedural rather than substantive. State v. Garcia, 229 So.2d 236 (Fla. 1969). Thus, only the supreme court could create a rule overriding rule 3.260. We do not interpret the reference to section 921.141 in Florida Rule of Criminal Procedure 3.780 as a decision by the supreme court to override rule 3.260 during the penalty phase.[32]

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[32] Rule 3.780, adopted in 1977, provides:

> **(a) Evidence.** In all proceedings based on section 921.141, Florida Statutes, the state and defendant will be permitted to present evidence of an aggravating or mitigating nature, consistent with the requirements of the statute. Each side will be permitted to cross-examine the witnesses presented by the other side. The state will present evidence first.
>
> **(b) Rebuttal.** The trial judge shall permit rebuttal testimony.
>
> **(c) Argument.** Both the state and the defendant will be given an equal opportunity
>
> (continued...)

556 So. 2d 464.

The District Court stated that it was not declaring § 921.141 unconstitutional (since the statute does not prohibit the state's involvement in the waiver of a jury), but was simply interpreting it consistent with the procedures required by Rule 3.260.

Similarly, in Williams v. State, 573 So. 2d 875, 876 (Fla. 4th DCA 1990), quashed in part on other grounds, 595 So. 2d 936 (Fla. 1992),[33] the Fourth District Court of Appeal said:

> Florida Rule of Criminal Procedure 3.260 provides that a defendant can, in writing, waive a jury trial. However, the rule unequivocally declares that this waiver requires "the consent of the State." As we will more

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[32](...continued)
for argument, each being allowed one argument. The state will present argument first.

Rule 3.780 deals only with the presentation of evidence and argument, and says nothing whatsoever about jury procedures such as unanimity, non-unanimity, waiver, or anything else. Thus, the District Court in Ferguson was clearly correct in determining that Rule 3.780 does not amount to a wholesale adoption of § 921.141 as a rule of procedure. Vaught v. State, 410 So. 2d at 149, and Morgan v. State, 415 So. 2d at 11, hold correctly that the definitions of aggravating and mitigating circumstances are matters of substantive law, and Morgan goes on to say that "[t]o the extent that section 921.141 pertains to procedural matters such as the bifurcated nature of the trial in capital cases", it has been incorporated by reference in Fla.R.Crim.P. 3.780, promulgated by the Court, and is therefore properly adopted. However, as recognized in Ferguson, Rule 3.780 does not pertain in any way to jury procedures, such as waiver or unanimity, and cannot fairly be read to have overridden the existing Rules of Criminal Procedure on these subjects.

[33] In Williams (unlike Ferguson, where sentencing was deferred), the trial judge actually imposed a sentence of life imprisonment. This Court held in Williams v. State, 595 So. 2d 936 (Fla. 1992) that even though the judge may have erred in allowing the defendant to waive the penalty phase jury over the state's objection, the Double Jeopardy Clause now prohibited any further proceedings in which death could be imposed.

> fully discuss hereafter, such consent was not obtained sub judice and we know of no reason why rule 3.260 should not apply equally to the penalty phase. Indeed, the Second District agrees with us and so held in State v. Ferguson, 556 So.2d 462 (Fla. 2d DCA 1990).

Flanning v. State, 597 So. 2d 864 (Fla. 3d DCA 1992), rev.den. 605 So. 2d 1266 (Fla. 1992), held that a defendant in a non-capital criminal case may, with the consent of the state and if specified requirements are met, waive his right to a unanimous six-person jury verdict and accept a 5-1 majority verdict. The District Court wrote:

> Although Florida's constitutional guarantee of a jury trial [Art. I, §§ 16, 22 Fla.Const.] has never been interpreted to require a unanimous jury verdict, it has long been the legal practice of this state to require such unanimity in all criminal jury trials; Fla.R.Crim.P. 3.440 memorializes this long-standing practice: "[n]o [jury] verdict may be rendered unless all of the trial jurors concur in it." No statute or rule of procedure in Florida has ever expressly abolished this unanimity requirement for any criminal jury trial in this state. See In re Florida Rules of Criminal Procedure, 272 So.2d 65,66-69 (Fla. 1972) (Roberts, J., dissenting). It is therefore settled that "[i]n this state, the verdict of the jury must be unanimous" and that any interference with this right denies the defendant a fair trial. Jones v. State, 92 So.2d 261 (Fla. 1956).

597 So. 2d at 866-67.

Nevertheless, the court held that, as long as the protective criteria of Sanchez v. United States, 782 F.2d 928 (11th Cir. 1986) are satisfied, a defendant may waive his right to a unanimous jury verdict and accept a 5-1 majority verdict. The court expressly distinguished such a "super-majority verdict" from a bare majority

(4-2 or 7-5) verdict, and noted that the latter might not legally constitute the verdict of a jury at all. 597 So. 2d at 868. See Johnson v. Louisiana, supra, 406 So. 2d at 366. (Blackmun, J., concurring).

As mentioned in Issue II, Delaware is the only state other than Florida which allows a death recommendation to be returned by a bare majority vote of the jurors. Delaware's new death penalty statute, 11 Del.C. § 4209, adopted in November 1991, is patterned on the Florida statute. State v. Cohen, 604 A. 2d 846, 849 (Del. Supr. 1992). In Cohen, the defendants and amicus curiae argued that the changes effected by the new law were substantive within the meaning of the Ex Post Facto Clause because, inter alia, it eliminated the requirement of a unanimous jury for the imposition of a death sentence. 604 A. 2d at 855. The Delaware Supreme Court, citing Dobbert v. Florida, supra, disagreed, finding that the elimination of the unanimity requirement, like the other changes brought about by the new law, were purely procedural in nature. 604 A.2d at 853-55.[34]

While ex post facto cases like Cohen and Dobbert do not automatically compel the conclusion that the unanimity requirement is procedural within the meaning of Art. V, § 2(a) of the Florida Constitution [see Vaught], when those decisions are placed side by

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[34] The Delaware Supreme Court stated that it need not decide whether the new law was "ameliorative" (the alternative basis of the Dobbert decision) since "[c]learly a procedural change need not be ameliorative to overcome a challenge under the Ex Post Facto Clause." 604 A. 2d at 854.

side with cases like Garcia, Lee, Ferguson, Williams, and Flanning,[35] it is clear that matters relating to unanimous or less-than-unanimous jury verdicts are procedural for both purposes. For the state to argue that jury unanimity is procedural when that is expedient to defeat an ex post facto challenge, but substantive when that is expedient to defeat a separation of powers challenge, amounts to arguing "Heads I win, tails you lose." The unanimity requirement is set forth in a Rule of Criminal Procedure for a reason. The corresponding statute, § 919.09, was repealed after the Rules were adopted for a reason. The reason is that the subject matter deals not with the definition of what acts are criminal, or what circumstances justify imposition of the death penalty, or with the quantum of punishment; but rather with the method or the process by which the death penalty is imposed. It is therefore a matter of practice and procedure within the meaning of Article V, Section 2(a). Garcia; Bernhardt; Smith.

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[35] See also Griffith v. State, 548 So. 2d 244, 246 (Fla. 3d DCA 1989), approved in part and quashed in part, 561 So. 2d 528 (Fla. 1990), characterizing the right to a jury composed of twelve persons as a "capital procedural safeguard." The twelve person jury was described in Ulloa v. State, 486 So. 2d 1373, 1375 n.4 (Fla. 3d DCA 1986) as a rule designed to provide extra certainty in a capital case (emphasis in opinion). [To the extent that Fla. Stat. § 921.141(3) allows penalty recommendations to be made by a bare majority vote of the jurors (notwithstanding Rule 3.440's requirement that no verdict shall be returned unless all of the jurors concur in it), it could be described as a rule designed to provide less certainty in a capital case. As argued in Issue II, it violates the Eighth and Fourteenth Amendments of the U.S. Constitution for that reason See State v. Daniels, supra].

C. Fla.R.Crim.P. 3.440 (Requiring Unanimous Jury Verdicts) Controls, and Fla.Stat § 921.141(3) (Authorizing Majority Vote Jury Recommendations in the Penalty Phase of Capital Cases) is Unconstitutional to the Extent of the Conflict.

To the extent that § 921.141 allows a death recommendation to be made by a bare majority of the jurors, it is inconsistent with Rule 3.440's requirement that no verdict may be returned unless all of the jurors concur in it.[36] The rule controls and the statute is unconstitutional to the extent of the conflict. Garcia; Bernhardt;

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[36] The state may contend that a jury's penalty recommendation is not a "verdict" within the meaning of Rule 3.440. Such an argument must fail. The Rules of Criminal Procedure govern all criminal procedure in state courts, State v. Garcia, 229 So. 2d. at 239 (emphasis in opinion), and they apply to the penalty phase of capital cases, see Ferguson; Williams. Florida's penalty procedure has been held comparable to a trial for double jeopardy purposes, and a jury's recommendation of life imprisonment (unless held to be unreasonable under the Tedder standard) constitutes an "acquittal" of the death penalty. Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991). A "verdict" is not limited to the question of guilt or innocence. It is defined in Black's Law Dictionary (5th Ed.) as:

> The formal decision or finding made by a jury, impaneled and sworn for the trial of a cause, and reported to the court (and accepted by it), upon the matters or questions duly submitted to them upon the trial. The definitive answer given by the jury to the court concerning the matters of fact committed to the jury for their deliberation and determination.

See also 55 Fla. Jur. 2d at 682 (defining verdict as "the determination of the jury on the evidence submitted").

A Florida jury penalty recommendation is the jury's finding, on the evidence submitted, on whether death or life is the appropriate punishment. The jury's decision is an integral part of the sentencing process [Riley v. Wainwright, supra], and a crucial and often determinative factor in whether the death penalty is actually imposed [see Wright; Grossman; Johnson v. Singletary; Espinosa v. Florida]. It is in every sense of the word a verdict.

Haven Federal. Appellant's death sentence, imposed pursuant to an 8-4 jury death recommendation, cannot constitutionally be carried out. His sentence should be reduced to life imprisonment.

ISSUE IV

THE TRIAL COURT ERRED IN EXCUSING FOR CAUSE A PROSPECTIVE JUROR WHO STATED THAT SHE DID NOT BELIEVE IN THE DEATH PENALTY, BUT THAT SHE PROBABLY COULD FOLLOW THE LAW.

The law is clear that a juror may not be excluded for cause merely because he is personally opposed to the death penalty, whether for religious, philosophical, political, or other reasons. In Gray v. Mississippi, 481 U.S. 648, 658 (1987) the U.S. Supreme Court reaffirmed that "the relevant inquiry is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" This strict standard has been established in such decisions as Adams v. Texas, 448 U.S. 38,45 (1980); Wainwright v. Witt, 469 U.S. 412, 424 (1985); Lara v. State, 464 So. 2d 1173, 1178 (Fla. 1985); and O'Connell v. State, 480 So. 2d 1284, 1286 (Fla. 1986). The constitutional basis of that standard was emphasized in Gray, 481 U.S. at 658-59:

> It is necessary . . . to keep in mind the significance of a capital defendant's right to a fair and impartial jury under the Sixth and Fourteenth Amendments.
>
> Justice Rehnquist, in writing for the Court, recently explained:
>
> > "It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference

to the rule of law."

> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." Wainwright v. Witt, 469 US at 423, 83 L Ed 2d 841, 105 S Ct 844. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law." Witherspoon v. Illinois, 391 US, at 523, 20 L Ed 2d 776, 88 S Ct 1770, 46 Ohio Ops 2d 368.

If prospective jurors are barred from jury service because of their views on capital punishment on any broader basis than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. Adams, U.S. at 48. The burden of demonstrating that a challenged juror will not follow the law in accordance with his oath and the instructions of the court is on the party seeking his exclusion; i.e., the state. Witt, 469 U.S. at 423. The erroneous exclusion of even a single prospective juror under this standard "goes to the very integrity of the legal system", and can never be treated as harmless error. Gray, 481 U.S. at 668 and 659-668; Davis v. Georgia, 429 U.S. 122 (1976); Chandler v. State, 442 So. 2d 171, 174-75 (Fla. 1983).

In the instant case, juror Arnaiz' responses to the trial court's preliminary questions and to the prosecutor's follow-up questions indicated that she did hold beliefs about the death penalty which would prevent or substantially impair her ability to

serve as a juror in a capital case (R19-21,63-64). However, during the prosecutor's questioning she said:

> MR. HANES [prosecutor]: Would it be fair to say that you could not recommend the death penalty under any circumstances?
>
> MS. ARNAIZ: Well, not only that, just the case in all, it's hard to do. I mean, you don't know anything about the case at all.
>
> MR. HANES: And that's why the question has to revolve around your feelings about the death penalty.
>
> MS. ARNAIZ: Well, in my case it's doubtful. I'm being honest.

(R64)

During defense counsel's questioning, however, Ms. Arnaiz indicated that despite her reservations about the death penalty she probably could follow the law:

> MR. LOPEZ [defense counsel]: . . . [W]ould you please tell me what your feelings are concerning capital punishment?
>
> MS. ARNAIZ: I just don't believe in it. I'm sorry.
>
> MR. LOPEZ: You don't believe in it?
>
> MS. ARNAIZ: No.
>
> MR. LOPEZ: Under any circumstances?
>
> MS. ARNAIZ: Well now [you're] getting me in doubt. It's been going around, so I don't know. I don't know.
>
> MR. LOPEZ: Well, let me ask it this way: Do you feel that could you follow the law concerning first degree murder in weighing the aggravating and mitigating circumstances here?
>
> MS. ARNAIZ: I probably could now, yes.
>
> MR. LOPEZ: You think you probably could?

MS. ARNAIZ: I probably could.

MR. LOPEZ: Don't let me put words in your mouth.

MS. ARNAIZ: No. No. I'm not.

(R124-25)

Over defense objection (R139), the trial court granted the state's challenge for cause to Ms. Arnaiz:

> MR. HANES [prosecutor]: I would say at least you could recall that as to what her feelings are that in and of itself are sufficient.
>
> THE COURT: I'm going to grant the motion. She further said she could not impose the death penalty under any circumstances. And then later she said she probably could.

(R139)

The excusal for cause of Ms. Arnaiz, after she ultimately indicated that notwithstanding her personal views about the death penalty she probably could follow the law in weighing the aggravating and mitigating circumstances, was reversible error.

In Sanchez-Velasco v. State, 570 So. 2d 908, 915-16 (Fla. 1990), the trial judge initially asked prospective jurors "Do you have any philosophical, moral, religious or conscientious scruples against the infliction of the death penalty in a proper case?" On appeal this Court rejected Sanchez-Velasco's contention that this question violated his right to an impartial jury. After discussing the Adams-Witt standard, this Court recognized that constitutional error would have occurred if the trial judge had excused jurors

based on an affirmative answer to the above-quoted question alone. However:

> . . . the judge went on to ask each venireperson who responded affirmatively whether he could put his personal convictions aside and vote to recommend the death penalty where the law requires it. The judge disqualified only those venirepersons who indicated unequivocally in the final inquiry that they could not [footnote omitted]. While the initial question was not adequate by itself, it was proper because it was used merely as a screening tool and was followed by extensive inquiry. We emphasize that no venireperson was eliminated who indicated in any way that he or she could follow the law.

Sanchez-Velasco v. State, 570 So. 2d at 915-16.

Similarly, in Johnson v. State, 608 So. 2d 4, 8 (Fla. 1992), prospective jurors Blakely and Daniels raised their hands (in response to the prosecutor's question) to indicate affirmatively that they could not, under any circumstances they could think of, vote to impose a death sentence. The prosecutor asked no follow-up questions, and "[a]lthough defense counsel questioned the entire panel about numerous other subjects, he never asked Blakely and Daniels of their feelings about the death penalty and never tried to rehabilitate them." 608 So. 2d at 8. The trial court granted the state's challenges for cause, and on appeal this Court rejected Johnson's claim of error, noting that "neither Blakely nor Daniels indicated in any way that they could follow the law." 608 So. 2d at 8.

In the instant case, in contrast to Sanchez-Velasco and Johnson, while juror Arnaiz initially responded affirmatively to questions as to whether her beliefs about the death penalty would

prevent or impair her ability to serve as a juror, she also indicated that it was hard to say whether she could recommend the death penalty under any circumstances, when (during voir dire) "you don't know anything about the case at all." If, as in Johnson, defense counsel had failed to clarify Ms. Arnaiz' position on the death penalty or her ability to follow the law, an excusal for cause would not have violated the standard of Adams, Witt, and Gray. However, defense counsel did question Ms. Arnaiz on these critical points, and her ultimate response was that she felt she probably could follow the law in weighing the aggravating and mitigating circumstances. Therefore, her exclusion from the jury violated appellant's Sixth and Fourteenth Amendment rights, and the death sentence in this case cannot constitutionally be carried out. Adams, Gray. [37]

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[37] The state may contend that Ms. Arnaiz's statement that she "probably could" follow the law was insufficiently unequivocal to show her ability to serve impartially. However, since the burden of demonstrating that the challenged juror will not follow the law is on the state [Witt], and since no juror may be excused on any broader basis than that [Adams], it was incumbent on the prosecutor to question Ms. Arnaiz further if he felt that her answer that she probably could follow the law needed clarification. [In Johnson v. State, supra, the ball was in defense counsel's court, but he made no attempt to rehabilitate the jurors. In the instant case, defense counsel did rehabilitate the juror and she said she probably could follow the law. That put the ball back in the prosecutor's court].

ISSUE V

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A NEIL INQUIRY AS TO THE STATE'S PEREMPTORY CHALLENGE OF A BLACK JUROR, BASED ON HER MISAPPREHENSION OF LAW THAT THE PRESENCE OF OTHER BLACKS ON THE PANEL NEGATED A SHOWING OF A LIKELIHOOD OF DISCRIMINATION.

After voir dire, as counsel were exercising their challenges, the following proceedings occurred:

> THE COURT: All right. Now we're through 32, Mr. Williams. Mr. Hanes?
>
> MR. HANES [prosecutor]: Strike Mr. Williams.
>
> MR. LOPEZ [defense counsel]: I would ask for a [Neil] inquiry.
>
> THE COURT: All right. Mr. Williams is black, a black male. We have a black male on the panel?
>
> MR. HANES: Uh-huh.
>
> THE COURT: I don't find that there is a sufficient showing that this is for anything other than that there is a race neutral reason. I don't find a sufficient showing. And for the record we have on the panel right now a black male somewhere back there, Mr. --
>
> MR. HANES: Number 25, Mr. Waymon.
>
> THE COURT: We have a black female, Ms. Mitchell, and we have a black female Ms. Smith.
>
> MR. LOPEZ: I would ask you to require the State to put on the record their reasons for the challenge.
>
> THE COURT: I'll be very frank with you, I don't think that there has been a sufficient showing to require the State to put a reason on the record.

(R147-48)

In State v. Neil, 457 So. 2d 481 (Fla. 1984), this Court recognized that racial discrimination in jury selection violates article I, section 16 of the Florida Constitution. To effectuate the constitutional guarantee, the Court in Neil and subsequent decisions established procedures that were intended to abolish the discriminatory exercise of peremptory challenges. The United States Supreme Court reached a similar conclusion in Batson v. Kentucky, 476 U.S. 79 (1986), holding that use of peremptory challenges to exclude jurors solely on the basis of race violates the Fourteenth Amendment to the U. S. Constitution. ". . . [U]nder Batson, the striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." United States v. Gordon, 817 F. 2d 1538, 1541 (Fla. 1987); see United States v. David, 803 F. 2d 1567, 1571 (11th Cir. 1986); Thompson v. State, 548 So. 2d 198, 202 (Fla. 1989).

Florida law, at the time of this trial, required that, in order to invoke the protection of the procedures outlined in Neil, the complaining party must initially make a prima facie showing of a "strong likelihood" of racial discrimination.[38] State v. Slappy,

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[38] In State v. Johans, 613 So. 2d 1319 (Fla. 1983), this Court eliminated the requirement of showing a "strong likelihood" of discrimination, and noted that the caselaw in this area did not clearly delineate what that means. From the date of Johans (February 18, 1993) forward, a Neil inquiry is required whenever a proper objection is made.

522 So. 2d 18, 21 (Fla. 1988). However, it is not necessary to show that the opposing party is "systematically" excluding minority jurors. Thompson v. State, 548 So. 2d 198, 202 (Fla. 1989); Stubbs v. State, 540 So. 2d 255, 257 (Fla. 2d DCA 1989); Williams v. State, 551 So. 2d 492, 494-96 (Fla. 1st DCA 1989). As this Court observed in Slappy, in determining whether there is a "likelihood" of racial discrimination:

> We know --- that number [of challenged peremptory strikes] alone is not dispositive, nor even that fact that a member of the minority in question has been seated as a juror or alternate. [citations omitted]. Indeed, the issue is not whether several jurors have been excused because of their race, but whether any juror has been so excused, independent of any other.

522 So. 2d at 21 (emphasis in opinion).

Accordingly, the state cannot justify a strike, or avoid a Neil inquiry, merely by pointing out that the panel still contains a black juror, Mack v. State, 545 So. 2d 489, 490 (Fla. 2d DCA 1989), or two black jurors, Williams v. State, 547 So. 2d 179, 180 (Fla. 4th DCA 1989), or that the next juror up is also black, Stubbs v. State, 540 So. 2d at 256-57. See, generally, Thompson v. State, 548 So. 2d at 201-02; Mayes v. State, 550 So. 2d 496 (Fla. 4th DCA 1989).

This Court reaffirmed in Slappy that:

> [T]he spirit and intent of Neil was not to obscure the issue in procedural rules governing the shifting burdens of proof, but to provide broad leeway in allowing parties to make a prima facie showing that a "likelihood" of discrimination exists. Only in this way can we have a full airing of the reasons behind a peremptory strike, which is the

> crucial question. Recognizing, as did Batson, that peremptory challenges permit "those to discriminate who are of a mind to discriminate," 476 U.S. at 96, 106 S.Ct. at 1723, we hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination.

522 So.2d at 21-22.

The principle that any doubt as to whether there is a likelihood of discrimination must be resolved in favor of a Neil inquiry has been repeatedly recognized by this Court and the District Courts of Appeal.[39]

In the instant case, the trial judge, in refusing to conduct a Neil inquiry as to the state's excusal of Mr. Williams, mistakenly focused on the availability of other blacks to serve on the jury. In so doing, she made the same error which led to reversals in Stubbs v. State, 540 So. 2d 255 (Fla. 2d DCA 1989); Williams v. State, 551 So. 2d 492 (Fla. 1st DCA 1989) and Smith v. State, 571 So. 2d 16 (Fla. 2d DCA 1990). In Stubbs, the trial judge refused to conduct a Neil inquiry, stating that there was a black person on the jury and no showing of systematic exclusion. The appellate court disagreed:

> We recognize that a trial judge is best able to determine whether the prosecutor's use of peremptory challenges constitutes a prima facie case of racial discrimination. See

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[39] See, e.g. Tillman v. State, 522 So. 2d 14, 16 (Fla. 1988); Roundtree v. State, 546 So. 2d 1042, 1044 (Fla. 1989); Thompson v. State, 548 So. 2d 198, 200 (Fla. 1989); Wright v. State, 586 So. 2d 115 (Fla. 1st DCA 1988); Mack v. State, 545 So. 2d 489 (Fla. 2d DCA 1989); Norwood v. State, 559 So. 2d 1255 (Fla. 3d DCA 1990); Hill v. State, 547 So. 2d 175 (Fla. 4th DCA 1989).

> Batson, 106 S.Ct. at 1723. Here, however, the trial judge misapprehended the law. She mistakenly believed that no discrimination could be shown, because there was a black man on the jury. Batson, however, recognized that the state is prohibited from exercising a peremptory challenge "to strike any black juror because of his race." Batson, 106 S.Ct. at 1724 n.22. The fact that a black person has been seated as a juror or alternate is not dispositive. Slappy, 522 So.2d at 21.

Similarly, in Williams v. State, 551 So. 2d at 495-96, the District Court of Appeal wrote "[t]he trial court's comments showed obvious concern that the state's exercise of peremptory challenges to excuse black jurors not exhaust the available blacks and result in an all-white jury. Yet the trial court never conducted an inquiry of the prosecutor's reasons for challenging the black jurors, noting only that at least one black remained on the jury panel." These comments -- "suggest[ing] a concern with whether any blacks would be available in the venire to serve on the jury rather than whether any particular juror was improperly excused solely on the basis of race" -- were found contrary to this Court's admonition in Slappy.

As this Court recently reaffirmed in Joiner v. State, ___So.2d___ (Fla. 1993) (case no. 79,567, decided May 13, 1993) [18 FLW S280], "Jurors are not fungible. Each juror has a constitutional right to serve free of discrimination. The striking of a single African-American juror for racial reasons violates the Equal Protection Clause." Accordingly, the Court "decline[d] the State's invitation to rule that as long as an improperly challenged juror

is replaced by a member of the same minority the constitutional infirmity is cured." [40]

The state may contend that there was a valid non-racial reason for striking Mr. Williams, based on his expressed concern about losing income due to absence from work (R83-85,141). However, in the absence of a Neil inquiry below, the state cannot "extract from the record the reasons it now believes justify the use of peremptory strikes. The proper time to do this was during voir dire, not on appeal. The proper tribunal to conduct an inquiry was the trial court, not the appellate court." Stokes v. State, 548 So. 2d 188, 196 (Fla. 1989); see Bryant v. State, 565 So. 2d 1298, 1301 (Fla. 1990); Mack v. State, 545 So. 2d 489 (Fla. 2d DCA 1989); Timmons v. State, 548 So. 2d 255 (Fla. 2d DCA 1989).

The proper remedy in all cases where the trial court errs in failing to hold a Neil inquiry is reversal for a new trial. State v. Johans, 613 So. 2d 1319 (Fla. 1993).

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[40] The Court went on to find that Joiner's attorney abandoned his earlier Neil objection when he affirmatively accepted the jury without renewing it. "It is reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn" 18 FLW at S280. There is no waiver problem in the instant case. Here, after all questioning of prospective jurors was completed, the attorneys exercised their cause and peremptory challenges (R137-49). The prosecutor struck Mr. Williams, and the trial judge denied defense counsel's request for a Neil inquiry, at pages 147-48 of the record. Defense counsel accepted the jury just seconds after telling the judge to note his objection to her ruling on the Neil issue (R148).

ISSUE VI

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE A GRAPHIC AND INFLAMMATORY CLOSE-UP PHOTOGRAPH OF THE VICTIM'S GENITALS, AS THE PROBATIVE VALUE WAS MINIMAL OR NON-EXISTENT, WHILE THE PREJUDICIAL EFFECT WAS EXTREME.

Over defense objection (R209-10,234-36), the trial judge allowed the prosecution to introduce State Exhibit 24 (R883-84); an extremely graphic close-up photograph of the victim's vagina, being opened by a hand in a surgical glove. The claimed relevancy, according to the prosecutor, was to the "heinous, atrocious, or cruel" aggravating factor (R235). The trial judge also noted that the defense was going to present some mitigating evidence concerning the sexual battery (R236). Defense counsel argued that the photograph was gruesome, inflammatory, and unnecessary; and that it was inadmissible under Fla. Stat. § 90.403 because its prejudicial effect outweighed any probative value it might have (R210,235). After being admitted into evidence during the testimony of Detective McNamara, the photograph was used by the prosecutor in his direct examination of the associate medical examiner, Dr. Miller, to illustrate his testimony regarding the injuries on the outside and inside of the victim's vagina (R291-92,310-11). Dr. Miller stated "it's not a very good photograph, as you can see" (R311).

The initial test for the admissibility of photographs is relevancy. Straight v. State, 397 So. 2d 903 (Fla. 1981). Even if relevant, however, photographs should not be admitted when their probative value is outweighed by their prejudicial and inflammatory

effect. See Fla. Stat. § 90.403; Henry v. State, 574 So. 2d 73, 75 (Fla. 1991); Czubak v. State, 570 So. 2d 925, 928-29 (Fla. 1990); Hoffert v. State, 559 So. 2d 1246, 1249 (Fla. 4th DCA 1990); Gomaco Corp. v. Faith, 550 So. 2d 482 (Fla. 2d DCA 1989). Here, Dr. Miller could have testified that the victim had tears on the skin between her vagina and anus, and a number of smaller tears just inside the external opening of the vagina (R292,311), and that these injuries in his opinion could have been caused by a hand or an object but probably not by a penis (R312-14), without such a graphic and inflammatory photograph being provided to the jury. See Hoffert, 559 So. 2d at 1249 ("The medical examiner could have testified that the victim had a bruise on the left side of his head and a hemorrhage to the temporalis muscle without reference to the photograph. The danger of unfair prejudice to appellant far outweighed the probative value of the photograph . . . ").

Whatever marginal relevancy State Exhibit 24 may have had to establish the HAC or felony murder aggravators, it was greatly outweighed by its inherent potential to inflame jurors to vote for the death penalty based on visceral emotions, rather than reasoned judgment. Cf. Garron v. State, 528 So. 2d 353, 359 (Fla. 1988); Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). In view of the narrow 8-4 death recommendation, the state cannot show beyond a reasonable doubt that the admission of this photograph did not contribute to the verdict. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Appellant's death sentence must be reversed for a new penalty proceeding before a newly impaneled jury.

ISSUE VII

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE AS REBUTTAL EVIDENCE THE TESTIMONY OF A JAIL DEPUTY, CONCERNING AN INCIDENT WHICH OCCURRED SUBSEQUENT TO THE PENALTY PROCEEDING BEFORE THE JURY.

At the end of the penalty hearing on May 21, 1992, the jury recommended the death penalty by an 8-4 vote (R599,799). On June 18, the state filed a Notice of Evidence in Rebuttal to Mitigating Circumstance, seeking to present to the trial judge the testimony of Charles Kelly (see R627), a detention deputy at the Hillsborough County Jail West, as rebuttal to the testimony of three jail deputies who had stated that appellant was a model prisoner and had caused no problems in the jail (R800-01). The incident involving Deputy Kelly took place on June 9, 1992, nearly three weeks after the jury was discharged (R801,631). At a proceeding on June 19, the trial judge overruled defense counsel's objection, saying "should I find that mitigating circumstances concerning good conduct while in prison to have been proven by a preponderance of the evidence, then I think this would go to the weight that I would give that mitigating circumstance" (R629). Deputy Kelly then proceeded to testify that on the night of June 9, as he and Deputy Redding were bringing appellant out of his cell to use the telephone, appellant (who was handcuffed in front) charged at Deputy Kelly without provocation and struck him on the arms, causing a cut and bruises (R632-34). Kelly's arms were up, protecting his face and head (R633). He did not see a weapon at the time, but later

what appeared to be a razor blade fashioned from a toothbrush handle or ball point pen handle was recovered from appellant (R633-34).

In her order sentencing appellant to death, the trial judge found that the penalty phase testimony of the three detention deputies regarding appellant's good conduct in jail was rebutted by Deputy Kelly's testimony, and therefore she gave this mitigating circumstance very little weight (R816,653).

Appellant submits that it was error to allow the state to present additional evidence to the trial judge after the penalty phase was concluded and the jury discharged. Fla. Stat. § 921.141 does not contemplate any additional evidentiary proceedings, and appellant did not waive his right to a penalty jury. The statute provides, in pertinent part:

> (1) Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relat-

> ing to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> (2) **Advisory sentence by the jury**.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Nothing in the statute purports to authorize the trial court to hear additional evidence or rebuttal evidence, over objection, after the jury has been discharged.

This conclusion is buttressed by Corbett v. State, 602 So. 2d 1240, 1244 (Fla. 1992) and Craig v. State, ___So. 2d ___ (Fla. 1993) (Case No. 79,209, decided May 13, 1993) [18 FLW S293], in which this Court said:

> We find that a judge who is substituted before the initial trial on the merits is completed and who does not hear the evidence presented during the penalty phase of the trial, must conduct a new sentencing proceeding before a jury to assure that both the judge and jury

hear the same evidence that will be determinative of whether a defendant lives or dies.

Since Florida's death penalty law does not permit the trial judge to consider evidence in addition to that presented to the jury in the evidentiary portion of the penalty phase, and since the error affected the weight which the judge accorded a mitigating circumstance (thereby affecting her weighing of the aggravating against the mitigating circumstances), appellant's death sentence must be reversed for resentencing.

ISSUE VIII

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE INTENT ELEMENT OF THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING FACTOR; AND ALSO ERRED IN FINDING THIS AGGRAVATING FACTOR, AS THE REQUISITE INTENT WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

The trial judge refused to give appellant's requested instruction #14, which would have informed the jury that a crime is unnecessarily torturous, within the meaning of the HAC aggravating factor, "if the defendant meant the victim to suffer deliberate and extraordinary mental or physical pain" (R793,528, see R586,778). The requested instruction was a correct statement of the applicable law, and was not adequately covered by the instructions which were given. While this Court has adopted a narrowing construction of the HAC aggravator in order to prevent its overbroad application which would render it unconstitutional [see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988)], this purpose is frustrated when the jury (a co-sentencer under Florida law)[41] is not informed of the narrower definition. See Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. ___, 112 L. Ed. 2d 1 (1990).

To establish the HAC factor, it is not sufficient to show that the victim in fact suffered great pain [see Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983)]; rather, the state must prove that the defendant intended to torture the victim, or that the crime was meant to be deliberately and extraordinarily painful. See Porter

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[41] Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993).

v. State, 564 So. 2d 1060, 1063 (Fla. 1990); Omelus v. State, 584 So. 2d 563, 566-67 (Fla. 1991); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Robertson v. State, 611 So. 2d 1228, 1233 (Fla. 1993).

An aggravating circumstance may not be weighed in imposing a death sentence unless it is proven beyond a reasonable doubt. State v. Dixon, 283 So. 2d 1,9 (Fla. 1973); Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992). Where the evidence of an aggravating factor is circumstantial, it cannot satisfy the burden of proof unless it is "inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds, supra, at 1163; see Eutzy v. State, 458 So. 2d 755, 757-58 (Fla. 1984); Peavy v. State, 442 So. 2d 200, 202 (Fla. 1983).

The evidence in this case established that the victim was beaten to death, and that she sustained numerous blows and kicks which caused severe internal injuries. Nevertheless, beating deaths do not automatically qualify for the HAC aggravating circumstance. See Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975) (defendant beat victim's skull with 19-inch breaker bar, and then continued beating, bruising, and cutting the victim's body with the metal bar after the first fatal injuries to the brain; trial court's finding of HAC stricken). The only direct evidence of what occurred in the dugout was appellant's testimony that he flew into a blind range, and choked and beat Ms. Birch to death, after she bit him on the penis. While the guilt phase jury's verdict finding appellant guilty of sexual battery indicates that it found that at

some point the sexual activity between appellant and Ms. Birch escalated and became nonconsensual, there was corroborating evidence both in the guilt phase and in the resentencing proceeding that the encounter at least originated consensually, when Ms. Birch approached the group of men and offered sex in exchange for crack cocaine or money (R838-85, OR347-50,424-32). Whether one accepts or rejects appellant's testimony that Ms. Birch bit his penis, the fact remains that there is no other direct evidence of what took place, and the physical and circumstantial evidence introduced by the state is entirely consistent with the reasonable hypothesis that appellant was in a rage when he inflicted the injuries.[42] The evidence strongly indicates that something occurred between appellant and Ms. Birch in the dugout that triggered a rage. A rage is inconsistent with the premeditated intent to kill someone, Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988), and it is equally inconsistent with the deliberate intent to inflict torture. Therefore, had the jury been properly instructed, it might well have found that while the victim may have suffered a great deal of pain, appellant did not act with the intent to inflict extraordinary mental or physical pain. The omitted instruction could easily have made the difference between jurors finding or not finding the HAC factor, which in turn may have made the difference between the 8-4 death verdict and a recommendation of life imprisonment.

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[42] Including the bruise on her forearm which Dr. Miller thought was characteristic of a bite mark. See Mitchell v. State, infra.

The recently adopted standard jury instruction on HAC (which was given in the instant case)[43] reads:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

After the Court approved this instruction in 1990, it referred it back to its Committee on Standard Jury Instructions (Criminal) for further consideration in light of motions for rehearing. The committee, upon reconsideration, recommended a very different instruction; one which would have adequately defined the intent element of the aggravating circumstance:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. To be heinous, atrocious or cruel, the defendant must have deliberately inflicted or consciously chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim, and the victim must have actually, consciously suffered such pain for a substantial period of time before death.

However, the Court denied rehearing on May 29, 1991, declining to follow the committee's revised recommendation.

Recently -- subsequent to the decision in Espinosa v. Florida, supra -- the committee has proposed another instruction similar to

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[43] The trial court added a special instruction that events occurring after death or loss of consciousness should not be considered to establish the HAC factor (R527-28,586,778).

the one quoted above. That recommendation is pending before this Court.

In any event, standard jury instructions are simply a "guideline to be modified and amplified depending upon the facts of each case", and they do not relieve the trial judge of his or her responsibility to charge the jury properly and correctly under the law. Yohn v. State, 476 So. 2d 123, 127 (Fla. 1985); In the Matter of the Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, 598, modified 432 So. 2d 599 (Fla. 1981). The applicable law here was that in order to establish the HAC factor, the state had the burden of proving beyond a reasonable doubt that the crime "was meant to be deliberately and extraordinarily painful." Porter v. State, supra, 564 So. 2d at 1063 (emphasis in opinion). Even assuming arguendo that the language in the standard instruction "'Cruel' means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others" could be considered somewhat equivalent to the intent to cause extraordinary mental or physical pain, this cannot save the standard instruction because it goes only to the definition of "cruel." The aggravating circumstance is framed disjunctively -- "heinous, atrocious, or cruel" -- and the standard instruction allows the jury to find the aggravating factor without proof of the requisite intent merely by finding that the crime was "heinous" or "atrocious." See Shell v. Mississippi, 498 U.S. ___, 111 S. Ct. ___, 112 L. Ed. 2d 1, 4-5 (Justice Marshall, concurring) (where trial court's definitions of "heinous" and "atrocious" were

constitutionally inadequate, it is of no consequence that he defined "cruel" in an arguably more concrete fashion, since the aggravating factor was submitted to jury on alternative theories).

Aggravating circumstances must be proven beyond a reasonable doubt [Dixon; Geralds], and a defendant's intent to cause extraordinary mental or physical pain is an essential element of the HAC aggravating circumstance [Porter; Santos]. When intent is an element of a criminal offense, and a challenged jury instruction has the effect of relieving the state of its burden of proof on the critical question of the defendant's state of mind, such an instruction amounts to constitutional error under the Fourteenth Amendment. Sandstrom v. Montana, 442 U.S. 510, 521 (1979); Francis v. Franklin, 471 U.S. 307, 313 (1985). In the penalty phase of a capital trial, where heightened standards of reliability apply under the Eighth Amendment [see e.g. Lockett v. Ohio, 438 U.S. 586, 604 (1978)], an instruction which relieves the state of it burden of proof of the intent necessary to establish an aggravating factor is equally defective.

In denying appellant's requested instruction, and also in finding the HAC aggravator (R649-50,813-14) when there was no proof beyond a reasonable doubt of the requisite intent, the trial judge reversibly erred. Appellant's death sentence should be reversed for resentencing before a new jury.

ISSUE IX

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE SPECIFIC NONSTATUTORY MITIGATING CIRCUMSTANCES OF A DEPRIVED CHILDHOOD AND FAMILY PROBLEMS, ORGANIC BRAIN DAMAGE, POTENTIAL FOR REHABILITATION, AND REMORSE.

In the charge conference, defense counsel requested the trial court to instruct the jury on specific nonstatutory mitigating circumstances which were supported by evidence presented in the penalty phase, including appellant's deprived childhood and his family problems, his organic brain damage (as testified to by Dr. Berland), his potential for rehabilitation, and his remorse for causing the death of Geraldine Birch (R533-34). The trial judge denied the request, saying "Counsel will just have to argue that those are aspects of the Defendant's character, record or background or any other circumstance of the offense. I'm not going to instruct the jury specifically on those items" (R534).

In giving only the "catchall" instruction on nonstatutory mitigating factors, and refusing appellant's request for specific jury instructions on factors which have been recognized as valid mitigating circumstances by this Court,[44] the trial court erred.

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[44] A defendant's disadvantaged family background, and/or his traumatic childhood or adolescence are valid nonstatutory mitigating factors. Campbell v. State, 571 So. 2d 415, 419 n.4 (Fla. 1990); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); Brown v. State, 526 So. 2d 903, 908 (Fla. 1988). Organic brain damage is a valid nonstatutory mitigator. Carter v. State, 560 So. 2d 1166 (Fla. 1990); DeAngelo v. State, ___ So. 2d ___ (Fla. 1993) (case no. 78,499, decided April 8, 1993) [18 FLW S236]. A defendant's genuine remorse, Campbell; Songer v. State, 544 So. 2d 1010 (Fla. (continued...)

A capital defendant is entitled, both under the United States Constitution and under Florida law, to have the jury fully instructed relative to their consideration of both statutory and nonstatutory mitigating circumstances. See e.g. Hitchcock v. Dugger, 481 U.S. 393 (1987); State v. Johnson, 257 So. 2d 597 (N.C. 1979) (discussing the applicability of the constitutional principle of Lockett v. Ohio, 438 U.S. 586 (1978) to penalty phase jury instructions); Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976); Toole v. State, 479 So. 2d 731, 433-34 (Fla. 1985); Robinson v. State, 487 So. 2d 1040, 1042-43 (Fla. 1986); Floyd v. State, 497 So. 2d 1211, 1215 (Fla. 1986); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).

This Court recognized in Floyd, 497 So. 2d at 1215 and Riley, 517 So. 2d at 658:

> Under our capital sentencing statute, a defendant has the right to an advisory opinion from a jury.... In determining an advisory sentence, the jury must consider and weigh all aggravating and mitigating circumstances.... The jury must be instructed either by the applicable standard jury instructions or by specially formulated instructions, that their role is to make a recommendation based on the circumstances of the offense and the character and background of the defendant.

The Court has also made it clear that "improper, incomplete, or confusing instructions relative to the consideration of both statutory and nonstatutory mitigating evidence does violence to the

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[44](...continued)
1989); Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983), and his potential for rehabilitation, Skipper v. South Carolina, 476 U.S. 1, 7 (1986); Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988), are also valid mitigators.

sentencing scheme and to the jury's fundamental role in that scheme." Riley, 517 So. 2d at 658 (citing Floyd).

The "catchall" instruction is wholly insufficient to guide the jury in its consideration of nonstatutory mitigating circumstances. Essentially it amounts to defining a mitigating factor as "whatever"; and it has a denigrating effect especially when contrasted with the clear and specific instructions on aggravating factors. See State v. Johnson, supra, 257 SE. 2d at 616-17. This is not to say, of course, that the "catchall" instruction should not be given; only that it cannot serve as a substitute for a requested instruction on a specific nonstatutory mitigating circumstance -- especially one which this Court has recognized as valid. A deprived childhood and family background [Campbell, Nibert]; organic brain damage or injury [Carter; DeAngelo]; potential for rehabilitation [Skipper; Cooper]; and remorse [Songer; Pope] are as legitimate and as important for the jury to consider and weigh as a statutory mitigator would be, and there is no reason why the jury should not be fully instructed on the applicable substantive law. See e.g. Yohn v. State, 476 So. 2d 123, 126-27 (Fla. 1985) (standard jury instructions are simply a "guideline to be modified and amplified depending upon the facts of each case", and do not relieve the trial judge of his responsibility under the law to charge the jury properly and correctly in each case as it comes before him). See also In the Matter of the Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, 598, modified 431 So. 2d 599 (Fla. 1981).

In order to insure that jurors understand all mitigating circumstances which are applicable to the life-or-death decision they are about to make, trial judges (when properly requested to do so) should instruct them on any nonstatutory as well as statutory factor for which evidence has been presented. In Foster v. State, ___So. 2d___ (Fla. 1993) (case no. 76,639, revised opinion issued April 1, 1993) [18 FLW S215, 217], for example, the court instructed the jury in the following manner (covering statutory and nonstatutory circumstances and the catchall):

> Among the mitigating circumstances which you may consider are the following. First, the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> Second, that the capacity of the defendant to appreciate the criminality of his conduct or t conform his conduct to the requirements of law was substantially impaired.
>
> Third, that the defendant has an abusive family background.
>
> Fourth, the defendant's poverty.
>
> Fifth, the physical illness of the defendant.
>
> Sixth, the defendant's love for and love by his family.
>
> Seventh, any alcohol or drug addiction of the defendant.
>
> Eighth, a troubled personal life including depression and frustration.
>
> Ninth, physical injuries suffered by the defendant.
>
> Tenth, the defendant's lack of childhood development.
>
> Eleventh, the effect of death of loved ones on the defendant.
>
> Twelfth, the learning disability suffered by the defendant.
>
> Thirteenth, the defendant's potential for positive sustained human relationships.
>
> Fourteenth, any other aspect of the defendant's character or record and any other circumstance of the crime or offense.

Because appellant requested that the jury be instructed on the nonstatutory mitigating factors of a deprived childhood and family problems, organic brain damage, potential for rehabilitation, and remorse, and because the factors were both supported by evidence and valid under the applicable substantive law, the trial judge erred in refusing to do so. The error was harmful (especially in light of the 8-4 vote for death), and requires reversal for a new penalty trial before another jury.

ISSUE X

APPELLANT'S DEATH SENTENCE SHOULD BE REDUCED TO LIFE IMPRISONMENT ON PROPORTIONALITY GROUNDS.

Appellant has argued that the felony murder aggravating factor is constitutionally invalid (Issue I] and that the intent element of the HAC aggravating factor was not proven [Issue VIII]. The only valid aggravating circumstance in this case is that appellant was previously convicted of a felony involving the use or threat of violence. Under Florida law, the death penalty is reserved only for the most aggravated and least mitigated murders. Kramer v. State, __So. 2d __ (Fla 1993)(Case No. 78,659, decided April 29, 1993) [18 FLW S266]; DeAngelo v. State, ___So.2d___ (Fla. 1993) (Case No. 78,499, decided April 8, 1993) [18 FLW S236]; Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989). As was recognized in DeAngelo and Songer, this Court has rarely affirmed death sentences supported by only one valid aggravating factor, and then only when there was little or no mitigating evidence. In the instant case, the evidence established and the trial court found that appellant was placed in foster care at the age of seven, and remained there, except for brief interludes, until he was sixteen. While in foster care, he was beaten for wetting the bed. His father never lived with him nor supported him; while his mother suffered a brain hemorrhage at a young age, and neither reads nor writes. The trial judge found these mitigating factors to exist, and gave then some weight. A troubled childhood and family background has been recognized by this Court as a significant mitigating factor in many

cases, including Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990); Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1989); Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989); and Brown v. State, 526 So. 2d 903, 908 (Fla. 1989). In addition, there was the unrebutted testimony of Dr. Berland that appellant suffers from organic brain damage, see Carter v. State, 560 So. 2d at 1167-68; DeAngelo v. State, 18 FLW at S237, and evidence of his genuine remorse, see Nibert; Songer v. State, 544 So. 2d at 1011. [According to Dr. Berland, appellant showed extreme levels of behavioral disturbance from a very young age, which was typical of a youthful brain injured person, and similar to the kinds of problems which are now seen in "cocaine babies" (R469-71). When appellant was seven years old, he was essentially non-verbal, and was described as communicating primarily with animal grunts and grimaces (R481)].

Accordingly, the death sentence is disproportionate, and should be reduced to life imprisonment.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court grant the following relief:

> Reverse his death sentence and remand for imposition of a sentence of life imprisonment [Issues II, III, and X].
>
> Reverse his death sentence and remand for a new penalty proceeding before a newly impaneled jury [Issues I, IV, V, VI, VIII, and IX].
>
> Reverse his death sentence and remand for resentencing [Issue VII].

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 1st day of July, 1993.

Respectfully submitted,

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