IN THE SUPREME COURT OF FLORIDA

DAVID ALLEN GORE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 80,916

INITIAL BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

David Gore appeals his death sentence for the murder of Lynn Elliott. The sentence was imposed at a resentencing hearing after the federal court found the 1984 sentencing proceeding unconstitutional. Shortly after asking questions respecting Gore's parole eligibility, the jury returned a unanimous death recommendation. The court found six aggravating circumstances, [1] and five mitigating circumstances. [2]

On July 26, 1983, Freddy Waterfield and David Gore (who was on parole for armed trespass to a conveyance, 1846), picked up 17-year-old Lynn Elliott and 14-year-old Regan Martin, who were hitchhiking in Indian River County. Martin testified to the following:

Waterfield was driving; Gore gave the girls beers. 1920. Waterfield offered marijuana. The glove compartment popped open showing a gun, which Gore put up to Martin's head, saying "Wouldn't it be fun to take these two girls home and have some fun with them." 1922-23. Elliott cried and Gore threatened to shoot her. 1927.

Waterfield drove to Gore's house, and Gore took the girls (who were handcuffed together) inside. 1927-9. In a bedroom, he slammed them down, and had them kneel next to a bed, still handcuffed. 1930. Going out to talk with Waterfield, he said "Don't try anything or I'll come back and kill you." 1931. Returning, he unhandcuffed Elliott, and cuffed Martin's hands together. 1933. Taking Martin to the kitchen, he held a knife to her throat, pulled her back to Elliott, and told Martin to tell her friend not to try anything. 1935. Elliott was on her stomach, ankles tied to her wrists. 1936. After binding Martin's ankles with

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[1] Under sentence of imprisonment, prior violent felony, felony murder, avoid arrest, heinousness, coldness. 4558-69.

[2] Exemplary conduct in prison, impoverished childhood, exemplary conduct during resentencing proceeding, depression at time of offense, love of his children. 4569-77.

electrical cord, he dragged her to another bedroom, where he cut her clothes off and put his fingers inside her vagina. 1938-40. He was going back and forth to her and Elliot, 1940-41. Martin heard Elliott choking and saying she couldn't breathe. 1941. Gore gagged Martin and put a pillowcase over her head. Id. He said he planned to keep them there for 2 or 3 days. 1942. Removing the pillowcase, he put his penis in her mouth. He left, returned, again made her give oral sex, kept doing it harder, saying "suck harder, suck harder, you're not satisfying, and if you don't I'm going to slice your throat." 1943. He ejaculated, she started gagging and coughing, an he said "I'm going to slice your throat, it doesn't matter to me because I am going to do it anyway. " 1944-46. He left her alone for a while, and she heard him taking his pants off. 1944. He put his tongue inside her. 1945. She heard one or two shots outside from what she thought was a BB gun, thought someone was outside. 1945-47. He returned, and stuffed her into a closet. 1947. He said he was listening to a police scanner for anything to do with them, and if he heard the closet doors move he would kill her. 1948. He moved her from the closet to an attic, saying, "don't try anything, don't do anything or I'll kill you." 1950-52. Returning, he said he had a knife and would kill her if she made one sound; she heard people outside and a phone ringing. 1954. People were saying, "David come down, come out." and "David, it's Lonny, come on out." Someone said his sister was out here and she's crying; he left. 1955. She was then rescued by the police. 1956.

During Martin's testimony, the defense unsuccessfully objected to the state talking to her during recesses in her testimony. 1978-84.

After a break in which the prosecutors consulted with her, she continued as follows: Although each man had a beer in the truck, she did not remember them drinking. 1994-95. Neither seemed under the influence of alcohol or acted strangely. 1995-6. Waterfield did not

order or suggest that Gore do anything. 1996. Although she now testified that Gore left her long enough for her to be able to tie up Elliott, she had previously testified that he did not leave her. R 2064-68. It may have been Waterfield who bound Elliott. 2065,

Michael Rock, who was 15 years old in 1983, testified that he heard screaming and a gunshot while bicycling near the Gore home. He stopped and saw a man (Rock identified him as David Gore) and a lady running up the driveway with no clothing; the man caught the woman and dragged her to a palm tree and threw her down. 2123-24.[3] As he dragged her back, she kicked, fought, and screamed. 2149. He had something like a gun in his hand, 2150; after throwing her down, he bent over slightly, extended his arms; Rock heard two shots and the man's arms went back. 2151-52. The man walked back to the house. 2153. When chasing her, the man was not staggering, did not fall down. 2155. The whole thing took maybe 3 minutes; Rock saw it from a distance of about 50 to 100 yards. 2160.

Michael went home and told his mother, and she called the police. Sheriff's Lt. Redstone went to the scene and saw a red substance near a palm tree, 2164. While he was investigating, dispatch said 911 calls reported screaming in an orange grove, and a man chasing a wounded woman. 2173-74. The calls were coming from the Gore home. 2176. Officers found the body of Lynn Elliott in a car trunk. 2179.

Redstone testified that, after first not answering knocks on the door, Gore surrendered peaceably when family members arrived and addressed him with a megaphone. 2194-96. After he came out, he seemed to understand instructions and Miranda warnings. 2197, 2203.

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[3] During a recess in Rock's testimony, the defense again unsuccessfully moved to prevent the state from questioning the witness while off the witness stand. 2128-29.

When, on cross, Redstone said Gore said he wanted to get something off his chest, the state successfully prevented testimony that Gore said, "Freddy was in on this one." 2261-97.

In the Gore house, officers found a gun containing five cartridges and four spent shells. 2338-40. There were knives in a closet space below the opening into the attic in the master bedroom. 2344. A half-full open bottle of vodka was in the house. 2387-8.

Waterfield was arrested near his truck, well away from the Gore house. 2390. Officers released the truck to his family, but retrieved it three hours later. 2390-1. Redstone thought there was at least one beer in the cooler in the truck. 2392-3. Rope in the truck seemed to match the rope found on Elliott; it was unlike the electrical cord used to bind Martin. 2397.

During the testimony of Capt. Sidney DuBois the state played a taped statement made by Gore at the sheriff's office after his arrest. Gore related the following on the tape: He and Waterfield picked up two hitchhiking girls who want to party and have good time. 2418. The men had planned to seduce women they picked up; when they took them to the house, they didn't want to go, and the men forced them. 2419. Waterfield had come by and asked if he wanted to pick up some hitchhikers and get relieved. 2420. They had a .22 in the glove box. 2421. The girls said they were going to Melbourne to have a good time. 2422. Waterfield had marijuana in the glove box and wanted to smoke, so they went up to the beach, but found no matches, so they went to look for matches. 2423. At the house, the girls didn't want to go in, and the men said you're gonna go whether you like it or not, so they went in under threat. 2424. They put them in a bedroom and "proceeded, you know, to have a little fun, I guess whatever you want to call it. " 2425. Asked what kind of fun, he replied: "Just, well, we really didn't do nothing really because we didn't even get started that good, you know, they just all, everything broke and run, happened so fast, you know." 2425-26. One ran outside

and started running down the driveway, chased by Gore. 2426. She had on a bikini bottom and tank top (Gore was unsure). After Gore got back to the house, Waterfield left in his truck. He concluded: "The rest is just history, I guess, you know." 2427.

Over defense objection, the court let DuBois testify that Gore lied on the tape when he said that Waterfield was not in the house when the girl ran outside. R 2430-36.

During the taped interrogation, the machine was briefly stopped while Gore sought clarification as to whether they were going to tell Freddy Waterfield anything he said. 2438.

Forensic evidence showed: Elliott had type A blood; Gore and Waterfield had type B. 2465-6, There were traces of sperm and saliva in the crotch and fly area of Gore's blue jeans. 2473-74. This fluid combination consisted of A and B secretions. R 2474. Waterfield is a non-secretor. 2474-75. Elliott's vaginal samples had saliva residues in groups A and B, but no seminal fluid. 2478-79. Waterfield's clothes did not have saliva or seminal fluid. 2484. Gore's shirt had many hairs consistent with Elliott. 2485.

A pathologist that injuries on Elliott's ankles were consistent with trying to work her leg out of the rope. 2517. Her injuries were consistent with falling while running, and being dragged. 25 18-21. There were bullet wounds to the back of the skull and to the jaw. 2523. The bullet through the jaw would not cause death. 2525. The other bullet went through her brain. 2526. The jaw shot would cause great pain if she were conscious. 2528-29.

Substantial controversy arose as to admissibility of testimony of Robert Stone, former State Attorney of the 19th Circuit. Proffers and argument on this point cover many pages of the transcript, 2537-2694, as discussed in the argument section of this brief. The court overruled defense objections, and Stone testified:

He told the Waterfield jury that "Freddy Waterfield is just as guilty as if he pulled the trigger himself and that is what the evidence will show in this case. " 2696. Waterfield was found guilty of manslaughter, and not guilty of kidnapping. 2697, In preparing for the Waterfield trial, he relied on Gore's deposition, 2697-98, saying that the men had planned to pick up hitchhikers and take them back to the house and terrorize them and sexually assault them. 2699. They picked up the girls and took them to the house, separated them into separate rooms -- Gore with Martin, Waterfield with Elliott. Waterfield sexually assaulted Elliott. Later, Waterfield came in and said Elliott had escaped; he gave Gore the gun and said to use it if he had to. 2700. Gore followed Elliott and shot her. 2700. Stone relied on it in making his opening statement. 2698. Near the trial's end, Gore's attorneys said he was not going to testify as he had previously testified under oath, that he had not been truthful. 2699.

Saying he could not vouch for Gore's credibility, Stone did not call him as a witness. 2700-1. After the Waterfield trial, said at deposition that Waterfield was absent when Elliott was tied up, and left before Gore chased and shot her. 2701. He said Waterfield left almost immediately after entering the house. 2701. The inability to put Gore on the stand "devastated our case" against Waterfield, 2701, "because we had based our entire case upon the fact that they had conspired together, that it was a plan to do this, that they had planned the kidnapping ahead of time and that Fred Waterfield had participated in that planning, that he even participated to the extent that he had discussed the use of handcuffs which have been a way to disable these girls. Discussed the use of a gun, that the fact that during the course of the ride they went back and nothing was spoken between the two of them, and the truck was driven to Gore's house without any discussion and that was also pre-planned. That after they got there that Waterfield participated in the actual handcuffing or the tying up with ropes of Lynn Elliott,

and that he gave the murder weapon to David Gore, handed it to him and that was the gun used to kill her." 2701-2. Stone said that the statement implicating Waterfield was a lie, 2702. "In our closing argument, I would assume our credibility wasn't very much with the Jury because we didn't produce as we said we would, and I think the verdict reflected that." 2703.

The state rested its case after Stone's testimony.

Defense evidence showed that the Gore and Waterfield were related, and grew up together. Relatives testified that David followed Freddy around "like a puppy." 2785 (testimony of Wendy Bowling).

George Stokes, Jr., a cousin of Gore and Waterfield, testified that Gore is quiet, shy, more to himself than outgoing. 2718. Waterfield is outgoing, has a lot of friends, dated a lot of women, is a "ladies' man." 2719. Gore did not date lots of women. 2719-20. Stokes saw Waterfield around 4:30 p.m. on July 26, 1983 near the Gore home. 2720.[4] He saw cars near the Gore house, saw unmarked car go up a side dirt road. 2721. Kind of nervous or something, Waterfield said if Gore had gotten him into any trouble he would kill him. 2721.

William Bowling, Gore's brother-in-law, testified that in high school Gore was very quiet, didn't have friends, was very introverted. 2728. Waterfield was very well liked, like a football star, all the girls liked him, he was very extroverted, the opposite of David. 2731. David really looked up to Waterfield because of how girls liked him, and maybe if he hung with him the girls would get to know him and like him too. 2733. Although inarticulate, David was a good fisherman. 2734. Usually very quiet, he would get loud and boisterous when drinking; he'd be cracking jokes and socially getting along; alcohol took away his

[4] This was shortly after the police arrived at the Gore home.

inhibitions: "He would get to where he would almost talk your head off sometimes." 2736. He quit school to support his family and went back later on to get his GED. 2737. David's wife, Donna, would tend to put him down, tried to make him not look as quite as bright as her (she completed high school and some college). 2738. After divorcing, they tried to work it out again because both loved their children and wanted to make it good for them and wanted to do what was right and give the children a father and a mother that both cared about them. 2740. Although David was very close to his first son, Michael, Donna kept him from developing a close relationship with his second son, Jonathon. 2740-41. He loved doing things for his Michael, like buying him a new fishing pole and teaching him to fish. He was very depressed when couldn't see the children; when Michael was with him "he was in seventh heaven. " 2741. After another divorce, there were problems about visitation rights -- she would come up with excuses for David not being able to see kids. 2742. Once there was a big occasion for taking the kids to David's parents' home and having people over, and David came back without the kids and began crying. 2743. His mother told him to pull himself together, and he pulled it back inside. 2743-44. The court sustained the state's objection to testimony about Donna's interference with the Florida court's visitation orders. 2745-46.

Donna moved to Virginia at one time and David had visitation problems. It depressed him severely and he'd get in the car and be by himself. He'd be super depressed. 2749. He had a very close bond with Michael and not seeing him "was just taking the last bit of his life away from him that he really loved and cherished. " 2750.

Alva Gore, David's father, drank excessive amounts of vodka, always had a bottle under the truck seat, drank it straight. He had bottles hidden in tool boxes and in the garage. He drank all the time. 2751. David's mother's father, Willie Webb, drank quite a bit and was

such a problem that some of the daughters wanted to get out of the home because of abuse, physical abuse and anger and swearing. 2752.

David did not hold jobs very long; his last job was working with Waterfield on four wheel drive trucks. 2752. He once worked for his father supervising a work crew in groves. 2753. David idolized Freddy. 2754. The night before the murder, David came by, "really almost bubbley, happy", the way he might act when drinking. 2756. He was in "a very, very, good mood"; but after eating, he seemed to sober up; got quieter and quieter, tapping foot as though thinking about something and left. 2757. A day or two later, Mr. Stokes went to the Gore home and found cushions thrown everywhere, quite a mess. 2758. There was a half empty gallon bottle of vodka in closet. 2758-9. There were pills like Contact and black pills scattered over the top of a dresser; a bed was turned over and thrown against the wall, drawers had been taken and dumped on floors, clothes thrown everywhere in the bedroom. "Just the things like he had some guns, cleaning tools laying around and some old empty cartridges thrown around, and it was just like somebody had come in there and turned it upside down and left it that way." 2759. Stokes thought the black pills were amphetamines. 2760. He found a paper bag with a liquor store receipt for about $10 dated the day before the murder. 2761.

Wendy Bowling (David's sister and William's wife) testified that their mother took care of Freddy, David, and herself when they were children. 2780-81. All his life, David would do what Freddy wanted. 2782. David was nice and everybody liked him, but he was not outgoing. 2783. He did not have a lot of dates; Freddy was more popular, a football player with quite a few dates. 2784. "In my mind to explain it I picture David with Freddy as like a little puppy dog." 2785. When they were about nine, they were in the back yard and Freddy had David stand so that Freddy could throw a knife at him, and the knife went into David's toe

and he had to get stitches, 2786, 2797. Even after this they continued to play together. 2797. Once in high school as they were about to go to school, David called to Wendy from the Florida room; she went in, and Freddy grabbed her around neck from behind and was pulling her back towards her bedroom; she realized it was not a joke -- he was serious. 2799. David said nothing as Freddy pulled her into her bedroom and threw her down on the bed; when they were out in hallway, David had touched or grabbed her arm; Freddy began pulling off her pants; she was upset, crying, and yelled at Freddy, who got angrier the more she threatened to tell her mother. 2800. As Freddy grew rougher and madder, David came over, put his hand on Freddy's shoulder: "'This is my sister,' he said 'and you can't do this to her.'" That was only time she saw him stand up to Freddy; at first Freddy ignored him; David said it again and Freddy backed off. 2800-2801. The boys stayed friendly, and went to Key West together right after this. 2801. When drinking David "would be very talkative, very hyped up", and would not slur words: his rapid talk and happy-go-lucky attitude would be a big change from his behavior when he was not drinking, 2802.

David loved his boys. 2804. After the second divorce, he was always in court trying to see them, 2805; he was devastated when Donna denied visitation. 2805. The May before the murder, Donna was in West Virginia but when he saved up money to go see the boys there, she returned to Florida: "It was a mind game that she would play with him to keep him away from the boys." 2805-6. He was devastated, crying and emotional over it. 2806.

Ms. Stokes' testimony continued: At the time of the arrest, Uncle Lonny said "David was out of his head, David wasn't David." 2807-8. After the arrest, Wendy and her mother went into house; David's room "was pretty much in turmoil" with beds turned upside down, and drawers thrown out. 2808. On a dresser were a little bottle of yellow liquid, capsules

(some red and white, some blue and white), and an envelope of tablets. 2809. When they heard the taped statement, she said to her mother, "That's not David talking." 2809-10. "David was more conservative, more shy, he would not have talked as fast or as rapidly. He was just very happy-go-lucky on the tape and talking very fast." 2810. He was how he would be when drinking a lot. 2810.

Wendy testified that David's personality changes from drinking was like Dr. Jekyll and Mr. Hyde. 2820.

Uncle Joseph Gore testified that David is generally quiet, withdrawn. 2824. Freddy is like a con artist. 2825. The night before the murder, Joseph was working the night shift as a security guard and David drove up. 2828. David was jumping from one thing to another; altogether different from his usual self. 2829. Though Joseph was on the job, David suggested they go swimming. 2830. Joseph could tell he had been drinking, 2830: his eyes were glassy, as though he were "hyper", 2831, and he wanted to wrestle. 2832.

Dr. Michael Maher, a psychiatrist, testified as a defense expert that Gore's capacity to appreciate the criminality of his conduct was substantially impaired at the time of the offense, and he was suffering from extreme emotional and mental disturbance. 2881-82. In reaching this conclusion, Maher reviewed prior evaluations of the defendant, Department of Correction files on him, psychological screening reports on him, testimony of Wendy Bowling, Lonny Gore, Dr. Peter Macaluso, Mr. Bowling, Alva Gore, Joseph Gore, Ms. Stokes, Reverend Boman; reports of Deputy Fink, Mr. Bevis, Lonny Gore, Phil Williams; testimony of Regan Martin; statements of the same persons; David Gore's school records; testimony of Sidney DuBois; and Michael Rock; deposition of Det. Phil Redstone; Department of Corrections documents respecting Freddy Waterfield; Mr. Gore's taped statement; and various other

materials including police reports. 2846-50. He examined David Gore twice and interviewed his family. 285 1-52.

Dr. Maher testified that at the time of the offense and in the weeks and months before, Gore was suffering from alcoholism, and alcohol abuse, and was intoxicated on the day of the offense. 2861-62. In the months leading up to the murder he was suffering from depression particularly as result of custody battle. He has dependent personality disorder which characterizes his way of relating to people and interacting with others. 2862. Gore said he and Waterfield shared a quart of vodka during the 5-6 hours before the offense; he also drank about a half quart of vodka and a six pack beer between 9 am and 2 or 3 pm that day. 2862-3. He had a pattern of daily drinking in the months before the crime. 2863. He had taken stimulants, uppers, pink hearts and "black beauties" (amphetamines). 2864. The facts of the armed trespass case (being in a car with a gun and a glass of vodka) "establishes a pattern of alcohol use and intoxication during criminal activities. " 2865. In adolescence, he established a pattern of drinking, especially with Waterfield; in the 10-12 months before this offense, he drank daily, from when he got up in morning, drinking in excess. 2867. He minimized its use, which is typical of an alcoholic in denial. 2868-9. There is a significant family history of alcoholism: his maternal grandfather killed himself as result of medical problems and severe alcoholism; a brother was a heavy drinker and alcoholic. 2869. A paternal uncle, Joe, a severe alcoholic, was committed to a hospital for 30 days to dry out. 2870.

David Gore depended on Freddy Waterfield and Donna "in a pathological, sick, exaggerated way. " 2875. Alcoholism, personality disorder, and depression had a synergistic effect: each made the other worse. 2879. At the time of the crime, he was in a "numb, distant, disturbed, emotional state where his capacity to appreciate the horrible and repulsive

effect that he was having on another human being in the kidnapping, in the rape, in the murder was not at the level that a normal human being under any reasonable circumstances had." 2883. The crime was a cooperative criminal enterprise, at least in the beginning. 2884-5. At the time of the offense, Waterfield substantially influenced his behavior and his criminal activities. 2885. During his statement, he had the tape turned off and said he wanted to make sure Waterfield did not know what he was saying on the tape, indicating irrational fear about Waterfield which was more significant to him than the fact that he was admitting to murder and sexual assault and kidnapping. 2887. "All of this is consistent with his holding Freddy in some special place in his mind as if Freddy had some kind of power over him, Freddy could intimidate him, Freddy had an influence on him that was more important and more significant than the fact that he was sitting there admitting to murder. " 2888.

Gore "has adapted very well to the prison environment. He has in effect found a place in the prison. He ministers in a religious way to other inmates. He corresponds with various people about his activities in prison. He depends on the prison, the institution to set his structure, to tell him what to do, where to do it, when to do it." 2889-90. His different accounts and inconsistent statements is consistent with an alcoholic confused about things and what happened and when. 2890.

Alva Gore, David's father, testified: When David was born, he worked from sunup into the night on a tomato farm, supplementing his income by frog hunting at night and by hunting alligators and wild hogs to feed the family. 2980-84. They had no plumbing, and got water from a hand pump. 2984. After the tomato farm went out of business, he continued frog hunting and worked for a lumber company. 2989.

David and Freddy Waterfield hung out together mostly all their lives. 2992. David always had a good personality, and was likeable when growing up. He was not outgoing, and would have only one or two friends at a time, and never liked groups or a lot of people. 2993. Freddy was more aggressive than David, who was a follower. 2995. David would do things to make somebody else look good. 2996. Freddy was the leader of the two. 3000. Once the two ran away to Detroit to see Freddy's girlfriend. 3001-3002.

Around the time of the first divorce, David started drinking more heavily; Alva could tell it from his eyes and facial expression, and his talk and rapid speech. 3009. When David lived with his parents after the divorce, Alva found a vial of powder, 3010, and David stole Alva's valium. 1011. David had child custody problems with Donna, who would take off so that David could not find the children. 3012. David "got real depressed", "real, real down and out about it"; "along about that time he was drinking pretty heavy", and the drinking kept "getting worse and worse". 3012. He cried about not being able to see the children -- this was the only time Alva saw him cry. 3012-13. He was working for Freddy right before the murder. 3013-4. Alva never saw David telling Freddy what to do or what they should do next, 3014-5, or suggesting plans, or acting as a moving force in their relationship. 3015.

Peter Macaluso, a psychiatrist and expert in addictive behavior, testified: David Gore suffers from chemical dependency. 3049. He was intoxicated and extremely disturbed at the time of the murder. 3050, 3058. In forming his opinion, he examined David Gore and reviewed three volumes of background materials, as well as various depositions and statements, including his taped statement, and the depositions of Drs. Maher and Cheshire. 3047-48.

Dr. Macaluso concluded that the family history of chemical dependency is "quite strong meaning it's pervasive throughout the family on both sides," 3053-54. David Gore is passive,

withdrawn, poor in school, and had committed a prior alcohol-related crime. 3054. His DOC file shows a 1981 diagnosis of chemical dependency made by a psychologist. 3055. His alcoholism grew when he lost custody of his boys; the night before the murder "he was in a state of fairly extreme or advanced intoxication. You couple that with some of the physical evidence, to self reporting, some of the evidence of his demeanor at the time or shortly after the time of the offense, certainly leads me to the opinion that within a reasonable degree of medical probability he was under an extreme emotional state." 3058-9. He took both amphetamines and alcohol -- approximately 80 % of all chemically dependent patients are multiple drug users or poly-addicted. 3059. These substances have a synergistic effect. 3060.

Velma Gore, David's mother, testified that when David was 17 months old, he was bitten by ants and went into convulsions, and was rushed to a doctor. 3128. Freddy Waterfield was always "kind of a hyperactive child and he was always here and there and you had to really keep up with him." 3 132. Velma "didn't really trust Freddy because I never knew what type of mischief he would get into. " 3 132. If "Freddy would want to do something, David would go with him, and whatever Freddy was doing or going, David would go with him." 3133. When David was 8, 9 or 10, the boys were outside and David came in crying and blood was everywhere. His toe was bleeding. 3 133. The boys said the knife slipped while they y were peeling a grapefruit. 3134. The cut was almost completely through his toe, and she asked what really happened, and he said the knife slipped. 3 134. She said it had to be more than that, and he said "really Freddy asked me to stand over to the side and he wanted to pitch the knife to see how close he could come to David's foot. " 3135. Velma did not like the Freddy's effect on David, 3138, and tried to discourage their playing together, but "somehow they always got back together playing." 3139. When Velma would arrange for David to have

activities apart from Freddy, Freddy would get himself involved. 3 139-40. They ran away from home when David was 15 and went to Michigan. 3 141. David had only one girlfriend before Donna. 3143. David and Donna honeymooned at Holiday Inn in Fort Pierce, same as Freddy. 3144. They lived in an apartment where Freddy had previously lived. 3144-45. David was trying to follow in Freddy's footsteps, and looked up and did the things that Freddy did. 3146. Freddy had a "cocky smart-alecky way." 3146. At family gatherings, Freddy was always loud, wanted to be heard, wanted to be noticed, wanted to be seen; David was almost the opposite. 3146. David loved his son, Michael, who loved him; they went fishing and were happy to be together. 3 147.

Velma testified that Freddy drank a lot, and kept trying to get David to drink, but David would not drink around his mother. 3 152. During the custody battles over Michael, Velma saw evidence that David had been drinking: she would find a bottle of Vodka under his bed, would see beer cans that he had taken from his car, could tell from his reaction that he would be drinking. Normally he was shy, quiet, but when drinking he would talk fast and try to cover up. 3 153. Velma and Alva were on vacation at the time of the murder, they were called and came home immediately; on their return, all the rooms at the house were about the same except David's, which was totally chaotic. 3154. On his dresser there was a small jar of yellow paste liquid, and there was a blue and white capsule on his dresser. 3154. There were small tablets, white pills, tablets in an envelope. 3 155. When David had been in a halfway house, he asked her to bring him "extra strength diet pills." She herself had once taken one of the pills and it made her nervous, and he said that he liked the way it made him feel, even thought he was in no need of a diet. 3155. Listening to the taped statement, her first reaction was "that's not David, because he was just talking too fast, too much and it was not the quiet

David. I knew then, it was not his normal talking voice." 3156. He talks fast like that when he's been drinking. 3156. The first thought was that he had been drinking. Bill Bolling told her he had found a gallon container of Vodka at the house, and Velma asked Roy Raymond, a deputy, whether they looked into David being intoxicated at the time of the offense. 3157. Asked a week or two after the murder why they did not take a blood sample, Raymond replied: "we didn't want to. " The officers did not take the bottle when they executed the search warrant. 3158. Velma's father, William Webb, was a heavy drinker, and Alva's father drank a lot, and he has a brother that drank quite a bit. 3159.

Dorothy Stokes, David's aunt, testified that, as children, David was shy and quiet, Freddy was just a real happy little guy. 3164. Letters from David are "full of sadness of how much he cared for his boys and he wasn't allowed visitation." He had a very good relationship with his son Michael, and did things that a father likes to do with a son. 3166. He felt the children were all he had in the world and if he couldn't visit with them or see them he didn't care about living. 3 167. Velma saw David's arrest; when he came out of the house he "just had a wild look about his face". 3174.

Robert Stone testified that Gore received concurrent life terms for kidnapping Elliott and Martin, and concurrent life terms for sexual battery, and that the kidnapping life sentences were consecutive to the sexual battery life sentences. 3200-3202. The state cross-examined him:

> Q. Let's break that down, Mr. Stone. Basically are you saying that of the life sentence it adds up to basically one life sentence followed by another life sentence?
>
> A. That's correct.
>
> Q. Two live [sic] sentences?
>
> A Two life sentences.

Q. And he is subject to parole; is that correct?

A. Yes.

Q. When could he receive parole?

A. I guess any time.

Q. Who is that up to?

A. Probation and Parole Commission.

Q. All right. People in Tallahassee?

A. Seven member board in Tallahassee.

3203.

The state's rebuttal witnesses were Neal Bevis, Roy Raymond, C.C. Walker, Judy Lewis, Ronald Schuster, and McKinley Cheshire.

Bevis, a deputy sheriff, testified that Gore followed his commands and was apparently able to understand what was being said to him at the time of his arrest. 3207. Gore seemed to understand directions given by other persons, and Deputy Bevis saw no evidence of influence of narcotic substances. 3208-9. Over defense objection that he was not qualified as an expert, the deputy testified that in his opinion there was no way that the defendant was under influence of 24 shots of Vodka and two six-packs of beer. 3211-2.

Under-Sheriff Roy Raymond testified that he had known the Gores for 15 years, and had seen David grow up. 3216. When he came out of the house, David obeyed commands. 3218. Raymond felt that Gore was definitely not under the influence of any alcohol that day. 3219. Raymond did not recall going to the Gore home after the incident and talking to Velma Gore about any subject; he did not recall talking to her about a bottle of Vodka, and never heard her at any time ask why they did not test David for alcohol. 3222.

Det. Walker had known Gore as an auxiliary deputy sheriff. 3226. Gore would ride with him on his shift. 3227. When arrested, he had no trouble walking, and showed no physical signs of intoxication or characteristics that would go with intoxication. 3228-9. As they rode to the detective bureau, there was casual conversation, and Gore was nervous. 3229. He did not seem really any different than when he was riding with Walker as an auxiliary. 3229-30. According to Walker, there was no way in the world that Gore had ingested 24 ounces of Vodka and two six-packs of beer. 3231.

Booking Deputy Lewis testified that, when booking Gore, she checked on a form that he did not appear to be under influence of alcohol or drugs. 3238-9. In her opinion, he was not under the influence of drugs or alcohol. 3239. In being fingerprinted and photographed, he was apparently able to understand commands, and acted accordingly. 3239-40. On the form she checked that there were no visible signs of alcohol or drug withdrawal. 3240.

Trooper Schuster testified that around noon on July 25, 1983, he stopped Gore, who had pulled directly in front of him on U.S. 1. 3249, 3258. When he walked to the trooper's car, Gore did not seem to have any problem walking, and said he was checking a motorist broken down on the road, 3252. He said he had offered her a ride. 3253. The defense unsuccessfully objected that questioning about the woman was outside the scope of rebuttal. 3254-6.

Dr. Cheshire, a psychiatrist, testified to his opinion that: "There are no circumstances that would excuse or alter the fact that a crime was committed by someone who knew what they were doing at that time and did it as their own agent. Not under the domination of anyone else." There was no substantial influence, Gore was not an alcoholic, he used alcohol as a tranquilizer to treat his anxiety. 3430. Review of statements of the Gore family showed anxiety: they described him as bashful, shy; when he had a beer, he became outgoing, likable,

lovable, part of the group; drink was a tranquilizer reducing his anxiety which is called group anxiety. 3431-2.

Cheshire examined Gore for three hours, in which he gave a history that he drank a lot, which Cheshire did not believe, saying a human being cannot handle that much and then go around in a nonimpaired condition; Cheshire thought he exaggerated his alcoholic history and is not an alcoholic. 3433. The other doctors failed to note he used alcohol as a tranquilizer, and when he achieved that comfort level with alcohol, he had what he needed to go ahead and do what he wanted to do -- there was no evidence that he was a "true alcoholic." According to the family even one beer would make him change his personality, which in the doctor's opinion is impossible because you can not change personality: personality is set in early ages and may be again in adolescence. What the family observed was a change in behavior. 3434.

To Cheshire, Gore may have had something to drink on the day of the murder, he was not intoxicated because he could not have been impaired and do what he did: he was hunting as one would go duck hunting. 3435. He got handcuffs, rope, a police scanner, and a gun with the full intent to hunt for young women. 3436. It was his custom as a hunter, he used beer and beer is something that gives a man the feeling of comfort. 3440. Cheshire did not think that he had a repressive disorder: "he merely had the feelings that go along with suppressing your mood with alcohol. " He did not think he had dependent personality disorder. 3442. Rejecting the contention of extreme mental or emotional disturbance, the doctor said: "If he was functioning in such extreme condition, he cannot carry out his acts with precision, he could not analyze and evaluate the environment and determine what he should do to cover up and protect himself." 3443. Waterfield "decided to get away from this scene to get away

from this hunt. And we don't know how frightened he was of David himself, and he left. And David did his acts without anyone else being present except the two victims." 3446.

Questioned about the armed trespass,[5] Dr. Cheshire said he found the same elements in that case as the case at bar: Gore was crouched in car on the floor, "he had his weapon and his equipment that he used to go hunting and he had the half can of beer." 3449-50.

Cheshire's diagnosed adult anti-social behavior without mental illness: "that means he does evil and wicked acts. He has no mental illness that impairs his ability to know the difference between right and wrong, to understand the nature and consequences of his act then he has the capacity to defend himself with the help of his lawyer. There was nothing there to make him not be able to conform his conduct to the law. There is no evidence of that. " 3450.

He said that a male learns to fool his mother, and to appear to conform to her requirements, so that "in and around his family he didn't announce what he was doing in secret and his hunting trips, and there was no reason for them to know what he was doing. " 3451. An anti-social adult can care about his children: "well, a mafia hit man loves his family and loves his kids, but he doesn't love the victim and he has no intent to give mercy to the victim. That's very well described often as a social people. They adhere to the cult and the cult's rules and regulations and members of the cult, but outside that cult, the world, it might be to them the target. " Gore's target was women "young women. Children 14 and 17 years old." 3452.

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[5] When the state began to ask about the armed trespass, the defense objected that his testimony was based on Mr. Gore's deposition contrary to agreements entered into between the parties. The state did not dispute that the testimony was based on the deposition, but contended that the defense experts had relied on materials supplied to them. The trial court overruled the defense objection. R 3446-48. The defense also renewed its prior objection to information from Ms. Owens, the victim of the trespass. R 3449.

The court sustained defense objection to the testimony that Gore is a threat to young children, but refused to grant a mistrial. R 3453-54. The doctor concluded that Gore "had the full intent to hunt down, capture, rape and kill his victims. Premeditated calculation and denying another human beings [sic] of their right to live, their right to have comfort, and their right to exercise their freedoms. " 3456. His antisocial behavior would not mitigate the crime. 3457-8. The doctor testified that "There are no severe mental illnesses here." 3510.

SUMMARY OF THE ARGUMENT

I. The court erred in denying cause challenges to jurors where there were substantial doubts about their ability to sit as impartial jurors. As a result, four objectionable jurors sat on the panel deciding Gore's fate.

II. A series of erroneous rulings mislead the jury as to Gore's parole eligibility, The jury's misunderstanding directly affected its sentencing decision.

III. It was error to let the state use detailed evidence regarding a conviction for armed trespass for the purposes of the "prior violent felony circumstance, and to improperly instruct the jury on this matter. This error infected the jury's verdict and the sentencing order.

IV. The court erred in letting the state argue the avoid arrest, premeditation and heinousness circumstances, instructing the jury on them, and finding them.

V. The jury misunderstood the role of sympathy and mercy in mitigation, and the court erred in refusing to give an instruct clearing away the jury's misunderstanding.

VI. A number of instructional errors infected the penalty verdict. The court gave improper and unconstitutional instructions on aggravating circumstances, and refused instructions which would have eliminated jury misunderstandings respecting mitigation.

VII. The state violated its agreements with Gore that it would not use information obtained against him. In so doing, it mislead the court as to the nature of the agreements.

VIII. The state engaged in improper argument to the jury.

IX. It was error to refuse to hear the motion to suppress identification, based on an erroneous belief that the state can present unconstitutionally unreliable evidence at sentencing.

X. It was error to refuse to allow evidence of Waterfield's involvement in the crime.

XI. It was error to permit the Sheriff's Captain testify to his opinion, apparently based on matters outside the record, that Gore lied about Waterfield's presence.

XII. It was error to let the state talk to witnesses during breaks in their testimony. The court had the erroneous belief that it lacked the power to prevent such conversations.

XIII. The court erred in failing to conduct an allocution with the defendant prior to reaching its sentencing decision and failing to consider his statement in mitigation.

XIV. It was error for the county court judge to preside over this capital sentencing proceeding.

xv. It was error to make Gore to submit to examination by the state psychiatrist.

XVI. Retroactive application of law violated the constitution.

ARGUMENT

POINT I

WHETHER THE COURT ERRED IN DENYING CAUSE CHALLENGES.

The court erred in denying cause challenges to various members of the venire under the following circumstances:

Mr. Patterson, whose wife worked in identification for the sheriff's office, 435, said he would do his best to follow the law. 539. He would apply common sense to the facts. 543. Questioned further by the state, he said that sympathy should play no part in the proceedings, and would "look to the law as the Judge reads it" in an effort to reach a just conclusion. 542. In response to defense questioning, he said he would not consider extreme economic impoverishment a relevant sentencing consideration. 1035-36.[6] He believed sympathy and mercy have

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[6] After questioning juror Hennis "if someone came from an impoverished background at the start of life, do you think that that is something that you would consider?", defense counsel turned to Mr. Patterson:

> MR. NICKERSON: Mr. Patterson, same question to you sir. The fact someone came from an impoverished background?
>
> MR. PATTERSON: No.
>
> MR. NICKERSON: What do you have reasons different from Mrs. Rinaldi? Could you tell me what your reasons would be for why you don't think that that should be considered?
>
> MR. PATTERSON: I don't think just because you were poor, impoverished, has anything to do with the way of life, your life.
>
> MR. NICKERSON: And if it was impoverishment that was joined with other factors, other aspects, do you think that at that point whether it was joined with other things that it happened to an individual in this life, do you think that that might be worthy of some considerations?
>
> MR. PATTERSON: Possibly.

(Rinaldi had said she came from an impoverished background and character is character regardless of background. 1032 .)

no part in sentencing, 1190-91,' although he would "listen" to argument of other jurors that they felt sympathy based on mitigation. 1192. When the defense challenged Mr. Patterson, 1329-38, the court somewhat ambiguously found him unable to follow the law. 1337-38. The state proposed further questioning, 1337-38, and the court said "before I rule on Mr. Patterson, I want to inquire a little further based on that. I won't rule one way or the other on Mr. Patterson. " 1338. It added: "Seemed to me Mr. Patterson indicated he would listen with an open mind ." Id. After reviewing its notes, the court denied the defense cause challenge without further inquiry, because Mr. Patterson had originally said he would follow the law, 1377, and defense used a peremptory on him. 1389.

Mr. Donithan said he would have trouble keeping his attention on the trial because of its length, and it would create undue hardship for him to sit on the jury because he worked on a straight commission. 759-60. He thought the death penalty should be used more often, and it "could be touch and go" whether he would recommend a life sentence, 761. He would

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[7] MR. NICKERSON: . . . Do you believe sympathy or mercy has a part in this sentencing proceeding?

MR. PATTERSON: Do I believe?

MR. NICKERSON: Sympathy or mercy has a part in this sentencing producing [sic]?

MR. PATTERSON: No.

MR. NICKERSON: Can you tell me why that is, sir?

MR. PATTERSON: Because it has nothing to do with what we're doing in here.

MR. NICKERSON: Do you believe that common sense --

MR. PATTERSON: Sure.

MR. NICKERSON: Okay. Can you explain to me why you would use your common sense and -- Well, do you have a reason why you would use your common sense and why sympathy and mercy should not be considered?

MR. PATTERSON: I just figure in this case it has nothing to do with sympathy.

follow the law "As well as I could." 762. He did not think sympathy should play any part in his verdict. Id. Without hearing any aggravating evidence, he would vote for death. 1261. Asked by the state if he would listen to evidence and look for aggravating and mitigating circumstances and base the penalty verdict on them, he replied: "I think so." 1293. The court denied a defense cause challenge to him. 1430.

Ms. Agostini was familiar with Lynn Elliott's family. 430-31. She agreed with the state that sympathy was not allowed to be part of her decision. 467.[8] She would do her best to follow the law, no matter what the law was. 539-40. She was familiar with extensive publicity about the case, 773-74, 779, but it would not affect her. 774. On the other hand, when she learned this was the Gore case, she "almost fell out of my chair." 778-79. She had read that the defendant had hurt "other people, killed, something like that, but I'm not sure." 788-89. The case was somewhat notorious. 790. She thought that the sentencing choice was between "going to the electric chair or to 25 years in prison." 782. She told the state she would be able to base her recommendation solely upon what she heard in the courtroom. 793. On defense questioning she reiterated that sympathy was not relevant to her consideration of the case, 911-12, and said that she did not think the concept of mercy had any place in the

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[8] MR. COLTON: Do you understand that each of you understand that sympathy in a case such as this, or in any criminal case, sympathy is not allowed to be a part of your decision making, your recommendation? Do you have any problem with that?

MS. AGOSTINI: Not at all.

MR. COLTON: Either sympathy for the victim or for the Defendant?

MS. AGOSTINI: No.

deliberations. 912. But if the judge instructed her that the concept of mercy was relevant, she would consider it. 912-13.[9] The court denied a defense cause challenge to her. 1319.

Mr. Wales thought extreme economic impoverishment should not be considered in mitigation. 1033. The following occurred during questioning as to whether the fact that Gore had already been convicted of first degree murder would affect jurors:

> MR. NICKERSON (defense counsel): Ms. Rinaldi, the same question to you. Do you think you could be fair and impartial?
>
> MS. RINALDI: I do think so.
>
> MR. NICKERSON: Mr. Wales?
>
> MR. WALES: I don't think so.

1232. Later, responding to leading questions by the state, he could listen with open mind to all the evidence and to instructions, could be fair and impartial and would base his recommendation on the evidence and the law and on common sense. 1298- 1300.

Ms. Kramer said she could set aside personal beliefs and follow the law, 573, and apply the law even if he thought it was wrong. 579. She did not personally feel sympathy should play a part in his decision; she would follow the law. 586. She thought childhood poverty

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[9] At this point, the state objected that defense counsel Nickerson was "insinuating that somehow the Judge will instruct that mercy is a mitigating circumstance of some sort", arguing that mercy is no longer part of the statute. 914. In response, Nickerson pointed out that, in questioning by the state, the jurors believed that sympathy is an irrelevant consideration. 914-15. (For instance, Mr. Crump said sympathy should not be a part of his decision in the case. 702.) He argued further that the jury could consider feelings of empathy, mercy and sympathy arising from mitigation, and the prosecutor replied "Judge, I don't disagree with what Mr. Nickerson says if the consequence of presenting mitigation causes the jury to have mercy, that's fine." 915. Without ruling, the court recessed for the evening. When court reconvened, Nickerson again pointed out that the nine veniremen had said they would lay aside feelings of sympathy, and argued that mercy is an appropriate consideration, pointing out that the state made modified the guilt phase instruction regarding mitigation and incorporated it into its voir dire inquiry. 938-39. As to the jurors' predisposition to refuse to consider sympathy and mercy, the state opined "That's just too bad." 945. The court said it would not give an instruction on this matter then, but said it might give one at close of evidence. 948. It said it would allow questioning about feelings "in generic, open-ended type question." 950,

should make no difference in sentencing. 1040. She had been previously raped a knifepoint, and gave contradictory responses concerning the rape's affect on her ability to serve. 1162."[10] During jury selection her husband discussed the case with her, telling her that there was a rape, and that bothered her, **1163,** Nevertheless she said she could be completely unbiased. **1165.** She reiterated that she did not think sympathy or mercy were things to be considered in a capital sentencing proceeding. 1203. She came to that conclusion based on what the state her asked her. 1204. The court denied a cause challenge to her. 1328.

Ms. Miller would follow the law, even if she thought it was a bad law. 608. On moving to the area in July 1983, she heard about the case and: "I think having moved here at that time it made an impact on me through the years what I've heard I remember the name and what had happened. I just at the time I moved her I remembered people telling me that Mr. Gore had kidnapped along with Waterfield was his name, I believe, two girls in Vero Beach, one of the girls escaped and the other girl was killed by Mr. Gore. I guess Mr. Waterfield was not present. And then, like I said, through the years and through the media, I even think I have seen him on TV, I wouldn't swear to that. I've just been very conscientious about it and realize that he was convicted." 813-14. "What I think is that these girls were raped, the one girl that escaped was nude at the time she escaped, and I think that there were officers outside of wherever they were being held trying to get Mr. Gore to come out

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[10] THE COURT: Do you think that experience would effect [sic] your ability to sit impartially on this case if you were asked to serve?

MS. KRAMER: No. No, it would not.

THE COURT: Would it affect your ability to be impartial?

MS, KRAMER: (Witness nods head.)

when he killed the other one." 815. Asked by the state if she could set this aside, she said: "I could but you're saying to lay it aside completely. I mean, it's definitely something that I can't block out of my mind but, yes, I can follow what happened in this courtroom and abide by the law, yes. " 818. She agreed with the state's leading question that it would be a miscarriage of justice if her recommendation were based on anything other than the evidence and law, 818, but, when asked by the state if she had any bias or prejudice, said: "I have a feeling. Biased yes, somewhat. But again, if what I learn in this courtroom proves that what I think I already know is incorrect, that bias may not be as strong as I feel it is right now with what I do know. " 818-19. She agreed with the state's leading question that she could set aside bias or prejudice and decide solely upon the facts and law as heard in courtroom. 820. She did not "think that what's in my subconscience can be totally controlled by anything that my conscience might want to control." 823. Her feelings of bias about the case were still with her. 824. She answered affirmatively to the state's question "Ma'am, whatever bias you have, again the question is, can you lay it aside and decide this case solely on the facts and the law?" 824-25. She would consider alcoholism and an economically depressed background if instructed by court, but "If you're asking me in the case of a murder trial do I think they would have effect, no. " 1052. Told this is mitigation not justification, she said: "I feel that someone who has a problem like that, they should have been getting help for it before they got to the point where they may possibly become dangerous and, you know, kill someone, " 1053. She did not consider mercy an appropriate consideration, but would not say that it would not be a consideration. 1205. The court denied a cause challenge to her. 1359-60.

Ms. Arcomone did not feel sympathy should play a part in her recommendation; she would follow the law. 677-78. She would have problems with gory photographs. 679. She

said that she would not consider mitigation, expanding on her long-held view in favor of the death penalty, 1249-50, as follows:

> MR. NICKERSON: Ma'am, do you believe that these views that you've held since you've -- that you held in Georgia, that you held when you came to Florida, do you believe that notwithstanding these views that you would be able to give Mr. Gore -- be able to be fair and impartial and apply the instructions as given to you by the Court? Or do you believe that you may be influenced by these views and may not be able to be fair and impartial?
>
> MS. ARCOMONE: No.
>
> MR. NICKERSON: No?
>
> MS. ARCOMONE: I don't think so.
>
> MR. NICKERSON: You don't think so, I'm sorry. Can you explain a little bit more? I'm not doing a very good job. My job is to try and have you all talk so that I don't do the talking. I'm sorry, sometimes I talk too much.
>
> MS. ARCOMONE: I believe in the death penalty according to, you know, what the person did.
>
> MR. NICKERSON: Okay. Now, this view of you believe in the death penalty according to what -- what the person did. Is it fair to say that that's a strong view, that it's strongly held by you?
>
> MS. ARCOMONE: I think so.
>
> MR. NICKERSON: Would you just listen to what the person did in deciding whether or not death was appropriate?
>
> MS. ARCOMONE: I believe so.
>
> MR. NICKERSON: Okay. Ma'am, what I'm saying is would YOU iust listen to what the person did and not consider the mitigators based on this view that you have?
>
> MS. ARCOMONE: Yes.

1251-52. She told the state that she believed she would follow the law, and that she would not automatically vote for death, but the state did not question her about her refusal to consider mitigation or look beyond the facts of the case. 1289-90. The court denied a defense cause challenge to her. 1382-88.

Mr. Gehart could not be fair and impartial in the case of a violent crime against a completely innocent bystander. 1235-36. Asked then if he could follow the judge's instructions, he replied:

> I could follow the Judge's instructions, but I don't know that I could -- it would affect my deliberations.
>
> MR. NICKERSON: Okay. You do not think you could be fair and impartial, fair statement?
>
> MR. GEHART: Under most -- under certain circumstances, no I couldn't.

Id. In response to questions by the state, he said he could be fair and impartial and would follow instructions. 1300-1301 .[11] When the defense made a cause challenge to Mr. Gehart, the court summoned him to the bench and questioned him as follows:

> THE COURT: Will you be able to listen to all the facts that are presented in this case, the arguments of the lawyers and follow the instructions that I gave you in arriving at an advisory verdict in this case'?
>
> MR. GEHART: Yes, sir.

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[11] MR. COLTON: I believe that there were questions to you along the same lines. I think you made your feelings pretty clear throughout the questioning that you're in favor the [sic] of the death penalty; is that right?

MR. GEHART: Yes.

MR. COLTON: But I think you also answered, and correct me if I'm wrong, I'm not trying to put words in your mouth, that you would follow the Judge's instructions on the law. Can you do that?

MR. GEHART: Yes, sir. If the death penalty is to be a fair and impartial verdict by the law I could be fair and impartial. In the same sense, if it's 25 years without parole if that's what dictated, I could vote for that also.

MR. COLTON: So as strongly as you feel about the death penalty, you would not want to see it imposed if you didn't feel it fit the facts and the law; is that correct?

MR. GEHART: Yes, sir.

MR. COLTON: And do you feel based on that, that could you be a fair and impartial juror and follow the law?

MR. GEHART: Yes, sir.

THE COURT: All right. Does anything -- Do you feel that there's anything that was asked of you that you need to clarify as far as your feelings one way or the other on the subject?

MR. GEHART: Well, I just want it understood that if there's a guilty verdict and if --

THE COURT: All right, there's already been.

MR. GEHART: I want everybody to understand my feelings.

THE COURT: Go ahead.

MR. GEHART: If it's clearly defined that a vicious act was done on an innocent victim, I would probably be for the death penalty.

THE COURT: Okay. Now, before you make a decision one way or the other, I'm not telling you which way, can you and will you listen to the evidence as presented to you with an open mind?

MR. GEHART: Yes, sir

THE COURT: Listen to the arguments of the lawyers from the State and Defense, and follow the instructions that I give you before arriving at a decision?

MR. GEHART: Yes, sir.

THE COURT: I'm not asking you which, to commit one way or the other, but do you think you can follow the instructions that I give you?

MR. GEHART: Yes, sir.

THE COURT: Do you have any questions?

MR. MORGAN: Mr. Gehart, I think you said this but I want to go over it a couple more times so the record is clear.

MR. NICKERSON: Judge, that was inquired by the Court, how many times is the State going to be allowed to go over it with this witness?

THE COURT: I'm going to allow y'all to question him, too, if you want. Based on the answer he gave me, I'm going to deny the challenge for cause. If y'all don't want either side to inquire.

MR. NICKERSON: We don't want to inquire.

THE COURT: I'll deny the challenge for cause. Thank you, Mr. Gehart. Be patient with us, please, sir.

1397-99.

Using its last peremptory on Gehart, the defense moved for additional peremptories to strike Tobin, Kramer, Arcomone. 1399-1404. The court gave each juror one additional challenge, "no more peremptory challenges, that's it." 1406. After using this challenge, the defense again sought more peremptories to strike the objectionable jurors; the request was denied. 1414-5. It unsuccessfully renewed its cause challenge to juror Donithan, noting that it had no more peremptories to use on him. 1425-29. Objectionable jurors Tobin, Kramer, Arcomone, and Donithan served on the jury. 1433.

If there is "any reasonable doubt" as to a juror's abilities, he should be excused for cause. Hill v. State, 477 So. 2d 553, 555 (Fla. 1985). Doubts of jurors' partiality are resolved in favor of excusing them. Walsingham v. State, 61 Fla. 67, 56 So. 195, 198 (1911) ("in criminal cases, whenever, after a full examination, the evidence given upon a challenge leaves a reasonable doubt of the impartiality of the juror, the defendant should be given the benefit of the doubt. "). Relying on Walsingham and other cases, the Court wrote in Singer v. State, 109 So. 2d 7, 24 (Fla. 1959):

> Too, a juror's statement that he can and will return a verdict according to the evidence submitted and the law announced at the trial is not determinative of his competence, if it appears from other statements made by him or from other evidence that he is not possessed of a state of mind which will enable him to do so.

From Singer the rule has evolved that "rehabilitation" or jurors must be viewed with great distrust. Club West v. Tropigas of Florida, Inc., 514 So. 2d 426 (Fla. 3d DCA 1987) states:

> Where a juror initially demonstrates a predilection in a case which in the juror's mind would prevent him or her from impartially reaching a verdict, a subsequent change in that opinion, arrived at after further questioning by the parties' attorneys or the judge, is properly viewed with some skepticism. See, e.g., Johnson v. Reynolds, 97 Fla. 591, 599, 121 So. 793, 796 (1929); Singer, 109 So. 2d at 24. The test to be applied by the court is whether the prospective juror is capable of removing the opinion, bias or prejudice from his or her mind and deciding the case based solely on the evidence adduced at trial. Singer, 109 So. 2d at 24; State v. Williams, 465 So. 2d 1229, 1231 (Fla. 1985). A juror's assurance that he or she is able to do so is not determinative. Singer, 109 So.

2d at 24; Smith v. State, 463 So. 2d 542, 544 (Fla. 5th DCA 1985); Leon, 396 So. 2d at 205.

See Hamilton v. State, 547 So. 2d 630, 632 (Fla. 1989) ("We recognize the juror eventually stated that she could base her verdict on the evidence at trial and the law as instructed by the court. Nonetheless, her responses, when viewed together, establish that this prospective juror did not presume Hamilton innocent."), Reilly v. State, 557 So. 2d 1365, 1367 (Fla. 1990), Morgan v. Illinois (general fairness and "follow the law" questions not enough to detect those who would automatically impose death sentence). [12] Club West found error in denial of a cause challenge where a juror first said her husband's ownership of stock in a corporate defendant might enter into her decision in the case, but on further questioning assured the court that it would not affect her verdict.

Similar is Price v. State, 538 So. 2d 486 (Fla. 3d DCA 1989), where a juror, asked if her husband's friendship with the decedent might make some difference in the case, said: "Just a little. I think it would be there." Id. 488. When the court "rehabilitated" her, she said she could be fair, would have no prejudice, and would base her verdict on the law and the evidence. The district court reversed, writing at page 489:

> We have no doubt but that a juror who is being asked leading questions is more likely to "please the judge and give the rather obvious answers indicated by the leading questions, and as such these responses alone must never be determinative of a juror's capacity to impartially decide the cause to be presented. Grappling with similar circumstances, the court in Johnson v. Reynolds, 97 Fla. 591, 121 So. 793, 796 (1929), observed:
>
> > It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias of prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of

[12] Here, the court apparently based determination of cause challenges strictly on whether jurors said they would or would not "follow the law." 1068. Hence, the court used an improper standard,

> principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?

Erroneous denial of cause challenges resulted in objectionable jurors sitting on the panel. Reversal is required. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const. ; amend. V, VI, VIII, and XIV, U.S. Const.

POINT II

WHETHER THE STATE MISLEAD THE JURY AS TO APPELLANT'S PAROLE ELIGIBILITY.

Through a series of errors, the court let the state present the jury with a false understanding that appellant could be released on parole by "people in Tallahassee" now or in 15 years of the resentencing. This false picture directly affected the sentencing decision, making it unconstitutionally unreliable.

Gore had a sentence for armed trespass, [13] followed by the death sentence, followed by two concurrent sentences for kidnapping, followed by three concurrent sentences for sexual battery, 3200-3202, 4949, followed by five concurrent sentences for first degree murder (each with a 25 year mandatory minimum). 5626 ff. Hence, if the death sentence was converted to life imprisonment with a mandatory minimum, he could not be considered for parole for a least 50 years. See Turner v. State, 645 So. 2d 444 (Fla. 1994) (with consecutive life sentences for first-degree murder, defendant would not be eligible for parole for 50 years). Under parole regulation 23-21.006, he would not even be eligible for a parole interview until 18 months before expiration of the minimum mandatory (here 50 year) period. See also Weller v. State, 547 So. 2d 997 (Fla. 1st DCA 1989) (no right to proposed parole release date where defendant had various concurrent sentences one of which had 15-year mandatory term). Further, the

[13] Needless to say, his parole was revoked.

intervening consecutive life sentences would make the parole interview even more remote under Attorney General Opinion 85-11, which the Commission has adopted. Cf. Lowry v. Parole & Probation Commission, 473 So. 2d 1248 (Fla. 1985).[14]

Notwithstanding that Gore cannot even be considered for parole before at least the year 2032, the jury was lead to believe that his release was much more imminent, and this belief affected the sentencing decision. This matter arose as follows.

Throughout the proceedings, the jury repeatedly heard the sentencing options were death or life in prison without parole eligibility for 25 years. Thus the court sustained state objection to defense questioning of the venire about a life sentence (instead of life without possibility of parole for 25 years), overruling defense argument that it would be inappropriate and inaccurate to instruct the jury on the possibility of parole in 25 years. 971-73. [15]

Juror responses during voir dire show they easily heard "life without parole for 25 years" as meaning a 25 year sentence. [16]

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[14] In Lowry, this Court found that, notwithstanding AGO 85-11, the prisoner who had complied with a Mutual Participation Agreement, was entitled to parole notwithstanding that he was serving consecutive sentences without mandatory minimums. This part of the Lowry holding does not apply to one serving consecutive sentences for first degree murder. Hence, in Turner, the defendant could not be considered for parole for 50 years.

[15] At a pretrial hearing, the state told the court that Gore "would be eligible for parole under this crime" after serving 25 years, 4954, adding: "But as far as this case is concerned, under the law as it is today, he is eligible for parole after twenty-five years; that is the law. And they are not being honest with you when they tell you that under the statute or under this crime, he can not be eligible for parole." 4956.

[16] Thus when the state asked juror Maynard if the fact that Gore was guilty could affect her recommendation that he "be sentenced to life without parole for 25 years or death", she replied: "MS. MAYNARD: Since, he's guilty and sentence is what they are, I don't think I have any problem. MR. COLTON: Thank you. MS. MAYNARD: Since he's serving 25 years anyway. MR. COLTON: Okay. Thank you." 853-54. Similarly, juror Agostini thought the sentencing choice was between "going to the electric chair or to 25 years in prison." 782.

The defense presented testimony from Robert Stone, the 1984 prosecutor, that Gore had been sentenced to concurrent life terms for kidnapping Elliott and Martin, and to concurrent life terms for sexual battery on Martin, and that the kidnapping life sentences were consecutive to the sexual battery life sentences. 3200-3202. The state cross-examined him on this point:

> Q. Let's break that down, Mr. Stone. Basically are you saying that of the life sentence it adds up to basically one life sentence followed by another life sentence?
>
> A. That's correct.
>
> Q. Two live [sic] sentences?
>
> A. Two life sentences.
>
> Q. And he is subject to parole; is that correct?
>
> A. Yes.
>
> Q. When could he receive parole?
>
> A. I guess any time.
>
> Q. Who is that up to?
>
> A. Probation and Parole Commission.
>
> Q. All right. People in Tallahassee?
>
> A. Seven member board in Tallahassee.

3203.

At the charge conference, Gore unsuccessfully moved to omit the possibility of parole in 25 years from the instruction on sentencing alternatives, arguing that, given the other life sentences, the life sentence here would be life without parole. 3273-8. It also unsuccessfully moved that state not be allowed to argue parole eligibility after 25 years to the jury, 3274-75, noting "it's incumbent upon the State of Florida to not make misleading arguments. And if they're allowed to stand up in this case and say that he could be released within 25 years, that that is a false argument and the government must do justice. That is the first -- that is the first

rule for a Prosecutor. And I believe that it would -- that in argument otherwise, that if you do not give him death, that he will get out within 25 years is an improper argument." 3275.

Given the foregoing, the jury during deliberations issued two written questions on this issue. The first was: "Is the 10 years served go towards the 25 years?" 3621, 5604. The state argued that he received credit "for all the time that he's been in jail from July 26, 1983." 3622. It added: "This isn't like a case where they're deciding guilt or innocence where the penalty has no part in what they're doing, this is the penalty they want to know before they vote for life without parole for 25 years or death, they want to know if he's going to get credit for the time he's already served and they have a right to know that." 3623. Asked if Gore was entitled to "credit against any sentence that is imposed for the time that he has served commencing on July 26, 1983?", defense counsel said he did not know, but he believed it to be true, adding: "As a fact, don't know that it is true, but it would be disingenuous for me to say that's not true." 3625. The defense argued that it "may be a correct statement of the law, but that's not sufficient to give it. The better argument is that it unduly emphasizes this issue before the Jury by specifically instructing them on that. And therefore, we would ask you just to answer it by saying that you can't answer the question, they have to rely upon the instructions previously given." 3627. The state argued that "This is not covered by the instructions and it is a matter of law." 3268-69. The court overruled the defense objection, and instructed the jury that "The defendant receives credit for all the time he has served since his incarceration since July 26, 1983." 3629, 5604.

On the same sheet, the jury asked: "The standing two life sentences, when and if a parole can occur?" 3629, 5604. When the court proposed instructing the jury to rely on its recollection, the state replied: "I don't think that is a legal issue anyhow. I know there was

some comment that it was. I don't think it is. It's really a discretionary matter. There has been evidence on it. We'd ask the Court to instruct as you just indicated, that they should rely on their own recollection of the evidence. " 3630.[17] The defense objected, saying it was not sure the evidence on this was correct as a matter of law. 3630-36. The defense noted Gore may be eligible for parole on the first one, but then he has the consecutive life sentence on the other. 3631-2. As the defense expressed doubt about the truth of Stone's testimony, the state said "If we checked, I think we probably find that they can release him now if they wanted to on those sentences, conditional release and everything else. "[18] The court opined: "I honestly don't know the answer. But my point is Mr. Stone testified on this subject, and whether Mr. Stone correctly stated the law or not, I don't know. But it's in evidence." 3632. Overruling the defense objection, it instructed the jurors to rely on their own recollection. 3633, 5604.

The Due Process Clause "guarantees every defendant a 'right to be sentenced upon information which is not false or materially incorrect.' United States v. Berzon, 941 F.2d 8, 18 (1st Cir. 1991); accord United States v. Curran, 926 F.2d 59, 61 (1st Cir. 1991)." U.S. v. Tavano, 12 F.3d 301 (1st Cir. 1993). Prosecution argument presenting a false evidentiary picture to the jury violates due process. U.S. v. Kojayan, 8 F.3d 1315 (9th Cir. 1993). A death sentence based on unreliable evidence violates the Cruel and Unusual Punishment and Due Process Clauses. Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). Prosecution presentation of a false evidentiary picture can be raised for the first time on appeal. U.S. v. Tincher, 907 F.2d 600 (6th Cir. 1990). The state has an "affirmative duty"

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[17] The state also contended that the defense had presented the testimony that Gore could be paroled at any time on those offenses. 3631-32. This is incorrect: the state presented the evidence on cross-examination of Robert Stone. 3203.

[18] Weller refutes this assertion.

to correct false evidence. Thorpe v. State, 350 So. 2d 552 (Fla. 1st DCA 1977). It may not claim that its trial prosecutor was ignorant of the falsity of the evidence, where other prosecutors or law enforcement authorities have access to it. Giglio v. U.S., 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (rejecting claim that trial prosecutor was unaware of impeachment evidence, where evidence was available to other prosecutors), Antone v. State, 355 So. 2d 777, 778 (Fla. 1978) (matter known to FDLE attributable to prosecution even where trial prosecutor does not know of it), U.S. v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992) (prosecution has duty to search files of police agency for exculpatory information). The Due Process Clause forbids the state's concealment of exculpatory evidence or use of false evidence. Brady v. Maryland, 373 U.S. 83 (1963) (prosecution withheld evidence that another confessed to murder). Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed. 350 (1946), wrote of the duty in responding to jury questions during deliberations: "When a jury makes explicit its difficulties a trial judge clear them away with concrete accuracy."

Here the state unconstitutionally presented a false picture that Gore was subject to parole either immediately on some offenses or, at most within 15 years. It presented false evidence that "people in Tallahassee" [19] could parole him at any time on the consecutive life sentences for kidnapping and sexual battery. These actions directly affected the jury's deliberations. In response to the jury questions, the court failed to clear away the false evidence -- indeed he was unconcerned whether the jury was relying on a false understanding of the law based on false evidence:[20] "whether Mr. Stone correctly stated the law or not, I don't know".

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[19] These "people in Tallahassee" were agents of the State of Florida, the prosecutor's own client.

[20] Here recall the state's position that parole eligible was a question of law. 4956.

Significantly, the Department of Legal Affairs is legal advisor to the Parole Commission. § 947.11, Fla.Stat. The prosecutors were in touch with the Department during the resentencing, 916, and an assistant attorney general represented the state at the charge conference. The Commission is an agency of the state. The state cannot now claim that it had no knowledge of the true possibilities respecting Gore's parole eligibility. Art. I, §§ 9, 16, 17, 21, 22, Fla, Const., amend. V, VI, VIII, and XIV, U.S. Const.

POINT III

WHETHER THE COURT ERRED IN LETTING THE STATE USE A CONVICTION FOR ARMED TRESPASS FOR THE "PRIOR VIOLENT FELONY' AGGRAVATING CIRCUMSTANCE.

The court erred in letting the state present to the jury its theory that Mr. Gore's conviction for armed trespass constituted a prior conviction for "a felony involving the use or threat of violence to the person" under section 921.141(5)(b). In so doing, the court overruled repeated defense objections. 1759-1802, 1807-34, 1839, 1875-76 (objection and motion for mistrial), 1907 (same). [21] (Gore's challenge to the instruction given is addressed elsewhere.) Neither the facts of the actual offense, nor the elements of the offense fit the circumstance. Further, the state did not cross-appeal the court's ruling at the 1984 sentencing that the armed

[21] The defense argued among other things that: Case law at the time of the conviction did not authorize use of the crime. 1763, 1766, 1808-09. (The state countered that "the case law evolved" thereafter. 1772-73). The prior court did not instruct on it or use it at the original sentencing. (Rejecting argument by the state, the trial court here ruled that the prior sentencing court specifically "found this aggravating circumstance does not apply". 1776.) Armed trespass is not a crime involving violence or threat of violence. 1777. The actual facts of the instant armed trespass did not include violence or threat of violence. 1778, 1800-1801. Aggravating circumstances must be strictly construed. 1780. Evidence of the trespass constitutes non-statutory aggravation in violation of the statute, the state constitution, and the 8th and 14th amendments. 1809, 1781. The prejudicial impact of the evidence outweighed its probative value. 1809. Redefinition of the statute and retroactive application violated the Ex Post Facto Clause and the state and federal constitutions. 1810, 1822. Such an expansive reading of the circumstance violated the constitutional requirement that aggravating circumstances genuinely narrow the class of death-eligible persons. 1810-11. Redefinition of the circumstance is unconstitutional because only the Legislature can amend the statute. 1822.

trespass could not be used for this circumstance,[22] so that it waived application of the circumstance to that offense. As discussed in subsection D below, the state cannot show that the error did not affect the sentence.

A. The facts of the armed trespass did not fit the circumstance. The record shows that a woman saw Gore hiding in the back floorboard of her car. She called to a policeman who arrested Gore without incident. In the car Gore had a police scanner, a loaded pistol, and a glass of alcohol. 1868-84. See also the state's recitation of the facts to the court at 1799, and its apparent claim that the fact that the woman was "very attractive" could cause a reasonable person to think Gore posed a threat to her. 1779.[23]

Obviously all criminal activity involves some threat of violence, however remote. Strict construction of the statute (see the next section) requires that the circumstance apply only to felonies in which the defendant harmed or actually threatened to harm the victim. See Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981) ((5)(b) "refers to life-threatening crimes in which the perpetrator comes in direct contact with a human victim." Citing cases.), Ford v. State, 374 So. 2d 496, 501-502 (Fla. 1979) (rejecting application of (5)(b) circumstances to sale of narcotics on ground that it "involves a threat to the safety of the public"). To hold otherwise would render the circumstance unconstitutional, as discussed below. The facts here do not

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[22] Record pages 5699-5700 and 5706-17 contain the discussion of this issue at the 1984 penalty charge conference.

[23] MR MORGAN: I would submit that a reasonable person could find Mr. Gore posed a threat to that woman. A very attractive female whose car it belonged to, had just gone to the Doctor's Clinic, and I would submit that a reasonable person could find that Mr. Gore had just committed a felony that involved the threat of violence to another person. . . .

This argument mirrored the argument the state made in 1984. 5699 ("the defendant observed a very attractive female go into a doctors' clinic").

amount to a felony involving violence or threat of violence. Hence, the court erred in letting the state present detailed evidence about this crime and argue it to the jury.

B. Like other aggravating circumstances, this circumstances must be strictly and narrowly construed. Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990) (aggravating circumstances must be strictly construed). [24] See also Mavnard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Picking and choosing among a various constructions on a case-by-case basis violates the Eighth Amendment. Id., 486 U.S. at 360 (discussing Tenth Circuit opinion with approval).

Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994) ruled that it was error to use a conviction for solicitation to commit murder to establish this circumstance, writing: "According to its statutory definition, violence is not an inherent element of this offense."

Similarly, violence is not an inherent element of armed trespass. It was error to let the state present evidence and argument respecting the armed trespass as a prior violent felony.

C. As already noted, the court ruled in 1984 that the state could not use the trespass conviction for the "prior violent felony" circumstance. The state acquiesced in this ruling and

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[24] Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This principle of strict construction is not merely a maxim of statutory interpretation: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (rule "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Cit.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "'plainly and unmistakably"' proscribed. [Cit.]"). This principle of strict construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980).

did not cross-appeal this ruling. Hence, it waived any right to use the trespass conviction for this circumstance. See Guerra v. State, 546 So. 2d 133 (Fla. 4th DCA 1989) (by not filing cross-appeal, state waived issue), Cannadv v. State, 620 So. 2d 165, 170 (Fla. 1993) (court should have found (5)(b) circumstance, but, since it was not presented to jury, was not argued below, not found by trial court, and not subject of cross-appeal, it was waived by state: "Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State. ").

D. The court erred in letting the state present detailed evidence about the armed trespass, R 1868-1907, and argue it to the jury. R 3557-59. The error led to the state expert's claim that the armed trespass had the same elements as the case at bar -- that Gore was crouched in car on the floor "he had his weapon and his equipment that he used to go hunting and he had the half can of beer." 3449-50. The expert used this to elaborate his theory that Gore was a hunter of women and a Mafia-style killer who targeted women. 3452. Thus, the state argued to the jury: "I submit to you on that day on 1/9/81 [the day of the armed trespass] he was hunting just as he was on 7/26/83 [the date of the murder]. " 3557. The state obviously deemed this prior crime crucial to its case for death? its argument on the prior violent felony circumstance was based almost entirely on the armed trespass. R 3558-59. Hence, it influenced the penalty verdict and the death sentence so that resentencing is required. Art. I, § § 9, 16, 17, 21, 22, Fla. Const., amend. V, VI, VIII, and XIV, U. S . Const.

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[25] Having spent well over 50 pages in arguments on this issue in the trial court, the state can hardly now say that it did not see this evidence as very important to its case.

POINT IV

WHETHER USE OF THE AVOID ARREST, PREMEDITATION, AND HEINOUSNESS CIRCUMSTANCES REQUIRES RESENTENCING.

The court erred in instructing the jury on the avoid arrest, premeditation, and heinousness circumstances, and in finding them in its sentencing order. Since the state urged these circumstances to the jury and the court relied on them, resentencing is required.

The sentencer "may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984)." Robertson v. State, 611 So. 2d 1228 (Fla. 1993). The evidence here does not support the circumstances. Their use renders the sentence unconstitutional. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., amend. V, VI, VIII, and XIV, U.S. Const.

A. Avoiding arrest.[26] Except where the defendant has killed a law enforcement officer, this circumstance applies only where there is "strong proof" of the defendant's motive and it is "clearly shown that the dominant or only motive for the murder was the elimination of the witness. We have also held that the mere fact that the victim knew and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest." Perry v. State, 522 So. 2d 817, 820 (Fla. 1988) (citations omitted). Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993) (striking circumstance where defendant murdered woman who had witnessed her companion's murder) held:

> ... The State must prove beyond a reasonable doubt that an aggravating circumstance exists. Williams v. State, 386 So. 2d 538 (Fla. 1980). Moreover, even the trial court may not draw "logical inferences" to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984). In order to support a finding that a defendant committed a murder to avoid arrest, the State must show beyond a

[26] "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." § 921.141(5)(e), Fla.Stat.

> reasonable doubt that the defendant's dominant or only motive for the murder of the victim, who is not a law enforcement officer, is the elimination of a witness, Menendez v. State, 368 So. 2d 1278 (Fla. 1979). "Proof of the requisite intent to avoid arrest and detection must be very strong" to support this aggravating circumstance when the victim is not a law enforcement officer. Riley v. State, 366 So. 2d 19, 22 (Fla. 1978).

See also Geralds (murder of woman who knew him during carefully planned burglary; defendant may have killed her because she attempted to escape). The circumstance does not apply even where there is a substantial inference that the murder was committed to cover up a crime. Davis v. State, 604 So. 2d 794 (Fla. 1992) (burglar killed elderly woman who knew and could identify him; supreme court held that the fact that witness elimination may have been a motive in the murder was insufficient to support circumstance); Dailey v. State, 594 So. 2d 254 (Fla. 1991) (defendant raped, stabbed, strangled, and drowned a fourteen-year-old girl). Menendez v. State, 368 So. 2d 1278 (Fla. 1979) (victim found lying on floor of his jewelry store with his hands outstretched in a supplicating manner; defendant had murdered the victim with a gun which had a silencer; while these facts suggested that Menendez committed the murder to avoid arrest, they did not amount to the very strong evidence required by law).

The state's argument, 3560-62, pointed to no evidence proving this circumstance. Without support in the record, it argued that Gore knew "from the beginning" that "he couldn't let her go. " 3561. The sentencing order finding the circumstance consists of a single conclusory sentence setting out no facts supporting the finding: "The evidence shows conclusively that the dominant or only motive for the Defendant's murdering Lynn Elliott, who was in the process of escaping, was to prevent her identification of him as the perpetrator of the kidnapping and to thereby avoid or prevent the Defendant's arrest." 4566. The court's failure to assign any factual predicate for the circumstance other than the fact that Elliott was escaping is an independent reason for disapproving the finding.

B. Cold, calculated, and nremeditated." This circumstance does not apply where the killing may have occurred because the victim tried to escape. Geralds v. State, 601 So. 2d 1157 (Fla. 1992) (during carefully planned burglary of home of family he knew, defendant bound and then murdered woman; although the only apparent motive for the killing was to cover up the burglary (the woman knew Geralds), perhaps the defendant killed the woman while she tried to escape). It does not apply when the evidence does not show intent to commit murder before the fatal episode began. Rogers v. State, 511 So. 2d 526 (Fla. 1987) (defendant shot robbery victim three times because he was "playing hero" and trying to flee). An intentional and deliberate killing during the commission of another felony does not necessarily qualify. Maxwell v. State, 443 So. 2d 967 (Fla. 1983). The fact that the underlying felony may have been fully planned ahead of time does not qualify if the plan did not include the commission of the murder. Jackson v. State, 498 So. 2d 906 (Fla. 1986), Power v. State, 605 So. 2d 856 (Fla. 1992) (defendant raped, kidnapped, stabbed 12-year-old girl. Although rape was carefully planned, evidence did not show that murder was carefully planned). A plan to kill cannot be inferred from a lack of evidence -- mere suspicion is insufficient. Llovd v. State, 524 So. 2d 396, 403 (Fla. 1988). Multiple wounds do not prove the heightened premeditation required. E.g., Hamilton v. State, 547 So. 2d 630 (Fla. 1989) (multiple wounds to two victims); Caruthers v. State, 465 So. 2d 496 (Fla. 1985) (victim shot three times); Blanco v. State, 452 So. 2d 520 (Fla. 1984) (victim shot seven times). A remote circumstance is not enough. Gore v. State, 599 So. 2d 978 (Fla. 1992) (taking woman to remote location, defendant raped and murdered her). In Gore, the court wrote:

[27] "The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." § 921.141(5)(i), Fla.Stat.

> To establish the heightened premeditation necessary for a finding of this aggravating factor, the evidence must show that the defendant had "a careful plan or prearranged design to kill." [Citations omitted.] Here, the evidence established that Gore carefully planned to gain Roark's trust, that he kidnapped her and took her to an isolated area, and that he ultimately killed her. However, given the lack of evidence of the circumstances surrounding the murder itself, it is possible that this murder was the result of a robbery or sexual assault that got out of hand, or that Roark attempted to escape from Gore, perhaps during a sexual assault, and he spontaneously caught her and killed her. There is no evidence that Gore formulated a calculated plan to kill Susan Roark. We therefore conclude that the State has failed to establish the existence of this aggravating circumstance beyond a reasonable doubt. [Citations omitted.]

The state argument at bar pointed to no specific evidence proving the circumstance. 3565-66. It contended, with no support in the record, that Gore "knew before he picked them up" that he would kill, adding that it was not as though he killed out of a grudge (which actually would support the circumstance). At most, it could say that "That's why at no point did he ever try to conceal his identity." 3566.

The evidence does not show a prearranged design to murder Lynn Elliott. At most, it shows that Gore said he was going to kill Regan Martin eventually, but apparently he did not make this statement until after Lynn Elliott was dead. The view of the evidence most favorable to the state is that Lynn Elliott broke free and that Gore chased her down, dragged her back and shot her. While he had said he would kill her if she didn't shut up, and said he would kill Martin if she tried anything, these statements are insufficient to establish a prior plan to kill Lynn Elliott as required by Rogers. The record does not show the sort of prearranged design to kill Lynn Martin which would support this circumstance.

C. Especially heinous, atrocious, or cruel. [28] It was error to use this circumstance for this murder by gunshot. In Green v. State, 641 So. 2d 391, 396 (Fla. 1994), while robbing Charles Flynn and Kim Hallock at gun point in the woods, Green tied Flynn's hands behind

[28] "The capital felony was especially heinous, atrocious, or cruel." § 921.141(5)(h), Fla.Stat.

his back, and kidnapped the pair. Trying to escape, Flynn shot at Green, who shot him back as Hallock fled. The court wrote: "The additional acts accompanying Flynn's death -- Flynn knew Green had a gun, his hands were tied behind his back, and he was driven a short distance to the orange grove -- do not turn this shooting into the ' "especially" heinous' type of crime for which this aggravator is reserved. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)."

Similarly, in Maharaj v. State, 597 So. 2d 786, 787 (Fla. 1992), the Court disapproved application of the circumstance to these facts:

> After shooting Derrick Moo Young, Maharaj questioned Duane Moo Young [Derrick's son] regarding the money. During this time, Derrick Moo Young crawled out the door and into the hallway. Maharaj shot him and pulled him back into the room. Shortly thereafter, Duane Moo Young broke loose and hurled himself at Maharaj, but Butler held him back. Then Maharaj took Duane Moo Young to the second floor of the suite where he questioned him again. Later, Butler heard one shot. Maharaj came downstairs and both he and Butler left the room. They both waited in the car in front of the hotel for Dames.

See also Burns v. State, 609 So. 2d 600 (Fla. 1992) (defendant shot trooper who was standing in watery ditch begging for his life); Robertson v. State, 611 So.2d 1228 (Fla. 1993) (defendant shot woman as she cried and screamed after he shot her companion); Bonifav v. State, 626 So, 2d 1310 (Fla. 1993) (defendant shot store clerk as he lay on floor begging for his life and talking about his wife and children); Santos v. State, 591 So. 2d 160 (Fla. 1991) (defendant chased and shot woman and children running down street screaming).

POINT V

WHETHER THE JURY WAS MISLEAD AS TO THE ROLE OF MITIGATION BY STATE VOIR DIRE QUESTIONING AND TRIAL COURT RULINGS RESPECTING SYMPATHY AND MERCY.

During voir dire the state told jurors that sympathy could play no role in their deliberation, and many jurors said sympathy and mercy should play no role. The court erred in letting the state create this impression, in limiting defense voir dire, and refusing a corrective

instruction. As a result, jurors misunderstood the role of sympathy and mercy so that they felt that they could refuse to consider valid mitigation in reaching the sentencing decision.

The state told the first juror (Agostini) on the panel that "sympathy is not allowed to be a part of your decision making". 467.[29] Thereafter, many jurors said that in their view sympathy or mercy should play no role in deciding the sentence, while at the same time saying that they would follow the judge's instructions. E.g. 542 (Patterson), 1190-91 (same), 762 (Donithan), 911-12 (Agostini again), 586 (Kramer), 677-68 (Arcomone), 702 (Crump), 546 (Kneut), 548-49 (same), 555 (Jackson), 564 (Bosick), 586 (Kramer), 604 (Thomas), 614 (Elsnick), 661 (Goff), 499 (Tobin). Some jurors were not expressly questioned on this point. Apparently only one juror had a partial disagreement to this proposition. 644-45 (McCall).

The defense objected repeatedly, eventually making a continuing objection to the state's questioning, saying the state had created or affirmed in the minds of the jurors[30] the idea that they could not consider sympathy or mercy in mitigation. 496-99, 546-48, 555-56. Although the court sustained an objection to one question as framed, 496-99, it held proper the state's line of questioning, based on its reading of Gore v. State, 475 So. 2d 1205 (Fla. 1985). 548, 927. (The court's misunderstanding of Gore and applicable law is discussed below.)

When Agostini repeated to defense counsel Nickerson that "You can't let sympathy into a case like this", he asked her if an instruction on mercy would change her mind. 912-913. She said it would. As he asked additional questions, the state objected, 913, arguing that

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[29] In fact this remark was partially addressed to the jury as a whole: "Do you understand that each of you understand that sympathy in a case such as this, or in any criminal case, sympathy is not allowed to be part of your decision making, your recommendation?"

[30] Juror Kramer said the she came to that conclusion based on what the state her asked her. 1204. Other jurors said that they had the same view before this proceeding.

Nickerson was "insinuating that somehow the Judge will instruct that mercy is a mitigating circumstance of some sort, that is not the law in the State of Florida. " 914. Lengthy argument followed interrupted by discussion of other matters. The defense sought an instruction "to the effect that if the Members of the Jury find that based on the mitigation that has been introduced that engenders feelings of mercy or sympathy that those are considerations which are valid in arriving at their recommendation. " 936-37. Pointing to the state's questioning of many jurors and their responses on this point, it argued that the panel as a whole need to be rehabilitated. 943-44. The judge refused to give such an instruction at that time, but said it might give one at the close of evidence. 948. But he also said he did not anticipate giving any instruction mentioning the words "mercy" or "sympathy." 949. He said he would allow "open-ended" questions, 950, but said "There's not going to be an instruction on mercy unless there's something I don't know about. There's not going to be an instruction on mercy. " 951. Similarly, the court sustained the state's objection to the defense asking juror Thomas "if someone started out life in an impoverished condition, what would you think about that if the Judge was to instruct you that that could be something to be considered in someone's character?" 1043-44. The court also sustained an objection to the defense asking whether a juror could consider, under the catchall mitigation instruction, control of the defendant by another. 1144-48. The objection was that the defense was seeking a commitment from the juror. The court ruled that the defense could only ask whether the jurors would follow an instruction concerning "any aspect of his character. " 1148.

At the charge conference, the defense filed a written requested instruction to the jury that "you may grant mercy to David Alan Gore so long as that mercy is based on the mitigating circumstances. " 3330. State argued that the statute doesn't have mercy or sympathy, what it

has is weighing of aggravating and mitigating. 3332. It contended that the defense could argue it, but it was not part of the weighing process. 3334. The defense replied that the state's questions during voir dire about sympathy and mercy required the instruction to cure the jury's misunderstanding on this point. 3334-5 .[31] Denying the instruction, the court said the defense was free to make the argument "but I'm not prepared to instruct them as requested here. You all are free to make that argument, and they may do that in their wisdom." 3336-7.

Apparently the court thought under Gore mercy has no role in capital sentencing. 9 ("The mercy issue was discussed in the Florida Supreme Court as not permittable or part of the law in Florida. "), 548 ("This Gore decision by the Florida Supreme Court when Defense counsel was asking about a recommendation of mercy and the Judge sustained the objection and upheld by the Supreme Court. "). Thus it seemed to accept state argument tracking the argument it made in Gore. 914 ("I mean, it's a concept that they could gain that from perhaps mitigating circumstances somehow, but nowhere in any jury instruction I would submit is the Court going to instruct them on the item of mercy it's not even in the statute. It used to be, it's not even in the statute. ").

In Gore, the state objected to a question as to whether a juror could recommend mercy, arguing that "there is nothing in the statute that says anything about mercy. " Id. 1206-1207. The court sustained the objection to the question as framed. This court disapproved, noting: "We have previously held that it was error for a trial judge to refuse to allow defense counsel to propound any voir dire inquiry as to the issue of mercy, since 'such inquiry . . . could

[31] The state was represented by an assistant attorney general who was not present at voir dire. Nevertheless, he argued: "But I don't feel that this instruction is necessary to cure anything that happened in voir dire. Because what happened in voir dire is not really what this instruction deals with." 3336.

conceivably be determinative of whether the defense should challenge a juror -- either for cause or peremptorily. ' Poole v. State, 194 So. 2d 903, 905 (Fla. 1967) (emphasis supplied)." Id. 1207. In view of the total record of voir dire, this Court held the error harmless.

Sympathy and mercy are the very stuff of the Supreme Court's teachings respecting mitigation. Justice Scalia, who strongly disagrees with these teachings, aptly summarized the rule in his dissent in Morgan v. Illinois, 112 S.Ct. 2222, 2242 (1992) (Scalia, J., dissenting: "Not only must mercy be allowed, but now only the merciful may be permitted to sit in judgment. " While the eighth amendment does not require that jurors consider "mere sympathy" which is "totally divorced from the evidence adduced during the penalty phase", California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 840, 93 L.Ed.2d 934 (1987), they must give weight to "compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

California v. Brown concerned an instruction that capital sentencing jurors "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. " The state supreme court held that this instruction might divert the jury from consideration of sympathetic aspects of the defendant's character or record. 107 S.Ct. at 839 (summarizing course of proceedings). The state obtained certiorari review arguing that the instruction was proper, arguing that the instruction simply prevented the jury from relying on "untethered sympathy" unrelated to the circumstances of the offense or the defendant. Id. 843

(Brennan, J., dissenting) (quoting from state's brief). A Supreme Court plurality[32] rejected Brown's challenge to the jury, writing at page 840 (emphasis in original):

> By concentrating on the noun 'sympathy,' respondent ignores the crucial fact that the jury was instructed to avoid basing its decision on mere sympathy. In a juror who insisted on focusing on this one phrase in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating circumstances. While strained in the abstract, respondent's interpretation is simply untenable when viewed in light of the surrounding circumstances. This instruction was given at the end of the penalty phase, only after respondent had produced 13 witnesses in his favor. Yet respondent's interpretation would have these two words transform three days of favorable testimony into a virtual charade. We think a reasonable juror would reject that interpretation, and instead understand the instruction not to rely on "mere sympathy" as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase.

In a concurrence, Justice O'Connor, the swing vote,[33] agreed that the instruction "does not by itself violate the Eighth and Fourteenth Amendments", but continued that it was an open question whether the instruction improperly affected Brown's jury. Id. 841. But she also noted that "the jury instructions -- taken as a whole -- must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character, or about the circumstances of the crime." Id. On remand the state court "should determine whether the jury instructions, taken as a whole, and considered in combination with the prosecutor's closing argument, adequately informed the jury of its responsibility to consider all of the mitigating evidence introduced by the respondent." Id. 842. She concluded: "Because it is open to the California Supreme Court to determine on remand whether the jury was

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[32] The Chief Justice's opinion for the Court was joined by Justices White, Powell, O'Connor, and Scalia. But, as noted below, Justice O'Connor also filed a separate concurrence presenting narrower grounds, so that the case was returned to the state court for further consideration.

[33] Where a concurrence by the swing vote presents "grounds narrower than those put forth by the plurality, [that] position is controlling." Romano v. Oklahoma, 114 S.Ct. 2004 (1994).

adequately informed of its obligation to consider all of the mitigating evidence introduced by the respondent, I concur in the judgment and opinion of the Court." Id.

Here, at the outset of the trial, the jurors thought that sympathy and mercy play no part in the sentencing decision, and saw no conflict between that view and following the law.[34] This was because the state told them that sympathy was to play no part in their decision. They might have changed their minds and properly considered mercy and sympathy arising from mitigation had the trial court given the requested defense instruction. We don't know, because defense questioning was erroneously cut off, and the court refused to give a corrective instruction. Argument of counsel is no substitute for accurate instructions. Taylor v. Kentucky, 436 U.S. 478, 488-489, 92 S.Ct. 1930, 56 L.Ed.2d 468 (1978), Mellins v. State, 395 So. 2d 1207, 1209 (Fla. 4th DCA 1981). This Court should order a new trial. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., and amend. V, VI, VIII, and XIV, U.S. Const.

POINT VI

WHETHER ERRONEOUS JURY INSTRUCTIONS REQUIRE RESENTENCING.

Florida law and due process require accurate instructions. Fla.R.Crim.P. 3.390(a), Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (willfully depriving person of civil rights; "willfully" not defined for jury: "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even

[34] "It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining . . . dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception." Morgan v. Illinois, 112 S.Ct. at 2233. A footnote omitted from this quote gave examples from the voir dire examination.

those guilty of the most heinous offenses are entitled to a fair trial. ") (e. s.). It can be fundamental error to instruct incorrectly as to what the state must prove. State v. Delva, 575 So. 2d 643 (Fla. 1991) (error not fundamental where element not in dispute).

The federal and state constitutional rights to jury trial carry the right to accurate instructions on the elements of the offense and the defense. In Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945), the court wrote in reversing a conviction where there was an incorrect instruction on self-defense:

> There is much at stake and the right of trial by jury contemplates trial by due course of law. See Section 12, Declaration of Rights, Florida Constitution.. . . We have said that where the court attempts to define the crime, for which the accused is being tried, it is the duty of the court to define each and every element, and failure to do so, the charge is necessarily prejudicial to the accused and misleading. [Cit.] The same would necessarily be true when the same character of error is committed while charging on the law relative to the defense.

"Amid a sea of facts and inferences, instructions are the jury's only compass. " U.S. v. Walters, 913 F.2d 388, 392 (7th Cir. 1990) (refusal to give theory of defense instruction). Arguments of counsel cannot substitute for instructions by the court. Taylor v. Kentucky, 436 U.S. 478, 488-489, 92 S.Ct. 1930, 56 L.Ed.2d 468 (1978), Mellins v. State, 395 So. 2d 1207, 1209 (Fla. 4th DCA 1981).

A jury instruction relieving the state's burden of proof or persuasion as to an element of the offense is unconstitutional. In Mullanev v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), Sandstrom v. Montana, 442 U.S. 510, 524, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (discussing Mullanev), Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). These principles apply to penalty phase instructions. Mills v. Marvland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 349 (1988), Stringer v. Black, 112 S.Ct. 1130

(1990). The court's rulings on jury instructions below were unconstitutional. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., and amend. V, VI, VIII, and XIV, U.S. Const.

A. Prior violent felony. The court erred in instructing the jury on this circumstance and in refusing an instruction properly narrowing its construction.

1. Over extensive defense objection, 1877, 3366-75, the court instructed the jury: "The crime of Trespass of a Conveyance while Armed may or may not be a felony involving the use or threat of violence to another person depending upon the circumstances of that offense. You may consider an Armed Trespass conviction in regards to this aggravating circumstance only if the evidence presented convinces you beyond a reasonable doubt that the defendant had previously been convicted of Armed Trespass, and that that offense involved the use or threat of violence to another person." 4448. The court erred. Under Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981), this circumstance applies only to "life-threatening crimes in which the perpetrator comes in direct contact with a human victim." See also Elam (circumstance did not apply to solicitation to commit murder).

2. Compounding its error, it refused a defense instruction not to "consider as an aggravating factor the Defendant's prior conviction for armed trespass or the evidence concerning that event unless you find beyond a reasonable doubt that that incident involved a life-threatening crime in which the Defendant came in direct contact with a human victim." 4443. The court erred: this was not covered by the instructions given, and was a correct statement of the governing law under Lewis and Elam.

B. Coldness (CCP).

The parties agreed that the standard instruction tracking the statute on this circumstance is unconstitutional. 3399-3402. In a confused discussion, the defense argued that the

circumstance was so unconstitutionally vague that no narrowing construction could be made of it, 3403, sought an instruction tracking the limitations set out in Rogers, 3405, and said that it wanted the standard instruction, 3406, contending that it was not incumbent on it to come up with an instruction. 3407. The state proposed supplementing the statutory language with: "The kind of crime intended to be cold, calculated and premeditated is one that follows a careful plan of pre-arranged design." 3408-3409. The defense then argued that this instruction "is still unworkably vague for purposes of the Eighth Amendment." 3409. The court overruled the objection, 3409, and instructed the jury: "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The kind of crime intended to be cold, calculated and premeditated is one that follows a careful plan or pre-arranged design." 4449.

The court erred. Instead of constitutionally narrowing the circumstance, the instruction unconstitutionally expanded it. The jury would readily have applied the circumstance where the murder "follow[ed] a careful or pre-arranged design" even it the design was only to commit sexual battery rather than murder. This would be a clear misapplication of the circumstance under Jackson (fact that the underlying felony was fully planned ahead of time does not qualify unless plan included commission of murder) and Rogers.

C. Heinousness (HAC).

The parties agreed that the standard instruction on this circumstance is unconstitutional. 3381-91. The defense relied on Espinosa v. Florida, 112 S.Ct. 2926 (1992) and Sochor v. Florida, 112 S.Ct. 2114 (1992). Again, the defense argued that the statute is so vague that no limiting instruction could cure it. 3387. The defense asked for "limiting language which goes to contemplation of death, prior to the act, and/or kidnapping," 3387, and argued that no

instruction should be given. 3397. The defense objected to the state's proposed instructions as being vague. 3395-96. Pressed to choose between options which it considered unconstitutional, the defense said it would take the standard instruction without abandoning any of its objections. 3396-97. The court, over defense objection, 3397-98, gave this instruction proposed by the state: "The crime for which the defendant is to be sentenced was especially heinous, atrocious and 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, and cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim." 4449.

The court erred. The first four sentences contain language found unconstitutional in Shell v. Mississippi, 111 S.Ct. 313 (1990) and Espinosa. The last sentence might have saved the circumstance only if it made clear to the jury that the circumstance applied only to the conscienceless or pitiless crime which is unnecessarily torturous. Sochor, 112 at 2121. But it did not. Also, it did not inform the jury that torturous intent is required, relieving the state of its burden to prove this element. See McKinney v. State, 579 So. 2d 80, 84 (Fla. 1991) ("The evidence in the record does not show that the defendant intended to torture the victim").

E. Instruction on doubling of circumstances.

The court erred in refusing to instruct: "The State may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that as supporting a single aggravating circumstance." 4414.

This instruction correctly states the law and is not covered by the standard instructions. Castro v. State, 597 So. 2d 259, 261 (Fla. 1992), Provence v. State, 337 So. 2d 783 (Fla. 1976). This error unconstitutionally authorized the jury to accept the state's arguments on both the coldness and avoid arrest circumstances, when those arguments were based a single aspect of the offense: the state argued as to both circumstances that Gore always intended to kill in order to avoid arrest. 3566 (coldness), 3561 (avoid arrest).

D. Instructions regarding mitigation.

Many veniremen, including several who sat on the jury, expressed views that an economically depressed background was not mitigating, at least absent such an instruction from the court. 1052 (Miller), 1032 (Rinaldi), 1033-34 (Wales and Tobin), 1035 (Hennis), 1038 (Drake), 1035-36 (Patterson), 1036-37 (Kneut), 1039 (Campbell), 1040 (Kramer), 1041 (Gates), 1042-43 (Thomas). Of these, Tobin, Drake, and Kramer sat on the jury. 1433.

Hence it was error to refuse to instruct: "You may consider as a mitigating circumstance David Alan Gore's background and early and his deprived childhood. " This instruction is a correct statement of the law under Eddings v. Oklahoma, 455 U. S. 104 (1982). As noted in Justice O'Connor's concurrence in California v. Brown, these matters must be considered in mitigation. As Justice O'Connor explained, a catch-all instruction will be insufficient if the jury is otherwise mislead as to the nature of non-statutory mitigation.

Likewise, under the facts of this case, the court erred in overruling the defense's objection to the standard catch-all mitigation instruction and refusing to give an instruction listing non-statutory factors to be considered by the jury. 3361-62, 3411, 4444-45.

Also as noted earlier in this brief, many jurors saw no contradiction between their agreement to follow and law and a refusal to consider sympathy. Again, as noted in Justice

O'Connor's concurrence in California v. Brown, mitigation based on mitigating evidence must be considered by the sentencer.

Hence the court erred in refusing to give this instruction which is not covered by the standard instruction and which is a correct statement under Spivev v. Zant, 661 F.2d 464, 467-72 (5th Cir. 1981): "Mitigating circumstances are those factors which in fairness and mercy may be considered as extenuating or reducing the degree of blame for the offense. Mitigating circumstances also include any aspect of David Alan Gore's background and life which may create a reasonable doubt about the question of whether death by electrocution is the only appropriate sentence for David Alan Gore." 4419. The court rejected argument that the instruction was made necessary by state questioning the jury about sympathy. 3302-4.

It also erred in refusing an instruction on principals which would have informed the jury that if David Gore was a principal as defined by law (the instruction tracked the standard instruction on principals), then it should consider the sentence imposed upon him in determining the verdict as to the sentence imposed on David Gore. 3349-53, 4441-42.

E. Other defense proposed instructions.

The court refused to instruct the jury: "You may not consider the death penalty as a possible punishment, unless you find that this homicide is one of the most aggravated and unmitigated of all first degree murder." 3279-84, 4410-11. The court erred, the instruction is correct under State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), and is not covered by standard instructions.

It also erred in refusing these instructions: "You are to presume David Alan Gore innocent of each alleged aggravating circumstance. You may not consider any evidence offered in aggravation unless it convinces you of the existence of an aggravating circumstance beyond

a reasonable doubt." 4412, 3284-6. "Aggravating circumstances must be proven beyond a reasonable doubt, before you can give them any weight whatsoever. If evidence is introduced to support an aggravating circumstance, but that evidence fails to prove the aggravating circumstance beyond a reasonable doubt, yo must totally disregard that evidence. " 4413. The court erred. These instructions are not covered by the standard instructions and they're correct under State v. Dixon, 283 So. 2d at 9.

It erred in refusing these instructions: "You are strictly limited to the aggravating circumstance which have been defined to you. You may not consider any fact or circumstance of this case as aggravating unless it strictly fits within the aggravating circumstances you have been instructed on. " "Although David Alan Gore has been found to be guilty of first degree murder, you may not take that finding to prove any aggravating circumstance. You must find the State has independently proven, beyond a reasonable doubt, an aggravating factor before you may consider it. " 4423.

The court refused to give the following instruction, which correctly states the law under State v. Dixon and Alford v. State, 307 So. 2d 433, 444 (Fla. 1975), and which is not covered by the standard instructions: "In determining whether to recommend life imprisonment or death by electrocution for David Alan Gore the procedure you are to follow is not a mere counting process of the number of aggravating circumstance and the number of mitigating circumstances, but rather you are to exercise a reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances presented." 4425.

It refused to give this instruction which is correct statement under State v. Dixon and is not covered by the standard instructions given: "Death, by electrocution, is a unique

punishment in its finality and its total rejection of the possibility of rehabilitation. Thus, you should only consider imposing the penalty of death, by electrocution, upon David Alan Gore, if you find that there is no possibility of rehabilitation for David Alan Gore, and that no other punishment is appropriate for him." 4427. Similarly, the court erred in refusing this instruction: "In order to render a verdict of death, by electrocution, upon David Alan Gore, you must be convinced beyond a reasonable doubt that death, by electrocution, is the only justified and appropriate sentence in the circumstances. If you are not convinced beyond a reasonable doubt that death, by electrocution, is the only justified and appropriate sentence in this circumstances, you must return a verdict of life imprisonment." 4428.

The court erred by refusing instructions that the state had the burden of proving that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt and that it was to render a verdict of death only if convinced beyond a reasonable doubt that a death sentence was required." 4428-29.

The court erred by refusing to instruct the jury that the fact that the defendant had been found guilty was not in itself a reason to recommend the death penalty and that that penalty was reserved for the most aggravated of first degree murders, 443 1. The court refused to instruct the jury that proof of an aggravating circumstance standing alone, even without mitigating evidence, did not authorize a death sentence because the jury, before recommending death, would have to determine that the aggravating circumstances were sufficiently substantial to justify the death penalty. 4432. The court refused to instruct the jury that recommending a life sentence was not dependent on finding of a specific mitigating circumstance if after consideration of all the circumstances the jury determined that a life recommendation was appropriate. 4433. The court refused to instruct the jury that the Florida Legislature has

abolished parole and that at present there is no early release procedure for a person sentenced to life in prison. 4434.

The court refused to instruct the jury that actions taken by the defendant after Elliott was "rendered unconscious or dead cannot be considered in determining whether or not any aggravating factors exist. " This instruction is not covered by the standard instructions and correctly states the law under Jackson v. State, 451 So. 2d 458 (Fla. 1984). The court refused to instruct the jury that it was not allowed to take into account any fact or circumstance other than the aggravating circumstances as read as the basis for deciding that the death penalty would be appropriate. 4440.

POINT VII

WHETHER THE STATE VIOLATED ITS AGREEMENTS WITH THE DEFENSE, AND WHETHER IT WAS ERROR TO ADMIT THE TESTIMONY OF ROBERT STONE.

The defense contended below and contends here that the state broke agreements with the defense. Gore and the state agreed in 1983 and 1984 that he would assist the state in various other cases, and that the state would not use "in any criminal proceeding or trial in the State of Florida" any information or cooperation obtained from him. Pursuant to these agreements, Gore provided the two depositions to the state. At bar, the court permitted Stone to testify concerning the depositions because, in its view, Gore had breached his agreement by not testifying at Waterfield's May 1984 trial. 2680-91. The controversy arose as follows:

On April 12, 1984, the parties signed an agreement "NUNC PRO TUNC November 30, 1983." 5058.[35] Gore was to help the state find the bodies of Hsiang Huang Ling, Ying Hua

[35] Robert Stone (then State Attorney), signed the agreement for the State. Mr. Gore, Elton Schwarz (then Public Defender), and James Long (then Assistant Public Defender) signed for the defense. Judge James Midelis (then Assistant State Attorney) participated with Mr. Stone in working out the agreements.

Ling, Judy Kay Daley, and two teenage hitchhikers. He was to plead guilty to first degree murder in the deaths of Hsian Hung Ling, Ying Hua Ling, Barbara Ann Byer, and was to be sentenced to life imprisonment for those offenses. He was "to give the State Attorney's Office a truthful statement under oath regarding the case of State of Florida v. David Alan Gore and Frederick Waterfield (Case No. 83-361 A & B), wherein the victims named in the Indictment therein are LYNN ELLIOTT and REGAN MARTIN, and any other cases about which he is questioned concerning his involvement and that of any other person." 5055D. He agreed to testify truthfully under oath against Waterfield in the Elliott-Martin case. The state agreed "that any information and/or assistance rendered by David Alan Gore to law enforcement after July 27, 1983 will not be used against him in any criminal proceeding or trial in the State of Florida. " 5057. It agreed that the murder convictions in the other cases would not be admissible against Gore in the Elliott-Martin case. It agreed not to prosecute him in the disappearance and murder of Angelica Lavallee and Judy Kay Daley. The parties agreed that "this Agreement will not be referred to by any party, in any manner, directly or indirectly, during any part of any trial in the case of State of Florida v. David Alan Gore, wherein the victims named in the Indictment are LYNN ELLIOTT and REGAN MARTIN. " 5058.

In April 1984 Gore gave a deposition implicating Waterfield in the Elliott-Martin case. 5062. Relying on this deposition and his expected testimony, the state told the jury in opening statement in Waterfield's May 1984 trial that Waterfield was "just as guilty as if he pulled the trigger himself, and that is what the evidence will show in this case." 1733. Then, during the Waterfield trial, Gore's attorney told the prosecutor that his testimony had changed. 2699. The state decided not to call him as a witness in the Waterfield trial.

On June 20, 1984, after Waterfield's trial for the murder of Elliott, 3887,[36] the parties signed an amended agreement "NUNC PRO TUNC May 31, 1984. " At Gore's July 1984 plea hearing, Robert Stone told the court that this agreement was "amending the agreement executed on the 12th day of April, 1984". 5657-58. He added that the purpose of the amendment was to add the additional murder charges. 5661. He acknowledged that Gore had fully complied with all terms and conditions of the amended agreement. 5662. At the state's request, the court, after accepting Gore's guilty pleas, deferred sentencing until "completion of the agreement. " 5682-83. That sentencing hearing occurred February 4, 1985. 5613.

The amended agreement provided that Gore was to plead guilty to first degree murder in the deaths of Hsian Hung Ling, Ying Hua Ling, Barbara Ann Byer, Judy Kay Daley, and Angelica Lavallee, and to testify at the trial of any other person indicted for any offense "arising therefrom. " 5059, 5060. Significantly, the agreement contains no requirement of Mr. Gore's testifying against Mr. Waterfield or giving a statement about him, but it does provide that the "State of Florida agrees that any information and/or assistance rendered by David Alan Gore to law enforcement after July 27, 1983 will not be used against him in any criminal proceeding or trial in the State of Florida." 5061, 5660.

As noted below, the court refused to hear defense testimony concerning an oral agreement that Gore's statements would never be used against him.

According to Stone in 1984, a primary reason for the amended agreement was Gore's cooperation in testifying against Waterfield. 5687. According to Judge Midelis, Mr. Gore,

[36] According to the testimony of Judge Midelis at a pre-trial hearing, Mr. Gore did testify against Mr. Waterfield at a subsequent murder trial. 3888. This page is also numbered 204 by the clerk.

pursuant to his agreement with the state, entered his guilty pleas to the other murders after he testified for the state at the second Waterfield trial. 3888-89.[37]

As discussed below, there may also have been an oral agreement whereby nothing said by Mr. Gore at deposition would be used against him. 2615-94.

The record does not show that the state claimed any breach of the agreements before the instant resentencing, when it indicated an intent to present evidence about the other murders, notwithstanding the written agreements. The defense moved in limine to bar the evidence. 4063. After a hearing, the court entered an order saying that, notwithstanding the clear language of the written agreements, the state had not intended to "utterly and permanently give up it's right to potentially present almost any type of evidence and the State would be unable to impeach, cross-examine or rebut it." 417 1. The court ruled that it would reserve ruling on the matter "during the defense presentation of testimony. " 4172.

The matter arose anew during the resentencing trial. In his opening statement, defense counsel told the jury that, at Waterfield's May 1984 trial, Robert Stone had told the jury that Waterfield was as guilty as Gore. The state objected, and the court sustained the objection, but the state did not move to strike the remark. 1733-42. After this, and after the defense cross-examined various state witnesses about Waterfield's involvement, the state sought to present Stone's testimony about the depositions made by Gore in 1984.

[37] These pages are also numbered 203-204 by the clerk.

After argument and some proffers of evidence, the court ruled Stone's testimony admissible because Gore broke his agreement by not testifying against Waterfield at the May 1984 trial. 2680-91.[38]

The court erred. The state entered into an arm's-length amended agreement after the Waterfield trial that "any information and/or assistance rendered by David Alan Gore to law enforcement after July 27, 1983 will not be used against him in any criminal proceeding or trial in the State of Florida." 5061, 5660. There were no if's, and's, or but's. At the July 1984 plea hearing, Stone himself acknowledged that Gore fully complied with his agreement.

It was error to let the state breach its agreement 8 years after the fact. See Long v. State, 610 So. 2d 1276 (Fla. 1992). Stone's testimony does not open the door to otherwise inadmissible evidence. Burns. This Court must reverse for resentencing. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const.

POINT VIII

WHETHER THE STATE ENGAGED IN IMPROPER ARGUMENT TO THE JURY.

In the state's final argument to the jury, the following occurred:

When discussing about the sexual battery, the state said: "and what did he do? This caring person, the one whose character the Defense wants you to look at. What did he do and say then?" 3546. The defense objected: "Judge, I object on the Eighth Amendment, that

[38] It based this ruling on Stone's testimony that Gore broke the agreement to give truthful statement, did not testify truthfully under oath at Waterfield's trial. 2677. Stone testified that the amended agreement "went only to two other victims, two other individuals," and did not in any way go to the case involving Lynn Elliott, which was "over with at that point". 2677-78. The court refused to hear defense testimony of an oral agreement that "anything he said would never be used against him," 2689, on the ground that such testimony would violate the "parole evidence rule." 2637-38, 2640, It said the testimony of Stone and Midelis was unrebutted that Gore violated the agreement. 2690. When the defense pointed out that Gore did not refuse to testify at Waterfield's trial, the state simply did not call him, the court responded: "I'm not prepared to accept that." 2691.

the State has engaged a valid [sic] -- of mitigating evidence." 3547. The court overruled the objection without comment. Id.

Discussing the 911 calls from the house, the state said: "And if you recall the description that was given as to where he was saying it was, was in a direction moving away from his house. And what he didn't realize or didn't think about then was that they had put this new feature on the 911 system. Remember. " 3555. The court overruled defense objection that the state was arguing facts not in evidence, saying: "Overrule. Proper closing for the jury. Overrule. " Id.

Respecting the heinousness circumstance, the state said: "I mean, listen when the Judge reads it to you and take it back with you and look at it and it's like a blueprint for this case." 3562. The defense objected that the argument was "an expression of the Prosecutor's experience in the application of this aggravator, and I'm going to object to that." 3562-3. The court ruled: "Any argument? Overrule. Proper argument based on the facts of this case." 3563.

The state argued:

> You know, based on what the Defense lawyer said in his questioning of this jury panel the first couple of days and what he said in his opening statement, the Defense will no doubt try and play on your sympathy. They'll tell you that if you give him life without parole, without the possibility of parole for 25 years that he'll never get out of prison. I submit that that's what he's going to stand here and tell you. That he'll never get out of prison. That there's been enough tragedy already and that another death won't bring back Lynn Elliott and won't solve anything.
>
> Ladies and gentlemen, David Allen Gore has no right to stand here through his lawyer and ask for that. He has no right --
>
> [Defense counsel objects and approaches bench]
>
> MR. NICKERSON: The case law is quite clear that in fact I can stand in front of that jury in mitigation, and say it engenders mercy and sympathy, that I can ask for something less than life. That's an improper argument. It's improper.

It's an improper comment on legitimate Defense tactics. It's an improper comment on the law and I object on the Eighth Amendment.

MR. COLTON: I never said under the law he has. I'm talking about under the facts and circumstances of this case he has no right to ask this jury for sympathy.

THE COURT: It's proper argument. I'll overrule the objection.

(Whereupon, the following proceedings were had in open court:)

MR. COLTON: As I was saying, he has no right to have carried out the death penalty on Lynn Elliott and then stand before you and ask you to please don't give him the death penalty. By saying to you that taking my life won't bring Lynn's life back. Well, that's not why we're here. We're here so that justice can be done. We're here so that you as a jury can speak out as to what the proper verdict, the proper recommendation under the laws of the State of Florida and the laws of the United States of America are.

You know, it takes courage, as I said, to uphold the law, and that's what we're asking you to do. I'm asking you to consider the aggravating circumstances in this case and determine whether or not we have proved beyond a reasonable doubt these aggravating circumstances, and then I'm asking you to consider whether or not any mitigating circumstance has been established and outweighs any of these aggravating circumstances. And I submit to you that they did not, I'm asking you to exercise your courage and to do your duty as Jurors in this case and to follow the law. You're not just being asked to go in there blindly and out of anger or out of rage come back with a recommendation.

3582-84.

Almost immediately thereafter, the state said: "If there was ever a case in the State of Florida that justified the death penalty, if there ever was a case for which this statute of death --", 3584-5. The court overruled defense objection that this was an improper comment implying "Prosecutorial experience in selection of who should die and who should not die, purely improper. That this attorney knows which case requires the death penalty in this State violates the Eighth and Fourteenth Amendment." 3585. The state then continued with the conclusion of its argument:

MR. COLTON: As I was saying, if there was ever a case that called out for the imposition of the death penalty, if there was ever a case that fit the aggravating circumstances set out by law, if there was ever a case where the mitigating circumstances had not been established and even if established did not outweigh the aggravating circumstances, this is the case.

> YOU know, society has a right, a right to exact the highest penalty or else the life of Lynn Elliott would be meaningless and have meant nothing at all. That's why we have the right to exact the ultimate penalty from this Defendant, from the man who is responsible for what took place for the act that ended that 17 year old child's life. I ask you to listen carefully to what the Defense lawyer says. I won't have another opportunity to get up here, but I ask you as he talks to say wait a minute, to yourselves. Mr. Nickerson, what you're saying to me, where is it established in the evidence? Where is it established in the testimony? And I ask you to listen carefully to Judge Vaughn as you have throughout this case, and I'm sure you'll reach the proper recommendation. Thank you.

3855-56.

About the drive to the house the state said, "and during that time you can sit and think about was going through those two girls' minds." 3540-1. "Think of the terror going through those girls' minds as they took that long ride -- remember how long it took? That long, silent ride. " 3542. It urged the jury to "surround that palm tree" and watch the murder and watch the chase. 3580-1.

The constitution requires that the jury's penalty verdict not be tainted by improper considerations. Espinosa v. Florida, 112 S.Ct. 2926 (1992). The state's argument improperly presented improper considerations for the jury's consideration and requires resentencing.

The state's argument concerning parole eligibility was improper, Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989) (argument that defendant would be released in less than 25 years), Teffeteller v. State, 439 So. 2d 840, 844 (Fla. 1983), especially because, as noted elsewhere, the state presented a false evidentiary picture respecting Gore's parole eligibility which directly affected the sentencing decision. It was improper to comment on matters not in evidence, Duque v. State, 460 So. 2d 416 (Fla. 2d DCA 1984), Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984), Libertucci v. State, 395 So. 2d 1223 (Fla. 3d DCA 1981) (prosecutor wishes he could have called co-defendant), U.S. v. Eyster, 948 F.2d 1196, 1206 (1 lth Cir. 1991) (government may not "allude to evidence not formally before the jury")+

It was improper to attack proper mitigation: the state may not denigrate a valid theory of defense. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990) (denigration of insanity defense), Rosso v. State, 505 So. 2d 611 (Fla. 3d DCA 1987). It was improper to urge the jury to have "courage" and do its job by returning a death verdict: the state may not urge jury to act as "bulwark" against crime or "do your job," U.S. v. Johnson, 968 F.2d 768 (8th Cir. 1992) ("bulwark"), U.S. v. Young, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) ("The prosecutor was also in error to try to exhort the jury to "do its job"; that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice, see, e.g., ABA Standards for Criminal Justice, 3-5.8(c) and 4-7.8(c).").

It was wrong to argue that Gore had "no right to have carried out the death penalty on Lynn Elliott and then stand before you and ask you to please don't give him the death penalty." Rhodes, 547 So. 2d at 1206 ("the prosecutor concluded his argument by urging the jury to show Rhodes the same mercy shown to the victim on the day of her death. This argument was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation. ").

It was improper to argue that this case was especially appropriate for the heinousness circumstance and a death sentence. Tucker v. Kemp, 726 F.2d 1496, 1505 (11th Cir. 1985) (en banc) ("There are not many times that I come before a trial jury and make the request that I will be making of you in this case. ").

It was improper to repeatedly urge jurors to imagine the victims' terror and imagine themselves at the scene of the crime. Garron v. State, 528 So. 2d 353, 358-59 (Fla. 1988) ("you can just imagine the pain this young girl was going through as she was laying there on the ground dying"), Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) ("can anyone imagine

more pain and any more anguish than this woman must have gone through in the last few minutes of her life, no lawyers to beg for her life."), Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989) (asking jurors "to try to place themselves in the hotel during the victim's murder"),

The failure to rein the state encouraged jurors to think these were proper considerations. The state, having urged them to the jury, cannot now say that they did not affect the verdict. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., and amend. V, VI, VIII, and XIV, U.S. Const.

POINT IX

WHETHER THE COURT ERRED IN REFUSING TO HEAR THE DEFENSE MOTION TO SUPPRESS IDENTIFICATION.

The court erred in refusing to hear a motion to suppress the identification of Gore made by the child eyewitness Michael Rock. It ruled that the defense could otherwise challenge Rock's testimony, but "it would be inappropriate to permit a Motion to Suppress to be raised on out-of-court identification by a potential witness to be irrelevant to the issues in a penalty proceeding. " 399. It added: "I don't think that would be a relevant issue in this case, so I'll deny any Motion to Suppress out-of-court identification by Mr. Rock of Mr. Gore. It's just -- it doesn't seem pertinent to this particular issue as Mr. Gore's guilt has been determined, that he was convicted of the crime. So I'll deny your Motion to Suppress any out-of-court identification. All right. " 400.

The basis of the motion was that Rock had identified Gore in an unconstitutionally suggestive lineup. 347, 4392.[39] The defense argued the motion was relevant to the sentencing

[39] The state initially opposed the motion arguing that it was an improper attempt by the state to relitigate guilt, and that the matter had been litigated at the 1984 trial. 337-38. But when the defense pointed out that in fact the matter had not been litigated at the first trial, 338-39, the state backtracked somewhat, 346, but continued to argue that it had already been determined that "David Gore shot Lynn Elliott . . . , and that's a fact of this case that all of us have to live with. " 347. Apparently the state forgot that it had adopted a different posture in federal court, as discussed below. In any event, the trial court refused to hear the motion solely on the ground set forth above.

issue of who was the triggerman, 341-42, and that refusal to hear the motion deprived it of the mitigating circumstance that an equally guilty codefendant had not been sentenced to death, contrary to the eighth amendment. 342-43. It argued the eighth amendment right to present evidence about the circumstances of the offense, and it was appropriate for it to challenge Rock's testimony. 390-91. It also argued the sixth amendment right to confront and challenge the witness's testimony. 394. The defense objected to the court's ruling based on the fifth, sixth and fourteenth amendments to the federal constitution and sections 9, 16, 17, and 22 of article I of the state constitution. Id. It renewed the objection during Rock's testimony. 2157.

The court erred. The verdict finding Gore guilt was not dispositive of who shot Lynn Elliott. The state sought conviction on two theories: murder by premeditated design and felony murder. Gore v. Dugger, 763 F. Supp. 1110, 1123-24 (M.D. Fla. 1989) (discussing theories of conviction and accepting state's argument that aggravators could apply to Gore regardless who was triggerman). The 1984 jury was instructed on a theory that Gore was guilty as an accessory to the murder. Hence, the question was open as to who shot Lynn Elliott. Without Rock's testimony that Gore shot her, the jury could easily have doubted that Gore was the triggerman. Such doubt can form the basis for a life recommendation. E.g. Barrett v. State, 649 So. 2d 219, 223 (Fla. 1994) ("Conflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment. Cooper v. State, 581 So. 2d 49, 51 (Fla. 1991)."). The sixth amendment right to confront state witnesses and challenge their evidence applies to capital sentencing. Engle v. State, 438 So. 2d 803, 813-14 (Fla. 1983) (applying Confrontation Clause and Specht v. Patterson, 386 U.S. 605 (1967) to capital sentencing), Vicarious application of capital aggravators is generally forbidden. Omelus v. State, 584 So. 2d 563 (Fla. 1991) (heinousness circumstance).

The state may not present the capital sentencing jury with "evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida." §921.141(1), Fla. Stat. The constitutions forbid use of evidence based on an unconstitutionally suggestive line up. Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), Edwards v. State, 538 So, 2d 440 (Fla. 1989). The use of such unreliable evidence is constitutional error. By refusing to hear the motion based on its misunderstanding of the law, the court deprived this Court of the ability to determine the merits of the admissibility of the evidence. See U.S. v. Simtob, 901 F.2d 799 (9th Cir. 1990) (error to rule on admissibility of evidence without hearing the evidence), Smith v. State, 47 1 So. 2d 1347 (Fla. 2d DCA 1985), Wright v. State, 570 So. 2d 1135 (Fla. 4th DCA 1990). The court may not determine constitutional issues in capital sentencing without an adequate inquiry. See Hamblen v. State, 527 So. 2d 800 (Fla.1988) (waiver of mitigation), Jones v. State, 612 So. 2d 1370 (Fla. 1992) (complaints about counsel), Francis v. State, 413 So. 2d 1175 (Fla. 1982) (absence of defendant from room where jury challenges were exercised). Due process proceeds upon inquiry and decides only after a fair determination of the facts. Cf. State v. Smith, 547 So. 2d 131 (Fla. 1989) (citing cases).

It is constitutional error to use unreliable evidence at capital sentencing. See Geralds v. State, 601 So. 2d 1157, 1162-63 (Fla. 1992), Engle. "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment in any capital case.' See Gardner v. Florida, 430 U.S. 349, 363-364, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (WHITE, J., concurring in judgment) (quoting Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976))." Johnson v. Missis-

sippi, 486 U.S. 578, 584, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). Resentencing is required. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., and amend. V, VI, VIII, and XIV, U.S. Const.

POINT X

WHETHER THE COURT ERRED IN REFUSING TO ALLOW INTRODUCTION OF STATEMENT THAT WATERFIELD WAS INVOLVED IN THE MURDER.

The court erred in refusing to admit Gore's statement that Waterfield was involved in the murder. [40] The matter arose as follows:

On direct examination of Lt. Redstone the state presented detailed evidence about the arrest, including that Gore "followed the instructions that were given to him." 2197. He understood his Miranda rights, and indicated he would speak to the police. 2204, 2207. He was taken to the carport where Redstone had contact with and observed him. 2204. He had no signs of obvious intoxication. 2209. He responded to commands and got down on the carport floor. Id. On cross, the defense asked if Gore said yes to the questions accompanying the giving of Miranda rights, and Redstone answered: "Yes, he said he understood his rights and he wanted to make a statement to get some things off his chest." 2260. The defense asked if there was another statement at the garage, and the state objected that a ruling at the 1984 guilt trial barred the defense from using the statement at the instant penalty proceeding. 2261. The defense contended that, given the state's direct examination at bar, the statement was admissible on cross-examination. 2264-5,[41] 2267, 2293-94. The court replied

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[40] The actual statement was: "Freddy was in on this one. " 2295.

[41] MR. NICKERSON: What I'm trying to elicit from this officer right now is the other part of the statement, Freddy says, in on this one.

There was substantial examination by this officer about Mr. Gore's motor movements, about his speech, and I'm simply trying to show there wasn't that much motor movements. All of this is happening at 14 feet. I didn't bring up this inquiry the State went into.

that "Because at one point it was inadmissible, and nothing changed to make it admissible now. ", and the defense replied: "This is the penalty phase, Judge. " 2294.

At the 1984 guilt trial the defense successfully objected to the statement on the ground that the state had agreed at a suppression hearing not to use it. 2281. The 1984 prosecutor agreed not to use the statement. Id. After reviewing the 1984 transcript, the court sustained the state objection "pursuant to the agreement that was made in the original trial proceeding and pursuant to Judge Vocelle's order from the transcript that I have just went over." 2295-96. It refused to let the defense make further argument. 2296.

The court erred, It thought it was bound by the ruling in the 1984 guilt trial, notwithstanding the difference in the proceedings. A capital sentencing uses less restrictive evidentiary standards than the evidence code. § 921.141(1), Fla.Stat.; Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). Given the state's extensive examination of the witness about the arrest, including that Gore understood the Miranda rights read to him, the proposed evidence was well within the scope of cross, as being "germane to that witness' testimony on direct examination and plausibly relevant to the defense". See Coxwell v. State, 361 So. 2d 148, 152 (Fla. 1978).[42] "Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters." § 90.612(2), Fla.Stat. Thus the court's discretion is limited only to "additional matters" -- it does not have discretion to limit cross on the subject matter of direct. Further, the court below did not exercise its discretion: it saw itself as bound by an evidentiary ruling in the 1984 guilt trial. Once the state went into

[42] Needless to say, the state and federal constitutional right of cross-examination applies to capital sentencing proceedings. Engle v. State, 438 So. 2d 803, 813-14 (Fla. 1983).

the fact that the officers gave instructions to Gore and that he said he understood his rights, and once the state's witness volunteered on cross-examination that Gore said he wanted to get something off his chest, it was error not to let the defense present what Gore said immediately after. Long v. State, 610 So. 2d 1276 (Fla. 1992) (error to let state present part of statement without letting defense present rest), Christonher v. State, 583 So. 2d 642 (Fla. 1991) (same).

The state cannot say that this constitutional error was harmless. It argued long and hard to exclude the evidence, which was crucial to the defense case for life, and contradicted the state's attempts to downplay Waterfield's involvement. Jury resentencing is required. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const, , and amend, V, VI, VIII, and XIV, U.S. Const.

POINT XI

WHETHER THE COURT ERRED IN PERMITTING OPINION TESTIMONY THAT APPELLANT'S STATEMENT WAS A LIE.

After presenting a taped statement in which Gore said Waterfield was at the house with the other girl when Gore was chasing Elliott, 2427, the state asked Capt. DuBois: "Did you find that when he said that while he was chasing Lynn and bringing her back to the house, that Freddy was in the house with the other girl, with Regan Martin. Did you find that he was lying about that?" 2430. When the defense objected that witness had no direct knowledge and could not give an opinion, 2431-32, the state rejoined that the defense was "trying to perpetrate a fraud upon this Court", 2432, and that for the defense to suggest on cross examination "that in fact Fred Waterfield was there at the house when, in fact, from Mr. Gore's own statements Fred Waterfield was not there is perpetrating a fraud upon this Court and upon the judicial system, it's not true." 2432-33. The defense reiterated that DuBois had no direct knowledge. 2433. The state reasserted: "For them to stand here and try to put over on this Jury that he was in the house or suggest he was in the house is wrong, it's improper, and I don't care how

much he dislikes us saying it, that's the truth. It is wrong for them to say something that they know is not true." 2435-36. The court ruled the question proper as framed "based on what information this witness had from Regan Martin." 2436. The state then had the captain say Gore lied about Waterfield being in the house with the other girl. 2436-37.[43]

The court erred. A personal opinion someone's veracity is improper evidence. Hollidav v. State, 389 So. 2d 679 (Fla. 3d DCA 1980). Gen. Tel. Co. and Amer. Motorists Ins. Co. v. Wallace, 417 So. 2d 1022 (Fla, 2d DCA 1982), Tingle v. State, 536 So. 2d 202 (Fla. 1988). The only way to comment directly on the defendant's veracity is by use of proper character evidence after the defendant has put his character for veracity in issue under section 90.404(1)(a).

But here, the Captain testified that, through his investigation including Regan Martin's statements, he had found that the defendant had lied. This testimony was based on matters dehors the record, since Regan Martin's testimony reflected that she could not have known where Waterfield was -- at most he was out of her line of sight as she was apparently bound and closely confined lying on the floor at the time of the shooting. 1945. At most she assumed the truck left: "I never heard the truck. But I said that the truck left. But I assume the truck left because I never saw Mr. Waterfield again, and besides, the time when he called Mr. Gore out of the room, I never saw him, I never heard him, I never felt like there was

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[43] Q. Capt. DuBois, I think before the objection, I had asked you did you base upon the further investigation done by the sheriff's department including the statements made by Regan Martin, that the Defendant's statement that while he was chasing Lynn and catching her in the driveway and bringing her back to the house, that Freddy was still back at the house with the other girl. Did you find based on Regan Martin's statement that that was not true, that he was not with her at the house?

A. Yes, sir.

anyone else in the house. " 2079. DuBois could have found "that that was not true" only by extrajudicial information. The prosecution may not in any allude to such evidence outside the record. E.g. U.S. v. Murrah, 888 F.2d 24 (5th Cir. 1989), U.S. v. Evster, 948 F.2d 1196, 1206 (11th Cir. 1991) ("In short, the government cannot argue the credibility of a witness based on the government's reputation or allude to evidence not formally before the jury. "), Duque v. State, 460 So. 2d 416 (Fla. 2d DCA 1984), Rvan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984).

Especially puzzling is the state charge that counsel was perpetrating a fraud by objecting to this improper testimony. The state itself played the taped statement in which Gore said Waterfield was at the house. In effect, it was impeaching its own evidence, which it had adduced as part of its case in chief. Thus the state improperly presented the tape for the purpose of impeaching it.

The state cannot show that the erroneous evidence did not affect the verdict and sentence. It was vital to the state's case to stamp out any chance that the jury might conclude that Waterfield was more than a minimal participant. To bring in a high-level officer to testify, based on "further investigation" and "Regan Martin's statement", that it was untrue that Waterfield was in the house with Regan Martin was an apparently successful attempt to influence the jury with improper evidence. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., and amend. V, VI, VIII, and XIV, U.S. Const.

POINT XII

WHETHER THE COURT ERRED IN LETTING THE PROSECUTORS TALK TO WITNESSES DURING BREAKS IN THEIR TESTIMONY.

Over objection, the court, based on a misunderstanding of applicable law, erroneously let the state consult with its two most important witnesses during breaks in their testimony.

A part of the common law rule of sequestration is that attorneys may not speak with a witness during a break in his testimony. Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976).[44] This rule is in effect in Florida, as evidenced by occasional cases in which trial courts have used the rule to prevent defendants from conferring with counsel during breaks in their testimony. E.g. Stripling v. State, 349 So. 2d 187 (Fla. 3d DCA 1977) (noting that usual rule barring witnesses from speaking with counsel did not apply automatically to defendant's consultation with counsel). Of course this rule is in application in the Fourth District, which governs appeals arising from the Nineteenth Judicial Circuit. Bova v. State, 392 So. 2d 950 (Fla. 4th DCA 1981) (under circumstances, no error in applying rule to prevent defendant-witness from conferring with counsel during break).

At a lunch break in the direct examination of Regan Martin, defense counsel saw the state speaking with her and asked the court to enforce the (previously invoked) rule of sequestration and bar the state from speaking with witnesses during breaks in their testimony. 1978-84. Apparently neither the court, 1983, nor the prosecutor were aware of the rule, as the latter advanced the somewhat xenophobic claim that "every once in a while an attorney comes here from Miami and says that that's a policy", 198 1, adding that defense counsel (who was from Miami)[45] was wrong "to come up here and say the better practice, well whose better practice? There's never been a judge in this circuit or any circuit that I've appeared in that has prohibited attorneys from talking to their witnesses during recess, during an overnight break,

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[44] Geders set out the history of this rule, but held that it could not be used to prevent a defendant from conferring counsel during a 17-hour overnight break in his testimony.

[45] The state made a number of ad hominem arguments respecting Jay Nickerson, the Miami lawyer. See his objection at 2334-36. As an example, see the state's accusation that he had employed "a sneaky tactic." 866.

during a short recess or any other time. There's no rule and I challenge you to give the Court some authority that says that that's improper," 1982. The court denied the defense motion. The matter recurred at a break in the testimony of the eyewitness Michael Rock, when the defense asked the court to prevent the parties from speaking with witnesses during breaks in their testimony. 2128-29. The court replied that "perhaps it would be abuse of my discretion to tell either Counsel, the State or Defense not to talk to somebody during a break from the witness stand. I'm not going to get involved in that. I don't think it's proper for the Court to do that. I don't know if its prohibition [sic] that would prohibit either party to do that, This is something I don't prefer to get into at this point. " 2129.

While a court has some discretion respecting the rule of sequestration, the predicate for an exercise of discretion is that the court understand the applicable law. "We find abuse of discretion when a court 'improperly applies the law or uses an erroneous legal standard."' U.S. v. Taplin, 954 F.2d 1256, 1258 (6th Cir. 1992) (citing cases). The court here misunderstood the law, apparently accepting the state argument that this was merely a rule espoused by lawyers "from Miami", and believing that it would be an abuse of discretion not to let the state violate the rule by talking to its cardinal witnesses during their testimony. The court erred in letting the state talk with its most important witnesses during breaks in their testimony. This court should order resentencing. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const.

POINT XIII

WHETHER THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN ALLOCUTION HEARING BEFORE REACHING ITS SENTENCING DECISION AND FAILING TO CONSIDER ALLOCUTION EVIDENCE.

After reading the order sentencing Gore to death, 3648-72, the court had counsel approach the bench and asked if defense counsel had "anything you would like to tell me on Mr. Gore's behalf?" 3672. Defense counsel said that Mr. Gore wished to address the court, and Gore said he is not the same person as the one who was arrested, today he is a Christian and his life belongs to God, said witness after witness lied, expressed deepest sympathy for Lynn's parents and for his actions against his daughter. 3672-73. The court then said Gore was sentenced to death. 3676.

The common-law rule of allocution is incorporated in the Due Process Clause, Ball v. United States, 140 U.S. 118, 129-30, 11 S.Ct. 761, 35 L.Ed. 377 (1891), Green v. United States, 365 U.S. 301, 304, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961), Keech v. State, 15 Fla. 591, 609, Spencer v. State, 615 So. 2d 688 (Fla. 1993). Waiver of mitigation must be made by the defendant personally. E.g. Hamblen v. State, 527 So. 2d 800 (Fla. 1988). The court must consider all mitigation proposed by the defense. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), Campbell v. State, 571 So, 2d 415 (Fla. 1990). "[E]very mitigating factor apparent in the entire record before the court at sentencing, both statutory and nonstatutory, must be considered and weighed in the sentencing process . . . ." Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992).

The court erred in not hearing from Gore prior to reaching its sentencing decision and in failing to consider his statement in mitigation. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., and amend. V, VI, VIII, and XIV, U.S. Const.

POINT XIV

WHETHER IT WAS IMPROPER FOR A COUNTY COURT JUDGE TO PRESIDE OVER THIS CAPITAL SENTENCING PROCEEDING.

At the time of this trial, and in the years preceding it, the Nineteenth Circuit routinely assigned felony cases (including capital cases) to county court judges via a series "temporary" assignments. This practice violated Payret v. Adams, 500 So. 2d 136 (Fla. 1986). Since the court followed it at bar, reversal is required.

The resentencing was originally assigned to Indian River County Judge Joe Wild pursuant to this practice. After Judge Wild transferred venue to St. Lucie County, County Court Judge Dan Vaughn, as acting circuit court judge pursuant to an order dated April 13, 1992,[46] assumed jurisdiction over the case. On August 19, 1992, the Chief Judge entered an Amended Order "nunc pro tunc, July 1, 1992" under which "all prior assignment orders concerning Judge Dan L. Vaughn are hereby revoked July 1, 1992". 4932-33. This order designated Judge Vaughn as acting circuit judge and directed him "to hear, conduct, try and determine in the Juvenile Division any matters presented to it; and to hear, conduct, try and determine in the Family Relations Division all HRS and recent filings and determine all matters presented to him in the Criminal Division of the Nineteenth Judicial Circuit." Id.

In November 1992, the defense moved for disqualification of Judge Vaughn on the grounds that his jurisdiction violated Payret, that the appointment of county court judges to

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[46] The order refers to the disqualification of Judge Wild in this case, but did not limit the appointment to act as circuit court judge only in this case, stating in pertinent part: "NOW THEREFORE, I, MARC A. CIANCA, . . . do hereby assign and designate the Honorable DAN L. VAUGHN, a Judge of the COUNTY Court of ST. LUCIE County, Florida, to proceed to the CIRCUIT Court, ST. LUCIE County, State of Florida. To hear, conduct, try and determine the cause or causes which shall be presented to him as a temporary Judge of said Court, and thereafter to dispose of all matters considered by him on said dates." R 4358. Notwithstanding the reference to "said dates", the order contained no time limitation on the appointment.

felony and capital cases violated the Due Process and Cruel and Unusual Punishment Clauses of the state and federal constitutions. 4928-32. The defense pointed that Judge Vaughn's tenure as acting circuit court judge had exceeded the Payret time limits, and that the Nineteenth Circuit had the practice of assigning county court judges as "temporary" acting circuit judges seriatim violated Payret. The court accepted the state's argument that the August 19 order conferred a six-month term as "temporary" acting circuit judge, so that there was no violation of Pavret. 4932-35. The court erred.

Pavret, relying on State ex rel. Treadwell v. Hall, 274 So. 2d 537 (Fla. 1973), stated: "We suggested [in Treadwell] that when a county court judge is assigned to do solely circuit court work, the assignment, in order to be temporary, should be for no more than sixty days; when a county court judge is assigned to spend only a portion of his time doing circuit court work, we suggested no more than six months."

The ongoing assignment of Judge Vaughn to circuit court work at bar is much more pervasive than the assignment of Judge Wild in Wild v. Dozier, 21 Fla. L. Weekly S 57 (Fla. Feb. 8, 1996). Judge Wild continued with all county court assignments, and his circuit court work was limited to one half of the work in only one division (criminal) of the circuit court, Judge Vaughn, on the other hand, was relieved of all other assignments and directed to hear Juvenile, Family Relations, and Criminal Division cases. Hence, Wild does not control here. In any even Wild does not authorize the routine appointment of county court judges to hear the most serious of the circuit court's cases -- capital cases. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const., amend. V, VI, VIII, and XIV, U.S. Const.

POINT XV

WHETHER IT WAS ERROR TO LET THE STATE PSYCHIATRIST EXAMINE APPELLANT.

The court erred in overruling defense objections and granting the state's motion for psychiatric examination of Gore for the purpose of rebutting mitigation. 4840-75. The compelled mental examination violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 1 6, 17 and 22 of the Florida Constitution. Bradford v. State, 873 S.W.2d 15 (Tex.Cr.App. 1993), cert. denied, Texas v. Bradford, U.S. ___, 115 S.Ct. 311, ___ L.Ed.2d (1994). In Bradford, the defense put on no mental health testimony as to competency or sanity. 873 S. W .2d at 16. However, in the penalty phase, defense counsel intended to call a mental health expert (Dr. Wettstein) who had examined the client. Id. The court ruled the defense expert could not testify to matters based on his examination of the defendant, unless the defendant submitted to a compelled mental examination by the prosecution expert (Dr. Grigson). Id. at 16-17.

The Texas Court of Criminal Appeals held this procedure violated the Fifth and Sixth Amendments. Id. at 20.

> The Fifth Amendment to the United States Constitution provides, among other things, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend V. It is very well-settled that this protection applies to defendants facing examinations seeking to elicit evidence to prove future dangerousness under Texas capital sentencing procedures. *Estelle v. Smith, supra*. Thus, if appellant's statements made during the Grigson examination were compelled, then the above-quoted Fifth Amendment protection would have been violated in admitting into evidence Dr. Grigson's testimony based upon such statements.
>
> Appellant vociferously objected to being ordered to submit to the Grigson examination. He specifically stated that he was acquiescing merely because the trial court was making the admissibility of evidence which he wanted to present be contingent upon submitting to such examination. Appellant insisted, and the trial court acknowledged, that such acquiescence was not waiving his claim of error in being coerced into a position of making such a choice.

> We note that the United States Supreme Court, admittedly in a different context, has recognized that "an undeniable tension is created" when a defendant must choose between the pursuit of one benefit under the Constitution and the waiver of another. ***Simmons v. U.S., 390*** U.S. 377, 394, 88 S.Ct. 967, 976, 19 L.Ed.2d 1247, 1259 (1968). In ***Simmons,*** that defendant (actually named Garrett) had testified at his unsuccessful suppression hearing, whereupon the State thereafter presented that testimony at the trial on the merits. ***Id.*** at 389, 88 S.Ct. at 973, 19 L.Ed.2d at 1256. Under those circumstances, the Court said, "[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another. " ***Id.*** at 394, 88 S.Ct. at 976, 19 L.Ed.2d at 1259. The Fifth Amendment privilege "is a bar against compelling 'communications' or 'testimony'. . . . " ***Schmerber v. California, 384*** U.S. 757, 764, 88 S.Ct. 1826, 1832, 16 L.Ed.2d 908, 916 (1966). That privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will. *Malloy* ***v. Hogan, 378*** U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d ***653, 659*** (1964); ***Miranda v. Arizona, 384*** U.S. 436, 460, 86 S.Ct. 1602, 16 L.Ed.2d 694, 715 (1966). Thus, a defendant has the right to remain silent and not discuss his case with anyone.
>
> The ***Simmons*** rationale appears analogous in the instant cause. The trial court's requirement, at the State's urging, that appellant submit to the Grigson examination forced him, in effect, to choose between exercising his Fifth Amendment right against self-incrimination and Sixth Amendment right to effective assistance of counsel. Like the United States Supreme Court, we find such coercion to be intolerable.
>
> This Court has specifically held that a trial court does not have the authority to appoint a psychiatrist for the purpose of examining a defendant for evidence relating solely to his future dangerousness, and that doing so was error. ***Bennett v. State,*** 742 S.W.2d 664, 671 (Tex.Cr.App. 1987), ***vacated and remanded on other grounds,*** 486 U.S. 1051, 108 S.Ct. 2814, 100 L.Ed.2d 917 (1988), *reaffirmed*, 766 S.W.2d 227 (Tex.Cr.App. 1989), ***cert. denied, 492*** U.S. 911, 109 S.Ct. 3229, 106 L.Ed.2d 578 (1989). . . .
>
> In light of the above authority, we conclude that the trial court's action in making the admissibility of portions of Dr. Wettstein's proffered testimony contingent upon appellant submitting to an examination by a State-selected expert was erroneous and such violated the Sixth Amendment to the United States Constitution. And under these circumstances the admission of Dr. Grigson's testimony based upon his examination of appellant violated appellant's Fifth Amendment right against self-incrimination.

Id. at 19-20.

The court rejected a claim that by using mental health testimony at penalty, Bradford waived his Fifth Amendment privilege:

> The State also claims that "[b]y introducing evidence of two psychiatric evaluations, then, [a]ppellant clearly waived his Fifth Amendment rights in the instant case. " It cites language in several United States Supreme Court cases in support of that proposition, specifically *Estelle* ***v. Smith,*** 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d ***359*** (1981); ***Buchanan v. Kentucky, 483*** U.S. 402, 107

S.Ct. 2906, 97 L.Ed.2d 336 (1987); and *Powell v. Texas, 492* U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989).

Estelle v. Smith involved a defendant's Fifth and Sixth Amendment rights under the United States Constitution being abridged by the State's introduction of psychiatric testimony at punishment because of the failure to administer warnings to that defendant prior to the examination which elicited incriminating statements that the failure to notify defense counsel that the examination would encompass the future dangerousness issue. *Estelle v. Smith, supra.* In light of the facts in the instant case not involving any lack of such warnings or notice, *Smith* is not entirely analogous. However, the State cites language in *Smith* which states that a criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. *Estelle v. Smith,* 451 U.S. at 468, 101 S.Ct. at 1876, 68 L.Ed.2d at 372. The State suggests that such language implies that a capital defendant might waive his Fifth Amendment privilege by introducing psychiatric evidence. However, we observe that *Smith* then indicated that if, after being properly warned, such a defendant refused to answer an examiner's questions, a validly ordered competency examination could proceed but on the condition that the results be applied solely for that purpose; in other words, "the State must make its case on future dangerousness in some other way." Id.

The State also points to language in *Buchanan v. Kentucky, 483* U.S. at 422, 107 S.Ct. at 2917, 97 L.Ed.2d at 355, which after discussing language from *Smith* regarding a defendant asserting an insanity defense and introducing supporting psychiatric testimony, states the logical proposition that if a defendant requests such an evaluation or presents psychiatric evidence, then at the very least, the State may rebut this presentation with evidence from reports of the examination that the defendant himself requested; i.e. the defendant would have no Fifth Amendment privilege against the introduction of that psychiatric testimony by the prosecution. Again however, it is undisputed that none of the examinations in the instant cause were for the purpose of determining competency or sanity issues,

The State also cites *Powell,* apparently based upon its language suggesting that "it m[ight] be unfair to the State to permit a defendant to use psychiatric testimony without allowing the State a means to rebut that testimony[.]" *Powell* v. *Texas,* 492 U.S. at 685, 109 S.Ct. at 3149, 106 L.Ed.2d at 556. However, the Supreme Court was clearly speaking in the context of a defendant raising a "mental-status defense. " Id. As noted previously, it is undisputed that the examination in the instant cause were not for the purpose of determining competency or sanity issues; thus, there was no "mental-status" defense raised and the Grigson examination was not ordered as rebuttal to such a defense,

Id. at 18-19.

Bradford noted the critical distinction between use of expert mental health testimony as to competency or sanity and its use at a penalty phase, writing that conditioning use of expert

mental health testimony at the penalty phase upon a compelled exam by the State's mental health expert violates the Fifth and Sixth Amendments to the United States Constitution.

Bradford notes the distinction between mental mitigation and an insanity defense. There is "no constitutional right" to plead insanity. Parkin v. State, 238 So. 2d 817, 822 (Fla. 1970). But there the constitution requires consideration of all mitigating evidence in capital sentencing, including mental mitigation.

Thus it is constitutional for a state to require a defendant to prove his insanity beyond a reasonable doubt. Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 52 L.Ed.2d 1302 (1952). Such is the law despite the general rule that the burden is on the prosecution to prove each element beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); see also discussion in United States v. Freeman, 804 F.2d 1574 (11th Cir. 1986). Leland also approved the right of states to adopt different tests for insanity such as "right and wrong" or "irresistible impulse. " 343 U.S. at 800. Mitigating evidence in a capital case is different. A defendant has a constitutional right to present evidence in mitigation, The state may not limit the introduction of evidence in mitigation of sentence at a capital sentencing hearing by way of the express wording of a statute, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), by restricted interpretations of statutes that allow such evidence on their face, Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 5 (1989), by evidentiary rule, Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979), by instructions to the jury, Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), by jury verdict form, Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 349 (1988); McCoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), or even by failure of the sentencer to give independent weight to circumstances that are

presented, Eddings v. Oklahoma,. 455 U.S. 104, 102 S.Ct. 2069, 72 L.Ed.2d 369 (1982). The court erred in granting the state's motion. As the state itself conceded, there was no basis in law for the court's ruling. This court should order resentencing.

POINT XVI

WHETHER APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

It was error to apply unfavorable changes in the law retroactively to Mr. Gore. The state did not seriously dispute that, at the time of the original sentencing, the armed trespass could not be used for the prior violent felony circumstance. 1772-73. At the original sentencing, the court ruled that the trespass conviction could not apply to the circumstance. 1776. Subsequently, a new sentencing hearing was ordered because Florida had conducted a constitutionally inadequate sentencing proceeding. Taking advantage of this situation, the state came up with a previously unavailable aggravating circumstance -- use of the armed trespass conviction to develop its theory that the present crimes were part of a pattern of hunting for women. Such retroactive application of a development in the law violates the Ex Post Facto Clause even when the development is by case law. See Bouie v. City of Columbia, 378 U.S. 357, 353-4 (1964).

By taking advantage of the time period between the two sentencing proceedings, Florida violated the Speedy Trial, Due Process, and Cruel and Unusual Punishment Clauses.[47]

The right to speedy trial applies to capital sentencing. Pollard v. United States, 352 U.S. 354 (1957), assumed the speedy trial right encompasses even noncapital sentencing, and

[47] These rights are guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, 16, 17 and 21 of the Florida Constitution.

"[o]f note, 'no federal court has held that sentencing is *not* within the protective ambit of the Sixth Amendment right to a speedy trial. '" Burkett v. Fulcomer, 951 F.2d 1431, 1438 n.7 (3d Cir. 1991) (quoting Perez v. Sullivan, 793 F.2d 249, 253 (10th Cir. 1986). In Moore v. Zant, 972 F.2d 318, 320 (11th Cir. 1992), the Eleventh Circuit held the right applied to capital sentencing proceedings, warning:

> In this case, if Georgia waits too long, the state could lose the right to sentence Moore to death. Moore has speedy trial rights under the sixth amendment that would cover a death penalty proceeding. *United States v. Howard, 577* F.2d 269, 270 (5th Cir. 1978) ("constitutionally guaranteed right to speedy trial applies to sentencing").

Moore, 972 F.2d at 320. But see Lee v. State, 487 So. 2d 1202 (Fla. 1st DCA 1986) (due process, not speedy trial, governs non-capital sentencing).

In Doggett v. United States, __ U.S. __, 112 S.Ct. 2686, 2696 (1992), even though the petitioner "did indeed come up short" in showing prejudice, delay required outright dismissal. There are four relevant inquiries to determine a violation of the right to a speedy trial:

> whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result.

Doggett, 112 S.Ct. at 2690 (citing *Barker v. Wingo, 407* U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972))[48]. Applying the relevant factors, it is plain that relief is required,

(a) The delay was long.

The penalty phase here occurred in November 1992, over 9 years after the arrest. In Doggett, the "extraordinary 8% year time lag between Doggett's indictment and arrest clearly suffice[d] to trigger the speedy trial enquiry. " Id. 2691. The Court noted that "the lower

[48] In assessing the related issue of appellate delay, "[t]he factors of *Barker* are preferred ... since the reasons for constraining appellate delay are analogous to the motives underpinning the Sixth Amendment right to a speedy trial." Harris v. Champion, 15 F.3d 1538, 1559 (10th Cir. 1994) *(quoting Rheuark v. Shaw, 628* F.2d 297, 303 (5th Cir. 1980).

courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year. " Id. at n. 1. See Madonia v. State, 648 So, 2d 260 (Fla. 5th DCA 1994) (delay of more than three years between charge and arrest "is sufficient time to make the delay 'presumptively prejudicial' and require a *Doggett* inquiry"). Compare Harris v. Champion, 15 F.3d 1540, 1560 (10th Cir. 1994)("a two-year delay in finally adjudicating a direct criminal appeal ordinarily will give rise to a presumption of inordinate delay that will satisfy this first factor in the balancing test"). The delay here is presumptively prejudicial.

(b) The government is more to blame for the delay.

Had Florida obeyed the law, a lawful penalty phase would not have been so delayed. Mr. Gore continuously raised his right to a constitutionally adequate penalty phase throughout the years, but this effort was continuously thwarted by the state.

Mr. Gore was convicted and sentenced to death in 1984. On August 22, 1985, this Court affirmed. Gore v. State, 475 So. 2d 1205 (Fla. 1985). The United States Supreme Court denied review February 24, 1986. Gore v. Florida, 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986). On February 24, 1988, Gore filed a motion for post conviction relief pursuant to Rule 3.850, Fla. R. Crim, P., in the state trial court. On April 4, 1988, he filed a petition for a writ of habeas corpus in the Florida Supreme Court. The trial court conducted an evidentiary hearing on the Rule 3.850 motion on April 15, 18 and 19, 1988, and then denied the motion. This Court consolidated the appeal from the denial of his Rule 3.850 motion with the petition for a writ of habeas corpus. On August 18, 1988, the Court affirmed the trial court's denial of Petitioner's Rule 3.850 motion and also denied his petition for a writ of habeas corpus. Gore v. Dugger, 532 So. 2d 1048 (Fla. 1988). On February 4, 1989, Gore filed a petition for habeas corpus in the federal district, which granted relief on August 17,

1989. Gore v. Dugger, 763 F.Supp. 1110 (M.D. Fla. 1989). The Eleventh Circuit affirmed on May 29, 1991. Gore v. Dugger, 933 F.2d 904 (11th Cir. 1991). Thus he has continually and diligently sought a fair sentencing proceeding.

His speedy trial claim is not invalid because he exercised his right to appeal. See United States v. Loud Hawk, 474 U.S. 302 (1986) (applying Barker to delay due to interlocutory appeals). The state cannot visit blame on him for the delay when he has been proven correct in asserting that his prior penalty phase was conducted unlawfully.

(c) The speedy trial right has been asserted in due course.

Gore has always sought a constitutional trial, and has been continuously in state custody, available for trial.

(d) The delay has prejudiced appellant.

The state has claimed that the delay has authorized it to develop a new aggravating factor and apply it retroactively to Gore. The delay also led directly to the state's threat to the jury that it, the state, would soon release Gore because he had served many years of the 25-year terms before parole eligibility.

Gore was subjected to "oppressive incarceration" and the "anxiety" under Doggett, 112 S.Ct. at 2692 (citing cases). " [W]hen a prisoner is sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." In re Medley, 134 U.S. 160, 172, 10 S.Ct. 384, 33 L.Ed.2d 835 (1890). See Lackey v. Texas, 115 S .Ct. 1421 (1995) (STEVENS, J., respecting denial of certiorari; collecting cases).

CONCLUSION

This Court should reverse the sentence and order a new sentencing trial or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Cecelia Terenzio, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401, by courier this 21 day of February, 1996.

Of Counsel