IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,639

LLOYD CHASE ALLEN,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
SIXTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MONROE COUNTY

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

In the trial court, the appellant, Lloyd Chase Allen, was the defendant, and the appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they stood in the lower court. The symbols "R.", "T." and "SR." will be used to refer to portions of the record on appeal, transcripts of the lower court proceedings, and supplemental record, respectively. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Mr. Allen was indicted for the first degree murder of Dortha Cribbs, and for her kidnapping, robbery, grand theft and grand theft auto. (R. I-8). The case was tried to a jury, before the Honorable Richard Fowler, Circuit Court Judge for Monroe County, on February 8, 9, 10, 11, 12, 13, 16 and March 3, 1993.

The Guilt/Innocence Phase

In early November, 1991, Dortha Cribbs, a 58-year-old widow, left her home in Bacyrus, Ohio, to drive to Florida. On Friday, November 8, at 6:00 p.m., Cribbs stopped in Jacksonville Beach, to visit her friends Bill and Janet Hudson. (T. 172). With Ms. Cribbs was the defendant, whom Cribbs introduced as "Lee Brock." Cribbs and the defendant remained with the Hudsons, sharing their guest room, until Sunday, November 10, at noon. (T. 174, 181). During that weekend, Cribbs and the defendant appeared to enjoy each other's company (T. 182); Mrs. Hudson, a childhood friend, said Cribbs was very happy, and that the defendant treated her well. (T. 189, 193).[1]

The defendant told the Hudsons that he was a widower, that he owned a ranch in Texas, and that he was a trucker whose rig had broken down in Atlanta. (T. 173, 188). Cribbs planned to sell her trailer in Bunnell, Florida; then she and the defendant were going into partnership on both Cribbs' vacation home in Summerland Key, and on the defendant's trucking business.[2] (T. 178-179, 188, 193, 194).

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[1] Cribbs told Mr. Hudson that she had known the defendant "for awhile". (T. 180). Cribbs would not tell Mrs. Hudson when she had met the defendant. (T. 195). Cribbs told another witness, Richard Hoops, that she had met the defendant about November 8, at a motel next to a truck stop in Atlanta. (T. 267, 269).

[2] Cribbs had long been attracted by the trucking business, and had in fact earned her trucker's license. (T. 148).

Mrs. Hudson said that Cribbs, who characteristically carried large sums of cash, informed the defendant that she divided her cash between different compartments within her purse. (T. 191). Cribbs wore, during the course of that weekend, a diamond-studded horseshoe-shaped ring. (T. 191).[3] Cribbs and the defendant left the Hudsons' home for Bunnell at noon on Sunday, November 10, the defendant driving Cribbs' car. (T. 179).

Cribbs and the defendant arrived in Bunnell on the evening of November 10, and met there, over the next two days, with Everett Smith, who purchased Cribbs' trailer, Richard Hoops, who arranged the purchase, and Cribbs' sister-in-law, Joyce McFarland, who lived nearby. (T. 206-207, 212, 213, 266-268). Cribbs introduced the defendant as "Lee Brock," and said that she was very much in love with him. (T. 207, 210-211, 218, 267, 271). The defendant said that he owned a ranch in Texas and several rigs. (T. 208, 270). Cribbs and the defendant were planning to drive to Summerland Key to sell Cribbs' home there, and then to share the defendant's truck route. (T. 209, 271).

On Monday, November 11, Cribbs and McFarland cleaned out the trailer for sale to Smith. (T. 221). At that time, Cribbs was wearing the diamond horseshoe ring. (T. 217).

On Tuesday, November 12, at noon, Cribbs was paid $4,100, in one hundred dollar bills, for the sale of her trailer to Smith, a transaction witnessed by the defendant. (T. 271). The defendant and Cribbs then left Bunnell for Summerland Key, a nine-and-a-half hour drive. (T. 272).

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[3] Numerous witnesses provided descriptions and valuations of the ring. (T. 152-153, 166-167, 191, 192, 202-203, 216-217). Although the character and value of the ring were not disputed, the trial court admitted, over defense objection, a photograph of Dortha Cribbs cuddling her grandchild in her lap, for the asserted purpose of depicting the ring, which she wore in the photograph. (T. 153-155). The trial court's error in admitting this photograph, as well as other victim impact evidence and argument, is discussed in Issue I.

On Wednesday, November 13, at 8:00 a.m., Larry Woods began installing siding on a home across the street from Cribbs' stilt house in Summerland Key. (T. 383). Sometime thereafter, Woods observed Cribbs descend the stairs, mill around the carport, then return upstairs, in no apparent distress. (T. 384, 391). A little after 11:00 a.m., Woods observed the defendant emerge from Cribbs' home, walk towards the road, stop, look at Woods, then return to the stilt house. (T. 385). At 11:45 a.m., Woods left for lunch. (T. 386). He had seen no one other than Cribbs and the defendant emerge from the stilt house that morning.[4] (T. 385-386). Woods returned from lunch after 1:00 p.m., by which time Cribbs' 1988 Ford Taurus, which had previously been parked beneath the stilt house, was gone. (T. 387).

At some time after 1:00 p.m.[5] that day, Chuck Vowels, the real estate agent who managed Cribbs' property, entered the stilt house, using his key. (T. 238-239).[6,7] The television set was on high volume, the coffee pot half full. (T. 240). Vowels turned off the television then walked into the master bedroom, where he found the body of Dortha Cribbs, face down on the floor in a puddle of blood. (T. 240, 250).

Sometime after noon on November 13, Richard Hare, a taxi driver, received

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[4] Woods testified that his view of the Cribbs home was unobstructed. (T. 386).

[5] Vowels testified that he entered the Cribbs home between 12:30 and 1:00, closer to 12:30. (T. 238, 240). But Woods testified that it was after his return from lunch when he observed Vowels enter the property, and that he had returned from lunch after 1:00 p.m. (T. 387).

[6] Vowels testified that he did not know whether the door was locked when he inserted his key. (T. 240).

[7] He had driven past the stilt house earlier that day, and had noted Cribbs' car parked beneath it, the blinds up and the sliding glass doors open. (T. 236-237). Because he had not been expecting Cribbs' visit, he had returned to investigate. (T. 237). Upon Vowels' return, the Taurus was gone and the curtains were closed. (T. 239).

a call to respond to the Buccaneer Resort Tiki Bar; he picked up the defendant there between 12:30 and 12:45 p.m. (T. 403-404). Hare drove the defendant to the Caribbean Club in Key Largo, an eighty dollar fare that the defendant paid with a hundred dollar bill. (T. 405-406).[8] The defendant told Hare that he was a trucker from Texas, and that he had a girlfriend in Key Largo. (T. 406-407).

On December 23, six weeks after Cribbs' murder, her Taurus was located in the parking lot of the Buccaneer Lodge. (T. 355; 443-444). Because of debris on its exterior, the car appeared to have been parked there for some time. (T. 451). The defendant's prints were lifted from the passenger window and the interior door frame. (T. 449-450, 463-466). Inside the car was a trucker's log book containing a credit card number and a sequence of telephone numbers which led to the location of the defendant in Manteca, California, where he was arrested, on February 18, 1992, for the murder of Dortha Cribbs. (T. 355-358, 361-362).

Found at the crime scene was a suitcase containing a blue shirt and a camera loaded with undeveloped film depicting the defendant (T. 286-289, 310, 311, 313-315; St. Exs. 9, 12, 22, 23); a pair of grey lizard skin boots (T. 228-299, 298); a pair of blue jeans lying at the foot of the bed in the master bedroom, with a one-quarter-inch blood stain on the right knee (T. 306, 309, 316, 327-328; St. Ex. 19);[9] a sperm-stained hand towel, by the side of the bed opposite Cribbs' body (T. 308); a five-inch piece of sashcord, under Cribbs' left arm, consistent with ligature marks found on Cribbs' wrists and ankles, and consistent with the sashcord in the spare

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[8] The defendant entered the cab carrying a drink, which he refilled in two separate stops en route to Key Largo. (T. 405-406).

[9] The suitcase, boots and shirt were identified as similar to those the defendant had in Jacksonville and Bunnell. (T. 175-176, 186-187, 198, 215-216, 270). The defendant was said to have worn blue jeans in Jacksonville and Bunnell (T. 175, 187, 198, 215-216). The boots and the shirt fit the defendant at the time of trial, but the blue jeans did not. (T. 363-364). There was evidence that the defendant had gained weight between the time of the offense and the time of trial. (T. 364, 389).

bedroom, from which a length had been cut (T. 291, 299, 312, 315-316; St. Ex. 21); and a sheaved knife and rag in the spare bedroom. (T. 309-310, 319, 330; St. Ex. 20).[10] Missing from the scene were Cribbs' forty-one one hundred dollar bills[11] and her horseshoe-shaped, diamond studded ring. (T. 311).

There were no fingerprints of value anywhere in the house, or on the surface of any of its contents (T. 289, 307, 319, 324-326, 331-332, 345-47, 374-375);[12] in fact, it appeared that the entire interior of the home, and the surfaces of all its contents, had been wiped clean with a damp rag. (T. 306, 332). There were no signs of forcible entry. (T. 306, 345).

Medical Examiner Nelms placed the time of Cribbs' death from between 4:00 a.m. and 2:00 p.m. on November 13th. (T. 412).[13] There were two superficial[14] stab wounds on the right side of Cribbs' face. (T. 416). There were superficial ligature abrasions on her wrists. (T. 315, 416). There was a stab wound to the left neck, one inch below the ear, that severed the carotid artery, causing Cribbs to

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[10] Although Deputy Petrick suspected the knife may have been the murder weapon, he did not communicate his suspicion to the medical examiner and it was never compared with the wound to determine whether it was in fact the murder weapon. (T. 322, 324, 368). The medical examiner testified that, given the length of the knife and the depth of the wound, the knife could have been the murder weapon. (T. 417). The knife bore no traces of blood or any fingerprints. (T. 307, 309, 319, 323, 330, 372).

[11] The other contents of her purse were strewn across the bed. (T. 311).

[12] There were two latent prints of no comparison value lifted from the master bedroom. (T. 307, 332).

[13] Nelms' estimate of Cribbs' time of death was a "rough approximation" derived from "data published in standard textbooks." (T. 411). Based upon Cribbs' temperature of 85° F at 7:00 p.m. on November 13, Nelms estimated the time of death at between five and fifteen hours prior thereto. (T. 412), or between 4:00 a.m. and 2:00 p.m. Nelms put 10:00 a.m. as the time of death on the death certificate, with the explanation that he was required by law to estimate the time of death on a death certificate. (T. 440-441).

[14] Both facial wounds were approximately one centimeter in width and in depth. (T. 416).

bleed to death. (T. 418-419, 421). The angle of the wound was consistent with its infliction as Cribbs lay face down. (T. 419-420).

Nelms testified to his "rough estimat[ion]" that Cribbs lived for fifteen to thirty minutes after the wound was inflicted. (T. 422). Nelms also estimated -- "It's just a guess" -- that Cribbs was conscious for "fairly close" to fifteen minutes. (T. 422).[15] Nelms opined that Cribbs was bound at the time she was stabbed, because there were no defensive wounds and no blood splatter. (T. 416, 423).

A serologist testified that there were type B and type O body fluids on the hand towel; that Dortha Cribbs is type B; and that the defendant is type O. (T. 481). The blood stain on the blue jeans was also type B. (T. 483). There was no evidence when the jeans were stained; the serologist said this could have happened years earlier. (T. 489-490, 519). A polymerase chain reaction (PCR) DNA test[16] confirmed that the blood on the blue jeans was type B, that of Dortha Cribbs, as well as 10.4% of the white population. (T. 514-515, 517).

At the close of all the evidence, the trial court entered a judgment of acquittal for robbery, finding insufficient evidence that force was employed in connection with any taking (T. 525-527, 531-532); and a judgment of acquittal for theft of the ring, finding insufficient evidence that the defendant had taken the ring. (T. 527, 533).

In closing to the jury, defense counsel noted the absence of any direct evidence of the defendant's guilt, and argued that the following evidence gave rise

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[15] Nelms said that Cribbs' right carotid artery would have carried blood to her brain, even after the left artery was severed, but that she could have lost consciousness from shock at some interval prior to death. (T. 422). Nelms did not provide any basis for determining when shock did or could have intervened, but only hazarded a "guess" that it intervened at "fairly close" to fifteen minutes after the wound was incurred. (T. 422).

[16] It is the restriction fragment length polymorphism (RFLP) DNA test, not the PCR test, which can identify with virtual certainty the source of blood or seminal fluids. (T. 515-516).

to a reasonable doubt whether the defendant had killed Dortha Cribbs: (1) the perpetrator wiped the entire Cribbs home clean of fingerprints, but left there several items identifiable as the defendant's, including his distinctive lizard skin boots and photographs of his face; and (2) the defendant had no motive to kill Ms. Cribbs -- had she lived, she would have shared with him the proceeds of the anticipated sale of the stilt house. (T. 551, 555-556, 558, 601, 603, 607). Defense counsel argued that the state's entirely circumstantial case was in fact more consistent with the theory that someone other than Lloyd Allen had murdered Dortha Cribbs, but that police suspicion fastened upon the defendant because he is a drifter. (T. 562-563, 566-567, 569, 571-572, 608, 610-611).

In rebuttal, the state eulogized the victim as a loving and generous family woman and emphasized her loss to her survivors:

> You heard from the relatives, the son and the stepson and the sister-in-law, sister, a friend in north Florida in the Jacksonville area, of what kind of a woman she was. She was a widow. A great-grandmother and a mother and a grandmother. She was a lonely woman and a trusting woman. She was very giving, helpful and loving. She'd help anyone out that needed a helping hand. She was a very kind and trusting woman.
>
> You know, even Everett Smith, who had just met her in the Bunnell area, he said: I have never seen such a sweet person in my life. He and his wife said: If anything happens and you need a place to stay, you can come back and stay here with us. . . .

(T. 581-582).

After eleven hours of deliberation (T. 633, 648, 655), the jury found the defendant guilty of first degree murder and grand theft auto, and not guilty of kidnapping. (T. 656; R. 172-175).

The Penalty Phase

Immediately after the jury returned a verdict, defense counsel moved the court

to permit him to withdraw from representation, and to permit the defendant to represent himself in the penalty phase of the trial. (T. 659-661). Counsel explained that it was the defendant's desire to waive the presentation of mitigating evidence and to seek death; that counsel was uncomfortable advocating this position; and that, in his opinion, Mr. Allen was competent to represent himself in seeking death. (T. 661). Although counsel had represented Mr. Allen for ten months prior to his motion to withdraw, counsel conceded that he had conducted no investigation into mitigating evidence during this period of time. (R. 16-17; T. 801-803).

Reserving ruling on defense counsel's motion to withdraw, the trial court conducted a *Faretta*[17] inquiry, finding that the defendant had knowingly and voluntarily waived his right to counsel, and was competent to represent himself, with trial counsel standing by. (T. 672).[18] The trial court then ordered the defendant's examination for psychological competency pursuant to Rule 3.210, Florida Rules of Criminal Procedure. (T. 674).

At the hearing on the defendant's competency, Drs. Wolfe and Holbrook testified that Mr. Allen was competent to proceed to the penalty phase of trial. (T. 687-688, 692-693). Neither doctor had any idea that it was the defendant's intention to waive mitigation and to seek death. (T. 687, 694). The court found the defendant competent to represent himself in the penalty phase. (T. 695).

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[17] *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562(1975).

[18] During the course of the *Faretta* inquiry, the defendant asserted that (1) he had an IQ between 135 or 138; (2) he had prepared appeals for and secured the release of many inmates, while employed as a law librarian in prison; and (3) he had been offered employment as a legal researcher for the firm of Leon Jaworski, of Watergate fame, for a fee of $80.00 an hour. (T. 664-671). Because defense counsel had conducted no mitigation investigation, these extravagant assertions were unchallenged. Explaining that it was his "job to get death" (T. 670), Mr. Allen argued that "[t]here is no attorney in America that could go in front of that jury and get what I want [i.e., the death penalty] as well as I could myself. There is no one that skilled." (T. 671-672).

The court then questioned the defendant whether he was familiar generally with the statutory mitigating factors and with the concept of non-statutory mitigation. (T. 706). Although the defendant said he was (T. 706), his claim of knowledge was untested: he was not questioned regarding the nature of any particular factor, nor by what character or method of proof these factors could be established. Because defense counsel had conducted no investigation at all into the mitigating circumstances in Mr. Allen's life (T. 801-803), there was no *Koon*[19] inquiry to determine whether the defendant's waiver of mitigation was knowing, intelligent and voluntary; and there is otherwise no record evidence that the defendant had ever been advised what mitigating evidence could have been presented on his behalf had he chosen not to waive it.

The prosecutor argued the existence of three aggravating factors: (I) the capital felony was committed by a person under sentence of imprisonment, §921.141(5)(a); (2) the capital felony was committed for pecuniary gain, §921.141(5)(f); and (3) the capital felony was especially heinous, atrocious and cruel, §921.141(5)(h).[20]

With regard to the first factor, the prosecutor introduced documents reflecting that, at the time of the instant offense, Mr. Allen was on escape from a work release facility in Kansas, upon sentence to one to ten years for forgery and fraud. (T. 7I9; St. Comp. Ex. I, penalty phase). The prosecutor then argued, on the basis

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[19] *Koon v. Dugger*, 6I9 So. 2d 246 (Fla. I993).

[20] During the sentencing charge conference, the state announced its intention to argue in addition the applicability of the following aggravating circumstances: (1) the capital felony was committed for the purpose of avoiding arrest, §921.141(5)(e) (T. 698); and (2) the capital felony was committed in a cold, calculated and premeditated manner, §921.141(5)(i). (T. 70I). The defendant vigorously advocated for the prosecution's right to argue these aggravators; in fact, he indicated his intention to argue them as well. (T. 70I-702, 704). But the trial court found that neither of these two aggravators applied to the case at bar. (T. 702, 706).

of this evidence, that only a sentence of death would prevent this defendant from hurting someone else:

> MR. MCLAUGHLIN: I do recall that the defendant escaped from that Work Release Program on the 6th of October, 1990. He was under the sentence of imprisonment at the time he left that program. What does that tell us? From the one case alone, that no form of control, whether it was probation or parole or prison or work release was adequate to take care of this defendant. Had he served out his term of years in Kansas at the time, this crime might not have been committed 13 months later.

(T. 728-729).

With regard to the pecuniary gain factor, the prosecutor argued that the defendant had murdered Ms. Cribbs for her cash and her ring, as well as for her car, notwithstanding that the trial court had entered a judgment of acquittal for robbery of the cash and for theft of the ring. (T. 729-730).

With regard to the heinous, atrocious and cruel factor, the prosecutor relied principally upon Dr. Nelms' testimony that Ms. Cribbs lived for fifteen to thirty minutes and was conscious for fifteen minutes after infliction of the wound to her neck. (T. 731-732).

Prior to closing argument, Mr. Allen announced that he would be arguing aggravating factors only and would in fact disavow to the jury the applicability of any mitigating factors. (T. 725). The court warned Mr. Allen that, in doing so, he could not rely upon facts not in evidence. (T. 725).

Nevertheless, in closing argument to the jury, and without any evidentiary support therefor, the defendant expressly denied the existence of mitigating evidence generally, and in particular denied abuse in childhood, denied alcoholism and denied drug addiction. (T. 739-740). Then the defendant provided the jury, in the form of an unsworn narrative in the third person, an hypothesis of his factual innocence of the murder of Dortha Cribbs.

Mr. Allen argued that the evidence was consistent with the murder having been committed by someone other than he. There was evidence at trial of Dortha Cribbs' intention to sell her stilt house in Summerland Key and to use the proceeds to go into partnership with the defendant in the trucking business. (T. 746). According to Mr. Allen, the stilt house required repair prior to sale. (T. 749). He summoned for this purpose an associate, whom he and Cribbs, en route from Bunnell, picked up at Miami International Airport on the evening of November 12. (T. 748). Then he, Cribbs and the third person drove to the stilt house, arriving there at 11:30 p.m. (T. 751).

At 11:45 a.m. the next morning, Mr. Allen left the house in Cribbs' car to use the pay phone at a nearby convenience store to call a trucking company.[21] (T. 751). Allen drove back to the stilt house fifteen to twenty minutes later, at which time he saw the second man walking down the road, carrying a suitcase. (T. 752). The second man, in whom Allen had confided that Cribbs had a large sum of cash in her purse, told Allen that he had been caught rummaging through Cribbs' purse, and that Cribbs had threatened to summon the police. (T. 752, 756-757). Allen, to avoid apprehension for escape from work release in Kansas, drove off, with the second man, to the Buccaneer Lodge. There they registered, and ordered drinks at the Tiki Bar. (T. 752-754). Then Allen called for a cab and left; he did not learn of Cribbs' murder until two days later, when he read of it in a newspaper. (T. 755-756).

Although he asserted his factual innocence of Cribbs' murder, Mr. Allen nevertheless urged the jury to vote for his death, for these reasons: (1) he was responsible and felt remorseful for Ms. Cribbs' death, because it was he who

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[21] The telephone service at the stilt house had not yet been reconnected, because Ms. Cribbs had arrived on the night before. (T. 751).

summoned the second man and told him about the cash in her purse, thereby setting in motion the forces that would result in her death (T. 757, 759, 762); and (2) he preferred death to life in prison. (T. 760, 761-762).

The jury recommended, by a vote of eleven to one, that the defendant be sentenced to death. (T. 771-773).

At the sentencing hearing on March 3rd, the prosecutor called three witnesses, to rebut the defendant's hypothesis of innocence.

Detective Harrold testified that on November 12th, the night before Ms. Cribbs' death, the defendant made two credit card telephone calls from the Miami International Airport. (T. 785).[22] Harrold said that, on November 13, there were no telephone calls made on that credit card from a pay telephone at a nearby convenience store, and that there were no telephone calls made that date from that telephone to the Peterbilt Trucking Company. (T. 786). But Harrold admitted that, on the date of his arrest, the defendant possessed other credit cards that had not been checked for use at the convenience store pay telephone; nor had Harrold checked whether the trucking company had an 800 number that the defendant might have used. (T. 790).

Detective Glover testified that the Buccaneer Lodge did not have a record of the defendant's registration there on December 21, 1991. It was, however, November 13, not December 21, when the defendant said he registered at the Buccaneer Lodge. (T. 752-754).

Finally, Chuck Vowels, the realtor, denied that the stilt house required repair prior to sale. (T. 795). Vowels admitted, however, that Cribbs had sued the building contractor for defective workmanship, and that the house had been on the market

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[22] This testimony in fact corroborated Mr. Allen's account of having picked up the second man from the airport that night.

for fully four years, prior to Cribbs' death, without having been sold. (T. 793, 795).

The trial court adjudicated the defendant for first degree murder and sentenced him to death. (T. 812; R. 190-194).[23] In aggravation, the court found (1) that the defendant had committed the murder while under sentence of imprisonment, after the defendant's escape from work release in Kansas; (2) that the murder was committed for pecuniary gain, based upon the fact that the contents of the victim's purse were strewn across her bed and the subsequent discovery of the victim's car; and (3) that the murder was heinous, atrocious and cruel, based upon the testimony of Dr. Nelms that the victim was alive for fifteen to thirty minutes after being stabbed, and that she was conscious for up to fifteen minutes of this time. In mitigation, the court found (I) that the defendant's parents divorced when he was fourteen, and he was thereafter on his own; and (2) that the defendant performed military service in Vietnam. (R. 239-241).[24]

This appeal follows. (R. 242).

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[23] The trial court adjudicated and sentenced the defendant to five years in prison for grand theft auto. (T. 811; R. 190-194).

[24] This non-statutory mitigation evidence was gleaned from the competency evaluations and presentence investigation report. (R. 239).

ISSUES ON APPEAL

I

THE TRIAL COURT'S ERROR IN ADMITTING, IN GUILT/INNOCENCE PHASE OF TRIAL, UNDULY PREJUDICIAL PHOTOGRAPH OF VICTIM CUDDLING GRANDCHILD IN HER LAP, AS WELL AS OTHER VICTIM IMPACT EVIDENCE AND PROSECUTORIAL ARGUMENT THEREON, VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL, UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§2, 9, 16, 17 AND 22 OF THE STATE CONSTITUTION.

II

THE TRIAL COURT ERRED IN ACCEPTING THE DEFENDANT'S WAIVER OF MITIGATION EVIDENCE, WHERE DEFENSE COUNSEL HAD NEVER PERFORMED ANY INVESTIGATION INTO THE PRESENCE OF MITIGATING EVIDENCE, AND CONSEQUENTLY THERE EXISTS NO RECORD SHOWING OF MITIGATION EVIDENCE, IN VIOLATION OF *KOON V. DUGGER*, 619 SO. 2D 246 (FLA. 1993), AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION.

III

THE TRIAL COURT ERRED IN PERMITTING THE DEFENDANT TO MAKE UNSWORN AND UNSUPPORTED DENIALS OF APPLICABLE MITIGATING FACTORS, BEFORE THE SENTENCING JURY, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION.

IV

THE TRIAL COURT ERRED IN FINDING, AS AN AGGRAVATING FACTOR, THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN, WHERE THE TRIAL COURT HAD ENTERED A JUDGMENT OF ACQUITTAL FOR ROBBERY OF THE VICTIM'S CASH AND WHERE THE THEFT OF THE VICTIM'S CAR WAS FOR THE PURPOSE OF ESCAPE, IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS, THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I §§ 2, 9, 16,

17 AND 22 OF THE FLORIDA CONSTITUTION, AND §921.141(5) (F), F.S.A. (1993).

V

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL, WHERE THE ENTIRE BASIS FOR THAT FINDING WAS THE TESTIMONY OF MEDICAL EXAMINER NELMS TO HIS "GUESS" THAT THE VICTIM WAS CONSCIOUS FOR FIFTEEN MINUTES AFTER THE FATAL STABBING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, §§2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, AND §921.141(5)(H), F.S.A. (1993).

VI.

THE PROSECUTOR'S COMMENTS TO THE JURY DURING THE PENALTY PHASE THAT ONLY A SENTENCE OF DEATH WOULD PREVENT THIS DEFENDANT, WHO HAD PREVIOUSLY ESCAPED FROM A WORK RELEASE FACILITY, FROM KILLING SOMEONE ELSE CONSTITUTED IMPROPER ARGUMENT OF A NONSTATUTORY AGGRAVATING FACTOR, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, §§2, 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION AND §921.141, F.S.A. (1993).

SUMMARY OF ARGUMENT

The trial court erred in admitting, into the guilt/innocence phase of this capital case, victim impact argument and evidence, including a photograph of Dortha Cribbs cuddling her grandchild on her lap. This evidence and argument was irrelevant and inflammatory and its erroneous admission harmful, where the single issue to be resolved was the perpetrator's identity, and the evidence of identity was circumstantial only.

The defendant in this case waived the presentation of any mitigating evidence to the sentencing jury and judge. The trial court erred in failing first to conduct an inquiry of the defendant in conformity with the requirements of *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993). Under *Koon*, a defendant's waiver of mitigation evidence is invalid unless counsel has investigated mitigation, and advised the defendant on the record what evidence could be presented, so that there is record evidence that the defendant knows what it is that he is waiving. Mr. Allen's trial counsel conceded that he had conducted no mitigation investigation in this case. The defendant was therefore never advised on the record what mitigation evidence could have been presented had he chosen not to waive it. Accordingly, the defendant's waiver of mitigation was invalid.

The trial court erred in permitting the defendant not merely to waive the presentation of mitigating evidence, but affirmatively to deny before the sentencing jury the existence of substantial and compelling mitigating factors. The defendant's denials of these factors were unsworn, were without record support, and were untrue. There resulted a profound subversion of the truth-seeking function of the capital sentencing hearing, with the result that the sentence is not reliable and must be vacated.

Because the trial court entered a judgment of acquittal for robbery of the

victim's cash, double jeopardy principles precluded it from relying upon the facts presented at trial to establish this offense in finding that the murder was committed for pecuniary gain. Furthermore, the theft of the victim's automobile was an afterthought, or committed for the purpose of escape, and likewise could not support this aggravating factor. The trial court therefore erred in finding that the murder was committed for pecuniary gain.

The trial court erred in finding that the murder was heinous, atrocious and cruel, because this finding was based entirely on incompetent and inadmissible testimony of the medical examiner regarding the victim's duration of consciousness after she was stabbed.

Prosecutorial comments, made before the sentencing jury and judge, that, in view of the defendant's prior conviction for escape, only a death sentence would prevent him from killing again, constituted impermissible argument of a non-statutory aggravating factor.

The erroneous admission of this argument harmed the defendant. Two of the aggravators argued to the jury and found by the trial court were not established by the evidence. See Points IV and V. The remaining aggravating factor found, that the capital crime was committed while the defendant was under sentence of imprisonment, was based upon the defendant's having walked away from a work-release program. It cannot be found, beyond a reasonable doubt, that the sentencer would have recommended and imposed the death penalty, in the absence of the prosecutor's impermissible argument of a non-statutory aggravating factor.

ARGUMENT

I

THE TRIAL COURT'S ERROR IN ADMITTING, IN GUILT/INNOCENCE PHASE OF TRIAL, UNDULY PREJUDICIAL PHOTOGRAPH OF VICTIM CUDDLING GRANDCHILD IN HER LAP, AS WELL AS OTHER VICTIM IMPACT EVIDENCE AND PROSECUTORIAL ARGUMENT THEREON, VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL, UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§2, 9, 16, 17 AND 22 OF THE STATE CONSTITUTION.

Introduced into evidence, over defense objection that it was irrelevant and unduly prejudicial, was a photograph of the victim Dortha Cribbs, cuddling her grandchild on her lap. (T. 153-155, State Exhibit 2). The prosecutor argued that the photograph was relevant and admissible because in it Cribbs was wearing the horseshoe-shaped, diamond-studded ring that the defendant was alleged to have stolen from her, and this was assertedly the only photograph which depicted that ring. (T. 153-154). Defense counsel suggested redacting from the photograph everything but Cribbs' hand, wearing the ring. (T. 154). The trial court refused to redact the exhibit, and overruled the defendant's objection to its admission, on the basis that he had waived it, by failing to object to previous testimony about Cribbs' grandchildren. (T. 154).

The trial court erred in overruling the objection: (a) the defendant did not waive objection to admission of the photograph; (b) the photograph was entirely unnecessary for the purpose of depicting the allegedly stolen ring, and comprised unduly prejudicial victim impact evidence; (c) victim impact evidence and prosecutorial argument thereon should never have been admitted in the guilt/innocence phase of the trial; and (d) admission of the victim impact evidence, and prosecutorial argument intended to inflame juror sympathy for the victim and her survivors, was harmful error in this circumstantial evidence case.

(a) The Defendant Did Not Waive Objection To Admission Of The Photograph.

The state's first witness was Ogier Johns, the son of Dortha Cribbs. Defense counsel objected, on relevancy grounds, the first time Johns testified about the grandchildren of Dortha Cribbs. (T. 146).[25] After the trial court erroneously overruled this objection, the prosecutor asked Johns whether Cribbs had told him when she would return to Ohio. (T. 152). Johns responded:

> A: She was supposed to be back in November by the 18th for my daughter's birthday.

(T. 152).

It was this testimony to which the trial court referred in finding that the defendant had waived objection to irrelevant evidence about Cribbs' grandchildren. (T. 155). However, the law is clear that where an objection has once been made and overruled, it need not be reurged, where to do so would be futile. *Birge v. State*, 92 So. 2d 819 (Fla. 1957); *LeRetilley v. Harris*, 354 So. 2d 1213 (Fla. 4th DCA 1978), *cert. denied*, 359 So. 2d 1216 (1978). The conclusion that further objection would have been futile is fortified by the trial court's having erroneously overruled defense objection to testimony by the very next witness, William Cribbs, the victim's stepson, to the "close relationship" he, his children and his grandchildren enjoyed

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[25] Q: Was Dortha Cribbs your mother?

A: Yes.

Q: Do you have any children?

A: Yes.

Q: How many children?

A: Three.

MR. HOOPER: Objection to relevancy.

THE COURT: I will allow some latitude.

(T. 146).

with Dortha Cribbs. (T. 163).[26] Because the defendant unsuccessfully objected to testimony about Cribbs' grandchildren, at its first elicitation, he did not waive objection to admission of a photograph depicting Dortha Cribbs cuddling her grandchild on her lap.[27]

(b) The Photograph Was Entirely Unnecessary For The Purpose Of Depicting The Allegedly Stolen Ring, And Should Have Been Excluded As Unfairly Prejudicial.

The ring itself was never found. But a parade of witnesses described the ring in great detail, recited its value, and said that Cribbs habitually wore it.[28] (T. 152-153, 166-167, 191, 192, 202-203, 216-217). Three of the witnesses -- Ogier Johns,

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[26] Q: How are you related to Dortha Cribbs?

A: I am her stepson.

Q: Did you have a close relationship with Dortha?

A: Yes, very close.

Q: Your children and grandchildren also?

MR. HOOPER: Objection, Your Honor.

THE COURT: Overruled for the moment.

THE WITNESS: Very much so, yes sir.

(T. 163).

[27] The trial court's error in admitting the victim impact testimony of Ogier Johns and William Cribbs, and the photograph of Dortha Cribbs cuddling her grandchild on her lap, were additionally the subject of the defendant's motion for a new trial. (R. 177-178).

[28] Ogier Johns said that . . . "It was beautiful. It had eleven diamonds in a horseshoe shaped ring" and that it was worth $8,000. (T. 152-153, 159-160). William Cribbs described it as "a gold ring . . . in the shape of a horseshoe with diamonds all the way around." (T. 167). Janet Hudson, Cribbs' friend, called it a "horseshoe diamond ring." (T. 191). Her daughter, Bonnie Chester, said it was a "man's horseshoe ring" with diamonds [all the way around] inside of the horseshoe." (T. 202-203). Joyce McFarland described it as a man's horseshoe diamond ring. (T. 217).

William Cribbs, and Joyce McFarland -- were additionally asked to identify the ring as that worn by Cribbs in State Exhibit 2, the photograph in which she is depicted cuddling her grandchild on her lap. (T. 152, 167-168, 216-217). The photograph was published to the jury. (T. 156).

There was no necessity for introduction of that photograph. The ring had been exhaustively described, and its value assessed, without any challenge from the defense. The only issue with respect to this ring was whether the defendant stole it from Ms. Cribbs.[29] The photograph did not assist the trier of fact in making this determination. Because the photograph was at best cumulative evidence of an issue not in dispute, it should have been excluded as unfairly prejudicial. §90.403, Florida Code of Evidence (1993). See *Smith v. State*, 556 So. 2d 1096 (Fla. 1990) (trial court erred in permitting prosecutor to show autopsy photographs to decedent's survivor, where body had already been identified, and only conceivable reason for showing photograph to witness was to inflame jury, particularly where issue at trial was reason for killing); *Czubak v. State*, 570 So. 2d 925 (Fla. 1990) (error to admit photographs of decedent's remains where photographs had little or no relevance to identity or cause of death).

(c) The Photograph Of The Victim Cuddling Her Grandchild, Testimony of Family Members And Prosecutorial Comments About The Victim's Family Relationships Comprised Inflammatory Victim Impact Evidence And Argument Which Should Never Have Been Admitted At The Guilt/Innocence Phase Of This Capital Trial.

The only purpose sought to be served through admission of the photograph was to evoke the jury's sympathy for the victim of the crime and for her survivors.

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[29] The trial court entered a judgment of acquittal on this count, prior to submission to the jury. (T. 533).

This purpose was revealed through prosecutor's eulogy to Cribbs during argument in closing for the first phase of the trial:

> You heard from the relatives, the son and the stepson and the sister-in-law, sister, a friend in north Florida in the Jacksonville area, of what kind of a woman she was. She was a widow. *A great-grandmother and a mother and a grandmother.* She was a lonely woman and a trusting woman. She was very giving, helpful and loving. She'd help anyone out that needed a helping hand. She was a very kind and trusting woman.
> You know, even Everett Smith, who had just met her in the Bunnell area, he said: I have never seen such a sweet person in my life. He and his wife said: If anything happens and you need a place to say, you can come back and stay here with us. . . .

(T. 581).

Even more revealing of the prosecutor's impermissible purpose was his reference to the photograph in the *sentencing* phase of the trial, by which time the defendant had been acquitted of theft of the ring that the photograph was assertedly intended to depict:

> You have heard from the testimony of the witnesses, both in Jacksonville Beach and Bunnell, that she had a ring that was worth about $8,000 on her right hand. *You saw the picture of it with her and the small child.* She had that ring on her hand when she was last seen in the company of the defendant in Bunnell, Florida.

(T. 730).

The trial court's error in admitting the victim impact testimony and photograph was thus compounded by the prosecutor's argument about the subject in closing to the jury. Florida courts have repeatedly condemned prosecutorial comments regarding family survivors of the victim of a crime. In *Nevels v. State,* 351 So. 2d 762, 763 (Fla. 1st DCA 1977), the court held it was error for the state attorney, in his opening statement, to call the jurors' attention to the fact that the deceased was married and had a 13-year-old daughter. In *Gomez v. State,* 415 So. 2d 822, 823 (Fla. 3d DCA 1982), the court reversed the defendant's conviction when the

prosecutor told the jury not to let the victim "with three children and a wife walk away without justice in this case." In *Harper v. State*, 411 So. 2d 235 (Fla. 3d DCA 1982), the court found it improper for the prosecutor to comment that the victim's wife and three children were sorry the defendant killed the victim. *See also*, *Edwards v. State*, 428 So. 2d 357, 359 (Fla. 3d DCA 1983) (prosecutor's comment asking for justice on behalf of victim's wife and children was "an improper appeal to the jury for sympathy for the wife and children of the victim, the natural effect of which would be hostile emotions toward the accused"); *Macias v. State,* 447 So. 2d 1020, 1021 (Fla. 3d DCA 1984) (prosecutor's question as to whether victim had ever seen his posthumously born child was improper appeal to sympathy of jury).

In particular, this Court has condemned the admission of victim impact evidence or argument in the guilt/innocence phase of a capital case. *King v. State*, 18 Fla. L. Weekly S465, n. 1 (Fla., September 2, 1993) (reference to victim as mother in opening and closing arguments during guilt/innocence phase conceded by state to be error); *Burns v. State*, 609 So. 2d 600, 605-607 (Fla. 1992) (error to admit in guilt/innocence phase irrelevant evidence concerning victim's background and character as law enforcement officer; error harmless in phase one, but harmful in phase two, requiring new sentencing hearing before newly impanelled jury); *Jones v. State*, 569 So. 2d 1234, 1240 (Fla. 1990) (trial court abused discretion in allowing victim's family members to testify to identity of victim during guilt/innocence phase, where relatives' testimony was unnecessary to establish identification and testimony was designed to evoke sympathy of the jury).[30]

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[30] Although *Payne v. Tennessee*, 501 U.S. ___, 111 S.Ct. 2587, 115 L.Ed.2d 720 (1991) holds that the Eighth Amendment does not prohibit a capital sentencing jury from considering victim impact evidence, if state law authorizes its consideration; and although 921.141(7), F.S.A., now authorizes consideration of victim impact evidence during sentencing; the statute went into effect on July 1, 1992, nearly eight months after the instant offense. Prior to the effective date of the provision, victim impact evidence and argument was inadmissible in the sentencing phase of a capital

Therefore, the prosecutor's characterization of the victim as a loving and generous mother, grandmother and great-grandmother was a lawless and inflammatory appeal for juror sympathy, which was erroneously allowed in the guilt phase of this capital trial.

(d) The Trial Court's Error In Admitting The Irrelevant And Inflammatory Photograph Of The Victim Cuddling Her Grandchild In Her Lap, As Well As Victim Impact Testimony, And In Permitting Prosecutorial Argument Designed To Inflame Juror Sympathy For The Victim Was Not Harmless In This Circumstantial Evidence Case.

The single issue in dispute, with respect to the murder charge, was the identity of the perpetrator. The evidence of identity was circumstantial only.

The evidence established that, between November 8 and November 12, the defendant and Dortha Cribbs drove through Florida in Cribbs' car, visiting friends and family. (T. 172, 180, 182, 189, 193). They appeared to enjoy each other's company; they were planning to sell Cribbs' trailer in Bunnell and her home in Summerland Key, then to invest the proceeds in a partnership on a trucking route. (T. 182, 184, 193-194, 178-179, 188, 207, 210-211, 218, 267, 271, 209). On November 12, in Bunnell, Cribbs received $4,100 in one hundred dollar bills, for the sale of her trailer,

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case. *Grossman v. State*, 525 So. 2d 833 (Fla. 1988). The *ex post facto* clause of state and federal constitutions prohibits application of the victim impact provision to this defendant. See e.g., *Talavera v. Wainwright*, 468 F.2d 1013 (5th Cir. 1972); *Dugger v. Williams*, 593 So. 2d 180, 181 (Fla. 1991). Accordingly, the trial court erred in permitting the introduction of victim impact evidence and argument in the sentencing phase of this trial.

Even if this Court concludes that the subsequently-enacted victim impact provision applies to this case, appellant submits that the provision is unconstitutional for the reasons that: (1) it authorizes consideration of a nonstatutory aggravating circumstance, inasmuch as §921.141(5), which enumerates the statutory aggravating circumstances, does not include victim impact; (2) it fails adequately to guide the sentencer's discretion; and (3) it is vague and overbroad; all in violation of the Eighth and Fourteenth Amendments to the United States Constitution; and Article I, §§ 9, 16, and 17 of the Florida Constitution.

a transaction witnessed by the defendant. (T. 271). At noon on November 12, the couple left for Cribbs' home in Summerland Key. (T. 272).

Sometime after 8:00 a.m. on November 13, Cribbs was observed walking around underneath her stilt house in Summerland Key, in no apparent distress. (T. 383, 391). A little after 11:00 a.m. that day, the defendant was observed to emerge from the stilt house, walk towards the roofing contractor across the street, pause, turn around, then return to the stilt house. (T. 385). No one else entered or exited the stilt house between 8:00 a.m. and 11:45 a.m., at which time the contractor left for lunch. (T. 386). Sometime after 1:00 p.m., a realtor entered the stilt house, using his own key, and there found the body of Dortha Cribbs. (T. 240, 250).[31]

Cribbs had bled to death from a stab wound to her left carotid artery, and had two superficial stab wounds to her right cheek. (T. 416, 418-419, 421). A knife found in a different room, free of prints and blood, may have been the murder weapon. (T. 307, 309, 319, 323, 330, 417). The entire interior of the stilt house, and the surfaces of all its contents had been wiped clean of fingerprints with a damp rag. (T. 289, 307, 319, 345-347, 332, 324-326, 374-375). The defendant's distinctive lizard skin boots as well as undeveloped photographs depicting the defendant were found at the scene. (T. 310, 311, 313-315). Also found at the scene was a hand towel containing type B and type O body fluids (T. 308); and a pair of blue jeans, with a dried, one-quarter inch, type B blood stain on the right knee. (T. 306, 309, 316, 327-328; St. Ex. 19). The defendant is type O; Cribbs, and 10.4% of the white population, is type B. (T. 481, 514-515, 517). Cribbs was killed between sometime after 8:00 a.m., when she was seen by the roofing contractor, and sometime after

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[31] The realtor said he entered Cribbs' home between 12:30 and 1:00, closer to 12:30. (T. 238, 240). But the contractor said the realtor did not enter the property until after the former's return from lunch, which was after 1:00. (T. 387).

1:00 p.m., when the realtor discovered by her body.[32] Missing were her car, her ring and her cash. (T. 410).

Sometime after noon, a taxi driver was called to respond to the Tiki Bar at the Buccaneer Resort. The driver picked up the defendant there, between 12:30 and 12:45. (T. 403-404). The defendant paid the eighty dollar fare to Key Largo with a hundred dollar bill. (T. 405-406). Six weeks later, the victim's car was found at the Buccaneer Resort, where it appeared to have been parked for some time. (T. 451). The defendant was arrested two months later in Manteca, California. (T. 355-357, 361-362).

The defendant's theory was that someone other than he had killed Dortha Cribbs, between 11:45 a.m., when the contractor left, and after 1:00 p.m., when the realtor arrived. This theory found support in the facts that: (1) the perpetrator had carefully wiped the fingerprints off the entire interior of the stilt house and the surfaces of all its contents, but had left behind photographs of the defendant, his distinctive boots and other belongings; and (2) the defendant was deprived by Cribbs' death of his share of the anticipated proceeds from the sale of the stilt house.[33]

The circumstantial evidence on the issue of identity was by no means overwhelming. See, e.g. *Breeding v. State*, 523 So. 2d 496 (Ala.Cr.App. 1987) (where defendant was last person seen with victim, victim was robbed and car was stolen, defendant thereafter left town without claiming pay checks and was later

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[32] The medical examiner testified that time of death was between 4:00 a.m. and 2:00 p.m. on November 13. (T. 412).

[33] The prosecutor conceded in closing the possibility that someone other than the defendant could have killed Dortha Cribbs, but for the fact that the medical examiner had put the time of death at 10:00 a.m., on the death certificate. (T. 628). However, as the medical examiner explained, although he was required by law to affix a particular time of death to the certificate, he could not say when, between 4:00 a.m. and 2:00 p.m., death had actually occurred. (T. 412, 440-441).

found driving victim's car in Colorado, sufficient circumstantial evidence that defendant murdered victim, although court noted this was a "borderline case.").[34]

Burdening the jury's resolution of the single issue in dispute, as to which the evidence was circumstantial only, was elegiac evidence and argument about the victim's loving nature, and her loss to her survivors. It cannot be said, beyond a reasonable doubt, that the trial court's error in admitting this evidence and argument did not affect the verdict. Therefore, Mr. Allen's convictions and sentences must be reversed. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). See *Amos v. State*, 618 So. 2d 157 (Fla. 1993) (cumulative errors harmful where evidence of murder's identity was circumstantial only). Compare with *Burns v. State*, 609 So. 2d 600 (Fla. 1992) (erroneous admission of victim impact evidence harmless in guilt/innocence phase where numerous disinterested witnesses testified that defendant stood over law enforcement officer, placed both hands on gun, and shot him; but harmful in penalty phase, where victim impact evidence was extensively referred to in closing by prosecutor).

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[34] See also *Turner v. McKaskle*, 721 F.2d 999 (5th Cir. 1983) (defendant's presence with victim near scene of crime on day of murder, flight day after murder, and possession of victim's belongings, insufficient); *Utah v. Petree*, 659 P.2d 443 (Utah 1983) (where defendant was last person seen with murder victim, two hours later arranged for flight, and next day fled jurisdiction, evidence insufficient); *Hall v. Commonwealth*, 149 Ky. 42, 147 S.W. 764 (1912) (evidence that defendant unsuccessfully attempted to get money from victim, defendant and victim were seen together shortly before latter's disappearance, defendant observed going toward secluded area where victim's body later found, and defendant spent money freely after killing, insufficient evidence); *People v. Hoc*, 537 N.Y.2d 165 (A.D.1 Dept. 1989) (defendant's hostility to victim, presence at scene of murder, flight shortly afterwards, and provision of false name and false exculpatory statement insufficient evidence); *Commonwealth v. Woong Knee New*, 354 Pa. 188, 47 A.2d 450 (Pa. 1946) (where defendant was with victim on date and at scene of murder, and defendant left town day after murder, but it was not shown that no other person had or could have had defendant's opportunity to commit crime, evidence insufficient); *Scott v. State*, 581 So. 2d 887 (Fla. 1991) (where defendant seen with victim on eve of latter's disappearance, near site where victim's bicycle later found, defendant gave false exculpatory statements to police, and defendant's car contained hair consistent with victim's and seashell consistent with victim's broken necklace, evidence insufficient).

II

THE TRIAL COURT ERRED IN ACCEPTING THE DEFENDANT'S WAIVER OF MITIGATION EVIDENCE, WHERE DEFENSE COUNSEL HAD NEVER PERFORMED ANY INVESTIGATION INTO THE PRESENCE OF MITIGATING EVIDENCE, AND CONSEQUENTLY THERE EXISTS NO RECORD SHOWING OF MITIGATION EVIDENCE, IN VIOLATION OF *KOON V. DUGGER*, 619 SO. 2D 246 (FLA. 1993), AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION.

In *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993), this Court established a formal test for the validity of a defendant's waiver of the right to present mitigation in the penalty phase of a capital case.[35] Before a defendant can waive mitigation, he must first be informed on the record what that mitigation is, so that there is record evidence that he knows what it is he is giving up:

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

A corollary to this rule is that trial counsel has a duty to investigate the existence of mitigating evidence for presentation in the sentencing phase of a capital case, even where the defendant has consistently disavowed his intention to present

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[35] This Court has repeatedly recognized the right of a competent defendant to waive presentation of mitigating evidence in phase two of a capital case, e.g. *Hamblen v. State*, 527 So. 2d 800, 804 (Fla. 1988); *Pettit v. State*, 591 So. 2d 618 (Fla.), *cert. denied*, 113 S.Ct. 110, (1992). *Koon* sets forth the prerequisites to the validity of that waiver.

mitigation.[36] Accord, *Deaton v. Dugger*, 19 Fla. L. Weekly S97 (Fla. Oct. 7, 1993) (defense counsel's failure to investigate mitigating evidence comprised prejudicially deficient performance, despite defendant's avowed intention to waive its presentation, because waiver "was not knowing, voluntary, and intelligent" in the absence of investigation).

The record in this case fails to reflect that the requirements of *Koon* were met. There is no record showing that counsel conducted an investigation, or what mitigating evidence he had uncovered. There is no record confirmation by the defendant that he had discussed this mitigating evidence with counsel prior to waiving its presentation.

In fact, defense counsel conceded that he had conducted no investigation at all into the existence of potential mitigating evidence, producing as reasons that (1) the defendant had expressed a preference for death over life in prison, in the event of his conviction of first degree murder; and (2) the defendant had not himself revealed to counsel potential mitigating evidence:

> I don't have any mitigating factors to present simply because -- he does not have the attitude or spirit of uncooperativeness but he refused to provide me with

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[36] See, *Blanco v. Singletary*, 943 F.2d 1477, 1502 (11th Cir. 1991) ("[A] defendant's desires not to present mitigating evidence do not terminate counsels' responsibilities during the sentencing phase of a death penalty trial: 'The reason lawyers may not "blindly follow" such command is that although the decision whether to use such evidence is for the client, the lawyer first must evaluate potential avenues and advise the client of those offering potential merit,'" citing *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986), *cert. denied*, 481 U.S. 1042, 825 (1987), *cert. denied*, 112 S.Ct. 2282 (1992); and *Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir.) ("It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by the objective standard of reasonableness."), *cert. denied*, 474 U.S. 998, (1985); *Martin v. Maggio*, 711 F.2d 1273, 1280 (5th Cir. 1983) (defendant's instructions that his lawyers obtain an acquittal or the death penalty did not justify his lawyer's failure to investigate the intoxication defense . . . uncounseled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better-informed advice."), *cert. denied*, 469 U.S. 1028 (1984).

> mitigating factors. He also repeatedly requested I not plead for life in his case. (T. 801).

This is no justification for counsel's dereliction.[37] *Koon*, *Blanco* and *Deaton* stand for the proposition that the defendant's desire to waive mitigation does not extinguish counsel's duty to investigate it. Furthermore, these cases plainly contemplate application to the recalcitrant defendant who will not cooperate in investigating mitigation because he has chosen to waive its presentation. Counsel

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[37] The fact that the defendant represented himself in the penalty phase likewise does not justify counsel's failure to investigate mitigation. Counsel's duty to investigate mitigation arises prior to commencement of the penalty phase. *Koon v. State*, 619 So. 2d at 248; *Deaton v. Dugger*, 19 Fla. L. Weekly S98; and *Blanco v. Singletary*, 943 F.2d at 1503. Defense counsel was appointed to represent Mr. Allen on April 14, 1992, ten months prior to trial on the guilt/innocence phase. (R. 16-17). Defense counsel did not withdraw from representing Mr. Allen until February 13, 1993, after conviction. (T. 659-661, 674). Counsel did no mitigation investigation during this time (T. 801-803), in violation of *Koon*, the original opinion in which issued more than eight months prior to his withdrawal.

In any event, the defendant's decision to represent himself at the penalty phase was tainted, because it directly derived from his uninformed waiver of mitigation. The reason the defendant represented himself was that counsel had moved to withdraw; the reason counsel moved to withdraw was that the defendant desired to waive mitigation. (T. 659-661). There is no meaningful distinction between a defendant whose counsel stands mute, in deference to his client's desire to waive mitigation, as was claimed in *Koon*; and a defendant whose counsel withdraws from representation, for the very same reason, as happened here. In either case, *Koon* requires a record showing that the defendant knows what it is he is waiving.

Finally, counsel's duty to investigate was not extinguished by the defendant's pretrial execution of a written waiver of mitigation, prepared by counsel, and purporting to relieve counsel of this duty. (R. 188-189). This written waiver was no more valid than the oral waiver: the defendant was never informed what it was that he was waiving. Counsel cannot relieve himself of the duty of effective assistance by the simple expedient of inducing his client to execute a written waiver of that duty. Nor can the defendant waive his constitutional right to *competent* counsel without a knowing, intelligent and voluntary waiver, on the record, after colloquy with the trial court. Note, "The Right to Waive Competent Counsel: Extending the Faretta Waiver," *Pepperdine Law Review*, Vol. 18:909, 1991; *People v. Johnson*, 75 Ill.2d 180, 188, 387 N.E.2d 688, 691 (1979); *People v. Escarrega*, 186 Cal.App.3d 379, 230 Cal.Rptr. 638 (1986). No such waiver occurred in this case.

has a duty in this event to elicit information from other sources.[38]

All counsel did in this case was to tell the defendant what the mitigating factors are -- counsel had even given him a book on the subject (T. 803-804) -- but not what evidence from the defendant's history would establish their existence in his own life. There is no record evidence that the defendant had understood counsel, or had read the book, or otherwise subjectively knew what the mitigating factors are, or the kind of proof required to establish their existence. Neither the trial court nor defense counsel made any record inquiry of the defendant to test his claim of knowledge.[39]

Most importantly, contrary to the rule of *Koon*, there is no record evidence that the defendant understood what, from his life history, would comprise proof of these factors, even assuming that he knew what they were. It cannot be assumed that the defendant had sufficient mastery or understanding of his own life history to

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[38] In *Deaton*, counsel was found to be ineffective in part on the basis of his failure to obtain documents as a source of mitigation on behalf of a defendant who had announced his intention to waive its presentation.

As was done in this case, after sentencing, counsel can acquire birth, death and marriage certificates; school, medical, military and prison records; and can interview family, friends, teachers, physicians or jailers identified in these records. Thus, mitigation can be investigated without the defendant's input. See Appellant's Motion to Relinquish Jurisdiction for the Purpose of Resentencing.

[39] The trial court merely asked the defendant if he knew what mitigation means, and the defendant said only that he did:

> THE COURT: Mr. Allen, as to mitigating factors, you are familiar with the statutory mitigating factors?
>
> THE DEFENDANT: Well-aware, sir.
>
> THE COURT: You are also aware you are not limited to those factors listed in the Florida Statutes?
>
> THE DEFENDANT: That is correct, Your Honor.

(T. 706).

know what events or conditions therein tend to establish statutory and non-statutory mitigating factors. For example, a defendant cannot be presumed to know that he has fetal alcohol syndrome, or organic brain damage, or mental retardation; or that he suffered lead poisoning, or malnutrition or sexual abuse in early childhood; or that a remote loss of consciousness, or high fever produced mitigating consequences. He cannot be presumed to know that he is an alcoholic or a drug addict, because these are diseases which are characterized by denial.[40] He cannot be presumed to know that he was the victim of vicious abuse by his parents, because he may not know that his parents' conduct constituted abuse, and because denial is characteristic of this condition as well.[41]

This case demonstrates the principle underlying the prophylactic rule of *Koon*, that a defendant cannot be presumed to know the mitigating circumstances of his life. Mr. Allen expressly denied, in front of the sentencing jury, that he had had a troubled childhood, or that he was an alcoholic or that he was a drug addict. (T. 739-740). Yet, a cursory mitigation investigation into the defendant's life history reveals that his denial of these three mitigating circumstances was in fact false: Mr. Allen's childhood was marked by savage physical domestic violence and emotional neglect; he is a severe and chronic alcoholic; he is a drug abuser. See Motion to Relinquish Jurisdiction for the Purpose of Resentencing and Reply to Appellee's Response to Motion To Relinquish. In view of the defendant's denials of mitigating factors which predict for denial and which did in fact exist, it may be presumed that the defendant did *not* know what he was giving up when he waived the right to

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[40] Kellerman, Joseph L., *A Guide For The Family Of The Alcoholic* (Hazelden: Center Cty, MD.) p. 5.

[41] Herman, Judith, *Trauma and Recovery*, Basic Books, New York, 1992, p. 101-102.

present mitigation.[42]

In the absence of a record recitation of mitigation evidence disclosed upon investigation and communicated to the defendant, the defendant's waiver of mitigation was invalid, and *Koon* compels reversal of sentence.

Koon Applies To The Subject Case, Because The Original Opinion In *Koon* Was Issued Nine Months Prior To Trial In This Case And The Revised Opinion Was Issued While This Case Was Pending On Direct Appeal.

This Court characterized the rule of *Koon* as "prospective." The rule applies to this case because (1) the original opinion in *Koon* was issued prior to trial in this case; and (2) the revised opinion in *Koon* was issued while this case was pending on direct appeal.

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[42] The trial court's determination of the defendant's competency does not disturb the conclusion that the waiver was unknowing. Although the standard of competency for waiving mitigation is no higher than the standard for proceeding to trial, *Godinez v. Moran*, 509 U.S. ___, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), there is a distinction between the requirement for competency and the requirement for waiver of constitutional rights:

> A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. *In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. Parke v. Raley*, 506 U.S. ___, 113 S.Ct. 517, 523, 121 L.Ed.2d 391 (1992) (guilty plea); *Faretta, supra*, 422 U.S. at 835, 95 S.Ct., at 2541 (waiver of counsel). In this sense *there is a "heightened" standard for pleading guilty and for waiving the right to counsel*, but it is not a heightened standard of competence.

Id. 113 S.Ct. at 2687. (emphasis supplied). The reason that a competency hearing cannot substitute for a waiver hearing is that the former looks to the defendant's ability to understand; and the latter looks to the defendant's actual understanding of a particular issue. *Id.* at 2680-2681, n. 12. Therefore, the determination of the defendant's competency did not obviate the need for a *Koon* determination of the validity of his waiver of the constitutional right to preserve mitigation.

Mr. Allen's trial commenced on February 8, 1993. (T. I-115). He was sentenced on March 3, 1993. (T. 779-813). The original opinion in *Koon v. Dugger*, at 17 Fla. L. Weekly S337 (Fla., June 4, 1992) (*Koon* I) was issued nine months before sentencing. The revised opinion, *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993), *reh. denied* (*Koon* II), was issued three weeks after sentencing. *Koon* I and *Koon* II are identical with respect to the issue raised herein, regarding the validity of the defendant's waiver of mitigating evidence, where counsel has failed to investigate mitigation. The rule in *Koon* I, exactly like that in *Koon* II, is as follows:

> "[W]e are concerned with the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence. Accordingly, we establish the following prospective rule to be applied in such a situation. When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel had discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence."

The reason for applying a rule prospectively is to provide notice of its requirements to litigants and to the trial court. Because the *Koon* rule was announced nine months prior to trial, the litigants and the trial court had ample notice of its requirements, and it was therefore binding on the trial court, notwithstanding the pendency of a motion for rehearing. See, *Reed v. State*, 565 So. 2d 708, 709 (Fla. 1st DCA 1990) ("We recognize that a motion for rehearing of *Pope* is pending before our Supreme Court. The state contends that application of the *Pope* rule would be improper before a decision for rehearing but cites not (sic)

authority, nor have we found a case to support that contention.")[43] To hold otherwise would encourage litigants and trial judges to ignore decisions of this Court for months or even years after publication, until such time as an opinion on rehearing issues, creating pervasive uncertainty about the state of the law.

Even if this Court decides that *Koon* was not final until the opinion issued upon motion for rehearing, it would still apply to the instant case, which was pending on appeal at the time *Koon* II was decided.

In *Smith v. State*, 598 So. 2d 1063 (Fla. 1992), this Court decried "the inconsistency or lack of clarity in various decisions of this Court and others concerning the application of the prospectivity rule" in the context of *Ree v. State*, 565 So. 2d 1329 (Fla. 1990) *modified*, *State v. Lyles*, 576 So. 2d 706 (Fla. 1991). In *Ree*, this Court announced a rule requiring contemporaneously written reasons for departures from the sentencing guidelines, and then characterized this rule, "without analysis," as "prospective only." *Smith*, 598 So. 2d at 1063.

Embracing the "bright-line rule" of *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), that all decisions announcing rules of criminal law be applied retrospectively to all cases pending on direct review or not yet final, the

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[43] Compare with *Deltona Corp. v. Bailey*, 336 So. 2d 1163 (Fla. 1976). In *Deltona*, this Court applied the holding in *Interlachen Lake Estates, Inc. v. Snyder*, 304 So. 2d 433 (Fla. 1973), which invalidated as unconstitutional a tax valuation statute, only to cases arising after the order issued on petition for rehearing, and not to cases that arose between the original and the revised order. But the language of prospectivity in *Interlachen* was as follows:

> "This decision operates prospectively *from the date the opinion becomes final because persons relying on the state statute did so assuming it to be valid* despite the new provisions of the 1968 State Constitution." (emphasis supplied).

Thus, by its own terms, and for reasons expressed therein, *Interlachen* did not become operative until final, that is, after the order upon petition for rehearing. This result is in keeping with the general rule that an act of the Legislature is presumed constitutional until invalidated by a final appellate decision. 336 So. 2d at 1166. See *Deseret Ranches v. St. Johns River Water*, 406 So. 2d 1132 (Fla. 5th DCA 1981), *on motion for rehearing and clarification*.

Smith Court stated:

> We are persuaded that the principles of fairness and equal treatment underlying *Griffith*, which are embodied in the due process and equal protection provisions of Article I, Sections 9 and 16 of the Florida Constitution, compel us to adopt a similar evenhanded approach to the retrospective application of the decisions of this Court with respect to all nonfinal cases . . . *[W]e hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this State in every case pending on direct review or not yet final.* (emphasis supplied).

Smith, 598 So. 2d at 1066. This Court accordingly applied the rule of *Ree*, notwithstanding its characterization as "prospective only," to all cases not yet final when the mandate issued.

Thus, under *Smith*, this Court's characterization of a rule as "prospective" means only that it will not be applied to cases collaterally, but that it will be applied to cases not yet final on direct appeal. See, e.g., *State v. Suarez*, 485 So. 2d 1283 (Fla. 2d DCA 1986) (Explaining that "our statement in *Neil* that it was to have no retroactive application was intended to apply to completed cases," this Court applied *Neil* to a case pending on direct appeal at the time *Neil* was decided); *State v. Castillo*, 486 So. 2d 565 (Fla. 1986) (same); *Reed v. State*, 565 So. 2d 708 (Fla. 5th DCA 1990) ("[T]he question of retroactivity is not implicated" in a "pipeline case. . . one in which a conviction is not final by trial or appeal at the time a controlling decision is issued by the Supreme Court. . . Since the time has not expired for issuance of a mandate in this case, and since appellant is entitled to the benefit of the law at the time of appellate disposition, we are required to apply the *Pope* [*v. State*, 542 So. 2d 423 (Fla. 5th DCA 1989)] rule at this time.")

Because this case was pending on direct appeal at the time *Koon* II was issued, *Koon* applies, notwithstanding its characterization as "prospective", pursuant to the principles set forth in *Smith*.

III

THE TRIAL COURT ERRED IN PERMITTING THE DEFENDANT TO MAKE UNSWORN AND UNSUPPORTED DENIALS OF APPLICABLE MITIGATING FACTORS, BEFORE THE SENTENCING JURY, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION.

Because of the *Koon* violation (See Point II), the trial court was unarmed with any collateral sources of information, and unwittingly but erroneously permitted Mr. Allen falsely to deny, before the sentencing jury, the existence of compelling mitigating factors. There resulted a profound subversion of the truth-seeking function of the capital sentencing hearing.

The search for truth is an integral part of our adversary system; but there are other fundamental values reflected in the system that at times override its truth-seeking function. For example, the fifth amendment privilege against self-incrimination, and the fourth amendment guarantee against unreasonable search and seizure act to safeguard individual rights against governmental oppression, often at the expense of truth. This is because a system which places a high value on human dignity and privacy will remain committed to those values even at the expense of truth. Mirjan Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study," 121 U.Pa.L.Rev. 506, 579-580 (1976).

It is our system's commitment to human dignity and privacy that induced this Court to resolve as it did the tension, exemplified in *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988), between the competent defendant's right not to present evidence of his character and history in mitigation of capital sentencing; and society's right to a non-arbitrary imposition of the death penalty.[44]

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[44] "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of

In *Hamblen*, the defendant waived the right to appointed counsel, waived the right to present mitigation, and asked for a sentence of death. Appellate counsel argued that the trial court erred in not appointing independent counsel to present mitigation evidence in order to safeguard society's interest in the reliability of the proceeding. This Court concluded that "there was no error in not appointing counsel against Hamblen's wishes to seek out and to present mitigating evidence and to argue against the death penalty," noting that the trial judge, who examined psychiatric reports, and was apprised of family, employment and criminal history, "adequately fulfilled that function on his own, thereby protecting society's interest in seeing that the death penalty was not imposed improperly." 527 So. 2d at 804. This Court cautioned that solicitude for the defendant's autonomy should not entirely deride the truth-seeking function of a capital sentencing hearing. The fact that

> "all competent defendants have a right to control their own destinies. . . does not mean that courts of this state can administer the death penalty by default. The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence. A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law." 527 So. 2d at 804.

> rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." *Furman v. Georgia*, 408 U.S. 238, 306, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), (Stewart, J., concurring).

Because death is different, *Spaziano v. Florida*, 468 U.S. 447, 468, 104 S.Ct. 3154, 3166, 82 L.Ed.2d 340 (1984) (Stevens, J., concurring in part, dissenting in part), "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). The death penalty must not be imposed in a "wanton and freakish manner." See *Furman v. Georgia*, 408 U.S. 238, 309-310, 92 S.Ct. 2726, 2762, 33 L.Ed.2d 346 (1972).

Accord, *Durocher v. State*, 604 So. 2d 810 (Fla. 1992) (waiver of mitigation valid where defense counsel proffered to court mitigating evidence about the defendant's life, family history, and mental health, and where trial court carefully considered and weighed this proffer, as well as mental health experts' reports in sentencing); *Clark v. State*, 18 Fla. L Weekly S17 (Fla. December 24, 1992) (waiver of mitigation valid where trial counsel urged jury not to recommend death, arguing the defendant's age and disparate treatment of co-defendant in mitigation, trial court instructed jury on these and other mitigation, and trial court weighed mental health experts' reports, defendant's substance abuse and disparate treatment of co-defendant); *Anderson v. State*, 574 So. 2d 87 (Fla.), *cert. denied*, 112 S.Ct. 110 (1991) (waiver of mitigation upheld where defense counsel introduced information charging co-defendant with third degree murder to show disparate treatment of defendant, a mitigating circumstance found by the trial court, and where defense counsel listed numerous witnesses who would have testified in support of a life recommendation); *Pettit v. State*, 591 So. 2d 618 (Fla. 1992) (mitigation waiver upheld where trial judge required medical examination and testimony regarding defendant's physical disabilities and called defendant's grandfather as witness to effects of disability).[45]

This case is different from *Hamblen* and its progeny. Mr. Allen did not merely *waive* the presentation of mitigation evidence; he affirmatively asserted the non-existence of mitigating circumstances which did in fact exist.

Mr. Allen denied the applicability to his case of mitigation generally. In particular, he denied the existence of these non-statutory mitigating factors:

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[45] Appellant avers that the holding in *Hamblen*, permitting a competent to waive the presentation of mitigating evidence in the sentencing phase of a capital case, is violative of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, §§9, 16, and 17 of the Florida Constitution and §921.141, F.S.A. (1993). His sentence must be vacated on the additional basis that the trial court erroneously permitted him to waive the presentation of mitigating evidence.

troubled family background, alcoholism, and drug addiction. (T. 739-740). His denial of these factors was false. As is set forth in his Motion to Relinquish Jurisdiction for the Purpose of Resentencing, and Reply to Appellee's Response to Motion To Relinquish Jurisdiction, cursory investigation suggests that Mr. Allen experienced physical abuse and emotional neglect throughout his childhood; he is an alcoholic; and he is a drug abuser. Each of these mitigating circumstances involves historical events or disease states for which denial is symptomatic.[46]

Because of the *Koon* violation, the trial court knew little about Mr. Allen's life history or mental state, other than the fact that he wanted to die.[47] There were no records of the defendant's schooling, military service, incarceration, mental health or medical treatment; or any witnesses other than the defendant himself with respect to his denials of mitigating circumstances.

Despite its being unarmed with any collateral sources of information; and despite its admonition that the defendant refrain from arguing facts not in evidence; the trial court permitted a defendant who had announced his desire to die to make unsworn and unsupported assertions of fact disavowing the applicability of

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[46] See, footnotes 40 and 41.

[47] Neither the *Faretta* inquiry nor the psychological evaluations provided the trial court with an objective test of the defendant's assertions, because the defendant was the only source of information furnished the trial judge and the psychologists. For example, during the course of the *Faretta* inquiry, the defendant asserted that (I) he had an IQ between 135 or 138; (2) he had prepared appeals for and secured the release of many inmates, while employed as a law librarian in prison; and (3) he had been offered employment as a legal researcher for the firm of Leon Jaworski, of Watergate fame, for a fee of $80.00 an hour. (T. 664-67I). During the course of his psychological evaluations, the defendant asserted that (1) he was not an alcoholic, (2) he did not use drugs and (3) his mother and father had been "decent and appropriate in their parenting". (S.R. I-9). Review of the defendant's school, prison, mental health and medical records, and interviews with family members and friends reveals that these assertions are unfounded. See Motion To Relinquish Jurisdiction and Reply to Appellee's Response to Motion to Relinquish Jurisdiction.

mitigating circumstances to the sentencing jury. It was the duty of the trial court to ensure the integrity of the fact-finding process and to monitor the arguments of the litigants with that goal in mind. *Bertolotti v. State*, 476 So. 2d 130, 133-34 (Fla. 1985); *Oropesa v. State*, 555 So. 2d 389, 391, n. 1 (Fla. 3d DCA 1989); *Kirk v. State*, 227 So. 2d 40, 42-43 (Fla. 4th DCA 1969). The trial court's failure to discharge that duty resulted in the subversion of the truth-seeking function of a capital sentencing hearing, where the requirement of reliability is rigorous.

Under *Hamblen*, a defendant may omit to present mitigation, even though this derogates from society's interest in a non-arbitrary imposition of the death penalty. There is, however, a significant difference between an omission and a misrepresentation of fact. This Court must not tolerate spurious denials of mitigating factors anymore than it would tolerate spurious assertions of aggravating factors: "[a] defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law." *Hamblen*, 527 So. 2d at 804. Because the propriety of the defendant's sentence was not established according to law, it must be vacated and remanded for resentencing.

IV

THE TRIAL COURT ERRED IN FINDING, AS AN AGGRAVATING FACTOR, THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN, WHERE THE TRIAL COURT HAD ENTERED A JUDGMENT OF ACQUITTAL FOR ROBBERY OF THE VICTIM'S CASH AND WHERE THE THEFT OF THE VICTIM'S CAR WAS FOR THE PURPOSE OF ESCAPE, IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSES OF THE FEDERAL AND STATE CONSTITUTIONS, THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, ARTICLE I §§2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, AND §921.141(5)(F), F.S.A. (1993).

At the close of all the evidence, the trial court entered a judgment of acquittal for robbery of Dortha Cribbs' cash, finding insufficient evidence that force was employed in connection with its taking.[48] (T. 525-527, 531-532). The jury convicted the defendant of grand theft of her automobile. (T. 656).

At the penalty phase hearing, the trial court found, as an aggravating circumstance, that the defendant had murdered Cribbs for pecuniary gain. It based this finding upon (I) the condition of Cribbs' purse at the crime scene, its contents strewn across the bed, and (2) the discovery of Cribbs' car at a site where the defendant had been picked up by a taxi cab, both of which facts were proven at the guilt/innocence phase; and (3) unspecified statements made by the defendant during the penalty phase of the trial. (R. 239-24l).

Having acquitted the defendant of robbery of Cribbs' cash, the trial court was estopped, under principles of double jeopardy, from finding that he had killed Cribbs for pecuniary gain, based upon the evidence introduced during the guilt/innocence phase. Furthermore, there was nothing in the defendant's statements during the penalty phase that supported a finding of pecuniary gain; the defendant in fact

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[48] The trial court also entered a judgment of acquittal for grand theft of Cribb's ring. (T. 527, 533).

denied killing Cribbs, and denied taking her cash. Finally, the theft of Cribbs' automobile was at best an afterthought, or for the purpose of escape, and as such cannot support a finding of pecuniary gain.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb." U.S. Const. Amend. V. The Double Jeopardy Clause does not bar the state from reprosecuting a defendant who obtains a reversal of his criminal conviction, *Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, 289, 102 L.Ed.2d 265 (1988); but it bars reprosecution where a trial has resulted in a judgment of acquittal, whether based on a jury verdict of not guilty, or on a trial court's determination that the evidence was insufficient for conviction. *Smalis v. Pennsylvania*, 476 U.S. 140, 142, 106 S.Ct. 1745, 1747, 90 L.Ed.2d 116 (1986); *United States v. Scott*, 437 U.S. 82, 91, 98 S.Ct. 1187, 2194, 57 L.Ed.2d 65 (1978); *Freer v. Dugger*, 935 F.2d 213, 217-18 (11th Cir. 1991). This is because an acquittal "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977).

In *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), the Supreme Court held that the Double Jeopardy Clause encompasses the doctrine of collateral estoppel, which, in the criminal context, "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit." 397 U.S. at 443, 90 S.Ct. at 1194. As the *Ashe* Court cautioned, "the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th Century pleading book, but with realism and rationality." 397 U.S. at 443-44, 90 S.Ct. at 1194. See, *United States v. Larkin*, 605 F.2d 1360, 1369 (5th Cir. 1979) ("[C]ollateral estoppel does not have the surgical precision found in double

jeopardy, for its basics are founded in equity and therefore command some flexibility").

The *Ashe* principle of collateral estoppel applies to the sentencing phase of a capital trial, under the federal[49] and state constitutions:

> "Double jeopardy principles apply to the penalty phase of capital punishment trials in Florida under Section 921.141 of the Florida Statutes (1985), because the Florida procedure is comparable to a trial for double jeopardy principles [citations omitted]. Florida law also protects individuals facing the death penalty from being twice placed in jeopardy. Art. I, §9 Fla. Const. Although federal law provides some guidance for interpreting the meaning of Florida's double jeopardy clause, we rely here on Article I, Section 9 of the Florida Constitution, which 'has historically focused upon the protection of the rights of the individual,' [citations omitted], and thus provides at the very least the same protection of individual rights as the federal constitution."

Wright v. State, 586 So. 2d 1032 (Fla. 1991). See also *People v. Ward*, 718 Cal.App.4th 1339, Cal. Rptr. 2d 864 (Cal. App. 4 Dist. 1993) ("Because the burden and expense in defending a penalty phase trial is as great as in defending a substantive criminal charge, and because the risk -- a death sentence -- is uniquely important, the trial of a death penalty proceeding is in practical terms akin to a substantive criminal trial. A proceeding which more literally places an accused in 'jeopardy of life and limb' can hardly be imagined.") *superseded by People v. Ward*, 851 P.2d 774, 19 Cal.Rptr.2d 492 (Cal. 1993).

Therefore, where the defendant has been acquitted of a charge during the guilt/innocence phase of a capital trial, neither that charge nor the facts asserted to comprise it can be relied upon for aggravation in the penalty phase. See *Atkins v. State*, 452 So. 2d 529 (1984) (where trial court entered judgment of acquittal for sexual battery, it could not rely upon sexual battery in aggravation of murder); *Delap*

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[49] *Delap v. Dugger*, 890 F.2d 285, 316-317 (11th Cir. 1989), *cert. denied*, 496 U.S. 929 (1990).

(where defendant acquitted of felony murder because of insufficient evidence that he committed felony, he could not be charged with aggravating circumstance that killing occurred while defendant engaged in committing same felony for which he was acquitted); *People v. McDonald*, 37 Cal.3d 351, 690 P.2d 709, 208 Cal.Rptr. 236 (Cal. 1984) (because jury acquitted defendant of robbery, double jeopardy considerations precluded prosecution from relying on robbery as a special circumstance supporting death penalty).

In particular, where a defendant has been acquitted of robbery, in connection with a first degree murder charge, the trial court is estopped from relying upon pecuniary gain as an aggravating circumstance in the penalty phase of the trial. *McCray v. State*, 416 So. 2d 804 (Fla. 1982); *State v. James*, 141 Ariz. 141, 685 P.2d 1293 (Ariz.), *cert. denied*, 469 U.S. 990 (1984). This is because of the convergence between the statutory definitions of robbery and of pecuniary gain.

An act is a robbery if force was employed prior to, contemporaneous with or subsequent to the taking of property from the person or under the control of the victim, so long as there is some continuity between the force and the taking.[50]

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[50] "(1) 'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, or putting in fear.

* * *

(3)(b) An act shall be deemed in the course of the taking, if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events."

§812.13, F.S.A. (1993).

The standard jury instruction for robbery includes this clarification of the taking element of the offense:

"In order for a taking by force, violence or putting in fear

Harris v. State, 589 So. 2d 1006 (Fla. 4th DCA 1991); *Fonseca v. State*, 547 So. 2d 1032 (Fla. 3d DCA 1989); *Rumph v. State*, 544 So. 2d 1150 (Fla. 5th DCA 1989). A capital felony has been committed for pecuniary gain[51] only if "the murder is an integral step in obtaining some sought-after specific gain." *Hardwick v. State*, 521 So. 2d 1071, 1076, *cert. denied*, 488 U.S. 871 (1988); *Hill v. State*, 549 So. 2d 179 (Fla. 1989); *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988). Under double jeopardy principles, if a murder was not committed in connection with the taking, for the purpose of the robbery statute, then it was not an integral step in obtaining some sought-after specific gain, for the purpose of the pecuniary gain factor.

For example, in *McCray*, the defendant entered a store to buy some guns. The store manager, who was the victim, said he had already put the guns away for the night. The defendant left the store, then broke into the victim's van and took some guns. The defendant returned to his car and waited in the store's parking lot. When the victim emerged from the store, the defendant, "saying that he did not want to leave empty-handed," jumped from his car and shot the victim. The victim fired back, and the defendant left without taking his money. 416 So. 2d at 805. The defendant was acquitted of attempted armed robbery. This Court held that the trial court was therefore precluded from finding, in aggravation, that the

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> to be robbery, it is not necessary that the taking be from the person of the victim. It is sufficient if the property taken is under the actual control of the victim so that it cannot be taken without the use of force, violence or intimidation directed against the victim." (p. 1049).

See *Ashe*, 397 U.S. at 444, 90 S.Ct. at 1194 (principles of collateral estoppel require the court in a subsequent proceeding to examine, *inter alia*, jury instructions from the first proceeding to determine whether a rational fact-finder could have grounded its decision upon an issue different from that which the defendant seeks to foreclose from consideration).

[51] §921.141(5)(f), F.S.A. (1993).

murder was committed for pecuniary gain. 416 So. 2d at 807. See also *State v. James*, 141 Ariz. 141, 685 P.2d 1293 (Ariz.), *cert. denied*, 469 U.S. 990 (1984) (where jury acquitted defendant of armed robbery and theft, trial court barred from finding pecuniary gain in aggravation of murder, the appellate court noting, "[a]lthough we see merit in the analysis of the trial judge in determining that the murder was committed for pecuniary gain, we are reluctant in a case of this nature to adopt an argument which requires some mental gymnastics to refute the findings of the jury.").

The evidence at trial was that at noon on November 12, Dortha Cribbs, in the company of the defendant, possessed $4,100.00 in one hundred dollar bills, a diamond ring and a 1988 Ford Taurus. Twenty-four hours later, Cribbs was found murdered. The contents of her purse were strewn across her bed; her cash and her car were gone. The trial court entered a judgment of acquittal prior to submission of the case to the jury for the reason that there was insufficient evidence that the force -- the murder of Dortha Cribbs -- was connected with the taking of her money.[52,53] (T. 525-527, 531-532).

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[52] During the hearing on the defendant's motion for judgment of acquittal on the robbery count, the trial court repeatedly asked the prosecution what evidence established that the force employed was connected with the taking:

> THE COURT: Let me ask you this: As to the robbery, what evidence is there to sustain a robbery, independent of the offense of murder, as in there was force, violence or putting in fear?
>
> MR. McLAUGHLIN: The other two stab marks on the face, which Dr. Nelms testified was done before she was killed.
>
> THE COURT: How is that connected in the taking?
>
> * * *
>
> THE COURT: Where in the record do we have robbery connected with the infliction of those wounds?

Nevertheless, during closing in the penalty phase, the prosecutor argued that the murder *was* connected with the taking, that it *was* an integral step in obtaining pecuniary gain. Specifically, the prosecutor reasoned that because Cribbs' cash and ring[54] were missing from the crime scene, then the defendant must have taken them; and that if so, the taking must have been the motive for the murder:

> In this case, we know that the 25 hours before her death Dortha Cribbs had $4100 in one hundred dollar bills from the Credit Union at Flagler Beach, Florida, for the sale of the trailer in Bunnell.
>
> You have heard from the testimony of the witnesses, both in Jacksonville Beach and Bunnell, that she had a ring that was worth about $8,000 on her ring hand. . .
>
> So the defendant, in fact, probably got the $4100 in cash; he got the ring; and we know he took her car for some period of time. The crime was committed for financial gain.

(T. 729-730).

However, the defendant's realization of pecuniary gain as a result of Cribbs' murder does not establish that the murder was an integral step in achieving this purpose. "[T]he receipt of money must be established as a cause of the murder, not a result." *State v. Gillies*, 135 Ariz. 500, 662 P.2d 1007 (Ariz. 1983).[55] The sentencer may

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(T. 525, 526, 537).

[53] This result is entirely consistent with the prosecution's theory of its own case: the state did not charge the defendant with felony (robbery) murder, but only with premeditated murder (R. 5); the state did not request a jury instruction on felony (robbery) murder; the state did not argue to the jury, in opening or closing statements in the guilt/innocence phase, that the defendant murdered Cribbs to get her cash, her ring or her car, but only that the murder was premeditated. (T. 599).

[54] The prosecutor erroneously relied upon the missing ring as probative of pecuniary motive, because the trial court had entered a judgment of acquittal for theft of the ring. (T. 527, 533).

[55] See, e.g., *Buenoano v. State*, 527 So. 2d 194, 199 (Fla. 1988) (where defendant received life insurance proceeds and veteran's benefits, in consequence of poisoning death of her husband; defendant would not have received this money in the event of divorce; and defendant had advised a friend against divorce, but

not infer pecuniary motive from a taking, unless the taking is inconsistent with any reasonable hypothesis other than the existence of this aggravator -- for example, that the taking was an afterthought. *Simmons v. State*, 419 So. 2d 136, 138 (Fla. 1982); see e.g. *Hill v. State*, 549 So. 2d 179 (Fla. 1989) (that defendant had no money immediately prior to murder, and that he took victim's money, did not establish pecuniary gain motivation where defendant committed sexual battery on victim prior to murder; sexual battery could have been motive for murder, and the taking an afterthought).

Under the circumstances of this case -- Cribbs' rifled purse lay next to her body, her cash and her car were gone -- there were only two reasonable hypotheses regarding the relationship between the murder and the taking: either the murder was connected with the taking, or the taking was an afterthought of the murder. The trial court's entry of a judgment of acquittal on the robbery charge was equivalent to a finding that the taking was an afterthought. Because the trial court acquitted the defendant of robbery of Dortha Cribbs' cash, the trial court was estopped, under the state and federal double jeopardy clauses, as well as the Eighth

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instead to take out insurance on her husband's life and then to poison him; pecuniary gain factor established); *Michael v. State*, 437 So. 2d 138, 142 (Fla. 1983) (where victim had recently executed new will bequeathing entire estate to defendant; defendant took possession of will just after murder; and defendant deposited victim's body in such a place and manner as to make certain that it would be quickly found and identified; pecuniary gain factor established), *cert. denied*, 465 U.S. 1013 (1984); *Harmon v . State*, 527 So. 2d 182, 187 (Fla. 1988) (where defendant admitted intention to rob victim; knew that victim had substantial amount of cash in house and had previously asked to borrow this cash, but the victim refused; and took victim's cash after murder; pecuniary gain factor established); *Floyd v. State*, 569 So. 2d 1225, 1232 (Fla. 1990) (where defendant admitted breaking into victim's home and "ripping her off"; cashed a check on victim's account within hours of the murder and attempted to cash another two days later; aggravator sufficiently shown), *cert. denied*, 111 S.Ct. 21912 (1991); *Hildwin v. State*, 531 So. 2d 124, 129 (Fla. 1988) (where, before murder, defendant admitted he had no money and was reduced to searching for pop bottles on the road side to cash in for gas to get home; forged and cashed victim's check after her death; and took her ring and radio; factor established), *aff'd.*, 490 U.S. 638 (1989).

Amendment and its state counterpart, from relying upon the facts comprising the robbery charge in finding that the murder was committed for pecuniary gain.[56]

The trial court also purported to rely upon unspecified statements of the defendant for its finding that the murder was committed for pecuniary gain. (R. 239-241). There were only two statements of the defendant to which the trial court could have referred: (1) his argument to the jury during the sentencing hearing, in support of a death recommendation (T. 737-762); and (2) his statement to radio interviewer Bill Becker, on February 16, prior to the trial court's imposition of the death penalty. (S.R. 812-826). In neither statement does the defendant admit a pecuniary gain motivation for the murder. He admits to being a con man generally, and to an intent to defraud Cribbs of the anticipated proceeds of the sale of her Summerland Key home (T. 737-742, 750, 814-815, 818-819); but he denies killing Cribbs and he denies taking her money or her ring. (T. 752-756, 818-819).

He admits using her car to escape -- he drove it to a motel up the highway, and abandoned it there, after arranging a taxi ride out of Summerland Key. (T. 820). And the evidence during the guilt/innocence phase established that Cribbs' car was

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[56] This conclusion is fortified by this Court's consistent ruling that the factor of pecuniary gain merges with the felony murder factor where the underlying felony involves a financial motive. *Id.* at 924. In *Provence v. State*, 337 So. 2d 783 (Fla. 1976), this Court noted that all robbery-murders involve a pecuniary gain motivation. "Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit a crime in the course of any other enumerated felony will not be similarly disadvantaged." 337 So. 2d at 786. This Court held that only one aggravating factor -- felony murder *or* pecuniary gain -- could be established by this aspect of the capital crime. Accord, *Davis v. State*, 604 So. 2d 794, 798 (Fla. 1992); *Castro v. State*, 597 So. 2d 259, 261 (Fla. 1992); *Oats v. State*, 446 So. 2d 90, 95 (Fla. 1984); *Palmes v. State*, 397 So. 2d 678, 656-657 (Fla. 1981). Conversely, one who is acquitted of robbery in connection with a murder did not commit the murder for pecuniary gain. *McCray*. This conclusion would not of course follow where there is no conceivable temporal continuity between the murder and the gain, but where the gain is elsewhere established as the motive for the murder, such as where a defendant murders in order to inherit under a will, or to collect life insurance proceeds. See, e.g., *Buenoano*, 527 So. 2d at 199. Under this circumstance, there would be no robbery, although there would be a pecuniary gain motive.

abandoned at the site where the defendant boarded a taxi out of the Key. (T. 355, 403-404, 443-444). But his conceded use of Cribbs' automobile for escape does not establish a pecuniary gain motivation. *Scull v. State*, 533 So. 2d 1137 (Fla. 1988) (That defendant took car following murder did not establish pecuniary gain motivation beyond reasonable doubt, because it was "possible that the car was taken to facilitate escape rather than as a means of improving [defendant's] financial worth"), *cert. denied*, 490 U.S. 1037 (1989); *Peek v. State*, 395 So. 2d 492 (Fla. 1981) (same), *cert. denied*, 451 U.S. 964 (1981).

In view of the trial court's entry of a judgment of acquittal for robbery of Cribbs' cash; the defendant's use of Cribbs' car for the purpose of escape only; and an absence of other evidence that the murder of Dortha Cribbs was an integral step in the defendant's acquisition of her property; the trial court erred in finding, in aggravation of the murder, that it was committed for the purpose of pecuniary gain.

V

THE TRIAL COURT ERRED IN FINDING IN AGGRAVATION THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL, WHERE THE ENTIRE BASIS FOR THAT FINDING WAS THE TESTIMONY OF MEDICAL EXAMINER NELMS TO HIS "GUESS" THAT THE VICTIM WAS CONSCIOUS FOR FIFTEEN MINUTES AFTER THE FATAL STABBING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, §§2, 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION, AND §921.141(5)(H), F.S.A. (1993).

A lay witness is qualified to testify because of firsthand knowledge of facts in issue which the jury does not have. An expert witness "has something different to contribute[:]

> "[A] power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of testimony from a qualified expert, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier of facts in its search for truth. [citations omitted]"

Mills v. Redwing Carriers, Inc., 127 So. 2d 453, 456 (Fla. 2d DCA 1961). Where an opinion is nothing more than speculation, it invades the province of the jury. *Id.*, at 457. See, *Southern Utilities Co. v. Murdock*, 99 Fla. 1086, 1091, 128 So. 430, 432 (1930) ("The judgment of an expert must be more than a guess.").

An expert's opinion which is based on speculation has no probative value whatsoever. For example, in *Gurganus v. State*, 451 So. 2d 817 (Fla. 1984), two psychologists testified that there were "equal probabilities of [the defendant's] sanity and insanity under the McNaughten Rule," i.e. neither could state, within a reasonable degree of medical certainty, that the defendant did not have the ability to distinguish right from wrong at the time of the crime. This Court characterized the experts' testimony as lacking in any evidentiary value, hence irrelevant and

immaterial. *Id.* at 821. In *Husky Industries, Inc. v. Black*, 434 So. 2d 988 (Fla. 4th DCA 1983), a products liability case, the plaintiff's expert testified as follows regarding the design of a can of lighter fluid: "I think that the cap itself appears to be somewhat of a problem." This testimony fell "woefully short of the proof required to demonstrate a design defect, because as is all too well known, '[t]he judgment of an expert must be more than a guess.' [citation omitted]." 434 So. 2d at 993. In *Crosby v. Fleming & Sons, Inc.*, 447 So. 2d 347 (Fla. 1st DCA 1984), plaintiff's doctor testified to future medical condition and needs, "in terms of possibilities, not probability," as follows: "I think he has a problem in his lower back there. I certainly hope that it is not a disc rupture. . ." *Id.* at 348. On appeal, this testimony was found to be speculative and hence "not probative of . . . future damages." *Id.* at 349.

Dr. Nelms, the medical examiner in this case, testified that, in his opinion, Dortha Cribbs bled to death as a result of the stab wound through her left carotid artery, and that she had lived for sixteen to thirty minutes after its infliction. (T. 421-422).[57] Nelms then explained that, although the left carotid artery was severed, other arteries would continue to carry blood to the brain, permitting consciousness; but that consciousness would have terminated with the onset of shock. However, Nelms offered no opinion, nor any basis to infer at what point shock intervened. Without any basis for an educated inference on this issue, Nelms testified to his "guess" that Cribbs was conscious for up to fifteen minutes after the stabbing:

> Q: Due to this blood that is still being circulated by the other arteries, would the victim in this case have been

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[57] Dr. Nelms explained that approximately one-sixteenth of the blood flows through the carotid artery, and that blood circulates the body within one minute. Therefore, the body would lose one-sixteenth of its blood every minute through the severed artery. (T. 421). Dr. Nelms noted, however, that shock retards blood loss. (T. 421-422). Allowing for shock, Cribbs would have lived for sixteen to thirty minutes after the stab wound. (T. 422).

conscious and mentally aware and awake?

A: I believe so. With medical treatment we sometimes block one carotid artery and the person still stays awake.

Q: How long would she have been awake while she was bleeding to death?

A: Well, probably the thing that would determine when she was no longer awake is when stock [sic] intervened. She may [sic] fainted as a result of the shock, but not as a result of the blockage of that one branch of the artery.

Q: Approximately how long do you think it would have taken her to lose consciousness from shock or loss of blood?

A: It's just a guess, but I would estimate fairly close to the 15 minutes.

(T. 422). Dr. Nelms' "guess" regarding the duration of Cribbs' consciousness was incompetent, irrelevant and inadmissible. *Southern Utilities Co.*; *Husky Industries, Inc.*; *Crosby*.

Defense counsel interposed no objection to this testimony. However, the admission of this incompetent testimony was fundamental error, for the reason that this was the only evidence upon which the trial court relied in finding that the murder of Dortha Cribbs was heinous, atrocious and cruel.

In *Wright v. State*, 348 So. 2d 26 (Fla. 1st DCA 1977), *cert. denied*, 353 So. 2d 679 (1977), the defendant, who was charged with premeditated murder, admitted causing his wife's death through operation of a bulldozer in attempting to extricate her from a dirt pit in which she was buried, but claimed accident. The only evidence of premeditation was the medical examiner's opinion that the decedent's wounds were inflicted prior to her submersion in the dirt pit. The medical examiner's opinion was not informed by any pertinent expertise, and was speculative. Noting that no objection had been interposed, the First District Court of Appeal nonetheless held that the error in admitting this incompetent "expert"

testimony was fundamental, because it was the only evidence introduced with respect to the only issue in dispute:

> This testimony of the medical examiner was the *only* testimony, if competent, that tended to establish premeditation. The verdict of guilty must be supported by this evidence to stand. We hold such evidence was beyond the competence of the medical examiner to give. The theory of allowing evidence of an expert witness to be received by the triers of fact is to understand and determine an issue of fact. He must be qualified by knowledge skill, experience, training or education to express an opinion.
>
> The effect on the verdict of the evidence of the expert here was so obvious and extensive that its admission falls within the definition of fundamental error which this Court may and should review, in the interest of justice, regardless of objection at the trial level.

Wright, 348 So. 2d at 31 (footnotes omitted).

In this case, the prosecution relied extensively upon Nelms' incompetent testimony regarding the duration of Cribbs' consciousness to prove that her murder was heinous, atrocious and cruel. In closing to the jury during the sentencing phase of the trial, the prosecutor argued Nelms' incompetent testimony regarding Cribbs' consciousness as establishing this aggravating factor:

> As Dr. Nelms told you, it took the victim probably 30 minutes to die. She bled to death. You saw the picture with her face in a pillow. You heard the testimony, the television was turned up high and the radio was on so she could not summon help. *She lay there bleeding through her mouth for at least 15 minutes that she knew about; 15 minutes that she was in pain*. It took her 30 minutes to finally exhaust enough blood to die.
>
> *Remember Dr. Nelms' testimony. At least 15 minutes she knew she was bleeding. The pain from that stab wound for the 15 minutes she lay there*, unable to summon help because she was bound hand and foot, unable to cry out
> . . .

(T. 731-732) (emphasis supplied).[58]

In argument to the trial court, before sentencing, the prosecutor urged the trial court to rely upon Nelms' inadmissible and incompetent testimony, in deciding to impose a sentence of death:

> Here we are in the final argument to you to apply the death penalty. *And the last thing I want you to consider, judge, if you will, is heinousness of the crime. I would like you to remember Dr. Nelms' testimony that the witness was alive for 30 minutes after she was stabbed and she was conscious for somewhere between 15 to 30 minutes* as the blood flowed out of her mouth. . . .
>
> This lady laid there tied up, knowing she was dying, blood flowing through her mouth, unable to do a thing about it.

(T. 798-799).

In its sentencing order, the trial court relied exclusively upon Nelms' testimony regarding the time it took for Cribbs to die and the duration of her consciousness -- characterizing the testimony as "unrefuted" -- in finding that the murder was heinous, atrocious and cruel:

> Further, the Court finds the aggravating circumstance that the capital felony was especially heinous, atrocious and cruel in that the Court finds it extremely wicked, shocking, evil, vile and with a high degree of indifference to suffering that the victim was mortally wounded and thereafter it took from fifteen to thirty minutes for death to occur. There being unrefuted testimony in the record that the victim would have been conscious and aware of her circumstances for upwards of fifteen minutes prior to losing consciousness.

(R. 239).

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[58] In closing argument to the jury during the guilt/innocence phase of the trial, the prosecutor alluded to Nelms' testimony:

> "She was forced to suffer for a long period of time before she died. She knew she was suffering. She was awake while she was bleeding to death. . ." (T. 597-598).

The aggravating factor of heinous, atrocious and cruel is appropriate only where it is established, beyond a reasonable doubt, that the crime is a "conscienceless or pitiless [one] which is unnecessarily torturous to the victim." *Sochor v. Florida*, ___ U.S. ___, 112 S.Ct 2114, 212, 119 L.Ed.2d 326, 339 (1992). This Court has construed *Sochor* to require that the murder "be *both* conscienceless or pitiless *and* unnecessarily torturous to the victim." *Richardson v. State*, 640 So. 2d 1107, 1109 (Fla. 1992) (emphases in original).

The evidence established that Dortha Cribbs was stabbed three times -- twice superficially (one centimeter in depth) on the right lower side of her face; and once to the left neck, four or five inches in depth, severing the carotid artery. (T. 416-417). The evidence suggested that her hands and feet were bound and that she lay face down on a pillow on the floor at the time of the stabbing. (T. 420, 424). The prosecutor's and the trial court's reliance upon Dr. Nelms' incompetent testimony reflects that the permissible evidence that the murder was heinous, atrocious or cruel was not conclusive. See *Demps v. State*, 395 So. 2d 501, 505-506 (Fla.) (where victim of multiple stab wounds was conscious en route to three different facilities, and died soon after arrival at third, murder not so "conscienceless or pitiless" as to set it "apart from the norm of capital felonies"), *cert. denied*, 454 U.S. 933 (1981). Contrast with *Spaziano v. State*, 433 So. 2d 508, 511 (Fla. 1983) (defendant admitted to torturing victim by stabbing her on the breasts, stomach and chest), *aff'd.*, 468 U.S. 447 (1984); *Dougan v. State*, 595 So. 2d 1 (Fla. 1992) (defendant repeatedly stabbed victim, then stepped on his head and shot him once in the chest and once in the ear, and later admitted his enjoyment of the victim's pain), *cert. denied*, 113 S.Ct. 1660 (1993); *Davis v. State*, 604 So. 2d 794, 797 (Fla. 1992) (victim bled to death from 21 stab wounds, no one of which was sufficient to cause death, was standing or struggling at time of stabbing, and could

have been conscious for thirty to sixty minutes after stabbing).

In view of the prosecution's extensive reliance upon the incompetent, irrelevant and inadmissible testimony of Dr. Nelms, before both the jury and the judge; and in view of the trial court's exclusive reliance upon this testimony, in establishing the aggravating factor of heinous, atrocious and cruel; it cannot be said that the error in admitting this evidence was harmless beyond a reasonable doubt.

VI

THE PROSECUTOR'S COMMENTS TO THE JURY, DURING THE PENALTY PHASE, THAT ONLY A SENTENCE OF DEATH WOULD PREVENT THIS DEFENDANT, WHO HAD PREVIOUSLY ESCAPED FROM A WORK RELEASE FACILITY, FROM KILLING SOMEONE ELSE CONSTITUTED IMPROPER ARGUMENT OF A NONSTATUTORY AGGRAVATING FACTOR, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, §§2, 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION AND §921.141, F.S.A. (1993).

Aggravating circumstances must be limited to those enumerated in the statute. §921.141(5), F.S.A. (1993); *Geralds v. State*, 601 So. 2d 1157, 1162-1163 (Fla. 1992); *Marshall v. State*, 604 So. 2d 799, 805 (Fla. 1992); *Lewis v. State*, 398 So. 2d 432, 438 (Fla. 1981); *Miller v. State*, 373 So. 2d 882, 885 (Fla. 1979); *Elledge v. State*, 346 So. 2d 998, 1003 (Fla. 1977) ("We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.") This Court has cautioned that strict application of the sentencing statute is necessary, because "the sentencer's discretion must be 'guided and channeled' by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Miller*, 373 So. 2d at 885, citing *Proffitt v. Florida*, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

In particular, a defendant's conviction for a non-violent offense, such as escape, is a nonstatutory aggravating factor which the sentencer may not consider in deciding upon a proper sentence. *Marshall*; *Lewis*. Nor may a sentencer rely upon the defendant's future dangerousness, in the event of his release from prison, because this too is a nonstatutory aggravating factor. *Miller*.

For example, in *Miller*, the trial court relied upon the defendant's mental

illness, in conjunction with the possibility of his parole from prison, as probative of future dangerousness, in deciding to sentence him to death. In vacating the sentence, this Court noted that "[t]he legislature has not authorized consideration of the probability of recurrent violent acts by the defendant if he is released on parole in the distant future." 373 So. 2d at 886.

Because the sentencer may not rely upon conviction for a non-violent offense, such as escape; or upon future dangerousness, in the event of release from prison; the sentencer may not rely upon a defendant's prior conviction for escape as probative of future dangerousness, in deciding upon his sentence.

This was precisely what the prosecutor exhorted the sentencer to do in the subject case. During the penalty phase, the prosecutor established that, at the time of the instant offense, Mr. Allen was on escape from a work release facility in Kansas, upon sentence to one to ten years for forgery and fraud. (T. 719-720, St. Comp. Ex. I, penalty phase).[59] The prosecutor then relied on the escape as a basis for execution, on the theory that the defendant would otherwise escape from prison and kill again.

Before the sentencing jury, the prosecutor said:

> MR. MCLAUGHLIN: I do recall that the defendant escaped from that Work Release Program on the 6th of October, 1990. He was under the sentence of imprisonment at the time he left that program. What does that tell us? From the one case alone, that no form of control, whether it was probation or parole or prison or work release was adequate to take care of this defendant. Had he served out his term of years in Kansas at the time, this crime might not have been committed 13 months later.

(T. 728-729). The prosecutor recurred to this theme just prior to the trial court's imposition of sentence:

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[59] The defendant had initially been imprisoned, released on probation shortly thereafter, incarcerated for a probation violation, paroled, re-arrested then sentenced to the work release program. (T. 728-729).

> He also told us his job is to escape.[60] If he gets the opportunity, he will escape as he escaped from the previous prison sentence that he was on the charge of escape for when he committed this crime.

(T. 800).

Although the prosecutor was permitted to prove the escape from the work release facility, to establish that the capital offense was committed while the defendant was under sentence of imprisonment, *Songer v. State*, 544 So. 2d 1010 (Fla. 1989); he was not permitted to rely upon the escape to establish future dangerousness as a reason for imposing death instead of life imprisonment. *Miller*.

The prosecutor's argument that only a death sentence would prevent the defendant's commission of violent crimes in the future was harmful, under the circumstances of this case. The trial court's findings that the murder was committed for pecuniary gain, and that it was heinous, atrocious and cruel were without competent, record support. (See Points IV and V). The only aggravating factor remaining was that the murder was committed while the defendant was under sentence of imprisonment.

In *Songer v. State*, 544 So. 2d 1010 (Fla. 989), the defendant, like Mr. Allen, "did not break out of prison but merely walked away from a work-release job", prior to the subject murder. 544 So. 2d at 1011. In vacating the defendant's death sentence as disproportionate, this Court noted "the almost total lack of aggravation" and characterized the case as "the least aggravated . . . case to undergo

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[60] While it is true that the defendant himself referred to this escape (T. 758; S.R. 814), that reference did not justify the prosecutor's egregiously impermissible and factually unwarrantable argument that, because the defendant had once walked away from a work-release job, only a death sentence would prevent his escape from prison and future commission of violent crimes.

proportionality analysis." *Id.*[61]

Compensating for the "almost total lack of aggravation" in the subject case, *Songer*, thereby "tip[ping] the scales of the weighing process in favor of death," *Elledge*, was the prosecutor's spectral invocation of the defendant's future escape and commission of other violent crimes. The specter of a defendant's release from prison and commission of other violent crimes has been shown to induce jurors to vote for death where they would otherwise have voted for life. See, Eisenberg and Wells, "Deadly Confusion: Juror Instructions in Capital Cases," *Cornell Law Review*, Vol. 79:1 (1993). Given the paucity of permissible aggravation and the prejudicial character of the nonstatutory aggravator argued by the prosecutor, it cannot be said that the error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 429 So. 2d 1191 (Fla. 1986).

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[61] There was, in Songer's case, unlike in the present case, "significant mitigation" presented. 544 So. 2d at 1011. In the present case, there was no mitigation presented, because the defendant had waived mitigation. The invalidity of that waiver is the subject of Points II and III. In the absence of any mitigation evidence, this Court cannot of course conduct a proportionality review of Mr. Allen's sentence.

CONCLUSION

Based on the cases and authorities cited herein, the appellant respectfully requests this Honorable Court to reverse the judgment and sentence of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33125, this 30 day of March, 1994.

VALERIE JONAS
Assistant Public Defender