IN THE SUPREME COURT OF FLORIDA

DAVID PANGBURN

Appellant

vs. CASE NO:81,650

STATE OF FLORIDA,

APPELLEE.

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APPELLANT'S INITIAL BRIEF

RICHARD G. BARTMON, ESQ.
ATTORNEY FOR APPELLANT
Law Offices of Bartmon & Bartmon
1515 N. Federal Hwy.
Suite #300
Boca Raton, FL 33432
(407) 392-7782
Fla. Bar No: 337791

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PRELIMINARY STATEMENT

This case arises from Appellant's convictions on two counts of first degree murder and one count of armed robbery and a sentence of death imposed by the Circuit Court in and for Broward County, the Honorable Paul Backman presiding. R,1902-1904,2008-2009,2021-2034.

In this Brief, DAVID PANGBURN will be referred to as "Appellant". The symbols "R" and "SR" will refer to the Record-on-Appeal and Supplemental Record on Appeal filed pursuant to this Court's March 8, 1994 Order. The symbol "ea" will mean "emphasis added". "A" will refer to the Appendix attached to this Brief.

STATEMENT OF THE CASE

On July 19, 1990 Appellant was charged by Indictment, along with his brother, Michael Pangburn of having committed the first-degree murders of Diane Matlawski (Count I) and Nancy Cole (Count II), "by asphyxiation", on or about November 20, 1989 in alleged violation of §782.04, Fla.Stat. R,1569-1570. Appellant was also charged in Count III of the Indictment with armed robbery with a deadly weapon, by taking Diane Matlawski's car and jewelry "by force" while possessing "a ligature and/or blunt instrument" under §812.13, Fla.Stat. R,1570.

After a jury trial was held from December 1 to December 10, 1992, R,1-1183; S.R., 1-622, the jury found Appellant guilty of all three counts as charged. R,1174-1175,1902-1904. After a penalty phase proceeding on February 1, 1993, R,1241-1471, the same jury recommended the death sentence by a 7-5 vote. R,1470-1471,1973-1980;1981. The Court held a sentencing hearing on March 12, 1993, R,1504-1527, after having allowed both parties to submit memoranda. R,1990-1992;1993-2006. On March 31, 1993, Judge Backman issued a written sentencing Order, imposing the death penalty on Appellant for the murder of Diane Matlawski. R,2021-2034. The Court also sentenced Appellant to life imprisonment for the murder of Nancy Cole, R,2014, with the minimum mandatory of 25 years' imprisonment, to run consecutively to Count I. R,2015,2016. The Court further sentenced Appellant to life imprisonment for armed robbery as a habitual violent felony offender, with a mandatory minimum 15 years

in prison, to run consecutive to the other counts. R,217-219. This was a departure sentence from a recommended range of 17-22 years on Count III, supported by stated reasons of the two capital convictions and Appellant's status as a "violent habitual offender". R,2020.

Appellant timely filed a Notice of Appeal from these convictions and sentences. R,2050.

STATEMENT OF THE FACTS

On August 18, 1992, Appellant filed a Motion to Suppress Confession, Admissions and Statements. R,1805-1807. Appellant specifically sought exclusion of a statement he gave to Broward deputy sheriffs on July 11, 1990, as a violation of his Fifth and Sixth Amendment rights and further challenged its "free and voluntary" nature. R,1806.

On September 25, 1992, the Court held a suppression hearing. R,133-183. The evidence showed that Detective Dominick Gucciardo and then-Sergeant John Auer went to the jail at the South Florida Reception Center in Miami to interview Appellant on July 11, 1990. R,136,153-154. The interview was conducted in an office at the jail. R,137. The officers knew Appellant was already in custody, on escape charges unrelated to their murder investigation. R,138,144-145,169; A,2. Gucciardo testified he orally advised Appellant of his Miranda rights. R,138,139,154. Gucciardo acknowledged that Appellant stated he did not understand when

Gucciardo advised, as part of Miranda warnings, that Appellant had the right to stop questioning at any time and speak to an attorney, if he decided to begin to answer questions without one. R,140. After Miranda advisements were given, Appellant said nothing until Gucciardo told him that Appellant's brother, Michael Pangburn, had given a statement to police implicating Appellant in the murders of Diane Matlawski and Nancy Cole. R,140,141,150,151,155. Despite the fact that the interview with Appellant lasted at least 15 minutes, R,161, and the police were at the jail for 35 minutes, R,137,143, no attempt was made to ask for or obtain Appellant's signature on the rights waiver form Gucciardo had. R,144,148,149,151,161. Furthermore, despite having a tape recorder with them, the police did not tape any part of the interview or Appellant's statement. R,143.

When told of his brother's accusations, Appellant sighed, lowered his head, stared beyond the officers, covered his face, and gave a statement. R,141,155,156. Appellant stated, among other things, that "I know what we were doing was wrong but he is my brother", that it was Michael's idea to kill the victims "for the car"; that Michael "should have kept his mouth shut", and that "if I tell you guys everything I'll be putting him and me in the electric chair for sure". R,141. Appellant made no further statement, R,142, and the jury learned he never admitted he "took part" in the murders. R,424,751. The Court took the issue under advisement, R,183, and later issued a form Order summarily denying Appellant's Motion. R,1831. Appellant renewed his Motion at

trial. R,370.

At trial, Elizabeth Hollenbaugh, Nancy Cole's mother, testified that her daughter was an "acquaintance" of Diane Matlawski. R,272. Hollenbaugh believed and had heard that Matlawski was "bad news", and did not like the friendship because Matlawski was "doing drugs" and would buy drugs. R,275,276. She further testified that Cole was living with a fiance who was involved with drugs. R,275. Evidence showed Matlawski spent 3 years in prison for drug trafficking and Cole had an arrest for delivery of marijuana. R,410.

The bodies of Ms. Matlawski and Ms. Cole were found on November 20, 1989 by a security guard, at the 63 mile marker of Alligator Alley, in the Everglades area. R,289,290. The bodies were under blankets, in the grass about 20 feet apart by a chain-link fence that bordered the road. R,290,298. The location was about 15 miles west of the east toll booth on Alligator Alley, bordering a 75 mile stretch from east to west. R.297. State's Exhibits #6 and 7, depicting the victims as they were found at the scene, were admitted among other photos. R,299,301. There was police testimony conceding that one person could have left the victims there, and that Michael Pangburn was strong enough to lift Ms. Matlawski over the side of the road. R,317,318. Michael Crosse identified Michael Pangburn as having been with Diane Matlawski at a Ft. Lauderdale apartment on the afternoon of November 19, 1989. R,335-339.

On November 28, 1989, Ms. Matlawski's red 1986 Pontiac Trans-

Am was recovered from the Carriage Crossing Apartments, Pompano Beach, Florida. R,309. There was no physical evidence linking Appellant to this car, or the victims' bodies. R,413,561,562,608-610. A fingerprint matching Michael Pangburn was recovered from a newspaper bag found inside the car. R,397,610. Michael Blair, a resident at these apartments, identified Michael Pangburn as the individual he saw drive "a red Camaro" away from the apartment complex one early morning. R,427,430-433. His wife, Linda Blair noticed "a red Firebird" sometime in November, 1989 and picked out Appellant from a photo line-up as the man she saw wash the car. R,438-442. Mrs. Blair admitted in court that Appellant's height, hair color and hair style were much different than her prior description. R,443-444. Furthermore, Mrs. Blair saw this person previously without a shirt, yet never described any tatoos or abdominal scars, which Appellant revealed in court by removing his shirt with leave of Court. R,444-446. Mrs. Blair admitted Appellant's scars and tatoos were "significant". R,446. Detective Wiley later testified that Raphael and Susan Quilles, identified Michael Pangburn from a photo line-up as being at the apartment complex, not Appellant. R,518. Rita Flint, a nurse at North Broward Medical Center, testified that Michael Pangburn was admitted to the hospital at 12:33 P.M. on November 20, 1989, while she was on duty there. R,475,477-478. Michael had a diamond tennis and ruby bracelet on, R,480, which had previously been identified as belonging to Diane Matlawski. Flint told Michael to have these bracelets taken home for security reasons, and saw them

on Appellant's hand after she made this statement. R,493.

Appellant's counsel objected to the admission of several photos, as being overly gruesome and prejudicial beyond any probative value. R,538-541,765-767. Appellant described some of the depictions in the photo, including a "ripped open skull" of Matlawski, R,765, decomposition of the face of Ms. Cole, R,765, and of Matlawski's "brain peeking through the skull". R,767. The Court found these photos to be relevant as probative, R,542, and of assistance to the medical examiner in his testimony. R,766,767,779, and admitted them. R,542,779.

Michael Pangburn's two taped statements given to police on July 11, 1990 were admitted without defense objections, S.R.,506-523;527-533. A video tape deposition of Alfred LeBlanc, S.R.,537-620, who was living with Michael Pangburn in a house owned by Scott Palmer, Michael's gay lover, R,697, was admitted into evidence as a court exhibit, R,768. The video tape was done on October 11, 1991, with defense and State counsel present, based on LeBlanc's terminal cancer. R,1579-1581. LeBlanc admitted to being on painkillers every four hours, R,579, and to drinking a "lot of alcohol" in November, 1989 because of personal problems. R,581. Further references to LeBlanc's videotape testimony will be made in the Argument part of this Brief.

Scott Palmer testified that when he went to his house where michael Pangburn lived on November 20, 1989, Appellant was there, and looked like he "had been and was still partying". R,704. Appellant acknowledged there had been a party the night before.

R,705. Appellant said nothing to Palmer about being involved in murders. R,719. Palmer testified that Michael Pangburn confided to him that Michael was the one who committed the murders. R,721.

Dr. Ronald Wright did the autopsy of the victims. R,771. Wright estimated the time of death within a range of 11:00 P.M. on November 19 to 1:00 A.M. on November 20, 1989. R,774,777,815. The medical examiner testified that Diane Matlawski had three lacerations to the back of her skull and a laceration behind the right ear, among other injuries. R,782. Matlawski had five skull fractures. R,786. The head blows were consistent to Wright with being done by a club, flashlight or baseball bat. R,783-784. Wright stated that either the head injuries or neck injuries would have caused death. R,786,787. Wright added that the neck ligature on Ms. Matlawski was not applied continuously. R,788. Dr. Wright admitted that the blows to her head would "maybe" have rendered Matlawski unconscious. R,789. He conceded that strangulation "eventually" causes a loss of unconsciousness, and that if she did not struggle, Matlawski would not have lost consciousness for one or two minutes. R,791. Wright found no defensive wounds on Matlawski, which he regarded as "unusual". R,792. Wright testified that Matlawski had a blood alcohol level of .08, R,794, and a small level of cocaine "consistent with recreational use" in her system. R,794. Wright further admitted that it was possible that one person could have killed Ms. Matlawski and Ms. Cole. R,811;813. The medical examiner conceded that the lack of scrape marks on Matlawski's body was consistent with dragging the body or

carrying the body as wrapped in a blanket or sleeping bag. R,809,810.

Appellant's Motion for Judgment of Acquittal, R,824-826,971-972, was denied by Judge Backman, R,828,972.

Thereafter, John Bates testified he loaned Appellant his red 1988 Camaro at least five to ten times. R,831,832,834,835. Carter described his car as the "Chevy equivalent" of a Pontiac Firebird. R,831.

John Carter testified that he was an inmate and trustee at the Broward County Jail in November, 1989, when Michael Pangburn was arrested for the murders. R,845. Carter related that Michael told him on or about July 12, or 13, 1990, that Appellant had "nothing to do" with the Matlawski/Cole murders, that Michael had lied because of police harassment, and that he planned to "straighten out" the situation "later". R,846,847.

Michael Pangburn testified for the defense. R,856-968. He confirmed telling John Carter that he did the murders and that Appellant had no involvement, and stated he had also said this to another inmate, R,870-872, as well as two other people. R,881. Among other things, Appellant's brother reiterated Appellant was not involved in the murders, and that Michael was responsible for the murders and the robbery. R,882-906,968. Michael stated that he met Matlawski at a bottle club the night of the murders, and smoked cocaine and "got high" with her. R,883-886. Michael testified that Matlawski called him names and insulted him and that he beat her with a baseball bat and strangled her because "she just

screwed up my high". R,886,887. Michael acknowledged hitting Matlawski in the head, including the side of the head, three to four times. R,927-930. Michael said Appellant was not there when he killed Matlawski, that he alone killed and disposed of Matlawski and Cole and that Appellant did not drive the car, participate in any robbery or know where the jewelry or car came from. R,888,890-894,898,900,901. Michael testified the murders happened "so quick", that the killings were done out of "anger" and were "sloppy" because of "drugs". R,904,905.

During deliberations, the jury first asked for "all photos", which were sent back to them. R,1158,1161,1900. The jury asked for "David's statement to police", then asked for this a second time when no response was initially given. R,1158,1900.

Prior to the penalty phase, defense counsel moved to exclude any evidence or argument relating to victim impact. R,1201. The Circuit Court denied this motion without prejudice, indicting that if the State argued victim impact beyond the facts and circumstance of the case,the Court would hear the motion at such time. R,1203. The Court agreed to instruct on the aggravating circumstance of "heinous, atrocious or cruel", over defense objections. R,1221. The defense clearly waived any reliance on the mitigating circumstance of lack of prior significant criminal history. R,1226.

Prior to the penalty phase testimony, defense counsel moved in limine to exclude any reference to his prior burglaries, based on his waiver of mitigation of no significant prior crimes. R,1260-

1262. The Court ruled that Appellant could be asked the basic impeachment question by the State about the number of times he had been convicted of a felony. R,1286-1288. The State and judge indicated that Appellant's testimony placed his character at issue, and could be impeached under §90.610, Fla.Stat. in the same way as any witness at a trial. R,1286-1288. On cross-examination of Appellant at sentencing, the first question asked revealed the fact of Appellant's 9 prior felony convictions for the jury. R,1287.

Judge Backman denied all defense special requested jury instructions. R,1274-1281;1943-1953; including those on the "heinous, atrocious or cruel" factor, R,1960, an instruction on separate consideration of "multiple murders", R,1953, and an instruction that the fact of conviction of first-degree murder was not itself a reason to recommend the death penalty. R,1956.

The State presented documentary evidence of an August 25, 1980 conviction for robbery as aggravation under §921.141(5)(b) Fla.Stat. (1992)("prior violent felony"). R,1291-1296. Officer Falk testified about the circumstances of the felony. R,1297-1302. The defense objected to any hearsay information from the officer, based on what other people told or reported to him. R,1298. The defense further objected that he could not challenge the accuracy of such information through the officer. R,1299,1300. Even though the Court told the prosecution to limit testimony to the officer's knowledge, R,1299, Officer Falk testified that Appellant snatched the elderly victim's purse, knocked her down so that she required hospitalization, was chased by bystanders and took out a knife when

cornered by them, and was apprehended after jumping in a canal. R,1298-1300.

Sherry Downing testified that Appellant was a loving father, good husband and faithful and caring friend. R,1305. Downing stated Appellant helped her with a lot of her problems, even from jail. R,1306,1307-1308. Kevin Chermark, his 15 year old stepson, testified that Appellant had "been like a real father" to him and his younger sister. R,1310-1311. Chermark described Appellant as a "great dad", a loving husband who did not fight with his mother, and a hard-working man who worked two jobs to support his family. R,1371,1372.

Appellant's father, Charles Pangburn testified that Appellant's mother kidnapped Appellant and his brother from the father's custody in Illinois, and took them to New York. R,1314. Pangburn described Appellant's mother as a prostitute, and an abuser of drugs and alcohol, and that this lead to his filing for divorce. R,1315. Pangburn was told by Appellant, Michael Pangburn and their mother that the boys' stepfather, Mike Russo was "pretty abusive" towards them. R,1317,1318.

Dr. Trudy Block-Garfield testified as an expert psychologist, based on her interview with Appellant and his father, test results and examination of records. R,1324,1325. Garfield stated that based on psychological survey results, Appellant suffered from drug abuse, an unsettled and abusive love life, and held "a great deal of hostility and resentment". R,1327. She learned that Appellant's parents divorced when he was 3, and his mother took him

to New York. R,1328. Appellant's mother was a prostitute, and had some drug abuse problems when Appellant was a boy. R,1328. Appellant recounted substantial and severe physical and emotional abuse of Appellant by his stepfather, including name calling and physical beatings. R,1328,1329,1331,1332. Garfield also learned Appellant began taking marijuana and alcohol when 12 years old, and was a "frequent" and "heavy" user by age 17 or 18, when he took downers, PCP and quaaludes. R,1331.

Appellant painfully recalled to her the humiliation of being ashamed of bruises from his stepfather's physical abuse. R,1328-1329. Appellant was a chronic runaway. R,1329. Garfield concluded that Appellant appeared to have adjusted in jail and would be likely to function well within the structured jail environment. R,1334,1335. Garfield described Appellant as a "very angry young man". R,1340. Garfield also related that Appellant and his brother had been placed in separate foster care, even though only 15 months apart in age. R,1338-1339. The psychologist concluded that Appellant could not have grown up any differently, given this abusive background and that he "didn't have a chance at all" in light of this environment. R,1335. Sheila Cutter testified that Appellant had been a trustee at the county jail and could be trusted within the jail. R,1345-1346.

Appellant also testified at his sentencing hearing. R,1351-1435. He confirmed the abusive nature of his upbringing and background described by Dr. Garfield. R,1352-1359;1370-1399. Among these descriptions, Appellant related substantial physical

abuse of the family by his stepfather. R,1357-1359,1372,1375,1376,1379. Appellant suffered from depression, and would "wet myself" when he knew a beating was "coming". R,1383. David spoke of his mom being a prostitute, with drug and alcohol problems that made Appellant take her into his Florida home, then required him to kick her out because of her drug abuse and "lifestyle". R,1354,1388,1389,1394,1399. Other references to Appellant's testimony appear in Points XVI and XVII.

In his instructions, Judge Backman did not advise the jury to independently and separately consider and make separate recommendations of penalty for <u>each</u> murder victim. R,1451-1460;1973-1979. The jury's recommendation was for death by a 7-5 vote. R,1470-1471,1980. The jury was not given and did not return separate advisory verdict forms for each of the two victims. R,1981. This was not noted until about a month after the advisory verdict had been rendered. R,1480. A "stipulation" was entered and approved by the Court that the jury's advisory sentence would be regarded as a death recommendation on the Matlawski murder, and life on the Cole homicide. R,1492-1494;1500-1501;2021. Prior to sentencing on March 31, 1993, R,2021-2034, Appellant wrote a letter to Judge Backman, A,1, asking for a new penalty phase proceeding and jury. This request was denied. R,2022.

Following the jury's recommendation, Judge Backman sentenced Appellant to death for the Matlawski homicide. R,2021-2034. In his written sentencing Order, Judge Backman found the existence of aggravating factors that 1) Appellant was "under sentence of

imprisonment" when the murder occurred, §921.141(5)(a) Fla.State. (1992), R,2023; 2) Appellant had committed a prior violent felony, the 1980 robbery, §921.141(5)(b), R,2023; 3) the murder was committed "while defendant was in the commission of, or attempt to commit, or escape from robbery with a deadly weapon, §921.141(5)(d), R,2023-2024; and 4) the crime was "especially heinous, atrocious or cruel", §921.141(5)(h), R,2024;2025.

The Circuit Court rejected all statutory mitigating circumstances. R,2025-2027. Judge Backman found 10 substantial non-statutory mitigating circumstance categories to exist: 1) Appellant had suffered "mental, physical and emotional abuse" to which the Judge gave "great weight"; R,2028; 2) that Appellant's "formative years" were spent in a verbally and physically abusive environment, with a stepfather who had alcohol and drug problems ("some weight"), R,2029; 3) Appellant had no positive male role model in life and had no opportunity for a relationship with his father, ("some weight"), R,2029; 4) Appellant was a good parent, husband and family man ("some weight"), R,2028; 5) Appellant had been a trustee in the prison setting, had attended programs for drug and alcohol abuse (NA & AA) and could function and be treated in a structured prison setting, ("some weight"), R,2030; 6) Appellant was not properly nurtured by his mother who had drug and alcohol problems as well as criminal difficulties and "run-ins with the law", ("some weight"), R,2030); 7) Appellant had a five year old daughter who needed his love and encouragement ("some weight"), 8) Appellant had a good work record, working 2 jobs to take care

of his wife and two step-children ("little weight"), 9) Appellant had shown "concern for others" and helped neighbors with carpentry work for free ("little weight"), R,2028; and that 10) Appellant's trial behavior was "excellent" ("little weight"), R,2030.

Other facts will be referred to in the relevant Argument portions of this Brief.

SUMMARY OF THE ARGUMENT

The Circuit Court committed clear error in admitting Appellant's pre-trial statement made to Broward County police on July 11, 1990. The statement violated Appellant's Miranda rights, when in the face of silence from Appellant, the police informed him that his brother had given statements implicating Appellant in the murders of Diane Matlawski and Nancy Cole. The police violated Appellant's Sixth Amendment rights by failing to investigate whether or not Appellant had invoked and/or maintained his rights to counsel on the unrelated escape charges, which the police knew of when they questioned Appellant. The statement was also inadmissible as coerced, and not the product of appellant's voluntary and free will. The admission of this statement, in light of some of the devastating nature of its content and the jury's request to see the statement twice during deliberations, was not harmless error.

There was insufficient circumstantial evidence to support Appellant's armed robbery conviction. There was considerable evidence that Ms. Matlawski was not aware or conscious of her

jewelry and car being stolen. There was no evidence anyone took these items by force or fear. There was no evidence beyond a reasonable doubt that Appellant had intent to steal these items. The testimony demonstrated Appellant did not even hold the jewelry, except for security for his brother upon the advice of a nurse when Appellant's brother was hospitalized the day after the murders. Since there were considerable circumstances consistent with reasonable hypotheses of innocence, this conviction cannot be sustained.

There was insufficient proof that Appellant committed premeditated first-degree murder of Ms. Matlawski. The evidence was equally consistent with the murder resulting from a sudden, anger, frenzied confrontation between Michael Pangburn and the victim, after smoking cocaine and after the victim insulted and yelled at Appellant's brother. The evidence further failed to establish felony-murder, since there was insufficient evidence to demonstrate that Appellant forcibly took Matlawski's car or jewelry by force or fear, and had this intention at the time of the murder. There was also insufficient evidence that the murder was committed to further an intention to rob, or that the robbery had any "causal connection" to the murders. The evidence failed to conclusively establish Appellant assisted his brother in robbing Matlawski, with such an intention to rob prior to or at the time of the homicide.

The State's closing argument at the guilt phase violated Appellant's rights to fair trial by vouching for the credibility of police witnesses, misstating evidence that had crucial impact on

Appellant's defense and commenting on Appellant's post-Miranda silence in the face of police interrogation. These comments were not harmless, in light of the circumstantial nature of the case, their impact on jury evaluation of the key defense witness and the inference of guilt from Appellant's silence in response to interrogation.

The Circuit Court abused its discretion in admitting gruesome photos of the victims' head and faces that were so shocking that the visual images outweighed any value in assisting the medical examiner in his testimony. This admission was not harmless error, particularly because the jury requested them during deliberations, the defense did not dispute the possible explanations for cause of death and the photos themselves were highly inflammatory.

Appellant did not receive a fair or rational sentence or sentencing proceedings, when the jury was not instructed to consider separate recommendations of penalty as to each of the two victims, and did not receive or return separate verdict forms or advisory sentences. This defect made the jury's consideration and recommendation of the death penalty an arbitrary and capricious one, and impermissibly allowed the jury to consider multiple murders in an unguided manner as non-statutory aggravating circumstances. Without such distinctions between counts, there was no individualized consideration of each crime, in violation of Appellant's Eighth Amendment and due process rights. The jury was thus given unlimited discretion in deciding to recommend death. Appellant's consent to the defective recommendation was not a valid

waiver, since it was not in writing, and Appellant was not adequately advised of the nature and consequences of waiving a penalty phase jury proceeding. Furthermore, Appellant's pre-sentencing letter amounted to either conflicting evidence as to waiver or a legitimate request to withdraw his prior consent that should have been granted.

The Circuit Court erred in permitting the State to elicit testimony at sentencing that Appellant had 9 prior felony convictions, when Appellant expressly waived reliance on statutory mitigation of no significant prior criminal history. This was a violation of the rule in Maggard v. State, 399 So.2d 973 (Fla. 1981), and was not made admissible by any defense testimony that "opened the door" to exploring a basis for opinion about Appellant's character.

There was insufficient evidence to support a valid finding of the aggravating circumstance that Ms. Matlawski's murder occurred during the commission of a felony. The testimony did not establish that Matlawski was killed to obtain her car or jewelry. Furthermore, the evidence showed considerable doubt that these items were taken by Appellant, or that the taking of property was a primary motive rather than mere afterthought.

The trial court abused discretion in denying a defensive requested jury instruction that would have informed the jury that the murder conviction alone did not per se support imposing the death penalty. This instruction went beyond the standard instruction given, which did not distinguish between the felony-

murder conviction and aggravating circumstance. The defense instruction was a correct statement of law, and the standard instruction failed to prevent the jury from basing a death recommendation on the fact of a murder and/or murder and underlying felony conviction.

The felony murder aggravating circumstance and corresponding jury instruction were Unconstitutional on their face and as applied. Because this aggravator and instruction made no distinction between Appellant and any other individual convicted of felony-murder or murder and a felony, the factor and instruction failed to narrow the eligible class for the death penalty, and put him in that class merely because of the convictions themselves. The factor and instruction required no more proof than this, which was particularly harmful when there was insufficient evidence that robbery was the primary motive for the murder of Ms. Matlawski.

There was insufficient evidence to support a valid finding that the murder was "heinous, atrocious or cruel" beyond a reasonable doubt. There were no additional acts that set the murder of Matlawski apart from the "norm" of capital felonies. The evidence was consistent with a lack of awareness or foreknowledge of death by Matlawski.

The Court abused discretion in denying Appellant's requested jury instruction on the "heinous, atrocious and cruel" aggravator. The requested instruction would have allowed the jury to consider whether the victim was aware or conscious of impending death, consistent with this Court's application of law to this factor,

where the standard instruction did not permit affirmative consideration of this fact. The denial of this instruction seriously and substantially impaired Appellant's ability to defend against imposition of the death penalty.

The standard jury instruction on the "heinous, atrocious and cruel" aggravator was Unconstitutionally vague. It failed to adequately channel the jury's discretion by failing to define "conscienceless", "pitiless" and "unnecessarily torturous". The instruction did not inform the jury to consider the factual issue of the victim's knowledge and awareness of the impending end of life in determining the existence or non-existence of this aggravating circumstance. This error was not harmless, in light of substantial mitigation and the 7-5 advisory vote.

The evidence elicited in support of Appellant's "prior violent felony" was substantially hearsay, irrelevant and violated Appellant's right to fairly confront evidence against him at sentencing. The prejudicial impact, particularly of Appellant's display of a knife and the physical injuries to the victim went well beyond what was necessary or probative proof of this aggravating circumstance.

The reception of victim impact evidence unequivocally contained characterization and opinions of the crime and Appellant and violated Appellant's rights to a fair sentencing proceeding. This evidence permitted consideration of non-statutory aggravating circumstances, and was reversible error warranting a new sentence.

The imposition of the death penalty for the Matlawski murder

was disproportionate and should be reduced to life imprisonment. The totality of circumstances demonstrated substantial findings of mitigation including mental, physical and emotional abuse; a very harsh upbringing featuring lack of contact with Appellant's father, neglect by his mother, substantial upheaval, placement in foster care that all resulted in Appellant often running away from home; personal drug and alcohol problems, including consumption beginning at age 12; the ability to function in a structured prison environment; and his status as a loving and caring father, husband and friend. When compared with relatively weak and/or invalid aggravating circumstances, this mitigation warrants reduction of Appellant's death sentence. Further mitigation was shown by a life sentence for Michael Pangburn, who was at least as involved if not more responsible for victim Matlawski's death.

The Circuit Court erred in determining that the aggravating circumstances outweighed the mitigating evidence and findings. The Court's weighing process was not supported by sufficient competent evidence, since the facts of this case were not extreme in aggravation and non-existent in mitigation.

I. CIRCUIT COURT COMMITTED CLEAR ERROR AND ABUSED DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS JULY 11, 1990 STATEMENT TO POLICE, WHEN EVIDENCE AT SUPPRESSION HEARING DEMONSTRATED VIOLATION OF APPELLANT'S FIFTH AMENDMENT RIGHTS UNDER MIRANDA AND THAT STATEMENT WAS NOT VOLUNTARY

Appellant challenged the admission of this statement as a violation of his Fifth and Sixth Amendment rights and as

involuntary in nature. R,1805. Appellant knows this Court will regard the Circuit Court's ruling on his Motion to Suppress his statement to police while in custody on July 11, 1990 as presumptively correct, and that he must show clear error on the issue of voluntariness. e.g., Bonifay v. State, 626 So.2d 1310, 1312 (Fla. 1993). The testimony by police at the suppression hearing demonstrated that the statement was inadmissible on each of these grounds, overcoming this presumption.

Detective Gucciardo's testimony at the suppression hearing convincingly established that the police obtained Appellant's statement in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). His testimony reads in relevant part, on cross-examination:

> GUCCIARDO:...When I initially contacted him, what we discussed was his brother's statement, basically that he implicated him, Mr. David Pangburn, as part of being involved in the double murder.
>
> MR. SOLOMON: Okay. And he didn't make a statement until you told him that?
>
> A: No.
> Q: Okay. Do you think the fact that you told him that his brother had made a statement implicating him gave him--was the catalyst or the key to get him to talk to you?
>
> A: That may be possible, but I had to tell him what my intent purpose was, to interview him.
>
> Q: And you said that to him in the efforts to have him make a statement to you?
> A: I said that to him to inform him as to what we were doing there.
> Q: Okay. And as to make him--
> A: As to make him aware of what his brother said about him, yes.

> Q: With the hope that he would answer and give you a statement.
>
> A: With the hope of him cooperating and telling me what transpired.
>
> Q: Okay. And then that was after he was Mirandized?
> A: That was after he was Mirandized, yes.
> Q: Not before?
> A: No.

R, 150-151. (e.a.).

This account was confirmed by direct testimony from then-Lieutenant Jim Auer:

> STATE: Tell us what happened. Tell us about the conversation.
>
> Auer: Detective Gucciardo, after Miranda, spoke to Mr. Pangburn about the fact that his brother was under arrest by the Broward Sheriff's Office and had given a confession or given information implicating himself as well as David in the murder of Nancy Cole and Diane Matlawski.
>
> He, Detective Gucciardo, gave minor details as to what he knew...knew about the car and knew about the chronology that led up to the killings. And then the fact that Michael had given a statement to detectives regarding the murder.
> Q: At that point was there any response by the defendant...?
>
> A: Initially, no...At a point toward the end of Detective Gucciardo speaking,...he just stopped the stare...I felt at that point that he was ready to, what we call, cleanse himself or give details about the case.
>
> ...and we figured that this was going to be relatively simple...David then covered his face, he put his head down, covered his face and then went on to make some comments....

R,155-156. (e.a.)

As a basic premise of the protections under Miranda, supra, and as a matter of both Federal and Florida Constitutional law,

Art. I, §9, Fla.Const. (1980), interrogation of a suspect must end if the suspect "...in any manner, at any time prior to or during questioning" indicates he wants to remain silent. Miranda, 86 S.Ct., at 1612; Traylor v. State, 596 So.2d 957, 966 (Fla. 1992); State v. Brown, 592 So.2d 308 (Fla. 3rd DCA 1991); Smith v. State, 492 So.2d 1063, 1066 (Fla. 1986). Such interrogation significantly includes any "words or actions on the part of the police...that the police should know are reasonably likely to elicit an incriminating response from the suspect". Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-1690, 64 L.Ed.2d 297 (1980); Brown, 592 So.2d, at 309; Jones v. State, 497 So.2d 1268, 1270 (Fla. 3rd DCA 1986); Tierney v. State, 404 So.2nd 206 (Fla. 2nd DCA 1981).

Both officers' testimony demonstrated that after Miranda, Appellant said nothing until Gucciardo informed him that he had been fingered as a participant in the murders by his brother. R,150,155. Appellant clearly invoked his right to remain silent until that time prohibiting any further interrogation. Id. Even assuming arguendo his silence was at least an equivocal invocation of this right, Jacobs v. Singletary, 952 F.2d 1282, 1292, 1293 (11th Cir. 1992), any further interrogation was limited to clarification of Appellant's invoking of his rights. Innis; Jacobs, supra. Telling Appellant that his brother had implicated him in murder was absolutely calculated, let alone "reasonably likely" to get Appellant to make an incriminating statement. R,150; Innis; Tierney, supra.

In Tierney, supra, as here, the defendant invoked his right to

silence, until police then told him what a co-defendant had said about the crime. Tierney, at 208. The Court further observed that from the suspect's perspective, Innis, a suspect faced with police believing he is guilty might think he had nothing to lose by talking or fear that not talking would be seen as admitting guilt. Tierney, at 208, quoting Toliver v. Gathwright, 501 F.Supp. 148, 153 (Ed. Va. 1986). The same ruling should be made here, since Appellant made no statement until confronted with Gucciardo's rendition of Michael Pangburn's exculpatory statement about Appellant's involvement.

It is apparent that Gucciardo's statements were intended to and did produce Appellant's incriminating response. Innis; Tierney; Jones, 497 So.2d at 1270 (statement inadmissible under Innis when suspect invoked right to silence, spoke to mother on phone and officer picked up phone and informed suspect and his mother about the charges and evidence against the suspect, followed by defendant's statement); Brown, 592 So.2d, at 308-309 (statement inadmissible under Innis when defendant invoked right to silence, and police told defendant he had been listed by the victim as a suspect and had been placed at the crime scene by witnesses, and defendant admitted involvement approximately 1 1/2 hours later). This violation of his Federal and Florida Constitutional protections against self-incrimination made Appellant's statement inadmissible. It was error to admit this evidence in violation of these guarantees. Id.

Detective Gucciardo further admitted that before questioning

Appellant on July 11, 1990, he knew Appellant was in custody for an "unrelated" charge. R,138,145. In fact, Appellant was being held at the South Florida Reception Center jail, under DOC custody for the charge of escape. R,169; A,2. Despite this knowledge, the police never checked to see or insure whether or not Appellant had been appointed counsel or was represented by counsel on the escape charge as of July 11, 1980. The police did not interview Appellant that day at Appellant's invitation or request. R,136-137,153,154. Under these circumstances, the police violated Appellant's Sixth Amendment right to counsel under Arizona v. Roberson, 486 U.S. 675, 683-688, 108 S.Ct. 2693, __ L.Ed.2d __ (1988). Under Roberson, the police failed to meet a Constitutional obligation to check to see if Appellant had invoked his right to counsel or had counsel for the escape charge. Roberson, 486 U.S., supra, at 687, 688.[1]

The Record demonstrates Appellant's statement was not voluntary, but the result of coercion by police. Under Miranda and Innis, Gucciardo's rendition of Appellant's brother's statement to Appellant, who had said nothing before that, must be viewed as compelling Appellant's statement against his will. This police conduct was "calculated" to make David Pangburn talk about the

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[1]It is unclear whether Appellant was represented by counsel on the escape charge as of July 11, 1990. A,2. Under Florida law, it is reasonable to presume such counsel would have been appointed no later than at a first appearance, which clearly would have predated his statement of July 11. Rule 3.130(a); (c)(1), Fla.R.Crim.Pro. (1992). In any event, the Broward police had a constitutional obligation not to speak with Appellant until insuring whether or not Appellant's Sixth Amendment rights had been invoked. Roberson. This argument was adequately preserved by Appellant's suppression motion challenging the admission of the statement on Sixth Amendment grounds. R,1805.

crime, when he otherwise had not done so to that point. Appellant's change in emotion and shift in body language, in direct response to hearing of his brother's accusation, R,141,156, underscores this conclusion. Brewer v. State, 386 So.2d 235-236 (Fla. 1980)(statements are not voluntary if they are the product of "undue influence", or statements by those present that are "calculated to...exert improper and undue influence", quoting Frazier v. State, 107 So.2d 16, 21 (Fla. 1958). Such a coerced statement, and the alleged waiver of rights by Appellant, should not have been regarded as voluntary. Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 522-523, 93 L.Ed.2d 473 (1986); Moran v. Burbine, 475 U.S. 412, 420, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986); Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977); Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed.2d 1461 (1938).

Additional circumstances support a finding that Appellant's statement was not voluntary. Although Michael Pangburn's statement was taped, Appellant's statement was not, despite the presence of a tape recorder at Appellant's interview. R,136-137, 143. Appellant was never asked to sign a rights waiver form, despite the fact that the encounter and interview lasted at least 15 minutes, and the fact that such procedure was usually done by Gucciardo before taking statements from suspects. R,144,148,161. This circumstance is consistent with the decision to confront him with Michael's incriminating statement to get him to confess, supra, and wholly inconsistent with police testimony that Appellant left the

room before there was a chance to obtain the written waiver. R,149,164. Additionally, Gucciardo admitted on direct testimony that in response to alleged Miranda advisements, Appellant said "no" to whether he understood he had the right to stop questioning "at any time and speak to an attorney". R,140. Gucciardo's testimony showed that no response or attempt was made by police to further explain this aspect of waiver to Appellant, or to clarify whether Appellant fully understood this consequence of waiver.

Under these circumstances, Appellant's statement was not the product of non-coercive free will, and was further not made with full awareness of the nature of his rights or the consequences of waiver. Innis; Moran, 106 S.Ct., supra, at 1141; Brewer, supra; Traylor, supra. Because it was practically possible to obtain a written waiver, the failure of police to ask for this violated Appellant's state Constitutional rights against self-incrimination. Traylor, 596 So.2d, at 966; Art. I, §9, supra.

These legal and factual errors cannot be viewed as harmless. Among other things, the statement informed the jury that his brother "should have kept his mouth shut", and "[I]f I tell you guys everything, I know I will be putting myself and my brother in the electric chair for sure". R,141. It is difficult to imagine more devastating phrases than these in a capital murder trial. The jury asked on two separate occasions for this statement during deliberations, R,1158-1159,1900 (Question #2,3). It cannot be concluded there was no reasonable possibility the erroneous admission of this statement in a highly circumstantial death

penalty murder trial did not affect the verdict and the penalty recommendation. DiGuilio, at 1135,1139.

Appellant is entitled to a new trial, with the exclusion of his July 11, 1990 statement from consideration at guilt or penalty phase.

II. THERE WAS INSUFFICIENT CIRCUMSTANTIAL EVIDENCE TO SUSTAIN APPELLANT'S CONVICTION FOR ROBBERY WITH DEADLY WEAPON, WHERE EVIDENCE DID NOT DEMONSTRATE APPELLANT STOLE OR INTENDED TO STEAL VICTIM'S JEWELRY OR CAR BY FORCE OR FEAR BEYOND REASONABLE DOUBT

Appellant was charged with robbery with a deadly weapon, for allegedly stealing Diane Matlawski's jewelry and car by force on November 20, 1989. R,1570. This felony formed the basis for the State's theory of felony-murder, and was the underlying felony relied on by the State and Court for instruction on and imposition of the "felony-murder" aggravating circumstance at sentencing. R,260,262,1014,1205-1206,1213,1455,1456,2023. The State's case on robbery was entirely circumstantial. The prosecutor's theory was that Appellant and/or both Appellant and his brother took the jewelry and car, and Appellant was seen around the victim's Pontiac Trans-Am after the murders. R,827,260,262,1014. Since the Record definitely demonstrates the State's evidence did not exclude all reasonable hypotheses but guilt, State v. Law, 559 So.2d 187, 189 (Fla. 1989), the Circuit Court should have granted a directed verdict and this Court must vacate Appellant's convictions for murder and robbery, and his death sentence.

Robbery is defined as the stealing of another person's property "when in the course of the taking there is the use of force, violence, assault or putting in fear". §812.13(1), Fla.Stat. (1992). The use of force or fear is the crucial element distinguishing robbery from other theft crimes. Johnson v. State, 612 So.2d 689 (Fla. 1st DCA 1993); Harris v. State, 589 So.2d 1006, 1007 (Fla. 4th DCA 1991); S.W. v. State, 513 So.2d 1088, 1090 (Fla. 3rd DCA 1987). Under these circumstances, the victim must be aware of the taking of property at the time of the crime, for there to be a robbery. Harris, supra, (when victim not aware of robbery of jewelry prior to or at the time taken, and did not discover until following day, was not a taking by force and fear, and robbery conviction reversed); Walker v. State, 546 So.2d 1165, 1167 (Fla. 3rd DCA 1989)(robbery conviction reversed, when victim did not discover necklace gone until after the fact, and no force or fear by defendant occurred at time of taking); S.W., 513 So.2d, supra, at 1092 (no robbery when defendant distracted 3 year old girl with game, took bracelet and necklace, and child did not realize until after taking done; even though crime was such that defendant "literally took candy from a baby", no robbery); compare Santiago v. State, 497 So.2d 975,976 (Fla. 4th DCA 1986)(robbery affirmed when defendant reached into car, grabbed necklace from driver's neck, and snatching left physical marks on victim). There must be evidence of intent to steal, prior to or at the time of the taking. Stevens v. State, 265 So.2d 540, 541 (Fla. 2nd DCA 1972).

As to Matlawski's bracelets, there is no evidence that anyone

took these items by force, violence or fear. Harris; S.W.; Walker. There was no evidence presented that the jewelry was taken by anyone, while Ms. Matlawski remained alive. It was entirely possible and reasonable that whoever took these items from Ms. Matlawski, did so at a time when she was either unconscious or dead. This lack of awareness is a reasonable hypothesis not contradicted by the State's evidence, requiring vacating of the robbery conviction. Law, supra; Harris; S.W., Walker.

Rita Flint, a nurse at North Broward Medical Center testified to seeing the bracelets on Michael Pangburn, more than 12 hours after the estimated time of death. R,475,477,774,777,815. No evidence established felonious taking of the jewelry before this, or that anyone other than Michael Pangburn possessed the bracelets between the murders and his admission to the hospital. It was further indicated that the only reason Appellant came to possess the bracelets in the hospital, was after Ms. Flint instructed Michael Pangburn to send the bracelets home for security reasons. R,493. Michael Pangburn said nothing to Rita Flint that implicated Appellant in the taking of the jewelry. R,491; State's Exh. 17-25.

No evidence or reasonable inference establishes that Appellant stole the jewelry, that he took it or helped take it while Diane Matlawski was conscious or alive, or that the taking was forcible or violent. Harris; Walker; S.W. If anything, the evidence shows Michael Pangburn took the jewelry on his own, without Appellant's aid or assistance, and Appellant took the jewelry only to safeguard it for his brother, well after the death of the victim. Nothing

suggests any statement or act revealing a prior connection or dealings between Appellant and Matlawski concerning jewelry, such that an inference of robbery can be drawn from surrounding circumstances. Stevens, supra; compare Atwater v. State, 626 So.2d 1325, 1328 (Fla. 1993)(circumstantial evidence supported robbery conviction, when there was evidence defendant received money from victim on prior occasions, victim told friend on day of murder she feared defendant and would not give him any more money, and victim found with pants pockets turned out with pennies on floor). There simply was insufficient circumstantial evidence to support a robbery conviction relating to the bracelets. Harris; S.W.; see also Butts v. State, 620 So.2d 1071, 1072 (Fla. 2nd DCA 1993); Jackson v. State, 436 So.2d 1085, 1086 Fla. 3rd DCA 1983); Perez v. State, 390 So.2d 85 (Fla. 3rd DCA 1980); Pack v. State, 381 So.2d 1199, 1200 (Fla. 2nd DCA 1980); Williams v. State, 206 So.2d 446, 448-449 (Fla. 4th DCA 1968).

There was no evidence of statements by Appellant showing a plan, design or intent to steal Diane Matlawski's car, at or prior to the taking. Harris; S.W. The State's witnesses conceded no physical evidence linked anyone but Michael Pangburn to the car. R,397,584,608-610. The evidence does show that Matlawski's car was used solely to transport and dispose of the victims, with no evidence suggesting they were alive when placed in the car. R,892,895,904,905; SR, 516,517,530. Dr. Wright's uncontradicted testimony established a range of 11 P.M. to 1 A.M. for the time of death, and that the victims were not killed where recovered by

police. R,808,815.

Michael Pangburn testified he transported the victim alone with no help from Appellant and no assistance by Appellant in cleaning the car afterwards, R,892,885,904,905, which was consistent with the physical evidence, supra. There is no other evidence about the car or the keys, physical or testimonial, prior to the evidence suggesting a motive to use the car beyond moving the dead victims from Michael Pangburn's residence to elsewhere.

Michael Pangburn, not Appellant, had been seen before the murders with Diane Matlawski at the apartment Complex where the car was recovered. R,333-335,339,340. Michael testified to being the one who took it there, around Thanksgiving, 1989. R,906. According to Detective Wiley, two other people identified Michael, not Appellant, in proximity to the car. R,518. Michael Blair, another resident of the complex, saw Michael Pangburn with the car, not anyone else. R,430-433,435. Linda Blair was the only witness who claimed to see Appellant driving the car after the murder, R,440,442. Her photo identification of Appellant was impeached so substantially that Appellant did not match her prior description at all regarding height, hair color, style and length, and the presence of significant scars and tatoos Appellant showed to the jury that she had not described. R,444-446. Theresa Knowles never saw Appellant drive a red sports car after the murder, R,691. Other evidence established Appellant borrowed and drove a friend's red 1988 Camaro, described as the "Chevrolet version of a Pontiac Firebird", on at least 5-10 occasions. R,831-832,834-835,906,907.

Thus, the car and keys were not shown to have been taken with Ms. Matlawski's awareness, or by forcible taking. Harris; Walker; S.W. The car was used for transport purposes, not with a prior intention to steal. Stevens; Perez, supra; Jackson, 436 So.2d, supra, at 1086 (robbery conviction reversed, "principals" theory, where even though victim followed getaway car, saw defendant get out, defendant fled scene, and spoils of robbery in car, no evidence that defendant knew of intent beforehand or had "prior intention to participate"). The evidence did not exclude these reasonable hypotheses, or that Appellant was not the person seen with the car afterwards or that he was seen driving a car similar to but not belonging to the victim. Butts, 620 So.2d, supra, at 1072-10073. As with the jewelry, there was no prior history between Appellant and Matlawski concerning her car that was suggestive of a motive to steal. Atwater. The evidence did not support conviction of Appellant as a principal, because it did not sufficiently establish Appellant aided or assisted a forcible taking of the car or a taking by instilling fear in the victim, with intention to participate in a robbery of the car. Jackson; Perez; Pack, supra; Williams, supra; §777,011, Fla.Stat. (1982).

The insufficiency of evidence mandates that the robbery conviction be set aside. Id; Butts; Harris; S.W. It also requires the murder convictions be reversed, since the State clearly relied on this crime as the underlying felony in its felony-murder theory, and it is possible that both murder convictions may have been based on felony-murder. Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct.

1981, 100 L.Ed.2d 575 (1988); Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 1866, 100 L.Ed.2d 384 (1989); supra, Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235 (1983); Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 535-536, 79 L.Ed. 1117 (1931). The death sentence must be vacated, since the underlying felony for the felony-murder aggravator was the robbery conviction which cannot be sustained. Id.

Additionally, the Circuit Court's impositioin of a consecutive jail sentence to those on Counts I and II was reversible error. Bayson v. State, 19 Fla.L.Weekly 2170 (Fla. 4th DCA, October 12, 1994); Hale v. State, 630 So.2d 521, 524 (Fla. 1993); Daniels v. State, 595 So.2d 952, 954 (Fla. 1992).

III. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT CONVICTION FOR FIRST-DEGREE MURDER OF DIANE MATLAWSKI ON BASIS OF PREMEDITATION OR FELONY-MURDER, OR FOR MURDER OF NANCY COLE ON FELONY-MURDER BASIS

Appellant's conviction on Count I of the Indictment was pursued by the State on circumstantial evidence of premeditation and felony-murder with armed robbery as the underlying felony. R,256-262;1010-1014. The Record shows that the death of Diane Matlawski, was just as consistent with being the result of an angry, sudden, "frenzy"-type homicide, as from premeditation. The evidence also is insufficient to sustain proof of armed robbery beyond a reasonable doubt or alternatively that there was any connection between the robbery and murder of Diane Matlawski to support a felony-murder conviction.

With a circumstantial case, the State clearly did not eliminate every reasonable hypothesis other than a premeditated design and intent by Appellant to kill Diane Matlawski. Hoefert v. State, 617 So.2d 1046, 1048 (Fla. 1993); Smith v. State, 568 So.2d 965, 967 (Fla. 1st DCA 1991); Brumbley v. State, 453 So.2d 381, 386 (Fla. 1984); Hall v. State, 403 So.2d 1319, 1321 (Fla. 1981). Alfred LeBlanc's testimony established that the victim was at the Michael Pangburn residence for a party. S.R., 553,592. Appellant was not seen with Matlawski in the house during the night by LeBlanc. R,556,589,594,606,608. Yet, LeBlanc observed Ms. Matlawski during the night, looking "passed out" as if from drinking alcohol. R,551,552,593,594. LeBlanc heard a female call someone "you bitch, you bastard", but did not identify the speaker or the recipient and could not place Appellant there at that time. R,550,553,606,608. Matlawski was alive when last seen on the couch; no one called police, and LeBlanc saw no dead bodies, blood or "strange things". R,597,605. No one saw Appellant strike Ms. Matlawski with a bat. R,599,605.

Other facts showed Matlawski had prior arrest for drug trafficking, and had .08 blood alcohol level and "recreational" level of cocaine in her body when killed. R,323,328,794. The cause of death could have been skull fracture injuries or strangulation. R,786,787. Dr. Wright conceded that one person could have killed Ms. Matlawski and carried her body. R,809,811. The victim could have lost consciousness before being strangled with a ligature that was not continuously applied. R,789,798.

R,789,798.without a struggle, loss of consciousness would have occurred within 1-2 minutes. R,791. Police testimony acknowledged that one person which may not have been Appellant could have lifted Matlawski's body and dumped it at the Alligator Alley location where it was found. R,315-316,319.

Furthermore, Michael Pangburn acknowledged he killed Diane Matlawski, both before and at the trial. R,721,883-885,924-931. Pangburn's statement that he beat Matlawski because "she just screwed up my high" while Appellant was at work, and testimony of drug use by himself and the victim were not inconsistent with other evidence of such a "party". supra. R,883,887,888,890.

Even in the light most favorable to the State, the evidence showed no prior connection between the Appellant and Matlawski, no prior difficulties between them and circumstantial evidence that speculatively may have shown an unidentified woman insulting another unidentified individual. The evidence was just as consistent with an inference of an unlawful killing resulting from an angry, sudden, cocaine-induced, frenzied and brief encounter between Diane Matlawski and Michael Pangburn. The nature of the wounds could just as reasonably resulted out of frenzy as out of premeditation. In fact, there is conflicting evidence on whether Appellant was even in the house with Matlawski at the time of the murders. VanPoyck v. State, 564 So.2d 1066, 1069 (Fla. 1990). Since the proof did not exclude these reasonable hypotheses, Appellant's first-degree murder conviction cannot be upheld on a premeditation theory. Hoefert, 617 So.2d, supra, at 1048; Smith,

568 So.2d, supra, at 967; Brumbley, supra; Hines v. State, 227 So.2d 334, 335 (Fla. 1st DCA 1969); Purkhiser v. State, 210 So.2d 448, 449 (Fla. 1968). Even if consistent with homicide, this evidence is not inconsistent with a lack of premeditation. Hoefert, Smith; Hall, supra.

As already maintained in Point II, supra, there was insufficient evidence to prove that Appellant took Matlawski's property by force, violence or fear. This would invalidate any conviction based on this robbery as an underlying felony, for felony-murder. There was no evidence proving beyond a reasonable doubt that Appellant intended or planned to kill Ms. Matlawski to further a goal or intent to obtain Ms. Matlawski's necklaces or her car. Bryant v. State, 412 So.2d 347, 350 (Fla. 1982); compare Bruno v. State, 574 So.2d 76, 80 (Fla. 1991)(felony murder based on robbery upheld where stereo equipment stolen from victim's house, defendant asked to use this equipment one month before homicide, borrowed car on night of killing to "get stereo equipment", was heard admiring stereo before striking victim with crowbar and told witness he was going to get stereo equipment from "guy's house who he killed".); Roberts v. State, 510 So.2d 885, 888 (Fla. 1987)(felony murder based on sexual battery upheld where "only logical inference" was that defendant posed as cop, frisked female too intimately, beat her companion to death with bat in furtherance of an intent to rape). In contrast, there was no such "causal connection" between the taking of Matlawski's property and her death. Bryant; Lovette v. State, 636 So.2d 1304, 1306 (Fla. 1994),

or that robbery caused or contributed to Matlawski's death. Bryant; Straughter v. State, 384 So.2d 218, 219 (Fla. 3rd DCA 1980); compare Robles v. State, 188 So.2d 789, 791 (Fla. 1966)

Unlike Bruno, there was insufficient evidence of an intent to steal the victim's bracelets or car existing at the time of the murder. Bruno; Point II, supra. Furthermore, as argued in Point II, there were insufficient circumstances demonstrating Appellant assisted his brother in the robbery of these items with a prior intention to participate at or prior to the murder. Point II, supra; West v. State, 585 So.2d 439, 441 (Fla. 4th DCA 1991).

For these reasons, Appellant's conviction for first-degree murder of Diane Matlawski must be reversed.

Count III charged Appellant with having stolen property belonging to Diane Matlawski. R,1570. The evidence clearly identified the car and jewelry as belonging solely to Matlawski, not Nancy Cole. R,272,281,282. There was absolutely no evidence that these items were taken from Nancy Cole, or that Ms. Cole ever possessed or held the jewelry or car keys, such that anyone could have legally committed a robbery of or upon Ms. Cole. §812.13, supra. Furthermore, no evidence suggested that these items were stolen, or taken by force or fear at any time, or that such a robbery was "casually connected" to Cole's murder. supra.

Despite the absence of any evidence supporting a felony-murder theory as to Cole, the jury was instructed at the trial phase to consider felony-murder as to the Cole count. R,1129. In closing argument, the State reinforced the importance of the jury

instructions on the felony-murder theory, leaving the impression that such a theory applied to both Count I and II. R,1011,1012. By the jury's general verdict of suit on Count II, it is impossible to tell whether the jury's guilty verdict rested on the invalid basis of felony-murder. This conclusion requires reversal of Appellant's conviction for the Cole murder. Mills v. Maryland, 108 S.Ct., at 1866; Zant v. Stephens, 103 S.Ct., at 2745; Stromberg v. California, 51 S.Ct., at 535-536 (1931); see also Franklin v. State, 403 So.2d 975, 977 (Fla. 1981).

IV. APPELLANT WAS DENIED RIGHT TO FUNDAMENTALLY FAIR TRIAL BY PROSECUTORIAL ARGUMENT AT TRIAL PHASE WHICH IMPERMISSIBLY VOUCHED FOR POLICE OFFICERS' CREDIBILITY, MISSTATED EVIDENCE AND COMMENTED ON APPELLANT'S SILENCE IN FACE OF PRETRIAL INTERROGATION

Prosecutorial comments that influence a jury to decide guilt or innocence on impermissible considerations outside the evidence and instructions have been consistently condemned by this and other courts. Berger v. United States, 295 U.S. 78, 88 (1935); King v. State, 623 So.2d 486, 488 (Fla. 1993); Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985); Ryan v. State, 457 So.2d 1084, 1086-1089 (Fla. 4th CA 1986). The prosecutor's closing argument at trial featured vouching for State witnesses' misstatement of evidence and comment on Appellant's exercise of his rights to remain silent. Individually and in combination, these errors were fundamental and mandate a new trial.

In comparing Appellant's brother's credibility to the police

officer witnesses, the prosecutor crossed the line of permissible comment and directly vouched for the truthfulness of State witnesses:

> STATE: Michael Pangburn told you there were cigarettes in that car [Diane Matlawski's Pontiac Trans-Am]. But there weren't. Because if there were, you can bet Detective Gucciardo would have told you about it, and you can bet that Sergeant Kammerar surely would have checked them to see if there were prints on that.

R,1027 (e.a.)

x x x x x x

> STATE: [Sergeant Scheff] ultimately had an initial conversation with Michael Pangburn.
>
> The conversation ultimately got to a point where Scott Palmer [Michael's gay lover] was picked up, and he told you ---Sergeant Scheff was honest with you--he was mad.

R,1036 (e.a.). These statements are clear examples of vouching for credibility of the officers involved. These comments also informed the jury that the officers' investigative skills, truthfulness and integrity were so strong that the officers would have found any physical evidence to be found and told the jury all about it. Garrette v. State, 501 So.2d 1376, 1379 (Fla. 1st DCA 1987)(improper vouching for credibility when prosecutor effectively told jury he would not have called witnesses for the State if they were not truthful). These comments are unequivocally prohibited, as improper expressions of personal belief in truthfulness and suggestions that the prosecutor knew about matters not presented or

introduced in evidence. Landry v. State, 620 So.2d 1099, 1101 (Fla. 4th DCA 1993); Blackburn v. State, 447 So.2d 424, 426 (Fla. 5th DCA 1984); Cummings v. State, 412 So.2d 436, 439 (Fla. 4th DCA 1982); Richmond v. State, 387 So.2d 493 (Fla. 5th DCA 1980); Peterson v. State, 376 So.2d 1230, 1232 (Fla. 4th DCA 1979)(on rehearing).

The prosecution misrepresented facts that were controverted by the evidence. Appellant's main defense was that his brother Michael committed the charged crimes. The prosecutor argued to the jury that the physical evidence precluded that possibility as testified to by Michael, based on what she represented to be Dr. Wright's conclusions:

> Michael Pangburn also tells you something else yesterday that is totally inconsistent with Dr. Wright. And it is up to you, Ladies and Gentlemen of the Jury, to believe who you choose to believe.
>
> Michael Pangburn tells you that he hits Diane -- He hits Diane Matlawski with a bat on the side of the head. Diane Matlawski is hit with a bat in the back of the head.

R,1047 (e.a.). In fact, Dr. Wright testified about Exhibit 68, which depicts a narrow slit-like red mark above Diane Matlawski's right ear, similar to but not as large as those marks on the back of her head featured in Exhibits 66 and 67. R,782. Dr. Wright testified this mark, on the side of her head, was consistent with being caused by a blunt object. R,782. Thus, the State misrepresented testimony by Michael Pangburn as a lie, when in

actuality it was consistent with Dr. Wright's testimony and the physical evidence.

Prosecutorial comment that misstates evidence is error. e.g. Garcia v. State, 622 So.2d 1325, 1332 (Fla. 1993); Garcia v. State, 564 So.2d 124, 127, 129 (Fla. 1990); Carter v. State 332 So.2d 120, 125-126 (Fla. 2nd DCA 1976). This variance between comment and evidence would definitely have contributed to an erroneous basis for evaluation of Michael Pangburn's credibility which was absolutely crucial to Appellant's defense. Compare Schneider v. State, 152 So.2d 731, 735 (Fla. 1963)(comment that victim's head "blown off" versus evidence that victim shot in head and neck was variance that "would not take one to the wrong conclusion" on the issue of guilt).

As a third category of improper comment, the prosecution unequivocally and directly commented on Appellant's invoking silence after making a statement to police on July 11, 1990:

> STATE:...and Mr. Pangburn chose after [the statement], Mr. Solomon asked the police officers, chose not to speak with them anymore. And he was entitled to do that.

R,1033 (.a.). This comment referred to earlier testimony by Detective Gucciardo, on direct examination by the State, that Appellant was asked to discuss or say more but "refused to say anything more". R,408. This was unequivocally susceptible of interpretation as a direct comment on silence. State v. Smith, 573 So.2d 306, 317-318 (Fla. 1990); State v. DiGuilio, 491 So.2d, supra, at 1131; State v. Kinchen, 490 So.2d 21 (Fla. 1985). This

comment further indicated Appellant had failed to offer an exculpatory statement when given the opportunity. Smith, 573 So.2d, at 317; Hooper v. State, 513 So.2d 234, 235 (Fla. 3rd DCA 1987). It did not matter that Appellant made a statement before invoking Fifth Amendment rights. Since a defendant can invoke such rights at any time during questioning, Miranda, supra, Point I, supra, the prosecutor's comment on silence was still error. DiGuilio, supra; Turner v. State, 414 So.2d 1161, 1162 (Fla. 3rd DCA 1982) and cases cited therein.

These errors cannot be written off as merely harmless, particularly in a death penalty case. Garcia, 622 So.2d, supra, at 1352; Bertolotti, supra; Pait v. State, 112 So.2d 380, 385 (Fla. 1959); Pait, supra, at 389 (on rehearing). This case hinged in material respects on the police officers' credibility versus Michael Pangburn's. Landry, 620 So.2d, at 1101. These errors reached into the heart of the guilt phase, telling jurors to believe the police and disbelieve Michael Pangburn, despite the consistency of some of his testimony with the medical examiner's testimony and photos. Peterson, 376 So.2d, supra, at 1234. The comments on silence raised clear inferences of guilt from the failure to further respond to police interrogation. Hicks v. State, 590 So.2d 498, 500 (Fla. 3rd DCA 1991); Bertolotti, 476 So.2d, at 133. In a case where no physical evidence connected Appellant to the murders, and where no State witness eyewitnessed Ms. Matlawski's murder, it cannot be said beyond a reasonable doubt that there is no reasonable possibility these errors did not affect

the verdicts. DiGuilio, 491 So.2d at 1135, 1139; Garcia, 564 So.2d, at 129.

Individually and collectively, these three forms of prohibited prosecutorial comment deprived Appellant of a fair trial. Pacifico v. State, 19 Fla.L.Weekly 2100, 2103 (Fla. 1st DCA, September 19, 1994); Brown v. State, 593 So.2d 1210, 1212 (Fla. 2nd DCA 1992); Ryan, supra; Peterson, 376 So.2d, supra, at 1234.

V: CIRCUIT COURT ABUSED DISCRETION IN ADMITTING GRUESOME AUTOPSY PHOTOS SHOWING EXTERIOR AND INTERIOR OF VICTIM MATLAWSKI'S HEAD WOUNDS, AND PARTIALLY DECOMPOSED FACES OF VICTIMS

The State was permitted by Judge Backman to introduce 8 photos of the murdered victims, Diane Matlawski and Nancy Cole, over defense objections. R,538,542,547,765-767,779. Some of the photos showed gruesome features of victim Matlawski's head wounds,including her partially shaved skull in the back, which revealed pulled back skin and partial views of the interior of her head. R,782; State Exh. 66, 67. Other photos depicted gruesome aspects of the victims' head and face, and the particularly gruesome nature of the victims' eyes. Exh. 27, 28, 70; R,780,781. Because the inflammatory impact of this evidence far outweighed any relevance, the admission of these photos was reversible error.

Of the eight pictures, seven featured gruesome aspects of the victims' head, face and neck area. Exh. 27, 28, 66-70. Exhibit 27 showed Diane Matlawski's body at the scene where recovered,

included bloody parts of the face, with the eyes darkened. Exhibit 20 showed Nancy Cole's body at the same scene, with the eyes darkened partially blue in color. Exhibit 66 depicted the back of Ms. Matlawski's head, with the hair separated from the skull, skin badly torn and three highly bloody marks prominently displayed. Exhibit 67 is even more graphic and gruesome, showing the three open gaping wounds, and a significant part of the interior of her head exposed. Exhibit 70 shows victim Matlawski's face, prominently featuring an extremely grayish-looking right eye.

Each of these photos must be regarded as "so shocking in nature", that whatever value these pictures contributed to Dr. Wright's testimony was outweighed by the gruesomeness of the images displayed. Czuback v. State, 570 So.2d 925, 928 (Fla. 1990)(capital case murder conviction reversed, based on admission of 8 photos of gruesome, partially decomposed body in strangulation murder); Hoffert v. State, 559 So.2d 1246, 1249 (Fla. 4th DCA 1990)(second-degree murder conviction reversed, based on admission of photo showing internal part of victim's head after scalp rolled away, leaving flesh under hair and showing bruises and bleeding); Young v. State, 234 So.2d 341, 348 (Fla. 1970)(murder conviction reversed, when admitted photos showed partially decomposed torso of victim, even though relevant to identity of the victim); Dyken v. State, 89 So.2d 866 (Fla. 1956)(en banc)(conviction reversed when photo of gunshot wound in head admitted, where defendant conceded issue of location of wound which was also described or shown by other evidence).

This Court has directed in recent years that gruesome photographs be "carefully scrutinized" before admission to avoid their potential prejudicial inflammatory impact, particularly in a death penalty case. Duncan v. State, 619 So.2d 279, 284 (Fla. 1993)(Kogan, J; Shaw, J, concurring in part, dissenting in part); Marshall v. State, 604 So.2d 799, 804 (Fla. 1992). The Circuit Court judge here did not do this, deciding that these photos were probative and agreeing to admit them if Dr. Wright said they were needed to help explain his testimony. R,541,542,766,767. Appellant did not dispute the physical cause of death described by Dr. Wright. The State's testimony otherwise established the nature and location of wounds. As such, there was little probative value, which was outweighed by the photographs' clearly inflammatory nature. Beagley v. State, 273 So.2d 796, 799 (Fla. 1st DCA 1973); Dyken, 89 So.2d, supra, at 866.

The admission of these photos was not harmless. The inflammatory impact was clear upon the jury, whose first question during deliberations was a request to see "all photos" which was granted. R,1158,1161,1900. The nature of the images shown could not help but inflame the jury to decide the case based on emotion and unfair emphasis on the photos. The State also relied on the photos in its closing argument at the sentencing phase. R,1119. compare Duncan, 619 So.2d, supra, at 282 (harmless error, in part because photos not "urged" by State as basis for recommending death). There was some evidence here supporting a verdict on lesser degrees of homicide. Points II; III, supra. Henry v.

State, 574 So.2d 73, 75 (Fla. 1991)(error not harmless under such circumstances). It cannot be said that the erroneous admission of these gruesome photos did not contribute to the guilty verdicts or the jury's death recommendation. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986).

This error requires a new trial and sentencing proceeding.

VI. APPELLANT'S SENTENCING PROCEEDING VIOLATED APPELLANT'S EIGHTH AMENDMENT AND DUE PROCESS RIGHTS TO FAIR AND RELIABLE CONSIDERATION OF SENTENCE, WHEN JURY WAS NOT GIVEN APPROPRIATE INSTRUCTION AND VERDICT FORMS REQUIRING SEPARATE CONSIDERATION AND SEPARATE INDEPENDENT ADVISORY VERDICTS FOR SEPARATE CONVICTIONS INVOLVING MULTIPLE VICTIMS

The exercise of unlimited, uncontrolled and unguided discretion by a jury in the capital sentencing process invalidates any death sentence that is a product of such a process, under the Eighth Amendment, Fourteenth Amendment, and Article I, Sections 9 and 17, (Fla.Const.)(1980). Proffitt v. Florida, 428 U.S. 242, 252-253, 258-260, 96 .Ct. 2960, 49 L.Ed.2d 913 (1976); Gregg v. Georgia, 428 U.S. 153, 187-189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)(Stewart, J; Powell, J; Stevens, J, plurality opinion); Furman v. Georgia, 408 U.S. 238, 253, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)(Douglas, J, concurring opinion); State v. Dixon, 283 So.2d 1, 7 (1972). As a consequence of the finality and irrevocable nature of the death penalty, many of the major death penalty decisions decided by the U.S. Supreme Court and this Court over the last 20 years have imposed a core requirement that the capital

sentencing process control, channel and guide juries to avoid arbitrary and irrational results. e.g. Arave v. Creech, __ U.S. __, 113 S.Ct. 1534, 1540. 113 L.Ed.2d 1534 (1993); Espinosa v. Florida, 505 U.S. __, 112 S.Ct. 2926, 2928, 120 L.Ed.2d 854 (1992); Zant v. Stephens, 103 S.Ct., at 2741; Gregg, 96 S.Ct., supra, at 2932; Proffitt, supra; Furman, 92 S.Ct., supra, at 2763. (Stewart, J, concurring opinion) (imposition of death penalty unconstitutional under Eighth and Fourteenth Amendment if "wantonly and freakishly imposed"), Dougan v. State, 595 So.2d 1, 4 (Fla. 1992); Dixon, supra. The jury must be given adequate guidance in the form of "careful instructions on how to apply §921.141, Fla.Stat. (1992):

> It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

Gregg, 96 S.Ct., at 2934, (plurality opinion); see also Dixon, 283 So.2d, at 10 (§921.141 held constitutional because requires a "reasoned judgment" when the death penalty is imposed).

In this case, it is undisputed that the jury was not instructed and did not separately consider and decide whether or not to recommend each separately and independently as to each count. R,1480. Appellant's death sentence was the result of a fundamentally flawed process, and must be reversed as a violation of his Federal and Florida Constitutional rights, and of §921.141. Proffitt; Gregg; Furman; Dixon.

Appellant was found guilty of separate counts of first-degree murder of Diane Matlawski and Nancy Cole. R,475,1902,1903. These verdicts were recorded on separate forms for each count.

R,1902,1903. Appellant requested a special jury instruction which would have informed the jury to "..return an advisory sentence as to each of the first-degree murders for which the defendant has been found guilty", and that verdict forms would be provided "as to each of the first-degree murders under consideration...because there are multiple convictions of first-degree murder for which the jury must recommend a penalty". R,1953 (e.a.). This instruction was denied without independently addressing this aspect of the requested instruction. R,1274. At the February 1, 1993 sentencing phase, no instructions or verdict forms were given requiring separate consideration or separate advisory verdicts for each of the murder convictions. R,1454-1460, 1974-1978. The 7-5 jury recommendation of death did not specify or distinguish whether the recommendation applied to each, both or one of the two separate counts of conviction for first-degree murder. R,1470-1471,1978,1981. It was not until over 1 month later, on March 4, 1993, that the Circuit Court judge diligently and in good faith announced that he realized the error and tried to resolve it. R,1480.

The standard jury instructions require separate verdict for separate counts at the guilt phase, providing a verdict form for "multiple counts, single defendant". Fla.Std.Jury Inst.(Crim), §2.08, #2. The standard verdict form for "capital cases, second proceeding" does not formally list a multiple count or separate verdict alternative. Fla.Std.Jury Inst.(Crim), §2.08, #4. The standard instructions clearly instruct that "Only one verdict may

be returned as to [the crime][each crime] charged". supra (e.a.). While not specifically directed at penalty phase proceedings, reason, common sense and the requirement to avoid arbitrary imposition of the death penalty mandate that a separate advisory verdict form should be returned for each count involving "a capital felony". §921.141(1), Fla.Stat. e.a. Gregg; Dixon.

Furthermore, under the criminal rules covering verdicts, jurors must render separate verdicts, specifically designating each count for which the jury has convicted a defendant. Rule 3.500, Fla.R.Crim.Pro. (1992). Each count charged must be considered as if it was contained in a separate Indictment, to be separately considered apart from any other count. Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189, 193, 76 L.Ed. 356(1932); Streeter v. State, 416 So.2d 1203, 1206; 1206, n.3 (Fla. 3rd DCA 1982). There is absolutely no apparent rationale for imposing a less stringent requirement on the consideration and resolution by a capital sentencing jury of separate counts at the penalty phase, in light of the ultimate and irrevocable nature of the death penalty. Gregg; Dixon; Furman, 92 S.Ct. at 2760. (Stewart, J, concurring opinion).

In reviewing death penalty cases, this Court has noted numerous circumstances where juries returned separate advisory verdicts for each count of conviction for first-degree murder. e.g. Caruso v. State, 19 Fla.L.Weekly 508. (Fla.,October 6, 1994)(two murders, life recommendations on each); Pittman v. State, 19 Fla.L.Weekly 489, 490 (Fla.,September 29, 1994)(three murders,

recommendation returned on "each count"); Asay v. State, 580 So.2d 610, 612 (Fla. 1991)(two murders, two separate recommendations); Cook v. State, 542 So.2d 964, 966 (Fla. 1989)(same), LeCroy v. State, 533 So.2d 750, 755 (Fla. 1988)(two murders; one recommendation for life imprisonment, and one for death); Garron v. State, 528 So.2d 353, 355 (Fla. 1988)(two murders; death recommendation on each); Correll v. State, 523 So.2d 562, 564 (Fla. 1988)(four murders; four separate recommendations); Craig v. State, 510 So.2d 857, 859, 866 (Fla. 1987)(two murders; one recommendation, 10-2 vote for death, other 7-5 for life); Garcia v. State, 492 So.2d 360, 363 (Fla. 1986)(two murder victims, separate recommendations for each); Miller v. State, 415 So.2d 1262, 1264 (Fla. 1982)(two victims; one recommendation for death, one for life); Barclay v. State, 343 So.2d 1266, 1267 (Fla. 1977)(same as Miller); Alvord v. State, 322 So.2d 533, 535 (Fla. 1975)(three murders; jury recommended death penalty "for each count"). In several cases, jury recommendations were for different penalties on different counts for different victims. LeCroy; Craig; Barclay, supra. In those cases involving overrides of jury life recommendations, this Court could not have appropriately or rationally conducted review under Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), without knowing there were separate recommendations for life amongst multiple advisory verdicts. Caruso. Additionally, this Court could not have conducted rational review of claims of disparate treatment amongst co-defendants, in those situations with differing recommendations of life and death.

e.g. Barclay.

These cases demonstrate a consistent history of requiring different advisory verdicts and independent considerations of penalty for each separate count, facilitating review of the appropriateness of the death penalty in each given case. Without such independent consideration and verdicts, there is no individualized consideration of the circumstances of each crime, in violation of due process and Eighth Amendment requirements. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2963-2965, 57 L.Ed.2d 973 (1978)(plurality opinion). Each first-degree murder naturally involves a different and unique set of circumstances, from which the validity of findings on aggravation, mitigation, proportionality and other issues must be evaluated. No such evaluation is possible here, because of the inability to tell what the jury's recommendation here, unguided and unchannelled, was based upon. Gregg; Furman.

The net effect of the error here permitted the jury unfettered discretion to consider at sentencing that Appellant committed multiple murders. This fact alone made it more likely that Appellant receive a death recommendation, since it is logical and reasonable to assume Appellant's jury, with no other guidance or limits, could have imposed the greater punishment on Appellant as a multiple killer per se. Mills, supra; Zant, supra. Not all multiple murderers deserve the death penalty because of this fact alone, e.g., Caruso, supra; Cook, supra (overrides reversed, life

imprisonment imposed), yet the risk exists that the jury's recommendation was thus impermissibly affected. Mills; Zant, 103 S.Ct., at 2745.

The error here effectively allowed consideration of the fact of multiple murders as a non-statutory aggravating circumstance. While §921.141(5)(b) does permit consideration of a separate victim-capital felony as evidence of a "prior violent felony" in limited situations, Cook, supra, the State clearly relied on a different prior robbery as the basis for this aggravator, with the jury so specifically instructed. R,1440-1441,1455,1975. Consideration of non-statutory aggravating factors has repeatedly been held to be error. §921.141(5)("Aggravating circumstances shall be limited to the following..")(e.a.); Geralds v. State, 601 So.2d 1157, 1162 (Fla. 1992); McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Blair v. State, 406 So.2d 1103, 1109 (Fla. 1981); Miller v. State, 373 So.2d 882, 885 (Fla. 1979); Elledge v. State, 346 So.2d 998, 1002, 1003 (Fla. 1977). Since there was mitigating evidence and findings of mitigating factors, this was reversible error. Statement of Facts, supra; Points XVI, XVII, infar.

Without separate advisory recommendations or adequate instructions, this Court is unable to tell whether the basis of the jury's recommendation was proper or improper. Mills, Zant. As conceded by the State, R,1492, the jury likely applied aggravating and mitigating circumstances without distinguishing per count, mandating vacating of the death sentence and a new sentencing jury and hearing. Id.

With all due respect to Judge Backman, he tried to make the best out of a sentencing defect that the parties and Court inadvertently missed when it occurred. R,1481-1482,1494-1500,1511,1512. However, neither the parties or the Court could legally stipulate that the defective advisory consideration and verdict was a death recommendation for the Matlawski count and life for the Cole count. R,1494-1500,1511,1512,2021-2022. e.g., Streeter, supra (finding of use of weapon in jury verdict on two counts could not be considered finding for other two counts where no such finding made). This Court cannot say if the basis for the jury recommendation given "great weight" by Judge Backman, R,2023, was based on impermissible considerations. Espinosa; Zant; Mills. This defect was clearly fundamental error, going to the absolute foundation of Appellant's death sentence. Sochor v. State, 580 So.2d 595, 601 (Fla. 1991), reversed, Sochor v. Florida, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); Clark v. State, 363 So.2d 331, 333 (Fla. 1978); Nova v. State, 282 So.2d 756, 757 (Fla. 2nd DCA 1980).

Assuming arguendo this defect to be capable of waiver, the Record shows Appellant did not make an unequivocal knowing and voluntary waiver of his essential rights to a valid separate penalty proceeding before a new jury. Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983); Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974); see also State v. Poole, 561 So.2d 535 (Fla. 1990)(defendant has crucial right to a 12 person jury, capital trial). There was clearly no written waiver here. Rule 3.260, Fla.R.Crim.Pro. (written waiver of jury trial required). In the

guilt phase context, this Court has recognized oral waivers as valid "if there is no harm to the defendant". Tucker v. State, 559 So.2d 218, 220 (Fla. 1990). Appellant was clearly prejudiced by the lack of a written waiver, by the imposition of a death recommendation based on a constitutionally deficient process. While there appears to be no rule governing the requirement of a written waiver of a penalty phase jury proceeding, the rule requiring a written waiver should be even more strictly applied in view of the finality and uniqueness of the ultimate penalty involved. Gregg; Dixon.

Furthermore, the evidence in writing here was that Appellant notified the Court by letter on March 22, 1994, and filed March 23 a full seven days before sentencing, that he was not waiving a new sentencing phase jury. A,1. Appellant clearly stated that "..I also wish to select another panel of jurors to determine my fate.....I accepted the plea as a convenience which I had thought included myself but I find I cannot live with this decision and pray it is not too late to correct this error. To concede at this point and time I would be compromising everything I believe and have chosen to take a stand for..." A,1. At the very least, this presented conflicting evidence as to Appellant's true intentions and raised considerable doubt that Appellant's prior consent to the stipulation of one death and one life recommendation had been full and voluntary.

While Judge Backman clearly meant well in his attempt to resolve this problem, the colloquy on the Record cannot be regarded

as a full and complete explanation by the Court and understanding by Appellant that he was waiving his essential rights to a penalty phase jury that would appropriately be instructed in considering its recommendation. R,1496-1497,1499-1500,1511,1512; Johnson v. Zerbst, supra; see also Rule 3.172(c), Fla.R.Crim.Pro. (requiring more of colloquy for acceptance of a guilty plea as voluntary, than occurred here). If a waiver of trial must be honored even if done on the morning of trial, Warren v. State, 632 So.2d 204, 206 (Fla. 1st DCA 1994), there was nothing untimely about Appellant's affirmative and written "withdrawal" of any prior consent or waiver, received and filed a full week before sentencing.

Assuming arguendo that Appellant's oral consent to the stipulation was a waiver of a new penalty phase proceeding and jury, Appellant's letter must be viewed as a withdrawal of waiver and a renewed request for a new penalty phase. This request was clearly not untimely. There is no evidence that Appellant's letter was anything but a genuine change of mind based on serious reflection about his best interests. Appendix, at 1. In the guilt phase context, this Court has urged a liberal approach in favor of permitting withdrawal of jury trial waivers. Floyd v. State, 90 So.2d 105, 106 (Fla. 1956). In Floyd, this Court based this policy on the importance of protecting a defendant's rights to a trial by jury, specifying that a withdrawal of an earlier waiver of this right be denied only if "not reasonably made in good faith, or it appears some real harm will be done to the public". Floyd, supra, at 106; Baker v. Wainwright, 245 So.2d 289, 290 (Fla. 4th DCA

1971). Again, this policy should at the very least be more strongly applied in the penalty phase jury proceeding context, where the ultimate punishment known to civilized society is at issue. Mills; Gregg; Furman, supra (Stewart, J, concurring opinion); Dixon, at 7.

Under such circumstances, the Circuit Court erred in failing to honor Appellant's withdrawal request. R,2022. The Court determined that no reason appeared to support withdrawal, R,2022, instead of determining whether any reason existed to deny withdrawal based on the exception to the rule calling for liberally granting of withdrawal quoted in Floyd. None of the Floyd exceptions apply or appear on this Record. Both Appellant and society have a fundamental interest in insuring that the death penalty is fairly administered to "only the most aggravated and unmitigated" of capital murders. Dixon, at 7; Gregg, Furman.

Because the error here affected all aspects of the validity of the jury's death recommendation and the judge's death sentence, Appellant's death sentence must be reversed, for a new penalty phase before a new jury that is adequately and properly instructed.

VII: TRIAL COURT COMMITTED REVERSIBLE ERROR IN PERMITTING ADMISSION OF EVIDENCE AT PENALTY PHASE, OF APPELLANT'S PRIOR CRIMINAL RECORD DESPITE APPELLANT'S WAIVER OF MITIGATING CIRCUMSTANCE OF NO SIGNIFICANT PRIOR CRIMINAL HISTORY

The Record is undisputed that prior to sentencing, Appellant expressly waived any reliance on the statutory mitigation of "no

significant history of prior criminal activity". §921.141(7)(a), Fla.Stat. (1993); R,1260,1262,1280. Defense counsel sought to exclude any reference by the State to prior burglaries and other convictions, based on this waiver. R,1260,1262. Despite this Court's ruling in Maggard v. State, 399 So.2d 973 (Fla. 1981), the Circuit Court permitted the State to establish through the first question of cross-examination of Appellant at the sentencing phase, that Appellant had nine prior felony convictions, over defense objections. R,1260,1262,1286,1287,1426,1427.[2] This direct violation of Maggard, supra, requires a new sentencing proceeding.

In Maggard, this Court established that when a defendant waives statutory mitigation of no significant prior crimes, the State is not permitted to present evidence of this record. Maggard, 399 So.2d, supra, at 977, 978. This Court reversed the death sentence in that case because, as happened here, a defense motion to preclude the State from presenting such evidence, based on waiver of §921.141(7)(a),, supra, was wrongfully denied. Maggard, at 977, 978. In this ruling, the Court concluded that "mitigating circumstances are for the defendant's benefit, and the

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[2]Undersigned counsel recognizes that Appellant's counsel appeared to "withdraw" his objection when the prosecution asked about Appellant's priors, after initially objecting to its admissibility, R,1426, and after having previously and unequivocally sought to exclude such evidence. R,1260,1262,1286,1287. Appellant's previously stated objections and oral Motion in Limine preserved his claim. R,1260,11262,1286,1287; Maggard, 399 So.2d, supra, at 987. In any event, this Maggard error was fundamental, striking at the heart of Appellant's sentencing proceeding by including non-statutory aggravation against Appellant. Geralds, supra; Clark, supra.

State should not be allowed to present damaging evidence against a defendant to rebut a mitigating circumstance that the defendant expressly concedes does not exist". Maggard, at 978. Subsequent decisions have reaffirmed this rule, establishing that such Maggard error effectively would permit the State to elicit evidence of non-statutory aggravating circumstances. Geralds, at 1162; Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986).

This Court has recognized that this otherwise inadmissible evidence becomes admissible to explore the basis for a defense witness' opinion about the defendant's personality or character. Bonifay, 626 So.2d, at 1312; Muehleman v. State, 503 So.2d 310, 315 (Fla. 1987); Parker v. State, 476 So.2d 134, 139 (Fla. 1985). However, those situations do not apply here. The State clearly introduced the fact of Appellant's 9 prior felony convictions, R,1426,1427, for basic credibility impeachment purposes. §90.610, Fla.Stat. (1993). The State and Circuit Court Judge expressed a belief that Appellant could be questioned about his priors at the penalty phase, in the same manner that witness credibility would be an issue in any trial. R,1286,1287,1288. In fact, the prosecutor did not ask about Appellant's priors as the result of any defense evidence that "opened the door" for the State to explore the basis for stated lay or expert opinion. Bonifay; Muehleman; Parker, supra. The State merely asked Appellant the basic question about the number of times Appellant was convicted of a crime involving dishonesty or a sentence of greater than one year in jail. R,1426-1427. This was not admissible or intended as admissible under the

Parker exception.[3]

The State here was permitted to do just what the Maggard rule prohibits: "...The State cannot present otherwise inadmissible information regarding a defendant's criminal history under the guide of witness impeachment". Geralds, 601 So.2d, at 1162-1163 (e.a.). This error cannot credibly be characterized by the State as harmless. The jury heard evidence of non-statutory aggravation, despite the fact that only statutory aggravating factors can be permissibly considered. Geralds, at 1162, and cases cited therein; Elledge, supra. The jury was told Appellant had 9 prior felony convictions. Geralds, (Maggard error not harmless when jury told defendant had eight prior felony convictions). The prejudicial impact of such testimony on a jury considering whether or not to recommend death cannot be overstated:

> "..once the prosecutor rings that bell and informs the jury the defendant is a career felon, the bell cannot, for all practical purposes, be 'unrung'".

Geralds, at 1162. It cannot be said there is no reasonability possibility that this error did not contribute to the jury's

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[3]The result in Jackson v. State, 530 So.2d 269 (Fla. 1988), cert.denied, 488 U.S. 1051, 109 S.Ct. 882, 102 L.Ed.2d 1005 (1989), does not contradict Appellant's argument. A close examination of the result in Jackson, supra, shows that the clear basis for affirming admission of the defendant's prior crimes was the defendant's "opening the door", like Parker, by stating on direct examination he had always been a positive influence on his family. Jackson, 530 So.2d, at 273. The purpose of prior record in Jackson, was to show the defendant had not "always" been so positive an influence. Id.

consideration and recommendation of penalty. Id. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986).

Based on Maggard, Fitzpatrick and Geralds, the admission and consideration of the fact of Appellant's 9 prior felony convictions, 8 of which were not violent per se (burglaries and grand theft, R,2020), requires reversal for a new sentencing hearing before a new jury. Approval of such questioning of a defendant would unfairly "chill" the right of a defendant to present mitigation at a capital sentencing phase, including his own testimony and would effectively allow the exceptions to swallow the legitimate rule of Maggard.

VIII. THERE WAS INSUFFICIENT EVIDENCE TO AGGRAVATING CIRCUMSTANCE THAT MURDER OF DIANE MATLAWSKI WAS COMMITTED DURING COMMISSION, ATTEMPTED COMMISSION OR ESCAPE FROM ROBBERY WITH DEADLY WEAPON

As an aggravating circumstance, the Circuit Court Judge found that the murder of Diane Matlawski was committed during the "commission of, or attempt to commit, or escape after committing robbery with a deadly weapon". R,2023-2024. The Court based this "felony-murder" aggravating circumstance on Appellant's conviction of robbery with a deadly weapon, and the conclusion that Diane Matlawski was "murdered for the purpose of stealing her car and jewelry". R,2023-2024. The evidence did not show that robbery was the dominant motive or reason for the murder, beyond a reasonable doubt. This aggravator was invalid based on insufficient evidence.

The evidence demonstrated that Matlawski had been dead for about six hours when she was discovered and examined by the medical examiner at 7:00 A.M. on November 20, 1989. R,771,774. Dr. Wright placed the time of death at late evening on November 19 or the early morning hours of November 20. R,777. Dr. Wright also concluded that the murder did not occur at the scene where the body was found. R,808. The physical evidence suggested the murder occurred at the home where Michael Pangburn lived. R,598-602. There were no statements by Appellant admitting that he killed Matlawski for her car or jewelry. R,424,751.

The victim's car was linked by some physical evidence as the one used to transport Matlawski's body to the Alligator Alley location where it was discovered. However, the only fingerprint matching anyone to this car was that of Appellant's brother. R,397,593-594,610. No physical evidence of any kind linked Appellant to the murder. R,608-610. The only other direct connection was Linda Blair's alleged observation of Appellant washing the car at the apartments where the car was found. R,443-446. However, her identification was substantially impeached because Appellant did not match Blair's physical description in height, type, style and color of hair, and because Blair noticed no tatoos or scars on the shirtless individual she claimed to see, contradicted by her in-court admission, after seeing Appellant shirtless, of his "significant" tatoos and abdominal scars. R,442-446.

The victim's jewelry was observed not on Appellant, but on his

brother, when Michael Pangburn was observed and treated by nurse Rita Flint at about 12:33 P.M. on November 20, 1989 at a local hospital. R,477-478,480. This was approximately 11-12 hours after the victim's death. No testimony placed or traced possession or the taking of the jewelry from the victim by Appellant at any time between the victim's death and nurse Flint's observation of the bracelets in Michael's possession. In fact, Flint noted that one of the bracelets taken was seen on Appellant at the hospital, but only after Flint told Michael to have the jewelry taken home "for safekeeping". R,493.

When a felony-murder aggravating circumstance finding depends on robbery as the underlying felony, such a finding is invalid unless the evidence shows beyond a reasonable doubt that the taking of property was a primary reason or motive for the murder. Knowles v. State, 632 So.2d 62, 66 (Fla. 1994); Clark v. State, 609 So.2d 513, 515 (Fla. 1992); Jones v. State, 580 So.2d 140, 146 (Fla. 1991); Parker v. State, 458 So.2d 750, 754 (Fla. 1984). In Parker, supra, the defendant admitted taking a necklace and ring from the victim's body after killing her, Parker, 458 So.2d, supra, at 752, 754, a much more substantial link of the accused to the property taken than shown here. This Court concluded that there was no evidence "the murder was motivated by any desire for these objects" or that it was taken as "more than an afterthought". Parker, at 754. In Clark, supra, where the defendant shot the victim, and took his wallet, money and boots, this Court invalidated the felony-murder aggravator because the taking of property was

"incidental" and not shown to be the primary motive for the killing. Clark, 609 So.2d, supra, at 514, 515. Most recently in Knowles, supra, this Court reversed the felony-murder aggravator finding, when the defendant shot and killed his father and took his truck, when the evidence showed no intent to steal the truck before killing or that the defendant murdered his father to steal the truck, particularly when the defendant had prior access to the truck and had not stolen it. Knowles, 632 2d at 66.[4]

The evidence fell far short of establishing that Appellant actually forcibly took Matlawski's jewelry or car from her, let alone that Appellant's murder of the victim was designed to accomplish such a taking. The facts here are even more compelling proof than in Knowles, Clark and Parker that robbery was not a primary motive for Matlawski's murder by Appellant. There was simply insufficient evidence that this intent existed prior to or at the time of Matlawski's murder. Appellant's reason for ultimate possession of the jewelry was clearly established as not unlawful. Assuming arguendo Ms. Blair's observation of Appellant washing the car to be credible, this does not demonstrate robbery as a primary motive for murder, and at best indicates the car was taken as an "afterthought". Clark; Parker, supra.

Because this aggravating circumstance was invalid, and there was substantial evidence and findings of both statutory and non-

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[4]Similarly, there is some conflicting evidence here, in Alfred LeBlanc's videotaped testimony, that Appellant had driven Matlawski's red Pontiac sports car before, and had given LeBlanc a ride in the car on one occasion preceding the murder. SR,547,566-567,569.

statutory mitigation, the Court's felony-murder finding is reversible error, not harmless. Sochor v. Florida, 112 S.Ct., supra, at 2119; Bates v. State, 465 So.2d 490, 493 (Fla. 1985) and cases cited; Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977).

IX: TRIAL COURT ABUSED DISCRETION IN GIVING STANDARD FELONY-MURDER AGGRAVATOR INSTRUCTION AND DENYING REQUESTED JURY INSTRUCTION THAT FELONY-MURDER CONVICTION SHOULD NOT BE RELIED ON AS PER SE BASIS FOR IMPOSITION OF DEATH PENALTY

In instructing the jury on aggravating circumstances, the Circuit Court merely told the jury to consider whether "the crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery". R,1455,1975. In requested Penalty Instruction #3, R,1956, Appellant sought to inform the jury that the fact of Appellant's murder conviction alone was not enough per se to support a death recommendation. Since Appellant had been convicted of both murder and robbery, this clearly created the possibility that the murder conviction was based on a felony-murder theory. As such, the Circuit Court's denial of this request left the jury to recommend death, and the felony-murder aggravator, based solely on Appellant's murder convictions. This amounted to reversible error.

The standard instruction given did not distinguish between the felony-murder aggravating circumstance and the fact of Appellant's conviction of both murder and robbery. R,1975. In fact, the guilt phase instruction on felony-murder similarly directed that such a

theory applied if the evidence showed that Ms. Matlawski's "occurred as a consequence of and while (defendant) ...was engaged in the commission of a robbery with a deadly weapon...". R,1124. There was clearly no additional facts or elements required under the penalty phase instruction given, R,1455, for the jury to recommend death based on a felony-murder aggravator. Zant. At the very least, Appellant's requested instruction, clearly not contained or encompassed by the standard instruction, would have effectively prevented the jury from any application of an "automatic" aggravating circumstance under §921.141(5)(d), solely based on the murder convictions. R,1956. It was error for the Circuit Court to deny this instruction on the basis that the standard instructions covered such an area. R,1278,1279.

The requested instruction as applied here was a substantially more correct statement of law than the standard instruction. This Court has clearly distinguished valid from invalid applications of §921.141(5)(d), depending on whether the underlying robbery involved was a primary or incidental motive or aspect of a murder. Knowles; Clark; Parker; Jones. Appellant's requested instruction would have correctly informed the jury that the felony and/or murder convictions based on felony-murder should not have been used per se to recommend the death penalty. Id. The standard instruction effectively created the exact opposite impression, raising the risk that the jury did apply §921.141(5)(d) as an "automatic" aggravator. Mills v. Maryland, supra; see Point X, infra. This conclusion is substantiated by the Circuit Court Judge

himself, who based his finding that the felony-murder aggravator applied, at least in part, on a conclusion that "[B]ased upon the evidence and the verdict returned by the jury the capital felony [involving Diane Matlawski] was committed while the Defendant was engaged in the commission of Robbery with a Deadly Weapon". R,2024. As applied here, the standard instruction given was effectively a misstatement of law, which the requested instruction would have substantially corrected.

It was error to give the standard felony-murder aggravator instruction and deny Appellant's requested instruction. Zant; Knowles; Parker; United States v. Boorman, 994 F.2d 801 11th Cir. 1991). This error clearly prejudiced Appellant in his ability to defend against recommendation and imposition of death. Boorman.

X: AGGRAVATING CIRCUMSTANCE OF "FELONY-MURDER" AND CORRESPONDING JURY INSTRUCTION ARE UNCONSTITUTIONAL ON FACE AND AS APPLIED, BECAUSE §921.141(5)(d) FAILS TO ADEQUATELY NARROW CLASS OF THOSE ELIGIBLE FOR DEATH PENALTY

A charge of first-degree murder in Florida necessarily encompasses alternative theories of premeditated and felony-murder. e.g., Bush v. State, 461 So.2d 936, 940 (Fla. 1984). The State proceeded in this case on both theories at the guilt phase, Statement of Facts; R,1010-1014. After Appellant was found guilty of both murder and robbery with a deadly weapon, R,1174-1175, the jury was informed at sentencing to consider as aggravation that "[t]he crime for which the Defendant is to be sentenced was

committed while he was engaged in the commission of the crime of robbery". R,1454,1975. Because this felony-murder aggravating circumstance does not adequately narrow or differentiate amongst the class of those eligible for the death penalty as required by Zant, §921.141(5)(d) is Unconstitutional on its face and as applied under the Federal and Florida Constitutions.

All those like Appellant who have been convicted of first degree murder and an underlying felony enter the penalty phase with at least one aggravator of felony-murder. Robbery is an underlying felony for purposes of both §782.04(1)(a)(2) and for §921.141(5)(d). The felony-murder aggravator instruction given did nothing to distinguish Appellant from any other individual defendant who has been convicted of felony-murder or murder and an underlying felony. R,1124,1455. State v. Middlebrooks, 840 So.2d 311, 342 (Tenn.1992), cert.granted, Tennessee v. Middlebrooks, 113 S.Ct. 1840 (1993), cert. discharged as improvidently granted, 114 S.Ct. 651 (1993). The instruction did not narrow Appellant's eligibility for the death penalty, and the Statute effectively placed him in such a class solely by virtue of his convictions. Appellant and those like him are thus placed at a greater risk of receiving the death penalty than individuals who are not so convicted and may have committed premeditated murder. State v. Cherry, 257 S.E. 2nd 551, 568 (N.Car. 1979). This arbitrary result mandates that §921.141(5)(d) be declared Unconstitutional. Middlebrooks, supra; Cherry, supra; Engberg v. Meyer, 810 P.2d 70, 89-90 (Wyo. 1991).

The Florida death penalty scheme requires no more requirement for proof of the felony-murder aggravating circumstance than the fact of the felony conviction. §921.141(5)(d); §782.04 et seq; Espinosa, supra, at 89. This makes §921.141(5)(d) particularly defective on its face and as applied, because this Court has invalidated the felony-murder aggravator where robbery was not a primary motive at the time of the murder. Point VIII, supra. No such parameters or limits are contained in §921.141(5)(d), or conveyed to a penalty phase jury through jury instructions. The absence from the Statute and penalty phase instructions Unconstitutionally fails to comply with Zant by injecting far too great an element of arbitrariness and lack of rationality, Zant; Middlebrooks; Engberg.

These circumstances violated Appellant's Eighth Amendment rights, as well as those under Article I, Section 17 prohibiting "cruel or unusual punishment". (e.a.); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). Because it is not clear whether the jury recommended death based on this improper and unconstitutional felony-murder aggravator, and because it is clear that the trial court's sentence was based in part on such an aggravating circumstance, Appellant's sentence must be reversed. Mills; Zant; Stromberg, supra. Resentencing and/or reweighing is required because of the substantial mitigation evidence and findings, and the judge's reliance on a constitutionally invalid aggravator. Sochor, supra; Bates, supra.

XI: THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT AGGRAVATING CIRCUMSTANCE THAT MURDER OF DIANE MATLAWSKI WAS "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL"

In Dixon, 283 So.2d, at 7, this Court observed that the uniqueness and finality of capital punishment made it appropriate to reserve such a penalty for "...only the most aggravated and unmitigated of most serious crimes". This Court has reserved application of the aggravating circumstance of "heinous, atrocious or cruel" (hereafter "hac"), §921.141(5)(h), Fla.Stat., solely to those murders that feature "such additional acts as to set the crime apart from the norm of capital felonies". Dixon, at 9. The facts here do not support the trial court's finding that the killing of Ms. Matlawski fits this standard, beyond a reasonable doubt.

The crucial aspect of the Dixon formulation is that the facts set the murder apart from the norm, in a manner that essentially shows a crime "unnecessarily torturous to the victim". Dixon, at 9; see also Atwater v. State, 626 So.2d 1325, 1329 (Fla. 1993)(death sentence reversed where this part of Dixon test left out of jury instruction that was limited to defining the terms "heinous", "atrocious" and "cruel"). A crucial factor in evaluating what is "unnecessarily torturous" is whether the victim had foreknowledge of her impending death; in cases where the victim was unconscious, semi-conscious or otherwise unaware of impending end of life, this Court has invalidated a finding of the "hac" aggravating circumstance. e.g., DeAngelo v. State, 616 So.2d 440,

443 (Fla. 1993); Rhodes v. State, 547 So.2d 1201, 1208 (Fla. 1989); Herzog v. State, 439 So.2d 1372, 1375, 1380 (Fla. 1983); Clark v. State, 443 So.2d 973, 977 (Fla. 1983); see also Cook v. State, 542 So.2d 964, 970 (Fla. 1989)("hac" invalid where death did not result from long struggle and was not "drawn out" process). Particularly in strangulation-murder cases, evidence of a victim's foreknowledge and fear of eminent death is what has separated a valid finding of "hac" from an invalid one. Compare cases cited, supra with Holton v. State, 573 So.2d 284, 289, 292 (Fla. 1990)("hac" valid where scratch marks on defendant indicate struggle by victim); Hildwin v. State, 531 So.2d 124, 128 (Fla. 1988)("hac" valid when victim did not lose consciousness for "several minutes", screamed and begged for help); Tompkins, 502 So.2d, supra, at 421 ("hac" valid where victim was fighting and struggling against strangulation and rape occurring at same time); Denton v. State, 480 So.2d 1279, 1282-1283 (Fla. 1985)("hac" valid, where death from strangulation took fifteen minutes, victim begged for life and as he did, defendant pulled cord tighter around victim's neck, from behind victim, until victim was spitting blood, and defendant laughed and joked about how long it took); Doyle v. State, 460 So.2d 353, 355, 357 (Fla. 1984)("hac" valid, where strangulation took up to five minutes, victim fought back, and victim was raped while still alive). This case, on its facts, is completely distinguishable from these decisions upholding application of the "hac" aggravator.

The medical examiner conceded the possibility that Ms. Matlawski was unconscious from several head blows that preceded any

strangulation. R,789. Dr. Wright also admitted that the head injuries themselves, apart from the neck injuries, could have been fatal. R,786,787. Significantly, there was no evidence of a struggle, and there were no defensive wounds, a fact termed "unusual" by Dr. Wright if there was evidence of blows to the side or front of the head. R,792,793. These facts, combined with the evidence of blows to the back of Matlawski's head, R,782, are strong evidence that Appellant was either unconscious or otherwise unaware of these blows before or during their occurrence. Furthermore, Dr. Wright stated that absent a struggle, the victim would have lost consciousness from strangulation in 1-2 minutes. R,791.

This conclusion is further bolstered by undisputed evidence that the victim had a .08 blood alcohol level when examined by Dr. Wright, R,794, thus equalling the level now presumed to impair the ability to drive a car. §316.193, Fla.Stat. (1994). The victim also had a "recreational use" level of cocaine in her system. R,794. Alfred LeBlanc testified that the victim appeared to be asleep on the couch when he last saw her the night of the murder, and that he thought she was "passed out" from drinking. SR,551,552, 588. LeBlanc further testified that there was what "sounded like a party" that night at the house, where he heard "a lot of people". SR,553,592.

These facts show that the evidence did not establish, beyond a reasonable doubt, that Matlawski was "conscious throughout" the beating and strangulation, and had foreknowledge of her death as

she was being strangled. R,2024,2025. The evidence did not show such awareness or foreknowledge, or permit the Court to reasonably infer awareness of a high level of pain setting the murder apart from the norm. Dixon.

There was no evidence that the victim here struggled or made any statements, and a total absence of any wounds to suggest she tried to defend herself. Herzog, 439 So.2d, at 1380 ("hac" invalid where victim was semi-conscious and/or unconscious prior to strangulation, as offered no resistance and made no statements). These facts are highly similar to those in DeAngelo, supra. This Court upheld a trial court's finding that "hac" was not valid, because the victim had no defensive wounds, no evidence existed of a struggle, the victim had a significant amount of marijuana in her system, and it was "possible" she was unconscious before being strangled from some blows to the head or choking. DeAngelo, 616 So.2d, at 443. Similarly, in Rhodes, supra, this Court invalidated a finding of "hac", where there was conflicting testimony that the victim was drunk or "passed out", corroborating testimony that she was "semi-conscious" at death and the victim was last seen alive in a bar and was known as a "heavy drinker". Rhodes, 547 So.2d, at 1208.

This case did not feature the type of additional torturous acts or "drawn out" circumstances proving the "hac" factor beyond a reasonable doubt. The circumstances are much more parallel to those in DeAngelo, Rhodes, or Herzog, than to those in Hildwin, Tompkins, Denton or Doyle, supra. Because there was considerable

mitigating evidence and findings, and at least one other invalid aggravator found besides this one, resentencing is required. Sochor, supra; Bates, supra; Elledge, supra.

XII: TRIAL COURT ABUSED DISCRETION IN DENYING APPELLANT'S REQUESTED JURY INSTRUCTION ON "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE

The Circuit Court gave the standard jury instruction on the "heinous, atrocious or cruel" aggravating circumstance. R,1455,1976; Fla.Std.Jury Inst. (Crim) at 77 (June, 1994). Appellant's requested jury instruction on this factor, R,1960. Judge Backman abused his discretion in denying this requested instruction, R,1960, because it prevented the jury from considering the victim's foreknowledge of death in resolving whether this aggravator applied to Appellant.

Appellant acknowledges that it is not inappropriate for a trial court to deny special requested jury instructions whose content is covered by standard jury instructions. Parker, supra; Delap, supra. However, Appellant's requested instruction on the issue of the victim's knowledge or consciousness of impending death went beyond what is covered by the standard jury instructions on the "hac" aggravating circumstance. It is also a correct statement of law, since victim foreknowledge of death or suffering is an integral and often determinative factor in whether the "hac" aggravator applies in a given case. DeAngelo, supra; Clark, supra; Rhodes, supra; compare Holton, supra; Tompkins, supra; Hildwin,

supra; see also Sochor v. Florida, supra. Since there was considerable evidence that Ms. Matlawski had no such foreknowledge, Point XI, supra, the failure to give Appellant's jury an instruction to affirmatively evaluate these facts in considering aggravating circumstances was reversible error.

Appellant's requested instruction further extended beyond the standard one given by informing the jury that "acts committed after the death of the victim are not relevant in considering whether the homicide was 'especially heinous, atrocious or cruel'". R,1960. This was also clearly a correct statement of law, Jackson v. State, 451 So.2d 458, 463 (Fla. 1984); Blair v. State, 406 So.2d 1103, 1109 (Fla. 1981), yet the jury was not informed by the instruction given not to consider such evidence in assessing the "hac" aggravator. The failure to give this part of the requested instruction created an untenable risk that the jury inappropriately considered subsequent acts like disposal of Ms. Matlawski's body near a canal along Alligator Alley, in evaluating this factor. R,289,292,296-302,550-580;769-774.

These conclusions must be at least impliedly acknowledged from the currently pending proposed instruction on "hac" by the Florida Supreme Court Committee on Standard Jury Instructions (Criminal), which includes a statement that would address both of these factual issues:

> ...To commit a crime that is heinous, atrocious or cruel...the victim must have consciously suffered such (extraordinary) mental anguish or physical pain for a substantial period of time before

death.

Florida Bar News, Vol. 20, No 4, February 15, 1993, at p. 2. (e.a.).

The denial of these requested instructions "seriously impaired the [Appellant's] ability to present an effective defense" to the jury's consideration and recommendation of death. Boorman, 944 F.2d, at 802. The court's denial here made the penalty phase arbitrary by not adequately or fully defining the "hac" factor for the jury. Espinosa. The jury's discretion in recommending death was not adequately and narrowly channelled as required of any capital sentencing scheme. Point VI, supra. Without these limiting instructions, the jury could not provide Appellant with the required individualized weighing of aggravating and mitigating factors. Sochor, supra; Zant, supra; Lockett v. Ohio, supra. The absence of such instructions did not permit the jury to apply §921.141(5)(d) so as to effectively determine if Appellant was one of the class of those persons eligible for the imposition of death, and was deserving of such a penalty. Zant, 103 S.Ct., at 2742, 2743.

For these reasons, Appellant's death sentence must be reversed.

XIII: JURY INSTRUCTION GIVEN AT PENALTY PHASE ON AGGRAVATING CIRCUMSTANCE OF "HEINOUS, ATROCIOUS AND CRUEL" WAS UNCONSTITUTIONALLY VAGUE

Appellant is fully aware that this Court has rejected

challenges to the Constitutionality of the "heinous, atrocious an cruel" standard jury instruction given in this case. R,1455,1576. See, e.g., Hall v. State, 614, So.2d 473, 478 (Fla. 1993). This instruction specifically defines each of the terms of "heinous", "atrocious" and "cruel", and then includes the following language verbatim from Dixon, 283 So.2d, supra, at 7:

> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

R,1455,1576. (e.a.). This quoted passage from the standard jury instruction has been regarded as essential to saving the "hac" instruction from being Unconstitutionally vague. Atwater v. State, 626 So.2d 1325, 1329 (Fla. 1993). However, this part of the "hac" instruction was not adequately defined to provide sufficient guidance for the jury to decide if Appellant's crime did or did not fit this aggravating circumstance. Espinosa, 112 S.Ct. at 2926, 2928; Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130, 1135, 117 L.Ed.2d 367 (1992); Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511 (1990). Even assuming arguendo the "hac" definitions were Constitutional, the remainder of the instruction here was thus Unconstitutionally vague. Id.

There can be little remaining doubt that the jury is a "co-sentencer" in the Florida capital sentencing scheme, and that the jury's consideration and weighing of aggravators and mitigation is entitled to "great weight". R,1974; Espinosa, 112 S.Ct. at 2928,

2929; Sochor v. Florida, supra; Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 2639-2642, 86 L.Ed.2d 231, (1985); Johnson v. Singletary, 612 So.2d 575, 576 (Fla. 1993). As the co-sentencer, the jury cannot be asked to consider an aggravating circumstance if the "description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor". Espinosa, at 2929; Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. 313, 314, 112 L.Ed.2d 1 (1990)(Marshall, J. concurring opinion); Mills, 108 S.Ct., at 1866-1867; Atwater, supra.

In this instruction, the terms "conscienceless", "pitiless" and "unnecessarily torturous" are not defined in any further way, and did not provide adequate guidance to appropriately enable the jury to decide whether the "hac" aggravator applied. Espinosa. Every murder potentially fits the category of a homicide done without conscience or pity for the victim. Shell, supra; Maynard v. Cartwright, 108 S.Ct., at 1859. Any "torture" of a human being by another would rationally be viewed by a jury as "unnecessary". See, e.g., Maggard, supra; Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 1764-1765, 64 L.Ed.2d 398 (1980); People v. Superior Court, Santa Clara County, 647 P.2d 76, 78, (Cal.1982)(en banc). Informing a "co-sentencer" to apply these terms without more, particularly in light of their lack of knowledge and experience in evaluating and applying prior circumstances of "hac" violates the due process principles essential to a fair capital sentencing process. Espinosa; Shell; Stringer; Walton. The existence of additional review by the trial court and this Court does not change

the fact that the sentencing jury was left to arbitrarily apply the "hac" factor based on completely undefined terms. Espinosa, at 2928, 2929; Walton, 110 S.Ct. at 3057; Caldwell, supra.

This Court's application of the "hac" factor to cases involving strangulation deaths often depends on the consciousness or lack of awareness of impending death by the victim. Point XI, supra. This factor was not even part of the jury instruction given here, see Point XII, supra, yet this issue was clearly a disputed factual issue. The instruction did not inform the jury at all of the importance of this fact or the need to resolve it in order to adequately decide to find or not find "hac" here. Espinosa. This further rendered the "hac" instruction Unconstitutionally vague. Point XII, Espinosa; Shell; Walton; Maynard.

This error cannot be considered harmless because there was substantial mitigation evidence and findings, and a 7-5 advisory recommendation by the jury, such that the jury's recommendation could well have been affected by application of the Unconstitutional instruction. Espinosa; Sochor; Gaskin v. State, 615 So.2d 679, 680 (Fla. 1993); Hitchcock v. State, 614 So.2d 483, 484 (Fla. 1993). The Matlawski killing could not be said to be "hac" under any definition of this aggravator, Thompson v. State, 619 So.2d 261 (1993); Foster v. State, 614 So.2d 455, 462 (Fla. 1992), particularly in light of evidence the victim had no foreknowledge of her fate. Under these circumstances, Appellant's death sentence must be reversed.

XIV: CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY ADMITTING, CONSIDERING AND RELYING ON HEARSAY, IRRELEVANT, UNNECESSARY AND UNFAIRLY PREJUDICIAL EVIDENCE REGARDING "PRIOR VIOLENT FELONY" AGGRAVATING CIRCUMSTANCE

The State relied on the "prior violent felony" aggravating circumstance, §921,141(5)(b), Fla.Stat. (1992), at the penalty phase. Evidence of a certified copy of Appellant's August, 1980 conviction for robbery was properly introduced, with expert testimony matching Appellant's fingerprints to those on the prior judgment. R,1290-1296. Despite the fact that robbery is per se a violent crime for purposes of this statutory aggravator, see, e.g., Simmons v. State, 419 So.2d 316, 319 (Fla. 1982), the State was permitted to introduce pure hearsay evidence of statements and circumstances from the prior arresting officer despite three separate objections from Appellant. R,1298-1300. These circumstances were presented to the jury, and expressly relied on by the Court in finding the presence of this aggravator. R,2023 Because such findings and consideration were based on inadmissible evidence erroneously admitted, which unfairly prejudiced fair and non-arbitrary consideration of Appellant's proper sentence, Appellant's death sentence must be reversed.

In addition to the fact of the robbery conviction, Officer Timothy Falk was permitted to testify to statements and circumstances he neither heard or saw. Falk stated Appellant came up behind the elderly female victim, knocked her to the ground while snatching her purse, and that the victim required hospitalization for a head injury. R,1298-1299. Falk also stated

that bystanders chased Appellant, that Appellant brandished a knife when cornered, and that he had to be apprehended by the civilians who chased him from a canal he jumped into. R,1299,1300. This testimony was undisputed hearsay, as out-of-court statements and observations by others not testifying, clearly coming in for the truth of the contents within the statements. §90.801(1)(c), Fla.Stat. (1991). Appellant and his counsel had no "fair opportunity" to confront or "rebut" these statements, when those who made them were not present and testifying. §921.141(1), Fla.Stat. (1992).

Appellant is aware of this Court's observations that the State may introduce evidence on the prior violent felony aggravator, going beyond the mere fact of conviction. e.g., see Tompkins, supra. However, this Court has found such evidence inadmissible, even under the relaxed rules governing admission of evidence at a capital sentencing phase, when irrelevant, a violation of the defendant's confrontation rights, or where prejudice outweighs any probative value of its admission. Duncan v. State, 619 So.2d, at 282; Rhodes v. State, 547 So.2d, at 1204, 1205. Here, the evidence admitted went way beyond what was necessary to prove the existence of this aggravating circumstance. Duncan, supra; Rhodes, supra.

The jury and judge were left to rely on extremely prejudicial hearsay, particularly evidence about the chase of Appellant by civilians and Appellant's flashing of a knife when confronted. The chase after the crime was complete was irrelevant to the prior violent felony itself. The evidence further focused on the impact

to the victim, including the "physical...trauma and suffering of the victim of a totally collateral crime..", rather than on the subject murders involved. Rhodes, 547 So.2d, at 1205. The pulling out of a knife was particularly irrelevant both logically and legally, since the prior violent felony was not for armed robbery, R,1922,1995,2020, no knife was involved in the subject crimes, meaning the only possible use of this evidence was to improperly inflame both jury and judge to sentence Appellant to death. Duncan, supra; Rhodes, supra. The additional testimony about the chase, the physical impact on the victim and the knife was absolutely unnecessary, given the admission of the certified copy of conviction. Duncan, at 282; Rhodes, at 1205, n.6.

This error cannot be viewed as harmless. Unlike the circumstances in Duncan, at 282, the Court here did expressly rely on this inadmissible evidence in sentencing Appellant to death and the prosecutor relied on such evidence in detail during penalty phase closing argument. R,1440-1441. This express consideration, presentation and focus upon inadmissible, irrelevant and non-statutory evidence to support an aggravating circumstance made Appellant's sentencing proceeding arbitrary, requiring reversal of Appellant's death sentence. Sochor, 112 S.Ct., at 2119; Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976); Gregg v. Georgia, 96 S.Ct., 2933; Rhodes, supra; Elledge, 346 So.2d, supra, at 1003.

XV: IMPROPER ADMISSION AND CONSIDERATION OF PROHIBITED VICTIM IMPACT EVIDENCE VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT AND RIGHTS OF DUE PROCESS

The Record is undisputed that at Appellant's penalty phase, the victim's relatives testified to the judge alone giving opinions about Appellant, the crimes, and an allegedly proper sentence of death. R,1464-1469,1983-1984. This included statements like the following:

> KELLY DESCHAMBAULT (Nancy Cole's daughter): My sister and I have come to Ft. Lauderdale with hope that David Pangburn's sentencing will be in favor of the death penalty. We realize that sentencing is the jury's decision but we also know that you have the final say in the end.
>
> x x x x x x x x
>
> We only hope that David Pangburn experiences the same terror [as victim] as he stares death in the face, and when his time is up, we pray that before he is sent to hell, he gets to once again meet Nancy Cole.
>
> x x x x x x x x
>
> David Pangburn is a cruel, coldblooded man with no respect for human life. We can't even use the word sick to describe him.....

R,1464,1466,1467. (e.a.).

> MS. LARY (daughter of Nancy Cole):.....you will never, ever be forgiven, ever. I will hate you until I die.

R,1468. (e.a.).

> MR. BROWN:.....I was living with Diane....And I'd like to volunteer to pull the switch on him.

R,1469. (e.a.). Ms. Deschambault and Ms. Lary were related to Nancy Cole, R,1463,1464,1465, who was not the victim involved in the robbery to which defense counsel agreed such victim impact testimony could be limited to. R,1461,1462,1463. It is obvious and apparent that the testimony of all 4 victims' family members had no connection or relevance to anything but the families' opinions about the murders, the defendant and the death penalty. This absolute violation of Appellant's Eighth an Fourteenth Amendment rights requires Appellant's sentence to be vacated.

§921.141(7), Fla.Stat. (1992) defines the scope of admissible victim impact evidence, unequivocally prohibiting the admission of certain categories of such testimony:

> ...the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

§921.141(7), supra. (e.a.). This codifies the U.S. Supreme Court's opinions on the inadmissible nature of those categories of victim impact evidence that are statements about "the crime, the defendant and the appropriate sentence"... Payne v. Tennessee, 508 U.S. 808, 111 S.Ct. 2597, 2611, n.2, 115 L.Ed.2d 720 (1991); Payne, 111 S.Ct., supra, at 2614, n.1 (Souter, J; Kennedy, J, concurring

opinion);[5] State v. Maxwell, 19 Fla.L.Weekly 1706 (Fla. 4th DCA, August 10, 1994)(upholding Constitutionality of §921.141(7) and specifically noting this prohibited category); Burns v. State, 609 So.2d 600, 605 (Fla. 1992); Hodges v. State, 595 So.2d 929, 933 (Fla. 1992). The evidence referred to here was inadmissible characterizations and opinions "about the murders, about Appellant and about his deserving the death penalty". Id. This testimony clearly should not have been considered as aggravators in sentencing, and cannot be interpreted as anything but non-statutory aggravating circumstances. Geralds v. State, 601 So.2d at 1162, and cases cited; Elledge, supra.

Despite the pronouncement by Judge Backman that he limited his consideration of aggravation to those in the written order, R,2025, he could not have "unheard" what he heard from the family members. Geralds. It is difficult to think of any other possible non-statutory aggravating testimony more devastating to a fair capital sentencing process, than the emotion saturated feelings of victims' families that the defendant is a "cruel coldblooded" man who should die for his crimes. Under these circumstances, Appellant's sentence must be reversed. Payne; Booth; Maxwell; Hodges, supra.

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[5]In Payne, Justices Souter and Kennedy expressly observed that the prohibited category of victim impact evidence quoted above was not at issue in Payne. Payne at 2614, n.1. This implies that this distinction was crucial to achieving the 6-3 result in Payne, which overruled the rule of inadmissibility of other categories of victim impact evidence announced in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). The Payne majority opinion would not have been a majority, without the votes of Justices Souter and Kennedy.

XVI: IMPOSITION OF DEATH PENALTY WAS DISPROPORTIONATE PUNISHMENT, AND SHOULD BE REDUCED TO LIFE IMPRISONMENT BASED ON COMPELLING SUBSTANTIAL AND UNDISPUTED EVIDENCE IN MITIGATION

The underlying rationale for this Court's proportionality review of death sentences is the unique finality of death as punishment and its reservation for only the most "aggravated and unmitigated" of capital murders. Dixon, 283 So.2d, at 7; Kramer v. State, 619 So.2d 274, 277; 277, n.3 (Fla. 1993); Tillman, 591 So.2d, at 169; Songer, 544 So.2d, supra, at 1011; Alvord v. State, 322 So.2d 533, 540 (1975)(where this Court noted that capital defendant "need not be sentenced to death" in every case). Because of the irrevocable aspect of the death penalty, a more intense and deliberate level of scrutiny is required in conducting proportionality review. Tillman, supra. Even where aggravating circumstances exist, this Court can reduce punishment based on an independent review of the totality of evidence and circumstances and comparison with other cases and a conclusion that the death penalty is not warranted. Palmes v. Wainwright, 460 So.2d 361, 364 (Fla. 1984); Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1980); Alvord, supra; Dixon, 283 So.2d at 7, 9. Such review leads to a clear conclusion that imposition of the death penalty here would be "unusual" punishment and unfairly disproportionate. Tillman, at 169.

The aggravating circumstances of heinous, atrocious and cruel and for felony-murder are invalid for a variety of reasons already

argued. Point VIII; XI, supra. This leaves the aggravating circumstances of "prior violent felony" and " under sentence of imprisonment". R,2023. The nature and quality of the aggravator that the crime was committed while Appellant was "under sentence of imprisonment is relatively weak. The undisputed evidence on this factor is that Appellant walked away from a work release facility because of threats by a fellow inmate to kill him with a knife, and that once these circumstances were explained, escape charges against Appellant were dropped. R,1406-1408,1420,1431-1432. Songer, 544 So.2d, at 1011 (in proportionality review, fact that defendant walked away from prison rather than by violent "break out" made "under sentence of imprisonment" factor "not so grave"). The prior violent felony involved a robbery by purse-snatching. R,2023.

When compared to the mitigating evidence and findings, these aggravating circumstances become weaker, even assuming arguendo that all four aggravators were valid. The trial court assigned "great weight" to evidence Appellant was mentally, physically and emotionally abused. R,2028. There was undisputed testimony by Appellant, his natural father and a court-appointed psychologist about physical beatings and mental abuse of Appellant, his brother and mother by his stepfather, Michael Russo. R,1317,1318,1358-1259,1372,1376,1377,1379; see also R,2028. This substantial abuse occurred when Appellant was between 5 and 12 years old, when Appellant started running away, R,1377, which became chronic. R,1339,1353. The beatings included Russo slamming Appellant's head

against the wall. R,1376. Appellant was humiliated to learn in gym classes that other children were not "beat up like me" with bruises. R,1359,1379. Appellant's attempt to get help in first or second grade, resulted in being "ass whipped" at home. R,1375. This abuse gave Appellant bad dreams and depression, and further caused Appellant to "wet himself" when he knew he was going to be beaten. R,1383.

Dr. Garfield confirmed the physical and emotional abuse heaped on Appellant by Mr. Russo, and his reluctance and emotional reaction in finally discussing these circumstances. R,1328. Garfield confirmed Appellant's feelings of shame and reluctance to go to gym class because the other children there had no bruises. R,1328-1329,1330. Garfield further revealed Appellant's feelings that his mother did not stop the abuse. R,1332. The psychologist concluded that this history of abuse gave Appellant a lack of self-worth, and a "great deal of hostility and resentment". R,1332-1333. Dr. Garfield gave undisputed testimony that such emotional and physical abuse causes depression, hopelessness, low academic achievement and substance abuse. R, 1332-1333.

There was additional undisputed evidence of harsh family background and deprived up-bringing. Appellant and his brother were the subjects of a custody battle at a very young age. R,1314. Although Appellant's father, George Pangburn received custody, Appellant's mother kidnapped her sons, moved to New York and lied to Appellant that his father had no interest in him. R,1314-1315,1357. Appellant's mother was a prostitute, and a drug and

alcohol abuser. R,1315,1328,1354,1388,1389. This abuse continued when his mother showed up at Appellant's door in Florida after ten years of no contact, lived with Appellant there, and had to be asked to leave by Appellant because of such drug use and "lifestyle". R,1360,1362,1364,1399. Appellant's brother became violent and "full of hate", as a result of this upbringing. R,1357. The brothers were placed in separate foster care facilities. R,1333,1334,1338. Dr. Garfield concluded that these circumstances created doubt that Appellant could have grown up differently than he did, and that Appellant "didn't have a chance at all". R,1335.

Dr. Garfield also testified at mitigation to severe drug and alcohol problems Appellant had. It was undisputed Appellant took marijuana and drank alcohol beginning at age 12, and this use became frequent by age 17 or 18. R,1331. At that time, Appellant began taking "downers", Quaaludes and PCP. R,1331. Further mitigation evidence established Appellant could function well in a structured prison environment, and had been a trustee for two years who could be trusted within the jail environment. R,1334-1335,1346. Appellant's stepson and friend also testified he was a good father and husband and a kind and caring friend who helped people in the neighborhood. R,1304-1312.

Appellant's death sentence must be reversed as disproportionate under these undisputed mitigating circumstances. Appellant's position is nearly identical to those in Livingston v. State, 565 So.2d 1288, 1292, (Fla. 1988), where this Court reduced

Livingston's death sentence under proportionality review. The defendant there killed a gas station attendant during a robbery. Livingston, 565 So.2d, supra, at 1289. Upon review, this Court invalidated one aggravator, leaving prior violent felony and felony-murder as valid aggravating circumstances. Livingston, at 1292. Measured against mitigation including physical abuse and beatings by the defendant's mother's boyfriend, neglect by his mother and extensive use by the defendant of cocaine and marijuana, this Court reduced Livingston's sentence to life imprisonment. Livingston, at 1292. The same result is compelled here by extremely similar and additional compelling mitigation described.

A death sentence here would be disproportionate compared to other cases where this Court reduced death to life imprisonment, based on mitigation such as a history of abused childhood, sordid up-bringing, drug and/or alcohol abuse, and the potential that the defendant could successfully and safely function in a prison environment. Kramer, 619 So.2d 274, 276-278 (Fla. 1993)(death sentence reduced as disproportionate based on defendant's alcohol and drug abuse, fact that he was good worker while in jail, even though murder was by blows and resulting fractures to the head; in addition, victim had very high blood alcohol level); Nibert v. State, 574 So.2d 1059, 1060, 1062-1063 (Fla. 1990)(death sentence reduced based on mitigation including defendant's suffering more than 10 years of child abuse; defendant's potential for rehabilitation; and abuse of alcohol, even though defendant stabbed the victim seventeen times and "hac" factor valid aggravator;

victim had a .05 blood alcohol level); Songer, 544 So.2d at 1011 (death sentence reduced based on mitigation including addiction to drugs, positive adjustment in prison, counteracting, aggravator of "under sentence of imprisonment", even though defendant shot and killed police officer); Ross v. State, 474 So.2d 1170, 1171-1174 (Fla. 1985)(death sentence reduced based on mitigation including evidence defendant had alcohol problem, was drinking on the night of the murder; husband killed wife by striking her in scalp with blunt instrument, and before that bruised her face with foot or fist, with presence of defensive wounds on victim; aggravating circumstance of heinous, atrocious and cruel, killing result of "angry domestic dispute", with likely short period of reflection and/or premeditation); see also, Penn v. State, 574 So.2d 1079, 1083 (Fla. 1991)(death sentence reduced based on mitigation including heavy drug use by defendant, in case where defendant beat mother to death with hammer, and valid aggravator of "hac").

Appellant's death sentence is further disproportionate because his brother, who was equally if not more culpable in the Matlawski killing, received a life sentence. Scott v. Dugger, 604 So.2d 465, 470 (Fla. 1992); Downs v. State, 572 So.2d 895, 901 (Fla. 1990); Barclay v. State, 343 So.2d 1266, 1271 (Fla. 1977); Slater v. State, 316 So.2d 539, 542 (Fla. 1975)(accomplices "should not be treated differently upon the same or similar facts"). According to Appellant's statement to police, Michael Pangburn had the idea and motive for murder. R,440. Michael Blair testified he saw Michael Pangburn driving a red Camaro around the Carriage Cross Apartments

after the murder. R,430,432,433. The hospital nurse, Rita Flint, established it was Michael Pangburn who was wearing the victim's bracelets the morning after the murders. R,477-480,482. The only print lifted from the victim's car matched Michael Pangburn; no physical evidence linked Appellant to Ms. Matlawski's car. R,608-610,644. Two other witnesses, Raphael and Susan Quilles, saw Michael Pangburn around the apartments, not Appellant. R,518. In his second statement to police, and trial testimony, Michael admitted at least equal if not greater responsibility in killing the victims and disposing of them. R,529,536,882-906,927-930. Furthermore, Michael Pangburn told Scott Palmer, his lover, and others that he committed the murders. R,721,870-872,881. Michael Pangburn told prison inmates John Carter and Corey Maxin that Michael lied to police when he originally implicated his brother. R,846,870-872.

This substantial evidence established that Michael either committed the murders or at the very least originated the idea and motive, and killed or helped kill both girls after doing drugs with them and after Matlawski "just screwed up my high". R,886,887. Statement of Facts. This culpability was equal to or greater than Appellant, yet Michael Pangburn received life imprisonment. This disparate treatment was further evidence warranting a reduction to life imprisonment to avoid a disproportionate death sentence. Downs, 572 So.2d, at 901(death penalties disproportionate "if co-defendant is equally culpable" but receives life); Barclay, 343 So.2d at 1271(death penalty disproportionate when co-defendant got

death, defendant received life, yet both men were part of group which all intended to kill a white man, which picked-up hitchhiker for this purpose, and co-defendant shot victim after defendant stabbed him); Messer v. State, 330 So.2d 137, 139, 142 (Fla. 1976)(death penalty disproportionate when defendant got death, co-defendant received conviction for second-degree murder by plea deal, and co-defendant helped hold up victim, drove his car, took his wallet and hit victim in head before defendant shot and killed him).

The facts and circumstances at most suggest an unpremeditated, angry and "frenzied" confrontation or argument amongst cocaine smokers including a victim who was drinking and smoking cocaine at a party in Michael Pangburn's home. The murder of Diane Matlawski was not a "most aggravated, least mitigated" murder, "beyond the norm" of capital felonies. Kramer, 619 So.2d, at 278; Dixon, at 7. Therefore, Appellant' death sentence must be reduced to life imprisonment.

XVII: TRIAL COURT ERRED IN CONCLUDING THAT AGGRAVATING CIRCUMSTANCES OUTWEIGHED MITIGATING CIRCUMSTANCES, REQUIRING REDUCTION OF SENTENCE TO LIFE IMPRISONMENT

The Record in this case established substantial and compelling mitigation. The Circuit Court's own findings established that Appellant was the victim of significant mental, physical and emotional abuse, R,2028; had no positive male figure or role model in his life; R,2029; and spent his "formative years" in the midst

of an abusive home, where there were alcohol and drug problems, a stepfather who physically and verbally abused him from the age of 5 to 13, and a mother who provided no emotional support and who had drug, alcohol and criminal problems. R,2029,2030. In offering her expert opinion on the result of these problems, Dr. Garfield gave undisputed testimony that these mitigating circumstances devastated Appellant's life, caused deep anger and created unavoidably tragic results:

> DR. GARFIELD:..as has been amply explained, he has had a very abusive upbringing. I doubt very seriously that he could have grown up and been any different than he is today, given the type of upbringing.
>
> x x x x x x
>
> DR. GARFIELD..the patterns are not only inherited but will frequently be displayed in one form or another; depending upon..the environment, and when the environment is poor, the person doesn't have a chance at all and that's essentially what happened to this young man.

R,1335. (e.a.).

In addition to this evidence, it was further uncontradicted that Appellant was a good father and husband, had a 5 year old daughter who needed his love and support, and had the ability to effectively function within a structured prison environment. R,2028,2030,2031.

The existence of an abusive and/or neglectful upbringing has been consistently viewed as compelling and significant mitigation in death penalty cases. e.g., Elledge v. State, 613 So.2d 434, 436

(Fla. 1993); Clark, supra; Nibert, 574 So.2d, at 1063; Campbell v. State, 571 So.2d 415, 419, n.4 (Fla. 1990); Livingston, 565 So.2d, supra, at 1292; Holsworth v. State, 522 So.2d 348, 355 (Fla. 1988). The existence of drinking or drug problems, particularly if there was drinking or drugs taken by a defendant or victim at or around the time of the killing, has also been viewed as significant mitigating circumstances. e.g., Clark; Penn, 574 So.2d, supra, at 1083; Livingston, supra; Songer, supra; Ross, supra. When all of the substantial categories and facts of mitigation are examined in this case, supra; Point XVI, supra, this case might be one of the most significantly mitigated cases to be reviewed by this Court. Compare Songer, 544 So.2d at 1011.

Two of the factors in aggravation were not supported by the evidence requiring reweighing of sentence at the very least. Points VIII; XI. One of the two remaining ("under sentence of imprisonment") has been characterized as "relatively weak" where as here, the defendant escaped from custody by walking away from work release under threat to his life. Point XVI; Songer, supra. R,1406-1408.1420.1431-1432. These facts substantially weaken the aggravating evidence in comparison to mitigation, such that the weight of mitigation substantially "counterbalances" aggravation. King, 623 So.2d, supra, at 489; Rogers v. State, 511 So.2d 526, 534 (Fla. 1987).

The trial court's weighing process in favor of death is simply not supported by sufficient competent evidence. Campbell, 571 So.2d, supra, at 420. In comparison to other similar cases, Clark;

Livingston, Songer, this case does not present the type of overwhelming heinous or extreme aggravating circumstances and absence of mitigation for which the death penalty is reserved. Dixon; see also Hamblen v. State, 527 so.2d 800, 807 (Fla. 1988)(Ehrlich, J, concurring opinion). Therefore, this Court must reverse Appellant's death sentence and require the imposition of a life sentence for David Pangburn.

CONCLUSION

Based on the foregoing arguments and authorities, Appellant respectfully requests that this Court reverse Appellant's convictions for first-degree murder and robbery with a firearm and remand for a new trial. Appellant further requests that this Court vacate the sentence of death imposed on Appellant and remand the proceedings for a new sentencing proceeding and/or to impose a sentence of life imprisonment on Count I.

Respectfully submitted,

Richard G. Bartmon
RICHARD G. BARTMON, ESQ.
Attorney for Appellant
Law Offices of Bartmon & Bartmon
1515 N. Federal Hwy.
Suite #300
Boca Raton, FL 33432
(407) 392-7782
Fla. Bar No: 337791

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Appellant's Initial Brief has been furnished by MAIL DELIVERY to: CELIA TERENZIO, ESQ., Florida Attorney General's Office, 1655 Palm Beach Lakes Blvd., Suite #300, West Palm Beach, FL 33401, this 25th day of October, 1994.

Richard G. Bartmon

RICHARD G. BARTMON, ESQ.

IN THE SUPREME COURT OF FLORIDA

DAVID PANGBURN,

Appellant,

vs. CASE NO: 81,650

STATE OF FLORIDA,

Appellee.

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APPELLANT'S APPENDIX

RICHARD G. BARTMON, ESQ.
ATTORNEY FOR APPELLANT
Law Offices of Bartmon & Bartmon
1515 N. Federal Hwy.
Suite #300
Boca Raton, FL 33432
(407) 392-7782
Fla. Bar No: 337791

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