IN THE SUPREME COURT OF FLORIDA

GUY GAMBLE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 82,334

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

GUY GAMBLE, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 82,334

STATEMENT OF THE CASE

On January 2, 1992, the grand jury in and for Lake County, Florida, returned its indictment charging Appellant, Guy Gamble, and the co-defendant, Michael Love, with one count of conspiracy to commit armed robbery in violation of Sections 777.04(3) and 812.13(2)(a), Florida Statutes (1991), one count of armed robbery in violation of Section 812.13(2)(a), Florida Statutes (1991), and one count of murder in the first degree in violation of Section 782.04(1)(a), Florida Statutes (1991). (R8-9) Appellant filed numerous pretrial motions directed towards the preclusion of certain evidence going before the jury and numerous motions attacking the constitutionality of the death penalty statute. (R102-103,104-106,114-135,136-139,140-144,145-153,154-160,161-178,179-180,181-183,191,192-199,220,221-222,223-224,225-229,230-236,237-239,240-288,289-292,293-296,297-299,300-303,304-323,324-327,328-329,330-331,332-333,335-338,339-340) On June 16th, 1993, a hearing was held on the majority of these

motions and rulings made. (R1870-2004) Appellant proceeded to jury trial on the charges on June 21 through 25, 1993, with the Honorable G. Richard Singeltary, Circuit Judge, presiding. (T1-1463) Following deliberations, the jury returned verdicts finding Appellant guilty as charged on all three counts. (T1462-1463; R437-439)

The penalty phase of Appellant's trial commenced June 28, 1993. (T1522-1869) Following deliberations, the jury returned an advisory recommendation by a vote of ten to two that Appellant be sentenced to death. (T1859; R462) Appellant filed a timely motion for new trial on July 2, 1993. (R466) Both the state and the defense presented memoranda in support of the appropriate penalty to be imposed. (R477-482,483-505) On August 10, 1993, Appellant again appeared before Judge Singeltary for sentencing. (T2005-2103) Judge Singeltary denied Appellant's motion for new trial. (T2086) Judge Singeltary imposed the death penalty for the murder conviction and sentenced Appellant to consecutive life imprisonment for the robbery conviction and a consecutive fifteen years in prison for the conspiracy conviction. (T2082; R541-553) Judge Singeltary filed a written order setting forth his reasoning for imposition of the death penalty. (R524-530)

Appellant filed a timely notice of appeal on September 2, 1993. (R573) Appellant was adjudged insolvent and the Office of the Public Defender was appointed to represent him on appeal. (R556-557,596)

STATEMENT OF THE FACTS

GUILT PHASE

Guy Gamble and Stacey Ash met in Indiana and started dating in June, 1991. (T975) In October, 1991, Appellant and Ash came to Florida. (T976) Arriving in Eustis, Florida, Appellant and Ash eventually moved in with Michael Love and Donna Yenger in an apartment they rented from Helmut Kuehl. (T757-758,976-977) Both Love and Appellant worked at Winn Dixie as part of the stock crew. (T758,898) During the time that they lived together, Love would purchase crack cocaine which they would all four use on a regular basis. (T760-762) This drug habit became quite expensive and Love had outstanding drug bills of $90.00 in addition to the $30.00 he had borrowed from Kuehl. (T806) Eventually, Appellant and Love decided that they needed money and planned to rob Kuehl. (T1206-1208) At some point, Appellant told Ash that he planned to "take out" Kuehl which Ash believed meant that he would kill him. (T980) However, Appellant stated that this meant only that they were going to tie up Kuehl and put him in a closet so that they could get away with the robbery. (T1283)

On Monday evening, December 9, 1991, Appellant told Stacey to pack their things because they were going to be leaving the next day. (T982) Appellant talked about going to Las Vegas or California. (T983) During that evening, Appellant was observed with a cord in his hand playing cat's cradle. (T985, 764) Appellant asked Ash to sit at the table and pretend to

write out a receipt and as she did he snuck up behind her and put a rope around her neck. (T986-988) Later while Ash was in the bathroom, Appellant again came up from behind and put the rope around her neck. (T989)

On Tuesday morning about 8:30 a.m., Appellant and Love went to Winn-Dixie to get their final paychecks. (T766,991,1213) When they returned, Kuehl was sitting outside the garage smoking a pipe. (T1214) Appellant and Love went into their apartment but then left again in about five minutes. (T766,993,1214) Love asked Appellant for some money to use to get Kuehl on the subject of rent. (T1215) When they got to the garage, Love asked Kuehl for a receipt for the rent. (T1215) Kuehl went up to his apartment, which was upstairs, to get some paper. (T1215,769, 994) While they waited for Kuehl to return, Love searched around for a weapon and picked up a claw hammer and set it on the counter. (T1215) Love told Appellant that when Kuehl returned Appellant should hit him with the hammer. (T1215-1216) After Appellant hit him, Love told Appellant "I'll do the rest." (T1216,1285) When Kuehl returned to the garage, Love had him come over to a table so that he could write out the receipt. (T1287) At Love's urging, Appellant picked up the hammer and hit Kuehl in the head from behind. (T1217,1287-1288) When Appellant hit him, Kuehl let out a loud moan and fell to the ground. (T771,995,1217,1289) Appellant got down on top of Kuehl to hold him down and told Love to shut the garage doors. (T1217,1290-1291) Love came over and picked up the hammer and started

hitting Kuehl repeatedly in the head with it. (T1217-1218,1291-1292) Finally, Appellant told Love to stop while Kuehl was still alive and to just tie him up. (T1218,1294) Appellant then gave the curtain cord to Love who proceeded to wrap it around Kuehl's throat. (T1218-1219,1296-1299) Appellant told Love that there was no reason to choke Kuehl since he was already unconscious and urged him to just leave him. (T1219,1240,1299) Love gave Appellant the hammer and rope and told him to dispose of them. (T1241,1299) Appellant wrapped the items in newspaper and left them on the floor. (T1299,1241) Love picked up another hammer and again hit the victim. (T1241) Love then went through Kuehl's pockets taking his wallet and his car keys. (T1299) Love cursed as he looked in Kuehl's wallet and found no money. (T1300) Appellant left the garage to return to his apartment leaving Love to close up the garage. (T1242) When Appellant returned to his apartment, he had blood on his hands and immediately went into the bathroom to wash them. (T773,997-998, 1242) As Appellant was finishing washing his hands, Love came in the apartment and since he also had blood on his hands he washed up in the kitchen. (T773-774,998-999,1242) Appellant and Love packed the car and they left. (T774,999-1002) As they drove away, Appellant started to look through Kuehl's wallet. (T777, 1003) Appellant found between $200.00 and $300.00 in cash and a blank check in the wallet. (T778,1004) Appellant also found a bank statement in the glove box which revealed that Kuehl had over $10,000.00 in his bank account. (T778,1004) When Appellant

discovered the statement, he wanted to return to Kuehl's apartment and look for more valuables but Love stated, "You never return to the scene of the crime." (T779,1006) Because Appellant had a fake I.D. in the name of Carlos Spriggs, it was decided that they would forge the check and then cash it. (T781-782,1006) They stopped at a Kentucky Fried Chicken to write out the check after which Love drove to a Barnett Bank. (T783,1010) Appellant went into the bank and was able to cash the check for $8,544.00. (T783,819-823,1010,1223) When Appellant returned to the car, he was quite excited and passed the money around for everyone to hold. (T784,1010) Love then continued driving until they got to Gulfport, Mississippi where they stopped and rented rooms at a Holiday Inn. (T785,853,1011,1228) Appellant gave each person $100.00 to go to Wal-Mart to purchase clothing. (T786,1012) They then stopped at a liquor store, bought some liquor and returned to the hotel. (T1012,1013) Appellant and Love went to the lounge while the girls remained in the room. (T789,1013) Appellant and Love went to purchase some crack cocaine after which they returned to the hotel and all four individuals smoked it. (T789,1013-1014,1228-1229) Appellant decided that evening that he would leave the rest of the group and checked out the bus schedules but found he could not catch a bus until the next morning. (T1232-1234) The next morning, Appellant got up and told Stacey that he was going to buy some cigarettes. (T1015,1234) After nearly an hour and a half passed, Love, Yenger, and Ash realized that Appellant was not

going to return. (T789-790,1015) Although Appellant stated that he only took about $700.00 and left the rest of the money in a dresser drawer, the other individuals never found any money. (T790,1015,1311) Love, Yenger and Ash took the clothes they had bought the previous evening back to Wal-Mart and got a refund. (T790,1017) The three of them then left Gulfport in Kuehl's car. (T790-791,1017) Stacey Ash parted company with Love and Yenger at a truck stop. (T791,1017) Before she left, Love told Ash that if she told the authorities he would come back and find her which Ash interpreted as a threat. (T1019)

Ash was able to obtain a ride to her home in Indiana. (T1020) On December 16, 1991, Ash went to the police in Indiana and talked to them about the incident. (T1021) She also gave the police Appellant's fake I.D. which he had left in Mississippi. (T1023)

Yenger and Love continued driving to Sioux Falls, South Dakota. (T791) On the evening of December 12, 1991, at approximately 11:30 p.m., Officer Jerome James of the Sioux Falls Police Department observed a vehicle traveling on the street with no headlights or taillights so he stopped the vehicle. (T624-627) When Officer James noticed an odor of intoxicants on the driver, he placed the driver in his police vehicle and ran a warrants check. (T627) The driver identified himself as Michael Love. (T628) When the dispatcher was unable to confirm whether there were any warrants, Officer James gave Love a warning ticket for driving with no headlights or taillights, told Love to park

the vehicle and to walk over to a nearby hotel where he could sleep off his drunk. (T629) When Officer James told Love he was giving him a break, Love assured him that he would not drive again. (T632) Officer James returned to the police station and, after approximately twenty to thirty minutes, returned to check on the car and again observed it traveling north without any headlights or taillights. (T634) Officer James again stopped the car which was being driven by Love and told Love he was issuing a citation to him for reckless driving. (T634) As Officer James waited for a warrants check, Love told him that there may be an outstanding warrant for burglary but that he had actually straightened it out with the State Attorney's Office. (T635-636) The warrants check revealed an outstanding warrant and Love was arrested. (T636) Later the car which was driven by Love was determined to be stolen. (T637)

Officer Harry Doremus of the Eustis Police Department received a teletype from the Sioux Falls Police Department at approximately 3:00 a.m. on the morning of December 13, 1991. (T646-647) Officer Doremus was instructed to go to 119 South Grove Street and to meet with Helmut Kuehl concerning a vehicle registered to him which had been seized in Sioux Falls, South Dakota. (T647) Officer Doremus knocked on the door and got a response from Brian Mahoney who lived in the downstairs apartment. (T648) Officer Doremus explained to Mahoney that he needed to contact Helmut Kuehl and Mahoney showed him access to Kuehl's apartment through his apartment. (T649) Officer Doremus

entered Kuehl's apartment and found everything to be in order but that Kuehl was not there. (T649) Officer Doremus observed a note on the table to Kuehl from a Jackie Mayberry stating that she was concerned and that he should call her immediately. (T650) Officer Doremus then checked the back shed area but found that both doors were locked. (T650) He also checked the downstairs rear apartment which appeared vacant. (T651) Officer Doremus took an address book from Kuehl's apartment and later contacted Kuehl's daughter to see if she knew where he was located. (T652) Later that morning, Officer Doremus returned to Kuehl's residence and again checked the shed area. (T654-655) When he looked in a window in the rear, Doremus observed two legs from the knees down. (T655) Doremus then used a crowbar to break the hasp on the door and went inside where he discovered the body of Helmut Kuehl. (T655)

Dr. Janet Pillow, a forensic pathologist, conducted an autopsy on the body of Helmut Kuehl. (T699-706) She observed multiple lacerations to the right side of the head, a thin abrasion or scratch running across the neck from behind the right ear and a gaping wound about one centimeter deep into the tissue on Kuehl's neck. (T705-706) There were a total of nine wounds to the right side of Kuehl's head. (T707) There was one large wound in the center which went all the way through to Kuehl's scalp. (T708) There were also skull fractures underneath the wound and brain tissue coming out of it. (T708) Kuehl also had a small laceration in the area of his left eyebrow which was

consistent with having falling onto the concrete. (T709) Dr. Pillow's opinion was that since there was very little bleeding around the neck wound, that it must have been inflicted either near death or after death. (T710-711) The cause of death was blunt head injury due to multiple blows to the head with a neck injury as a contributing factor. (T714) Any one of the blows to the head could have resulted in the victim losing consciousness at which point Kuehl would have felt no pain. (T723) Any one of the wounds could have killed Kuehl and Dr. Pillow testified that death probably occurred within minutes. (T724-726)

Sandra Thompson, a maid at the Holiday Inn in Gulfport, Mississippi, testified that on the afternoon of December 11, 1991, she was cleaning Rooms 228 and 230 and found two bags of clothing which apparently the occupants had left. (T836-838) She dated the bags and turned them over to housekeeping where they would be kept for ninety days in the event that someone requested their return. (T839-845) Officer Luanne O'Bannon of the Hairston County Sheriff's Department in Mississippi, pursuant to a request from the Eustis Police Department, went to the Holiday Inn in Gulfport and received two bags of clothing from the manager. (T851,860) After photographing the clothing, Officer O'Bannon shipped them to Eustis. (T869) When the clothes were received by the Eustis Police Department, Detective Hubbard forwarded them to the F.D.L.E. lab in Orlando for testing. (T922) Detective David Hubbard of the Eustis Police Department obtained blood samples from both Appellant and Michael

Love and sent these to the lab for DNA analysis. (T1059) He also obtained handwriting samples from both Appellant and Michael Love which he sent to the crime lab along with the check written on Helmut Kuehl's account for $8,544.00. (T1059-1061) When the canceled check was examined, it was determined that the face details of the check had been written by Michael Love. (T1144) The signature of Helmut Kuehl was simulated. (T1144) The analyst was unable to determine who wrote the Carlos Spriggs endorsement on the back of the check since the handwriting was different from the known samples of Michael Love, Appellant and Helmut Kuehl. (T1145)

Nancy Rathman, a forensic serologist with the F.D.L.E., testified that she examined tissue from Helmut Kuehl and did a DNA profile on it. (T1163) She then examined numerous items which had been sent to her including clothing and determined that the blood stains that she was able to type matched the blood profile of Helmut Kuehl. (T1164-1188) Additionally, the latent print examiner testified that he found three latent prints on the canceled check which matched Michael Love's fingerprints. (T1135)

PENALTY PHASE

Appellant's parents separated when he was 1½ years old. (T1606,1701) While he was growing up, Appellant bounced around from place to place and never had a stable home. (T1607-1610, 1632,1714) Appellant's mother was very strict with him and would punish him by spanking him and hitting him in the head. (T1659,

1677,1716) Appellant's father suffered from drug and alcohol addiction which often prevented him from exercising visitation with Appellant. (T1606) His father was not involved in Appellant's school activities. (T1607)

Once when Appellant was approximately six years of age, and during a company picnic, his half brother saw him lying under a beer truck catching beer that was dripping out. (T1650) Even at that early age, Appellant was drunk and everyone was laughing at him. (T1651) Appellant started drinking and abusing alcohol and drugs at approximately thirteen years of age. (T1608,1621) Appellant's mother used marijuana extensively and always had it in the house. (T1717-1725) Appellant used to steal her marijuana and diet pills. (T1704) After Appellant turned eighteen, Appellant's mother smoked marijuana with him. (T1717) As he was growing up, Appellant never felt like he was wanted. (T1623) Appellant and Lucinda Smethers were together for approximately three years during which time they had a baby together. (T1733) During this time, Smethers knew Appellant was using alcohol, cocaine, marijuana and crack cocaine. (T1733) Smethers is certain, however, that Appellant loves his daughter. (T1735)

While Appellant was incarcerated for the instant offense, Virginia Chapell, a nurse at the Lake County Jail, was summoned to his cell. (T1641-1642) Chapell encountered Appellant sitting on a table with his knees pulled up and his head between his knees. He was crying and his body was shaking

uncontrollably. (T1643) Appellant indicated to Chapell that he was contemplating suicide. (T1644) He expressed feelings of self-destruction and also told Chapell that he heard voices including that of the victim who was telling Appellant that he would have to pay for what he did. (T1644-1646) Since Appellant was already on medication, Chapell contacted the psychiatrist and got approval to increase the dosage. (T1644) Dr. Lowell Cunningham testified that he saw Appellant while he was in the Lake County Jail and observed significant depressive symptoms. (T1668) Dr. Cunningham prescribed anti-depressants for Appellant in an attempt to elevate his mood and to assist him in sleeping. (T1668) Dr. Cunningham felt that Appellant was suffering from clinical depression and also prescribed a tranquilizer for him. (T1669) Dr. Cunningham felt that Appellant was exhibiting schizo-affect disorder which prevented him from thinking clearly. (T1670)

While Appellant was growing up, there were two instances when he was sexually abused by male babysitters. (T1684-1685) Because of his father's drug problem, Appellant never really had a strong father figure in his life. (T1659) When his mother remarried, Appellant resented his stepfather and eventually the problems between the two caused Appellant to move out. (T1660,1681,1705)

SUMMARY OF THE ARGUMENTS

Point I: The trial court erred in finding that the murder of Helmut Kuehl was committed in a cold, calculated and premeditated manner. The evidence showed only that this was a planned robbery that got out of hand.

Point II: Appellant's death sentence must be vacated because it is disproportionate to other cases. The presence of the single aggravating factor of pecuniary gain is insufficient to support a death sentence particularly in light of the substantial amount of mitigation present.

Point III: Appellant's death sentence must be vacated because the trial court's denial of Appellant's special requested jury instructions in the penalty phase rendered the jury recommendation invalid.

Point IV: Florida's death penalty statute is unconsitutional.

ARGUMENT

POINT I

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPOSED THE DEATH PENALTY UPON AN ERRONEOUS FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

In sentencing Appellant to death, Judge Singeltary determined that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In support of this finding, the court stated:

> The victim was the Defendant's landlord. The Defendant knew that the victim liked woodworking and was often found in his converted garage practicing his hobby. The converted garage was located behind the main house which contained three apartments occupied by the victim, the Defendant and another individual not a party to this prosecution. The victim was known to keep rent money in his apartment, and had an almost new automobile.
>
> Approximately six days before the murder, the Defendant told his girlfriend that he planned to "take out" the victim and take his car. The Defendant's statement, taken after the murder and introduced at trial by the State, indicated that the Defendant only intended to rob the victim and render him unconscious.
>
> However, the evidence contradicts the Defendant's statement. On the day before the Murder, December 9, 1991, the Defendant prepared for a quick departure and told his girlfriend to get rid of personal belongings that they did not need. On that same day, the Defendant tore a window blind cord from a window in his apartment and practiced sneaking up behind his girlfriend and choking her. She was seated and pretended to be

> writing a receipt. That evening, the Defendant continued to play "cat's cradle" with the window cord.
>
> On December 10, 1991, the day of the murder, the Defendant and his co-defendant, Michael Love, picked up their paychecks at Winn Dixie and returned to the Defendant's apartment. The victim was woodworking in his converted garage behind the apartments. The Defendant retrieved the window cord and went to the garage with his accomplice. They entered on the pretense that they wished to pay their rent and wanted a receipt for payment. The victim left the garage, went to his apartment to get a receipt and returned to the garage to fill it out. While the victim was getting the receipt from his apartment, the Defendant located a claw hammer and positioned it for easy accessibility. When the victim returned he turned toward his work table to make out the receipt. At that moment, the Defendant struck the victim with the claw hammer. The blood stain pattern expert testified that the victim was struck at least three times before he hit the floor. According to the Defendant's statement given after the murder, the Defendant was the only person armed at that time. At or near the time of death, the Defendant and his accomplice strangled the victim with the window cord. The assistant medical examiner's examination concluded that there were 8 blows to the victim's head with a blunt instrument, consistent with a hammer. Any single blow was with such force that it could have been the fatal blow. The evidence is completely devoid of any moral or legal justification for murdering this innocent victim. This aggravating factor was proven beyond and to the exclusion of every reasonable doubt.

Appellant asserts that the facts do not support the application of this aggravating factor. Additionally, Appellant contends that no guidance was given to the jury as to how to interpret this aggravating factor and additionally, the trial court was without such guidance.

A. THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE IS INAPPLICABLE.

At least one commentator has exposed the inconsistency with which this Court has reviewed this aggravating circumstance. Kennedy, Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L. Rev. 47 (1987). It does appear, however, that the "cold, calculated, and premeditated" aggravating factor "is frequently and appropriately applied in cases of contract murder or execution style killings and 'emphasizes cold calculation before the murder itself'." Perry v. State, 522 So.2d 817 (Fla. 1988). See also Garron v. State, 528 So.2d 353 (Fla. 1988) (heightened premeditation aggravating factor was intended to apply to execution or contract-style killings). This Court has held that this factor requires proof of "a careful plan or prearranged design." Mitchell v. State, 527 So.2d 129 (Fla. 1988). While the heinous, atrocious and cruel factor focuses primarily on the suffering of the victim and the nature of the crime itself, the cold, calculated and premeditated factor focuses on the state of mind of the perpetrator. Mason v. State, 438 So.2d 374 (Fla. 1983); Michael v. State, 437 So.2d 138 (Fla. 1983). As stated in Preston v. State, 444 So.2d 939, 946 (Fla. 1984):

> [The cold, calculated, and premeditated] aggravating circumstance has been found when the facts are particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator. See, e.g., Jent v. State, (eyewitness related a particularly lengthy series of events which included

> beating, transporting, raping and setting victim on fire); Middleton v. State, 426 So.2d 548 (Fla. 1982) (defendant confessed he sat with the shotgun in his hands for an hour, looking at the victim as she slept and thinking about killing her); Bolender v. State, 422 So.2d 833 (Fla. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983) (defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died).

An intentional and deliberate killing during the commission of another felony does not necessarily qualify for the premeditation aggravating circumstance. Maxwell v. State, 443 So.2d 967 (Fla. 1983). However, where additional facts show greater planning prior to or during the killing, the homicide becomes "execution style." E.g., Routly v. State, 440 So.2d 1257 (Fla. 1983) (burglary victim bound and transported to a remote area before he was killed with a gunshot); Rose v. State, 472 So.2d 1155 (Fla. 1985) (defendant had to search for a concrete block, walk to the victim, and ask the victim to sit up and struck him six to eight times).

The facts set forth by the trial court in support of this aggravating factor show nothing more than a simple planned robbery. While it is true that Appellant had the cord with him, the testimony was that he intended to use this cord merely to render the victim unconscious. Significantly, the record is completely devoid of any plan to beat the victim. While there was evidence that Appellant stated that he was going to "take out" the victim, as the trial court recognized, this phrase is

susceptible to differing interpretations. It is wholly consistent with the theory that Appellant simply intended to render the victim unconscious so as to effect his getaway. The rope was going to be used to tie up the victim once again in an effort to disable him and permit his getaway. The record shows that Appellant believed that the victim was still alive when they left. Additionally, it is quite likely that Appellant administered only three blows to the victim and that the majority of the blows were administered by the codefendant, Michael Love. Appellant's testimony, which was the only testimony of someone who actually witnessed the events, was that Love repeatedly struck the victim with not only the claw hammer but a second hammer as well. Appellant testified that he urged Love to cease hitting the victim since he had already been rendered unconscious. Recently, in Vining v. State, Case Number 75,915 (Fla. April 28, 1994), this Court held that the cold, calculated and premeditated factor was improperly found in a robbery/murder situation. This Court noted that there was ample evidence to support simple premeditation, but insufficient evidence to support the heightened premeditation described in the statute which must bear the indicia of calculation. This Court continued that, "Although there is evidence that Vining calculated to unlawfully obtain the diamonds from Caruso, there is insufficient evidence of heightened premeditation to kill Caruso." Id., Slip Opinion Page 16. Similarly, in the instant case, there is ample evidence that Appellant had a premeditated plan to rob Mr. Kuehl.

However, there is insufficient evidence to prove, beyond a reasonable doubt, that Appellant possessed a cold calculated design to kill Mr. Kuehl. Thus, this Court must strike this aggravating factor.

B. THE JURY RECOMMENDATION IS UNRELIABLE BECAUSE INADEQUATE INSTRUCTION REGARDING THE COLD, CALCULATED AND PREMEDITATED CIRCUMSTANCE WERE GIVEN.

At the penalty phase, the trial court instructed the jury on just two aggravating factors, that the murder was for pecuniary gain, and that the murder was cold, calculated and premeditated. In so instructing the jury, the trial court used the standard jury instruction which basically stated, "The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." (R450; T1850) At the charge conference during the penalty phase, defense counsel objected to the trial court instructing on the aggravating circumstance of cold, calculated and premeditated. In so objecting, defense counsel argued that there was insufficient evidence of the heightened premeditation required for the application of this aggravating circumstance, but conceded that there was proof that the robbery was premeditated. In response to this argument, the state argued this Court's previous decision in Jackson v. State, 498 So.2d 406 (Fla. 1986). While not using any "magic words," Appellant contends that the argument of defense counsel below was in fact an objection to the trial court's instruction on cold, calculated and premeditated.

The sufficiency of defense counsel's objection becomes very important in light of the recent decision in Jackson v. State, 19 FLW S215 (Fla. April 21, 1994), wherein this Court found that the standard jury instruction (and the same one given at Appellant's trial) is unconstitutionally vague. After a decade of repeated rejections of this particular claim, this Court has finally conceded that the standard jury instruction on this circumstance is indeed unconstitutionally vague. This Court added:

> Claims that the instruction on the cold, calculated, and premeditated aggravator is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal.

Id. at S217. Appellant's objection was certainly specific enough to advise the trial court of the difficulty perceived by the defense counsel with regard to this aggravating factor. Therefore, Appellant contends that the issue is preserved for appeal.

Even if this Court finds Appellant's objection to be insufficient, he is still entitled to a new penalty phase. Certainly, after more than a decade of this Court repeatedly rejecting this particular issue, a trial attorney should have realized that raising the issue was an exercise in futility. Many defense lawyers rely on the past pronouncements of this Court on this and other issues to conclude that there is no point in raising an objection. Any subsequent change in the law certainly should be rectifiable in a post-conviction proceeding

by the unfortunate defendant whose lawyer decided not to interpose a "frivolous" objection. In light of the clear rejection of the argument that the jury instruction on cold, calculated and premeditated was unconstitutional by this Court, to require defense counsel to argue the issue to the trial court would be to require defense counsel to do a most futile and useless act. Williams v. State, 516 So.2d 975, 977 (Fla. 5th DCA 1987), review denied, 525 So.2d 881 (Fla. 1988). [Defense counsel not required to raise specific argument on motion for judgment of acquittal which had been recently rejected by the en banc decision of the district court of appeal].

The importance of deciding this issue on this direct appeal is apparent. The instant case involves one of the least aggravated murders. As argued previously, the facts do not support application of the cold, calculated and premeditated factor. For the sake of argument, the facts are at best marginal whether this aggravating factor can apply. With the unconstitutionally vague instruction given by the trial judge with regard to this aggravating circumstance, there is simply no way to know whether the jury would have found this factor to apply if properly instructed. As noted by this Court in Jackson, supra, most juries, untrained in the law, would consider every murder to be premeditated, calculated, and cold. Clearly, this is not enough. A jury must have further guidance in the form of an adequate instruction. Without this instruction the jury recommendation in the instant case is certainly suspect. Given

the paucity of evidence with regard to aggravating circumstances, it certainly cannot be deemed a legitimate trial tactic on the part of defense counsel to not request an expanded instruction. Consequently, should this Court affirm the death sentence herein, Appellant will have a very good claim of ineffective assistance of counsel and ultimately will receive a new penalty phase. Rather than unduly delay matters and cost the taxpayers exorbitant amounts of money, this Court should squarely deal with this issue and rule that the issue is preserved and thus, Appellant is entitled to a new penalty phase, or rule that, on the face of the record here, Appellant received ineffective assistance of counsel and remand for a new penalty phase. See generally Combs v. State, 403 So.2d 418, 422 (Fla. 1981).

POINT II

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In imposing the death penalty, Judge Singeltary found that the state had proved two aggravating circumstances, that the murder was committed for pecuniary gain and that the murder was committed in a cold, calculated and premeditated fashion. In mitigation the trial court found one statutory mitigating factor, the age of Appellant at the time of the murder and eight mitigating factors which were entitled to consideration. Of these mitigating factors, three were given substantial weight by the trial court. Appellant contends that the death penalty cannot stand since it is disproportionate to the crime and constitutes cruel and unusual punishment.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring), that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1, 17 (Fla. 1973), cert. denied sub nom., 416 U.S. 943 (1974). See also Coker v. Georgia, 433 U.S. 584 (1977) (the requirement that the death penalty be reserved for the most aggravated crimes is a fundamental axiom of Eighth Amendment jurisprudence). This

Court, unlike individual trial courts, reviews "each sentence of death issued in this state," Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), to "[g]uarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Dixon, 283 So.2d at 10, and to determine whether all the circumstances of the case at hand "warrant the imposition of our harshest penalty." Fitzpatrick, 527 So.2d at 812. Appellant's case is neither the "most aggravated" nor is it "unmitigated." Indeed, it is one of the least aggravated and one of the most mitigated of death sentences ever to reach this Court. The "high degree of certainty in ... substantive proportionality [which] must be maintained in order to ensure that the death penalty is administered even-handedly," Fitzpatrick, 527 So.2d at 811, is missing in this case, and the death penalty is plainly inappropriate on this record.

First, this case is not "the most aggravated." As argued previously, the aggravating factor of cold, calculated and premeditated cannot be sustained on the evidence before this Court. Thus, there is remaining a single aggravating circumstance, that this murder was done for pecuniary gain. If this Court sustains a death sentence on this single aggravating factor, particularly in light of the mitigating evidence present, the inescapable conclusion is that in every felony murder situation there is an automatic death penalty. Certainly, such a capital punishment scheme would not withstand constitutional muster. To the undersigned's knowledge, this Court has never

affirmed a death sentence where the sole aggravating factor was that the murder was committed for pecuniary gain. Research has revealed only a handful of cases wherein this Court has affirmed a death sentence based on a single valid aggravating circumstance. See Arango v. State, 411 So.2d 172 (Fla. 1982); Armstrong v. State, 399 So.2d 953 (Fla. 1981); LeDuc v. State, 365 So.2d 149 (Fla. 1978); Douglas v. State, 328 So.2d 18 (Fla. 1976); Gardner v. State, 313 So.2d 675 (Fla. 1975); and Duncan v. State, 619 So.2d 279 (Fla. 1993). In all but two of the previously-cited cases where death sentences based on a single, valid aggravating factor were affirmed, the crimes involved torture-murders. In Gardner, Douglas, and LeDuc nothing was found in mitigation by the trial court. In Arango the only mitigating factor was that Arango had no significant prior criminal history. In Armstrong (a non-torturous murder) this Court upheld one valid factor in aggravation but agreed with the trial court that there were no mitigating circumstances to weigh. Finally, in Duncan, the single aggravator was that the defendant had committed a previous murder and additionally this Court reversed the trial court's finding of mitigating factors. Appellant's case involves substantial mitigation that was actually accepted by the trial court and is entitled to substantial weight.

Second, this is not "the sort of 'unmitigated' case contemplated by this Court in Dixon." Fitzpatrick, 527 So.2d at 812. One statutory and seven nonstatutory mitigating

circumstances were discussed by the sentencing judge and were supported by abundant testimony. Of these mitigating factors, several were given substantial weight by the trial court. Without question, this case is not a proper one for capital punishment. It cannot be fairly compared with other cases reversed by this Court, because, as noted, none has ever been this mitigated and non-aggravated. A look at reversal on proportionality grounds does, however, reveal that since more aggravated and less mitigated cases then Appellant's are not proper for the ultimate penalty, surely Mr. Gamble must be spared.

In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), this Court accepted the sentencing judge's finding of five statutory aggravating circumstances, including those that showed culpable intent. Mr. Fitzpatrick had been convicted of the murder of a law enforcement officer. Mr. Fitzpatrick shot the officer while holding three persons hostage with a pistol in an office. Mr. Fitzpatrick had previously been convicted of violent felonies, a factor conspicuously absent in the instant case. Mr. Fitzpatrick established the existence of three statutory mitigating circumstances. Mr. Fitzpatrick's crime was significantly more aggravated than Appellant's, yet this Court found Fitzpatrick's actions to be "not those of a cold-blooded, heartless killer," since "the mitigation in this case is substantial." Id. at 812.

In Livingston v. State, 565 So.2d 1288 (Fla. 1988), the

defendant killed a store attendant, shooting her twice with a pistol during the commission of an armed robbery. This Court found that two aggravating circumstances (prior violent felony and felony murder), when compared to two mitigating circumstances (age and unfortunate home life), "does not warrant the death penalty." Id. at 1288. Of special importance to this Court in mitigation in Livingston is the offender's addiction to and/or intoxication from drugs or alcohol. This factor is also present in Appellant's case.

In Songer v. State, 544 So.2d 1010 (Fla. 1989), this Court reviewed a death penalty imposed by a trial judge based on one statutory aggravating factor, that the murder of a highway patrolman was committed while Songer was under the sentence of imprisonment. Due to the presence of several mitigating factors, this Court overturned the death sentence and remanded for imposition of a life sentence despite a jury recommendation of death. The reasoning of this Court is instructive:

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). To secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure the ultimate punishment is appropriate.
>
> Our customary process of finding similar cases for comparison is not necessary here because of the almost total lack of aggravation and the presence of significant mitigation. We have in the past affirmed death

> sentences that were supported by only one aggravating factor, (see, e.g., LeDuc v. State, 365 So.2d 149 (Fla. 1978), cert. denied, 434 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979), but those involved either nothing or very little in mitigation. Indeed, this case may represent the least aggravated and most mitigated case to undergo proportionality analysis.
>
> Even the gravity of the one aggravating factor is somewhat diminished by the fact that Songer did not break out of prison but merely walked away from a work-release job. In contrast, several of the mitigating circumstances are particularly compelling. It was unrebutted that Songer's reasoning ability was substantially impaired by his addiction to hard drugs. It is also apparent that his remorse is genuine.

Songer, 544 So.2d at 1011.

In Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988), this Court noted that, "Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Despite the presence of five statutory aggravating factors and three mitigating factors, Fitzpatrick's death sentence was reversed and the case remanded for imposition of a life sentence on the premise that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." Id. at 811. (Emphasis in original). Fitzpatrick equates with the instant case; neither is the most aggravated and unmitigated of serious crimes.

In Penn v. State, 574 So.2d 1079 (Fla. 1991), this

Court approved the trial court's finding that the murder was heinous, atrocious or cruel. In mitigation, the court found that Penn had no significant history of prior criminal activity and that he acted under the influence of extreme mental or emotional disturbance. This Court then concluded:

> Generally, when a trial court weighs improper aggravating factors against established mitigating factors, we remand for reweighing because we cannot know if the result would have been different absent the impermissible factors. Oats v. State, 446 So.2d 90 (Fla. 1984), receded from on other grounds, Preston v. State, 564 So.2d 120 (Fla. 1990). However, one of our functions "in reviewing a death sentence is to consider the circumstances in light of our other decisions and determine whether the death penalty is appropriate." Menendez v. State, 419 So.2d 312, 315 (Fla. 1982). On the circumstances of this case, including Penn's heavy drug use and his wife telling him that his mother stood in the way of their reconciliation, this is not one of the least mitigated and most aggravated murders. See State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Compare Smalley v. State, 546 So.2d 720 (Fla. 1989) (heinous, atrocious, cruel in aggravation; no prior history, extreme disturbance, extreme impairment in mitigation; Songer v. State, 544 So.2d 1010 (Fla. 1989) (under sentence of imprisonment in aggravation; extreme disturbance, substantial impairment, age in mitigation); Proffitt v. State, 510 So.2d 896 (Fla. 1987) (felony murder in aggravation; no prior history in mitigation); Blair v. State, 406 So.2d 1103 (Fla. 1981) (heinous, atrocious, cruel in aggravation; no prior history in mitigation). After conducting a proportionality review, we do not find the death sentence warranted in this

case.

Penn, 574 So.2d at 1083-1084. See also McKinney v. State, 579 So.2d 80 (Fla. 1981) [death sentence disproportionate given only one valid aggravator, and mitigation shows that defendant had no significant criminal history, had mental deficiencies, and alcohol and drug history].

Of considerable importance in the instant case is the disparate treatment between Appellant and Michael Love. After Appellant's penalty phase, the state struck a bargain with Michael Love, whereby they agreed not to seek the death penalty in return for Love's guilty pleas. Certainly, under normal circumstances, an accused is entitled to present evidence that a co-defendant received a sentence less than death. Messer v. State, 403 So.2d 341 (Fla. 1981). Because this deal was not struck at the time of Appellant's penalty phase Appellant was denied this right. Given the evidence in the record sub judice concerning Love's degree of participation, it is certainly possible, if not probable, that Appellant's jury, if they had known Love did not receive the death penalty, would have recommended life. This factor alone warrants reduction of Appellant's sentence.

A comparison of this case to those in which the death penalty has been affirmed leads to no other conclusion but that the death sentence must be reversed and the matter remanded for imposition of a life sentence. When compelling mitigation exists, such as that existing in this case, as found by the trial

judge, the death penalty is simply inappropriate under the standard previously set by this Court.

POINT III

IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S SPECIAL REQUESTED JURY INSTRUCTIONS IN THE PENALTY PHASE.

Appellant filed written requests for numerous special jury instructions at the penalty phase. (R409-416,443,460-461, 463) Appellant contends on appeal that the trial court committed reversible error in denying special requested instruction number 9 (R410), special instruction number 11B (R411-412), special instruction number 14 (R414), special instruction regarding nonstatutory mitigation (R415) and special instruction regarding mental impairment (R461).

Due process of law applies "with no less force at the penalty phase of the trial in a capital case" than at the guilt determining phase of any criminal trial. Presnell v. Georgia, 439 U.S. 14, 16-17 (1978). The need for adequate jury instructions to guide the recommendation in capital cases was expressly noticed in Gregg v. Georgia, 428 U.S. 153, 192-3 (1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law .... When erroneous instructions are given, retrial is

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

The instructions given in this case were far from adequate to avoid the constitutional infirmities that inhered in death sentences imposed under the pre-Furman statutes. Furman v. Georgia, 408 U.S. 238 (1972). Appellant's death sentence rests in part on the inadequately instructed jury's recommendation.

All of the rejected instructions recited in the preamble to this point were correct statements of the law and were directly applicable to Appellant's case. The standard instructions did not clearly tell the jury that even if an aggravating circumstance was proven beyond a reasonable doubt, that they were still entitled to recommend life imprisonment. [Instruction #9 and #14] The standard instructions failed to adequately define mitigating circumstances. [Instruction #11B and instruction on nonstatutory mitigation] Finally, the standard instructions which the spoke only to the statutory mental mitigators did not inform the jury that they could still find mental impairment in mitigation even if they did not conclude that such impairment was extreme. [Special instruction on mental impairment, (R461)] These instructions would have clarified vague and confusing standard jury instructions and also would have helped the jury in their analysis and weighing process.

Contrary to the trial court's assertion, the standard jury instructions did not cover most of the specially requested

instructions. Florida Rule of Criminal Procedure 3.390 provides that the presiding judge shall charge the jury upon the law of the case. Unfortunately, Appellant's jury was not adequately instructed. Hence, Appellant's death sentence is constitutionally infirm.

POINT IV

CONSTITUTIONALITY OF SECTION 921.141, FLORIDA STATUTES.

1. The Jury

a. Standard Jury Instructions

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

i. Cold, Calculated, and Premeditated

The same applies to the "cold, calculated, and premeditated" circumstance. The standard instruction simply tracks the statute.[1] Since the statutory language is subject to a variety of constructions, the absence of any clear standard instruction ensures arbitrary application. See Rogers v. State, 511 So.2d 526 (Fla. 1987) (condemning prior construction as too broad). Jurors are prone to similar errors. See Hodges v. Florida, 113 S.Ct. 33 (1992) (applying Espinosa to CCP and acknowledging flaws in CCP instruction). Since CCP is vague on its face, the instruction based on it also is too vague to provide the constitutionally required guidance. Jackson v. State, 19 FLW S215 (Fla. April 21, 1994). Any holding that jury instructions in Florida capital sentencing proceedings need not

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[1] The instruction is: "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification."

be definite, would directly conflict with the Cruel and Unusual Punishment Clauses of the state and federal constitutions. These clauses require accurate jury instructions during the sentencing phase of a capital case. Espinosa v. Florida, 112 S.Ct. 2926 (1992). The instruction also unconstitutionally relieves the state of its burden of proving the elements of the circumstance as defined by case law construing the "coldness," "calculated," "heightened premeditation," and "pretense" elements.

ii. Felony Murder

This circumstance fails to narrow the discretion of the sentencer and therefore violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions.

b. Majority Verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates the Due Process and the Cruel and Unusual Punishment Clauses. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate Due Process. See Johnson v. Louisiana, 406 U.S. 356 (1972), and Burch v. Louisiana, 441 U.S. 130 (1979). It stands to reason that the same principle applies to capital sentencing. Our statute is unconstitutional, because it authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six

must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates Due Process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. Only Florida allows a death penalty verdict by a bare majority.

c. Florida Allows an Element of the Crime to be Found by a Majority of the Jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. See State v. Dixon, 283 So.2d 1 (Fla. 1973). The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 490 U.S. 638 (1989).

d. Advisory Role

The standard instructions do not inform the jury of the great importance of its penalty verdict. The jury is told that their recommendation is given "great weight." But in violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320 (1985) the jury is told that its "recommendation" is just "advisory."

2. Counsel

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the

defendant has no say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

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

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

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

3. The Trial Judge

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

4. The Florida Judicial System

The sentencer was selected by a system designed to exclude African-Americans from participation as circuit judges,

contrary to the Equal Protection of the laws, the right to vote, Due Process of law, the prohibition against slavery, and the prohibition against cruel and unusual punishment.[2] Because Appellant was sentenced by a judge selected by a racially discriminatory system this Court must declare this system unconstitutional and vacate the penalty. When the decision maker in a criminal trial is purposefully selected on racial grounds, the right to a fair trial, Due Process and Equal Protection require that the conviction be reversed and the sentence vacated. See State v. Neil, 457 So.2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986); Swain v. Alabama, 380 U.S. 202 (1965). When racial discrimination trenches on the right to vote, it violates the Fifteenth Amendment as well.[3]

The election of circuit judges in circuit-wide races was first instituted in Florida in 1942.[4] Prior to that time, judges were selected by the governor and confirmed by the senate. 26 Fla.Stat. Ann. 609 (1970), Commentary. At-large election districts in Florida and elsewhere historically have been used to dilute the black voter strength. See Rogers v. Lodge, 458 U.S.

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

[3] The Fifteenth Amendment is enforced, in part, through the Voting Rights Act, Chapter 42 United States Code, Section 1973, et al.

[4] For a brief period, between 1865 and 1868, the state constitution, inasmuch as it was in effect, did provide for election of circuit judges.

613 (1982); Connor v. Finch, 431 U.S. 407 (1977); White v. Regester, 412 U.S. 755 (1973); McMillan v. Escambia County, Florida, 638 F.2d 1239, 1245-47 (5th Cir. 1981), modified 688 F.2d 960, 969 (5th Cir. 1982), vacated 466 U.S. 48, 104 S.Ct. 1577, on remand 748 F.2d 1037 (5th Cir. 1984).[5]

The history of elections of African-American circuit judges in Florida shows the system has purposefully excluded blacks from the bench. Florida as a whole has eleven African-American circuit judges, 2.8% of the 394 total circuit judgeships. See Young, Single Member Judicial Districts, Fair or Foul, Fla. Bar News, May 1, 1990 (hereinafter Single Member District). Florida's population is 14.95% black. County and City Data Book, 1988, United States Department of Commerce. In St. Lucie and Indian River Counties, there are circuit judgeships, none of whom are black. Single Member Districts, supra.

Florida's history of racially polarized voting, discrimination[6] and disenfranchisement,[7] and use of at-large

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[5] The Supreme Court vacated the decision because it appeared that the same result could be reached on non-constitutional grounds which did not require a finding of intentional discrimination; on remand, the Court of Appeals so held.

[6] See Davis v. State ex rel. Cromwell, 156 Fla. 181, 23 So.2d 85 (1945) (en banc) (striking white primaries).

[7] A telling example is set out in Justice Buford's concurring opinion in Watson v. Stone, 148 Fla. 516, 4 So.2d 700, 703 (1941) in which he remarked that the concealed firearm statute "was never intended to apply to the white population and in practice has never been so applied."

election systems to minimize the effect of the black vote shows that an invidious purpose stood behind the enactment of elections for circuit judges in Florida. See Rogers, 458 U.S. at 625-28. It also shows that an invidious purpose exists for maintaining this system in the Fifth Circuit. The results of choosing judges as a whole in Florida, establish a prima facie case of racial discrimination contrary to Equal Protection and Due Process in selection of the decision-makers in a criminal trial.[8] These results show discriminatory effect which, together with the history of racial bloc voting, segregated housing, and disenfranchisement in Florida, violate the right to vote as enforced by Chapter 42, United States Code, Section 1973. See Thornburg v. Gingles, 478 U.S. 30, 46-52 (1986). This discrimination also violates the heightened reliability and need for carefully channelled decision-making required by the freedom from cruel and unusual capital punishment. See Turner v. Murray, 476 U.S. 28 (1986); Beck v. Alabama, 447 U.S. 625 (1980). Florida allows just this kind of especially unreliable decision to be made by sentencers chosen in a racially discriminatory manner and the results of death-sentencing decisions show disparate impact on sentences. See Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.R. 27 (1984); see also,

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[8] The results in choosing judges in Citrus County (no black judges) and Marion County (no black circuit judges) is such stark discrimination as to show racist intent. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Radelet and Mello, Executing Those Who Kill Blacks: An Unusual Case Study, 37 Mercer L.R. 911, 912 n.4 (1986) (citing studies).

Because the selection of sentencers is racially discriminatory and leads to condemning men and women to die on racial factors, this Court must declare that system violates the Florida and Federal Constitutions. It must reverse the circuit court and remand for a new trial before a judge not so chosen, or impose a life sentence.

5. Appellate review

a. Proffitt

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

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

b. Aggravating Circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (Eighth Amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the

substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death-eligible persons, or channel discretion as required by Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

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

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts).[9]

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[9] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L.Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class

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

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[10] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. Appellate Reweighing

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So.2d 1200 (Fla. 1986).

d. Procedural Technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[11] See, e.g., Rutherford v. State, 545 So.2d

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of Death-Eligible Cases Without Making it Smaller, 13 Stetson L.Rev. 523 (1984).

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

[11] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review

853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of Eighth Amendment); and Smalley v. State, 546 So.2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated Eighth Amendment). Capricious use of retroactivity principles works similar mischief. In this regard, compare Gilliam v. State, 582 So.2d 610 (Fla. 1991) (Campbell[12] not retroactive) with Nibert v. State, 574 So.2d 1059 (Fla. 1990) (applying Campbell retroactively), Maxwell v. State, 603 So.2d 490 (Fla. 1992) (applying Campbell principles retroactively to post-conviction case, and Dailey v. State, 594 So.2d 254 (Fla. 1991) (requirement of considering all the mitigation in the record arises from much earlier decisions of the United States Supreme Court).

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[13] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven

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without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the special scope of review violates the Eighth Amendment under Proffitt.

[12] Campbell v. State, 571 So.2d 415 (Fla. 1991).

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

impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

6. Other Problems With the Statute

a. Lack of Special Verdicts

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

In effect, our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting a

similar Sixth Amendment argument).

b. No Power to Mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because Rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It also violates Equal Protection of the laws as an irrational distinction trenching on the fundamental right to live.

c. Florida Creates a Presumption of Death

Florida law creates a presumption of death where, but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case).[14] In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first-degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more

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

mitigating circumstances sufficient to outweigh the presumption.[15] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the United States Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to Due Process and the heightened Due Process requirements in a death-sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

d. Florida Unconstitutionally Instructs Juries Not To Consider Sympathy.

In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), reversed on procedural grounds sub nom. Saffle v. Parks, 494 U.S. 484 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violate the Lockett[16] principle. The Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987) (upholding constitutional instruction prohibiting consideration of mere sympathy), writing that sympathy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Parks, 860 F.2d at 1553. The instruction given in this case also states that sympathy

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

[16] Lockett v. Ohio, 438 U.S. 586 (1978).

should play no role in the process. The prosecutor below, like in Parks, argued that the jury should closely follow the law on finding mitigation. A jury would have believed in reasonable likelihood that much of the weight of the early life experiences of Appellant should be ignored. This instruction violated the Lockett[17] principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

e. Electrocution is Cruel and Unusual.

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

This unnecessary pain and anguish shows that

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[17] Lockett v. Ohio, 438 U.S. 586 (1978).

electrocution violates the Eighth Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977).

CONCLUSION

Based upon the foregoing cases, arguments, and policies, this Court is respectfully requested to vacate Appellant's death sentence and remand for imposition of a life sentence or, in the alternative, to remand for a new penalty phase.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 in his basket at the Fifth District Court of Appeal and mailed to Mr. Guy Gamble, #123096 (44-1232-A1), P.O. Box 221, Raiford, FL 32083 on this 4th day of May, 1994.

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