IN THE SUPREME COURT OF FLORIDA

KEVIN SINCLAIR,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 82,499
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D. E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

OTHER AUTHORITIES CITED:

TABLE OF CITATIONS (Continued)

IN THE SUPREME COURT OF FLORIDA

KEVIN SINCLAIR,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 82,499
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

Kevin Sinclair, hereinafter referred to as the appellant, was indicted for first degree murder from a premeditated design by the Brevard County Grand Jury on February 2, 1993. (R 1479) On February 11, 1993, the State motioned for an order directing production of blood samples of appellant. (R1492) On February 12, 1993, the court granted the order directing Appellant to provide blood samples. (R 1497)

Appellant filed motions attacking the constitutionality of the various aspects of Florida's capital sentencing scheme. (R 1545, 1551) Appellant also made a variety of other pretrial motions related to both substantive and procedural aspects of the capital trial.[1]

[1] Motion for Order Directing the State to Notify Accused Whether it Will Seek Death Penalty if Convicted of Murder in the First Degree (R 1519); Motion for Statement of Aggravating Circumstances (R1521); Motion For Statement of Particulars re:

Appellant filed a motion to suppress statements and admissions and a motion to suppress evidence. (R 1575, 1585, 1587) The motion was to suppress statements made by defendant obtained on the early morning hours of January 21, 1993. (R1585, R786), and a confession made the same day at the police station. (R1575, 811) The motions were denied and the interview at appellant's home was played to the jury. (R788) The defense also objected to the introduction of a fired 22 caliber shell found in Sinclair's bedroom on relevancy grounds. (R872) The defense also objected to the introduction of the victim's driver log for January 20, 1993 on the grounds that the document is hearsay. (R839)

The trial court entered an order appointing the HRS Diagnostic Team to determine whether appellant was mentally retarded and competent to proceed. (R1498) The trial court also entered an order appointing experts to determine competency. (R1502) A competency hearing was held On April 21, 1993. (S11) After reviewing the HRS report, and the reports of Dr. Ehrlich, Dr. Bernstein and Dr. Podnos, the court found that Kevin Sinclair did not fall within the definition of mental retardation as set

---

Aggravating Circumstances, The Reasons the Death Penalty is Sought, Theory of Prosecution Underlying Murder in the First Degree (R1525); Motion to Preclude First Degree Felony Murder (R1528); Motion for Voir Dire After Guilty Verdict (R1534); Motion For Recess of Trial Between Guilty Verdict and Penalty Phase (R1538); Motion For Individual and Sequestered Voir Dire (R1541); Motion for Separate Juries (R1547); Motion to Preclude the State Attorney From Seeking the Death Penalty (R1580); Motion For Determination of Whether Pursuit of Death Penalty is in Good Faith (R1582).

forth in Florida Statutes, and that Sinclair was competent to proceed. (S15)

One week before trial, appellant made a Motion to Continue which was denied. (R1347) The case proceeded to a jury trial on August 16, 1993. (R564) Before the jury was sworn and selection began, appellant renewed a Motion for Continuance. (R8)

At trial, the defense moved for a mistrial based upon a discovery violation. (R897, 898) The court then conducted a Richardson[2] hearing outside the presence of the jury. (R898, 912) The trial court determined that the violation was not wilful, and overruled the objection and denied the motion for mistrial. (R912) The defense objected to the expert testimony of FDLE Serologist, Lonnie Ginsburg, concerning DNA testing by Ginsburg of Sinclair's clothing. (R942) The trial court overruled the objection. (R944) The defense also objected to the testimony of Lloyd Lee concerning the habits of the victim. (R985) The court allowed the state to elicit testimony that the victim routinely carried unique denominations of money on his person. (R1011)

At the conclusion of the State's case-in-chief, Appellant's motion for judgment of acquittal and renewal of motions for mistrial were denied. (R1027,28) Appellant requested a modification of the standard jury instruction; the request was denied. (R1379) Based on improper comment by the prosecutor during final summation, Appellant objected and moved for a mistrial. The objection was overruled and the motion for

---

[2] Richardson v. State, 246 So.2d 771 (Fla. 1971)

mistrial denied. (R1415) Following deliberations, the jury found Appellant guilty as charged of first degree murder and armed robbery with a firearm. (R1465)

The penalty phase began on August 25, 1993. (S22, R1599) Following deliberations, the jury returned with an advisory verdict recommending the death sentence (11-1). (S256; R1780, 476) The trial court sentenced Appellant to death finding one aggravating circumstance, one statutory mitigating circumstance, and a number of non-statutory mitigating circumstances. (R538-543) Appellant filed a notice of appeal on September 30, 1993. (R1782) This Court has jurisdiction. Art. V, § 3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

On January 20, 1993, at approximately 1:00 pm Kristine Pellizze was awakened by a loud bang at her home on Wakefield Street in Palm Bay. (R618) The noise was from a taxi cab smashing into her garage door. (R628) She looked out her window and observed a yellow taxi cab roll back out of the street and on to the lot across the street. (R618, 19) Pellizze investigated further and observed a man slumped over in the driver's seat with his head hanging out the car window. (R620) Pellizze then called emergency 911. (R621)

Lieutenant Michael Marcinik, a paramedic with the Palm Bay Fire Department, responded to the scene. (R632, 634) He observed a yellow taxi cab with a person moving about in the front seat. (R635) The paramedics stabilized the patient and noticed that he had a hole about the right side of the head and suspected that he had been shot. (R638) Lieutenant Marcinik did not observe money or cash lying around the cab. (R639) He cut-off the patients clothes and left the clothes in the ambulance. (R642)

Officer Rebecca Smith was the first Palm Bay police officer on the scene. (R645) She surmised that the injuries to the victim were more severe than the damage to the vehicle and house, and called for Palm Bay detectives and evidence technicians. (R646) The Officer did not observe loose money around the crime scene. (R647) Detective Steven Russ and Detective Richard Woronka came to the scene as evidence

technicians. (R743, 853) Numerous pictures of the crime scene were taken by Detective Russ that were entered into evidence at trial. (R753) Detective Russ and Woronka also participated in a search for a weapon in the neighborhood that was unsuccessful. (R757, 868) Detective Woronka retrieved and inventoried Bartee's personal items at the hospital emergency room. (R867, 868) The Detective found a ten dollar bill and some change in Bartee's pants pocket, three two dollar bills in Bartee's wallet, and a silver dollar in Bartee's pocket. (R868)

Officer Smith advised the case agent Detective Bauman that a block from the crime scene on Wakefield was the prior home of Edrick Plain, a suspect in a previous crime. (R649) Detective Bauman contacted the cab company and determined that the victim had picked up a passenger on Gibbs Street in Melbourne shortly before being shot. (R777) During the course of the investigation Kevin Sinclair's name came up related to Edrick Plain. (R650) At 11:30 or 11:45pm Detective Bauman called Sinclair's home for an interview. (R783) Shortly after midnight, Detective Bauman and Detective Santiago came to Sinclair's home and conducted a audio taped interview. (R785) During the interview, Sinclair gave Bauman clothing that he wore that day. (R795) On his yellow shorts was a reddish-brown splattering consistent with blood. (R796) Sinclair explained that while he was walking home he fell and soiled his shorts. (R796) The detectives left the Sinclair residence stating that they may have to contact him again. (R798)

The following morning, Detective Bauman again returned

to the home of Kevin Sinclair and asked him if he was available to come to the police station for further questioning, and Sinclair agreed. (R798) At the police station, Detective Bauman advised Sinclair of his constitutional rights and then conducted a videotape interrogation. (R809) During the videotaped interrogation, Sinclair admitted that he accidentally shot Bartee. (R825) Detective Woronka subsequently obtained permission to search Sinclair's room and he recovered six .22 caliber shells, some shot and some unfired. (R870)

Edrick Plain testified that he knew Sinclair for two years before the shooting. (R711) Prior to the shooting, Plain stated that he lived at 1294 Wakefield with his parents for a year and a half. (R712) Plain also stated that Sinclair visited him at the house on Wakefield on more than one occasion. (R713)

The night before the shooting, Sinclair was at the home of a friend, Evette Busby. (R894) He complained to Busby that he was having money problems from taking money from his mother's bank account, and was looking to get money to replace the money he took. (R895) He discussed committing suicide. (R924) Sinclair also admitted to thinking about robbing a cab driver. (R896)

On the morning of the shooting, Sinclair was with Plain at the home of Evette Busby in Melbourne. (R715) Sinclair asked Plain if he could get a ride, and Plain called his parents to help, but the parents were not home. (R716) Plain stated that Sinclair may have gotten a cab. (R716)

Ronald Knight was the radio dispatcher for yellow cab that dispatched Bartee to south Melbourne at 12:36 pm on January 20, 1993. (R838) According to Knight, Bartee was dispatched to at least seven different runs starting at 5:30 am prior to the pickup at 1407 Gibbs. (R841) According to the driving log, Bartee collected over fifty dollars in cash before his last pickup on Gibbs. (R845) Lloyd Lee, was a cab driver that shared the victims cab. (R1011) Lee testified that the victim kept a lucky silver dollar and three two dollars bills in his wallet at all times. (R1011)

The afternoon of the shooting, Sinclair went to Barnett Bank with his mother to meet with Barnett Operations Manager, Crystal Sapp. (R980, 81) During the meeting, Sinclair admitted to removing money from his mother's savings account on two different occasions in the amount of two thousand dollars each time. (R982) After his arrest, Sinclair made calls to Evette Busby and Busby's mother Irene Wilson from jail. (R914, 923) To Busby he stated that "the gun went off." (R914) To Wilson he stated that "he pulled out a gun and he just shot." (R923)

Dr. Irvin Keller was the neurological surgeon at Holmes Hospital that treated the shooting victim, Clarence Bartee, in the emergency room. (R653) The Doctor observed a small wound in front of the right ear that had the appearance of a bullet entrance wound. (R654) From reviewing X-rays of the victim's head, the doctor concluded that there were bullet fragments and that the victim had been shot in the head. (R657) The victim

also had a severe laceration of the cheek tissue. (R658) Dr. Keller operated on the victim and removed a bullet fragment from his brain that was immediately turned over to Detective Woronka in the operating room. (R667, 855) After surgery, the victim's condition worsened. (R668) Five days after the surgery, the victim was declared brain dead, life support was terminated, and the victim expired. (R668-9) It was Dr. Keller's opinion that Mr. Bartee's cause of death was a single gunshot wound to the head. (R669, 672)

The Florida Department of Law Enforcement (FDLE) forensic serologist, Margaret Tabor, testified that she took blood samples from State Exhibit C (a pair of shorts) which were presumptive positive for blood (R887); State Exhibit D (purple shirt) which were presumptive positive for blood (R888); and State Exhibit E and H which were presumptive positive for blood. (R889) The samples were subsequently sent to Pensacola for further testing. (R889) The FDLE forensic serologist from Pensacola, Lonnie Ginsburg, testified that DNA taken from blood samples found on the defendant's clothing was consistent with the DNA found in the victim's blood. (R976, 977)

Dr. Dennis J. Wickham is the medical examiner and forensic pathologist that performed the autopsy of the victim. (R677, 681) The doctor identified two gunshot entrance wounds to the deceased victim's head. (R681) One wound was just right of the right eye. (R682) This wound had heat effect, a scant amount of gunshot residue, and stippling effect. (R682-84)

Stippling effect is a vital reaction which occurs when unspent and partially spent powder particles impact and scrape the surface of the skin. (R684) The second gunshot entrance wound was just in front of the right ear passing through the head and exiting the head. (R687) Based upon heat effect, residue and stripling the victim was shot from a range of less than twelve inches. (R696) In Dr. Wickham's opinion, the deceased died from multiple gunshot wounds to the head. (R698) Under cross-examination, Dr. Wickham admitted that he could not identify the caliber of bullet that caused either gunshot wound, nor did he examine the bullet fragment that was recovered from the victim's head. (R701) The doctor also admitted that the wounds were quite a bit different in shape and appearance. (R701) The wound near the ear was round and an eighth of an inch wide, and the wound underneath the eye was an inch and three quarters. (R701) The doctor stated that he could not determine whether the wounds were caused by the same caliber gun. (R702)

DEFENSE CASE

The defendant dropped out of school in the 11th grade to get a job. (R1030) He had been in the Slow Learning Disability program at school. (R1030) Defendant denied making any statements to his friend Evette Busby, or Samuel Lavender concerning the plan to rob a cab driver. (R1031,32)

The day of the shooting, Sinclair had breakfast at Evette Busby's house. (R1032) After breakfast, Sinclair needed to get home to accompany his mother for an appointment with the

bank. (R1033) The appointment with the bank was to investigate the withdrawal of funds from Sinclair's mother's savings account, and Sinclair admitted that he assisted his friends in withdrawing money from his mother's savings account. (R1033) Sinclair initially began walking home, but then called a cab. (R1034) Sinclair denied any plans to rob the cabdriver, and denied actually taking money from the cabdriver. (R1035)

Sinclair admitted that he had a gun the day of the shooting, and explained that he had obtained the gun a couple of months before for protection after receiving death threats. (R1035) Sinclair had been staying at Evette Busby's house, and had the gun with him to bring it back to his mother's house. (R1035) During the cab ride home, Sinclair decided that he was going to "run out," and had the cab driver take him to Wakefield Street to conceal where Sinclair actually lived. (R1037)

When the cab arrived at the Wakefield address, there was a cleanup crew there, and fearing that they would chase after him, told the cab driver to go around the corner and stop. (R1037) When the cabdriver put the car in park, Sinclair pulled the gun out by the barrel end, which caused the hammer of the gun to click back. (R1039) While exiting the vehicle with one hand, he moved the gun in his other hand from the barrel to the grip, he then used his shoulder to push open the door, and then his finger touched the trigger lightly, then the gun suddenly discharged. (R1039, 43) Sinclair denied ever consciously pointing the gun at the cabdriver, or saying anything at all to

the cabdriver. (R1040) Sinclair further stated that the gun fired only one time. (R1040) Sinclair also denied taking any money from the cabdriver. (R1044)

PENALTY PHASE

A. Aggravation.

The state called no witnesses or presented any further evidence of any statutory aggravating factors during the penalty phase. (S54)

B. MITIGATION

DEFENSE CASE

The defense first called Tamara Brookins. (S36) Brookins testified that she knew Kevin Sinclair socially through her boyfriend. (S40) She stated that she helped Sinclair get a job at Wendy's and filled out the employment application for him because he was "kind of slow." (S41) Brookins explained that Sinclair did not comprehend things well and that he stutters sometimes. (S41,42) Because of Sinclair's condition, he was the subject of ridicule, was routinely picked on, and was taken advantage of. (S42,43) Sinclair would avoid physical confrontation. (S42) Also, Sinclair would avoid guns. (S44)

Sinclair's house was shot into which scared him. (S44) He responded by avoiding home and getting a gun for protection. (S44) He also stated that he wanted to commit suicide. (S44)

Kevin Sinclair testified on his own behalf. (S54) He testified that he was eighteen years old with a date of birth of December 13, 1974. (S54,55) He lived with his mother in Palm

Bay, had no contact with his father or ever lived with him. (S55) Sinclair left school in the eleventh grade to get a job. (S56) While in school he was enrolled in the slow learning disability classes. (S58) Prior to the shooting, Sinclair was in the process of registering for school, and since being in jail is preparing to get his GED. (S56,57) Days before the shooting, Sinclair had been depressed and thought of suicide. (S66)

Sinclair denied ever intending to kill his victim. (S64) He called the cab to get home to his mother. (S65) Sinclair's mother had been arguing with him about where he had been for the past couple of days and that they had an appointment with the bank. (S65) As a result, Sinclair was nervous and scared. (S65) When calling for the cab, Sinclair admitted that he did not have the money to pay and intended to "run out" on the fare. (S67) He denied any intention of shooting or robbing the cab driver. (S67)

When the gun went off, Sinclair was scared began to cry and ran. (S68) Since the shooting Sinclair felt terrible and had prayed for the victim. (S68, 74) Also, Sinclair had nightmares and difficulty sleeping. (S68)

Daphney Re, Sinclair's mother, testified that Sinclair's father's showed no parental responsibility other than he gave Sinclair a bicycle. (S101) When Sinclair started school, his mother was told that Sinclair had a disability problem. (S101) Sinclair could not sit still and would always crawl on the floor and make funny sounds. (S101) Subsequent tests showed

that he needed special ed. and was enrolled in such classes ever since. (S101)

Sinclair and his mother moved to Palm Bay from New York three years before. (S104) Sinclair had problems adjusting to school in Florida. (S104) The teachers stated that Sinclair was "profoundly retarded." (S105) This had a bad effect on Sinclair and he was ashamed to go to school on the "small retarded bus." (S108) Sinclair was well behaved at home and respected his mother. (S107)

STATE REBUTTAL

Officer James O'Berne of the Melbourne Police Department testified that in July 1992 he pursued a blue Pontiac Firebird that had been reported stolen. (S156) The Pontiac had been occupied by three black males with Kevin Sinclair being seated in the backseat. (S156) The police pursuit lasted less than two minutes, and the car was later left abandoned with Sinclair and the others fleeing on foot. (S156) Sinclair was subsequently arrested at the scene for obstruction. (S158)

Sinclair's mother was called to testify. (S160) The day Sinclair got his license he took his mother's car out for a drive to show his friends. (S161) Not knowing that her son was using the car, Sinclair's mother called the police and reported her car stolen when she noticed that her car was missing. (S161) Sinclair's mother would have given permission to use the car if Sinclair had asked. (S162)

DEFENSE SURREBUTTAL

Sinclair testified that he had never been convicted of a crime. (S166) On cross-examination Sinclair stated that he agreed to go through a diversion program on the obstruction charge. (S167)

SUMMARY OF ARGUMENTS

POINT I: The trial court committed reversible error when it failed to conduct a full and complete Richardson hearing after requested by defense counsel.

POINT II: The trial court abused its discretion in denying appellant's Motion for Continuance of trial where initial counsel for appellant resigned from the Public Defender's Office effective one month before trial and subsequent counsel was not adequately prepared to try the case.

POINT III: The death sentence herein is disproportionate when compared with other capital cases where this Court has vacated the death sentence.

POINT IV: The trial court abused its discretion in determining that Sinclair's age of eighteen years at the time of the offense had little or no weight in mitigation of the instant offense where he based such determination on Sinclair's demeanor at trial and that Sinclair was "street-smart."

POINT V: Based upon this Court's review of prior decisions, the trial court erred where it failed to find that there was not sufficient evidence to support the statutory mitigating circumstance of no significant history of criminal activity where Sinclair had one prior misdemeanor arrest and had no prior convictions prior to the instant offense.

POINT VI: The trial court erred in refusing to suppress as evidence statements and clothing seized where appellant's consent to make a statement or search his residence

was involuntary.

POINT VII: Section 921.141, Florida Statutes is unconstitutional and therefore defendant's judgment and sentence must be reversed and remanded.

POINT I

THE TRIAL COURT ERRED WHEN IT FAILED TO CONDUCT A PROPER RICHARDSON HEARING AND THEN PERMITED THE INTRODUCTION OF STATEMENTS MADE BY SINCLAIR OVER OBJECTION.

The trial court erred in allowing witness Evette Busby to testify over objection to admissions against interest by the appellant. Rule 3.220(b)(1)(B), Florida Rules of Criminal Procedure requires that the prosecutor shall disclose the statement of any person whose name is furnished to the defense through discovery. The statement at issue occurred during the testimony of state witness Busby during direct examination:

> THE STATE: Just -- if you can limit it to what you heard the defendant say, okay, about what he was going to do about this monetary situation.
>
> BUSBY: He as trying to put it back. It was a situation where he was thinking about robbing a cab and--
>
> THE DEFENSE: Objection, your honor if we could approach? (R896)

The appellant contends that the trial court committed reversible error per se where it ruled that such a statement was admissible without prior disclosure and without conducting a full Richardson[3] hearing. The trial court began a Richardson inquiry and merely concluded that the discovery violation was not wilful, and ignored the issue of whether such discovery violation was willful or inadvertent, and whether the violation was prejudicial

[3] Richardson v. State, 246 So.2d 771 (Fla. 1971)

to the appellant.

RICHARDSON REQUIREMENTS

In State v. Hall, 509 So.2d 1093, 1096 (Fla. 1987) this Court held that:

> Richardson states that although the trial court has discretion in determining whether the state's noncompliance with the discovery rules resulted in harm or prejudice to the defendant, such discretion could be exercised only after the court made an adequate inquiry into all the surrounding circumstances. At a minimum the scope of the inquiry should cover such questions as to whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and, most importantly, whether the violation affected the defendant's ability to prepare for trial.

VIOLATION WILLFUL OR INADVERTENT

Concerning the issue of whether the discovery violation was willful or inadvertent the trial court held that the discovery violation was not willful. The appellant contends that the trial court's inquiry related to this issue was inadequate. Without fully questioning the witnesses to determine the circumstances surrounding the violation, the trial court summarily concluded the state would not do such a thing:

> I'm of the opinion that had Mr. Bausch been specifically told about the intent of the Defendant to rob a cab, that would have been something that probably would have stuck in his memory bank, he would have included that in the discovery. Clearly, that would be evidence that he would want to come out before this jury, and clearly he would know that if he willfully withheld that type of evidence that it would be excluded, and he could be facing a mistrial by not producing it....So I have to first conclude if there's

> been a discovery violation and then determine whether it has been willful or inadvertent. And if there was a discovery violation in this case, I cannot conclude that it was willful and, at best, that it was inadvertent... (R909-911)

The appellant contends that the trial court failed to make an adequate inquiry of Prosecutor Bausch and state witness Busby to make a determination of whether the discovery violation was willful or inadvertent. The trial court asked witness Busby whether she had disclosed the statement at issue to the prosecutor before trial wherein she replied that she told the prosecutor on the phone. (R903) The court asked Busby whether she could be mixed up, wherein she replied that she didn't think she was mistaken. (R905) Thereafter the state admits that the statement at issue was not provided to the defense. (R907) The court made no further inquiry of the state or Busby despite the following exchange:

> THE COURT: So there's nothing for me to believe that this information that was just related to him {the prosecution} by this witness today wasn't the first time that he heard it.
>
> BUSBY: It shouldn't be because I recall myself saying it --
>
> THE COURT: Ma'am, okay, we've talked now...
>
> (R909)

Appellant contends that the trial court's inquiry into the circumstances surrounding the violation to determine whether the state's conduct was willful or inadvertent was wholly inadequate. The trial court should have permitted witness Busby to testify to

what further recollections she had concerning the disclosure of the statement to the state. The failure of the court to adequately elicit the facts concerning this statement was an abuse of discretion by the trial court. As a result, the trial court's finding that the discovery violation was not willful was totally unreliable and therefore does not satisfy the requirements of Richardson.

VIOLATION TRIVIAL OR SUBSTANTIAL

The appellant contends that the trial court did not make a finding on the record as to whether the discovery violation was trivial or substantial. The appellant further contends that no other discovery violation could have been more substantial then the violation that occurred in the instant case. The state's theory of the case was that the appellant with premeditation and planning called a cab to commit robbery and murder. The evidence presented that there was a robbery was two-fold: the testimony of Evette Busby which is the subject of the discovery violation that Appellant told her that he planned to rob a cab driver; and two, circumstantial evidence that the victim performed a number of cab runs the day of the shooting and the likely fares collected were missing from the victim. Evette Busby's statement is likely the most substantial and significant piece of evidence of the whole trial concerning Sinclair's intent, and a discovery violation related thereto is therefore substantial.

VIOLATION AFFECTED ABILITY TO PREPARE FOR TRIAL

The appellant asserts that the trial court did not make an inquiry as to whether the discovery violation was prejudicial. In Thompson v. State, 565 So.2d 1311 (Fla. 1990) this Court detailed the proper inquiry by the trial court. This Court stated that the inquiry must focus on whether there was procedural rather than substantial prejudice. This Court further explained that this inquiry involves two aspects: "First, courts must determine whether the violation impaired the defendant's ability to prepare for trial." Thompson at 1316. Second:

> Once it has been ascertained whether the discovery violation hindered the defendant in his preparation for trial, the court must consider the nature of the violation in fixing upon a sanction. Prejudice may be averted through the simple expedient of a recess to permit the questioning or deposition of a witness.
>
> Thompson at 1317.

In the instant case a review of the Richardson hearing requested by defense shows no inquiry or finding by the trial court concerning whether the violation impaired the defendant's ability to prepare for trial.

In Jones v. State, 376 So.2d 437 (Fla. 1st DCA 1979) a new trial was ordered because the trial court failed to hold a Richardson inquiry with regard to an alleged discovery violation by the State. In Jones, supra, the State in response to discovery demand had indicated that the defendant had made no statement. At trial, the State, over objection of defense, was permitted to elicit testimony from a police officer concerning an

oral statement made by the defendant. In ordering a new trial, the court noted that the Richardson inquiry was inadequate since the circumstances establishing non-prejudice to the defendant did not appear affirmatively on the record.

The appellant argues that the failure of the trial court to make a full Richardson inquiry requires a new trial. This Court in Smith v. State, 372 So.2d 86 (Fla. 1979) held that the failure of a trial court to hold a Richardson hearing at the time the necessity arises is error and a post-trial Richardson inquiry cannot cure the error. In such cases a new trial is mandatory. Smith, supra; Zeigler v. State, 402 So.2d 365, 372 (Fla. 1981); Cooper v. State, 377 So.2d 1153, 1155 (Fla. 1979); Wilcox v. State, 367 So.2d 1020 (Fla. 1979); and Cumbie v. State, 345 So.2d 1061, 1062 (Fla. 1977).

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR CONTINUANCE OF TRIAL.

A week before trial appellant moved for continuance on the grounds that trial counsel for appellant, Susan Kraus, announced her resignation from the Public Defender's Office the month before. Kraus' replacement, Ernest Chang, was assigned to the case three weeks before and actually began preparation two weeks before. In addition, Ernest Chang had other scheduled matters and caseload that required near daily court appearances since July 19th, and the state had filed additional supplemental discovery that required evaluation and review. (R1589) Chang had only met with the appellant briefly one time. (R1304) The state performed DNA testing on evidence weeks before using a new technique that required time for appellant to review and evaluate. (R1306) Public Defender, Douglas Reynolds, had been assisting Kraus to learn about capital defense. (R1318) Reynolds was assisting Chang, but he had twenty-five sentencings scheduled over the next two days, a motion to suppress, a Williams Rule hearing for another capital trial, and six cases set for trial immediately following the instant case. (R1319)

After taking a short recess to consider the motion to continue, the trial court ruled as follows:

> I've considered the argument made for the continuance which I denied last week and the extended argument that was presented here today. I've also considered all of the other relevant aspects of this case, including the fact that the

> Defendant has been incarcerated for a long time now without a trial. And I have checked my schedule between now and the end of the year, and it is horrendous in terms of there's just no spot to put this case. And we also have a problem here with the courtrooms. And I've been trying to call around and see about the availability of courtrooms on times that would be available for me because our dockets continue, as we all know. And there just -- the times that are available to me, everyone seems to be occupying courtrooms already....
> The Court recognizes that it takes a lot of work to get one of these cases together.....I think it's a shame that you don't have the funds or whatever to afford to have a staff on hand that deals with these high profile type capital cases exclusively. That would -- that is something that I think that if it could be done -- I thought that you all did that because, in the past, it seems as though there were people that -- cases I have handled, that there were people that were sent down here that worked with one of the standard Public Defenders that I see every day on high profile cases. But anyway, that may not be the situation right now. That's the way it ought to be, I would think, because I recognize you all do have a lot of other work to do in just dealing with your other cases each day and it really is incredibly difficult. But I don't see that situation changing any either in terms of if we put it off to November....I'm compelled to continue on with this case and I'll deny the motion for continuance...So, Mr. Chang, you're just going to have to do the best you can with this case. (R1326-36)

The morning of trial Appellant again moved for a continuance on the grounds that the state furnished supplemental discovery three days before trial, to wit, an FDLE ballistics lab report that was in the state's possession since June 15th. (R9) The defense needed additional time to evaluate this development related to the state's theory that two gun shots were fired. (R9) The trial court denied the motion for continuance. (R35)

The trial court's ruling on a motion for continuance is addressed to the sound discretion of the trial court. Magill v. State, 386 So.2d 1188 (Fla. 1980). Moreover, the trial court's ruling will not be disturbed unless a palpable abuse of discretion is demonstrated to the reviewing court. Jent v. State, 408 So.2d 1024, 1028 (Fla. 1981). In the instant case, the denial of the motion for continuance was a palpable abuse of discretion.

Due process requires that the defendant must be given ample opportunity to prepare for trial. Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983); Harley v. State, 407 So.2d 382 (Fla. 1st DCA 1981); Lightsey v. State, 364 So.2d 72 (Fla. 2d DCA 1978); Sumbry v. State, 310 So.2d 445 (Fla. 2d DCA 1975); Hawkins v. State, 184 So.2d 46 (Fla. 1st DCA 1966). In the instant case, the State supplied defense counsel with new witnesses and new DNA and ballistics evidence days before trial. Personnel matters out of the control of Appellant resulted in counsel for appellant having weeks to prepare for trial while having a full felony case load and other capital cases to prepare. In the context of the capital case, defense counsel met his burden of showing that he had an inability to be prepared for trial, and evaluate DNA and ballistic evidence.

TIME CONSTRAINTS

In McKay v. State, 504 So.2d 1280 (Fla. 1st DCA 1986) the defendant appealed from a conviction and sentence for robbery with a firearm and aggravated assault. Prior to trial, McKay was

adjudged indigent and a public defender was appointed.

On Friday, November 22, 1985, prior to trial on Monday, November 25th, McKay retained private counsel who appeared before the court on the day of trial and requested a continuance to prepare for trial. The court denied the continuance but stated that he would permit private counsel to join the public defender as co-counsel. Counsel declined to do so and McKay proceeded to trial represented by the public defender. The jury returned a verdict of guilty on both counts. McKay argued that the trial court's denial of his motion for continuance prior to trial deprived him of his right to counsel of choice. The court held that:

> Thus, when a defendant asks for a continuance on the eve of trial in order to allow time for recently retained counsel to prepare, the court must balance that request against many other factors, such as those outlined in U.S. v. Uptain, 531 F.2d 1281 (5th Cir.1976).
>
> Factors to be considered in determining whether the denial of a continuance is error based on the lack of preparation time are: 1) the time available for preparation, 2) the likelihood of prejudice from the denial, 3) the defendant's role in shortening preparation time, 4) the complexity of the case, 5) the availability of discovery, 6) the adequacy of counsel actually provided and 7) the skill and experience of chosen counsel and his pre-retention experience with either the defendant or the alleged crime. Uptain at 1286-87.

TIME AVAILABLE

In the instant case, after initial counsel for appellant, Susan Kraus resigned from the public defender office, subsequent counsel, Ernest Chang, had less than a month

available to prepare for this case. Moreover, Chang retained his full felony docket with daily scheduled court appearances that narrowed his time available to actual hours for preparation.

LIKELIHOOD OF PREJUDICE

Appellant contends that having counsel on a capital case for only thirty days regardless of the preparation of previous counsel is per se prejudicial. Not only does new counsel have to absorb what had transpired over the previous months, they have to prepare a trial strategy (both guilt phase and penalty phase), prepare and evaluate subsequent developments, and build a rapport with the client. Thirty days is not sufficient time to have all of this performed competently while still maintaining a felony caseload.

DEFENDANT'S ROLE

In the instant case, Kevin Sinclair played no role in the change of counsel or the lack of time to prepare. Imagine the unsettling feeling it must of been where it is a week before trial and his trial counsel had only visited with him one time.

COMPLEXITY OF CASE

Death is different. Capital litigation is one of the most complex areas of the law. This Court has recognized that capital cases by their very nature are extraordinary and unusual. White v. Board of County Commissioners of Pinellas County, 537 So.2d 1356 (Fla. 1989).

ADEQUACY OF COUNSEL PROVIDED

This is difficult matter to weigh because the record is

silent as to what areas of the case (both guilt phase and penalty phase) could of or should have been developed had counsel more time to prepare. One area that stands out, however, is that the defense did not present any scientific evidence to explain their client's assertion that the gun was fired one time with two bullet wounds to the victim. Especially where in the first wound there was no bullet recovered and the second wound only a bullet fragment. Could there have been a bullet ricochet? A second area that stands out was the preparation and presentation of mitigation evidence.

SKILL OF COUNSEL AND RETENTION WITH CASE AND CLIENT

Mr. Chang is undoubtedly a skilled attorney. Regardless of his skill, less than thirty days with the case and a few hours with his client is not adequate time for the preparation and presentation of a capital case. Would anyone on this Court be comfortable with the counsel of their choice litigating a capital case with the time restraints and attorney/client contact of this case.

Using the McKay test above, this Court should find that the trial court concern over the orderly administration of the courts was outweighed by the due process rights of Kevin Sinclair where due to unique circumstances out of Sinclair's control, counsel for Sinclair did not have adequate time to prepare for trial.

DNA EVIDENCE

In Hill v. State, 535 So.2d 354 (Fla. 5th DCA 1988) the

trial court had denied a motion to continue where the defense sought a continuance to evaluate the state's newly furnished DNA test results and evaluate the recently deposed state DNA expert. Concerning the denial of the continuance the court held that:

> The denial of that motion for continuance was error because fairness, state and federal constitutional due process rights and the Florida Rules of Criminal Procedure require that witnesses be disclosed and made available to a defendant in a criminal case in sufficient time to permit a reasonable investigation regarding the proposed testimony. This is especially true in a case where innovative scientific evidence is the subject.
>
> Hill at 355.

In the instant case, the state had blood stains found on Sinclair's clothing tested for the DNA of the victim. The state expert performed the test weeks before trial and the expert and his results were available on the eve of trial. Under the facts of the instant case, the defense was not afforded a reasonable time to investigate the proposed testimony of the state DNA expert. This Court should find, as the court in Hill, that the denial of the motion to continue to provide a reasonable time investigate the findings of the state DNA expert was unfair and a violation of both federal and state Due Process, and the Florida Rules of Criminal Procedure and order a new trial.

BALLISTICS EXPERT

On the eve of trial, the state provided the ballistics report from the FDLE detailing that the one projectile removed by the surgeon in this case was a bullet fragment. The state had

the report in their possession for months before providing to the defense on the eve of trial. The defense moved for a continuance to determine whether it was possible for a bullet to split upon discharge therefore confirming Sinclair's claim that the gun was fired only one time. Defense counsel was not afforded adequate time to investigate this critical piece of evidence because of the conduct of state. See Richardson v. State, 604 So.2d 1107 (Fla. 1992). The trial court and no doubt the jury relied heavily on the state's circumstantial assertion that the victim was shot two times, to discredit Sinclair's claim that the shooting was accidental. The defense counsel was precluded from fully investigating the ballistic findings in this case to present scientific evidence consistent with their theory of the case.

For the reasons stated above, under the circumstances of this case the Appellant submits that the denial of the motion for continuance was a palpable abuse of discretion which violated Appellant's due process right to the benefit of counsel and the denial of his constitutional right to a fair trial. Under the circumstances of this case, the trial was so expeditious to deprive and effectively aid in the assistance of counsel. See White v. Ragan, 324 U.S. 760, 764, 65 S.Ct. 978, 980, 89 L.Ed. 1348, 1352 (1945); Harley v. State, supra, McKay v. State, supra.

POINT III

SINCLAIR'S DEATH SENTENCE IS DISPROPORTIONATE IN CONTRAVENTION OF HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THE TRIAL COURT IMPROPERLY WEIGHED THE MITIGATING CIRCUMSTANCES.

The trial court found only one aggravating circumstance, i.e., felony murder/pecuniary gain[4]. (1701) This circumstance is not especially compelling. Unfortunately today it is in fact rather ordinary, found in a large number, if not most murders. Against the backdrop of this routine aggravator, this Court must consider Kevin Sinclair's youth, his lack of a significant past criminal history, low intelligence, and having no father. The trial court found that, although not retarded, Sinclair has "dull normal intelligence." (R1711) According to the report of Dr. Howard R. Bernstein, appellant is functioning at 19th percentile which means that eighty percent of individuals his age have greater intellectual functioning then appellant. (See Court Exhibit #3) The trial court rejected the statutory mitigator concerning lack of significant criminal history which appellant disputes (See Point V). Assuming the statutory mitigator is not present, the fact that Sinclair had only one previous arrest before this incident is mitigating. Considering the spectrum of capital cases that this Court reviews, this case simply does not qualify as one warranting the imposition of the ultimate sanction.

---

[4] See Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988)

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), 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); See also Coker v. Georgia, 433 U.S. 584 (1977)[5] This Court reviews "each sentence of death issued in the state, " Fitzpatrick v. State, 427 So.2d 809, 811 (Fla. 1988), to "[g]uarantee that the reasons present in one case will reach similar result to that reached under similar circumstances in another case," Dixon, 283 So.2d at 10, and to determine whether all of the circumstances of the case at hand "warrant the imposition of our harshest penalty." Fitzpatrick, 527 So.2d at 812. Kevin Sinclair's case is neither "the most aggravated" nor "unmitigated."

Performing a proportionality review, this Court should strike Kevin Sinclair's death sentence. In Rembert v. State, 445 So.2d 337 (Fla. 1984) the Defendant was convicted of first-degree felony-murder and robbery. After drinking for part of the day and worrying about how to make his car payment, Rembert entered the victim's bait and tackle shop. He hit the elderly victim in the head once or twice with a club and took forty to sixty dollars from the victim's cash drawer. Shortly thereafter, a

---

[5] The requirement that the death penalty be reserved for the most aggravated crimes is a fundamental axiom of Eight Amendment jurisprudence.

neighbor entered the shop and found the victim on the floor, bleeding from his head. He died several hours later of severe injury to the brain. Rembert was charged with first-degree felony murder and robbery. The jury convicted him of both counts as charged and recommended the death sentence. The trial court sentenced Rembert to death for the murder and to life imprisonment for the robbery, but later deleted the sentence for robbery.

This Court found that one statutory aggravating factor had been established, ie, during commission of a felony. Rembert introduced a considerable amount of nonstatutory mitigating evidence, but the trial court chose to find that no mitigating circumstances had been established. This Court held:

> Given the facts and circumstances of this case, as compared with other first-degree murder cases, however, we find the death penalty to be unwarranted here.{Footnote} Compare Swan v. State, 322 So.2d 485 (Fla.1975). We therefore vacate the death sentence and remand for the trial court to impose a sentence of life imprisonment with no possibility of parole for twenty-five years. Rembert's convictions are affirmed.
>
> {Footnote} At oral argument the state conceded that in similar circumstances many people receive a less severe sentence.

Rembert at 340,341.

In Caruthers v. State, 465 So.2d 496 (Fla. 1985), a clerk at a convenience store was found lying motionless behind the counter, with the cash register open. Approximately $55 was missing. A white car with a dark top had been observed accelerating rapidly out of the store parking lot. An automobile

with a similar description had been reported stolen, and police investigation led to the stolen car, abandoned with the motor still running. Caruthers was subsequently arrested and confessed.

According to Caruthers, he had drunk a considerable amount of beer that day and after an outing with friends he decided to steal a car and drove to a friend's home and got a gun. He stated that someone had wanted him to shoot a big dog that bothered the children. Unable to find the dog, he went to the convenience store. He decided to rob the store and drew the gun on the victim. Caruthers stated that he had not wanted to hurt her, but that she jumped and he just started firing, shooting her three times. He was charged with premeditated and felony murder in the first degree, robbery with a firearm, theft of the car, and theft of the gun.

The jury found him guilty as charged on all counts. At the sentencing phase, several members of his family testified regarding his devotion to his younger brother, kindness toward others, parental love, church activities, and favorable school record. Appellant, age twenty-two at the time of the murder, also testified. It was established that his only previous conviction was for the misdemeanor of stealing a bicycle about a year earlier.

The jury recommended the death penalty, and the trial court imposed sentence in accordance with the jury's recommendation. This Court concluded that there was one valid

aggravating circumstance, that the murder was committed while the defendant was engaged in the commission of an armed robbery, and one statutory mitigating circumstance, no significant history of prior criminal activity, and several nonstatutory mitigating factors and held:

> Our review process in capital cases insures proportionality among death sentences, and it is an inherent part of our review, whether or not we mention the review process in our opinion or mention other capital cases. See Booker v. State, 441 So.2d 148 (Fla.1983); Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). We have conducted a proportionality comparison with other capital cases to determine whether death is the appropriate sentence in this case, and we find that it is not.
>
> Caruthers at 498.

In Proffitt v. State, 510 So.2d 896 (Fla. 1987) defendant was initially tried and convicted for first-degree murder and originally sentenced to death. The evidence at trial revealed that Proffitt, while burglarizing a house, killed an occupant with one stab wound to the chest while the victim was lying in bed.

The trial court resentenced Proffitt to death, finding the following aggravating circumstances: (1) the murder occurred during the commission of a felony (burglary), and (2) the murder was committed in a cold, calculated, and premeditated manner. In mitigation, the trial court found that Proffitt had no significant history of criminal activity, and recognized nonstatutory mitigating evidence from Proffitt's family, former

co-workers, religious advisers, and others.

Proffitt argued that the death sentence in his case was disproportionate. He claimed that this Court has never affirmed the death penalty for a homicide during a burglary unaccompanied by any additional acts of abuse or torture to the victim, where the defendant has no prior record of criminal or violent behavior. Moreover, Proffitt argued that this Court had consistently reversed death sentences in these types of felony murder cases with or without jury recommendations of life relying on Rembert v. State, 445 So.2d 337 (Fla. 1984); Richardson v. State, 437 So.2d 1091 (Fla. 1983); Menendez v. State, 368 So.2d 1278 (Fla. 1979).

In overturning Proffitt's death sentence this Court held:

> Here, not only is there no aggravating factor of prior convictions, but the trial judge expressly found that Proffitt's lack of any significant history of prior criminal activity or violent behavior were mitigating circumstances. Co-workers described Proffitt as nonviolent and happily married. He was employed at the time of the offense and was described as a good worker and responsible employee. This testimony was unrefuted. The record also reflects that Proffitt had been drinking; he made no statements on the night of the crime regarding any criminal intentions; there is no record that he possessed a weapon when he entered the premises; and the victim was stabbed only once. Additionally, following the crime, Proffitt made no attempt to inflict mortal injuries on the victim's wife, but immediately fled the apartment, returned home, confessed to his wife, and voluntarily surrendered to authorities. To hold, as argued by the state, that these circumstances justify the death penalty would mean that

> every murder during the course of a burglary justifies the imposition of the death penalty. We hold that our decisions in Rembert and Menendez require this Court to reduce the sentence to life imprisonment without the opportunity for parole for twenty-five years.
> Proffitt at 898.

In Lloyd v. State, 524 So.2d 396 (Fla. 1988) Defendant appealed his conviction of first-degree murder and sentence of death. In Lloyd, the victim was murdered in her home. The victim's five-year-old son, testified that he was in the garage when a man came to the door; that he went in the house and saw who was at the door and that the man had a beard and a mustache and was wearing driving glasses; that he was a guitar player and had a suitcase and a gun; that he told the child and his mother to go into the bathroom; that his mother got shot twice and that prior to her being shot the man told his mother to give him money; that his mother had her wallet out and tried to give the man money and a ring. The child stated that after the shots the man went outside.

During the penalty phase, appellant presented testimony from his wife, his nine-year-old daughter, and other family members that he was a good husband and father, and from an employer that he was a good, dependable worker. The trial court also found that Lloyd had no significant history of prior criminal activities. This Court concluded that the death sentence is supported by just one aggravating circumstance--that the murder was committed during the course of an attempted robbery--and one mitigating circumstance--that the appellant had

no significant history of prior criminal activities, and held:

> A review of our prior decisions requires us to conclude that the imposition of the death penalty on this record is proportionately incorrect, and, consequently, the death penalty must be vacated and a life sentence imposed. See Rembert v. State, 445 So.2d 337 (Fla.1984); see also Proffitt v. State, 510 So.2d 896 (Fla.1987); Swan v. State, 322 So.2d 485 (Fla.1975).
>
> Lloyd at 401.

In Clark v. State, 609 So.2d 513 (Fla. 1992) defendant appealed his conviction of first-degree murder and sentence of death. Clark traveled to Jacksonville to meet a friend who was working on a fishing boat. While visiting with the friend, Clark was introduced to another employee on the boat, Charles Carter, the victim in the case. Clark had previously tried to obtain a job on the boat, but was unsuccessful.

After drinking for a while on the boat and at a nearby lounge, Clark and his friend bought more beer, and continued drinking and riding around. Another friend joined the two men after their car got stuck on a dirt road, and the three returned to the fishing boat and drank more beer. The victim then joined the group, and stopped again to purchase beer. After driving around for a while, Clark stopped the car on a dirt road and stated that he needed to relieve himself. Everyone got out of the car. Clark exited the car with a sawed-off single-shot shotgun, pushed his friend out of the way, and shot Carter in the chest from a distance of about ten feet. Immediately thereafter, Clark reloaded the gun, approached Carter, and fired the fatal

shot into Carter's mouth from a distance of two or three feet. Clark then dragged the body to a ditch after removing Carter's wallet, money, and boots. The next day, Clark went to the fishing boat to claim Carter's job.

This Court upheld the aggravating circumstance that the murder was done for pecuniary gain. In mitigation, Clark presented evidence of his alcohol abuse and emotional disturbance, as well as his abused childhood. Much of this evidence was uncontroverted. The trial court acknowledged that the evidence showed that Clark was a disturbed person, that his judgment may have been impaired to some extent, that he drank an excessive amount of alcohol on the day of the murder, and that he was abused as a child. This Court held that:

> The death penalty is reserved for "the most aggravated and unmitigated of most serious crimes." Dixon, 283 So.2d at 7. Having found that only one valid aggravating circumstance exists, and having considered the mitigation established by the record, we find that this is not such a crime. The sentence of death in this case is disproportionate when compared with other capital cases where this Court has vacated the death sentence and imposed life imprisonment. See, e.g., McKinney v. State, 579 So.2d 80, 85 (Fla.1991); Caruthers v. State, 465 So.2d 496, 499 (Fla.1985); Rembert v. State, 445 So.2d 337, 340 (Fla.1984).

In McKinney v. State, 579 So.2d 80 (Fla. 1991) witnesses observed a black male wearing a red shirt dump a body from a white sedan into an alley and drive away. The victim told aid personnel that he was attacked while asking directions by a black male. Subsequent evidence showed that the victim was

missing nearly $10,000.00 dollars in cash, a rolex watch and wallet.

McKinney was subsequently questioned and gave various accounts for his presence at the victim's car. First he denied involvement, then blamed the shooting on others, confessed to the murder, then recanted stating that the confession was beat out of him by police. McKinney was convicted of first-degree murder, unlawful display of a firearm in the commission of a felony, armed robbery, armed kidnapping, armed burglary of a conveyance, and grand theft of an automobile.

This Court vacated the death sentence on proportionality grounds stating that:

> In light of the existence of only one valid aggravating circumstance, as well as the statutory and non-statutory mitigating evidence present here, the sentence of death is disproportional when compared with other capital cases where this Court has vacated the death sentence and imposed life imprisonment.
>
> McKinney at 85.

MITIGATION

Appellant argues that the facts surrounding the murder in the instant case are no more aggravated than in the series of cases listed above. Appellant further contends that there is as much if not more mitigation presented and found in the instant case than the series of cases listed above. For example, this Court should consider, unlike the trial court, the age of the Sinclair. The shooting occurred just over a month past his

eighteenth birthday. Days before the shooting Sinclair was emotionally upset and confided to friends that he was contemplating suicide. Sinclair was the subject of ridicule for having a stutter and being easily persuaded to do things. He was chastised for being enrolled in the special education classes and riding the "retarded bus" to school. For unknown reasons, he was being threatened by others and the home that he shared with his mother had received gunfire from an unknown person or persons.

The trial court concludes that the record failed to disclose any significant psychological problems existing at the time of the murder to reduce the defendant's chronological age. (R1709) The Court totally ignored the unrefuted testimony that Sinclair was suicidal immediately before the shooting. The trial court claims that Sinclair was "street smart," and in support of this conclusion makes the claim that Sinclair devised a plan to remove $4,000.00 from his mother's bank account. (R1709) This conclusion is totally unsupported by the evidence. The evidence was unrefuted that experienced "friends" planned the entire scheme and persuaded the unwitting Sinclair to participate by explaining that the money will be returned to the bank account because the bank made the mistake of giving the money to his friends.

Sinclair presented evidence of twelve mitigating circumstances:

(1) No prior significant history of criminal activity;
(2) The age of the Sinclair;
(3) Sinclair cooperated with police;

(4) Sinclair was remorseful;

(5) Sinclair has dull normal intelligence;

(6) Sinclair is rehabilitable.

(7) Sinclair was raised without a father or positive male role model.

(8) Sinclair has severe emotional problems.

(9) Sinclair is close to his mother.

(10) Sinclair has a speech impediment.

(11) Sinclair is polite and pleasant.

(12) Most of the statutory aggravators do not apply.

Although the state argued that two aggravating circumstances were applicable, the trial court found the existence of only one statutory aggravating factor, that being felony murder/pecuniary gain.

The trial court agreed that the evidence supported one statutory mitigating circumstance and several non-mitigating circumstances. The court found that Sinclair:

(1) Sinclair was 18 years old;

(2) Sinclair cooperated with police;

(3) Sinclair has dull normal intelligence;

(4) Sinclair was raised without a father or father figure or any positive role model;

(R1712,13) However, the trial court found that these elements in mitigation were entitled to little or no weight whatsoever. (R1713)

The Trial Court Improperly Rejected Unrefuted Statutory and Non-Statutory Mitigating Circumstances.[6]

Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence. Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988). In Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), this Court enunciated a three part test:

> [T]he trial court's first task....is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of the sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Id. Accord Campbell v. State, 571 So.2d 415, 419-20 (Fla. 1990); Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990); Hardwick, 521 So.2d at 1076.

In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court quoted prior federal and Florida decisions to remind trial courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982) and Rogers v. State, 511

---

[6] The discussion of the Statutory Mitigating Circumstances are presented in Point IV and V respectively.

So.2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or nonstatutory), the trial judge must find that mitigating factor. Although the relative weight given each factor is for the sentencer to decide, once a factor is reasonably established, it cannot be dismissed as having no weight. Campbell, 571 So.2d at 419-20.

In Nibert v. State, 574 So.2d 1059 (Fla. 1990), this Court held that, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. Nibert, 574 So.2d at 1066. A trial court may reject a mitigating circumstance as not proved, only where the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Kight v. State, 512 So.2d 922, 933 (Fla. 1987); Cook v. State, 542 So.2d 964, 971 (Fla. 1989) (trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance); see also Pardo v. State, 563 So.2d 77, 80 (Fla. 1990) (this Court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law).

In the instant case, the trial court improperly rejected that Sinclair was remorseful, that he is rehabilitable, that he had severe emotional problems at the time of the offense, and that he was a pleasant and polite person.

Remorse

Defendant broke down crying during his videotaped interview by Investigator Bauman. He testified that he prayed every night that the victim would not die. He also testified that he had nightmares every night about the incident and had trouble sleeping at night because the incident was always on his mind. He also testified that he was sorry for what he did and that he felt sorry for the victim's family. In the sentencing order, the trial court ignores this unrefuted evidence and summarily concludes that Sinclair was sorry that he was in the situation that he was in.

Rehabilitable

The trial court determined that Sinclair acted very maturely and spoke clearly and calmly on the witness stand. Defendant testified that since being incarcerated he has made a number of requests to get a G.E.D. program instituted in his cell. He also has visited the law library on numerous occasions and expressed an overall desire to better himself. This taken as a whole would support a finding that Sinclair is a candidate for rehabilitation.

Emotional Problems

The trial court in its sentencing order completely ignores the fact that school records indicate that Sinclair was placed in a program for the emotionally handicapped. The records also indicate that he has trouble dealing with stressful situations. The evidence showed that an unknown gunman had fired

a gun into his home. In the days leading up to the murder, the evidence was unrefuted that Sinclair was always scared, depressed and contemplated suicide.

Polite and Pleasant

This mitigating circumstance is supportive of the earlier contention that Sinclair is rehabilitable.

The trial court also failed to give adequate weight to the "cooperation with police" mitigating circumstance. The evidence is unrefuted that Sinclair consented to be interviewed by Investigator Bauman at this house the morning after the incident. He agreed to allow detectives to take the clothes he had been wearing at the time of the incident. Later that morning he accompanied Investigator Bauman to the Palm Bay Police Department for an interview that culminated in his confession. He accompanied law enforcement to the scene of the incident to do a videotaped re-enactment of the incident and the subsequent path he took to get back home.

Conclusion

To be sure, the instant case is not the most aggravated and least mitigated murder to come before this Court. On the contrary, this case is one of the least aggravated and more mitigated. The sentence of death in this case is disproportionate when compared with other capital cases where this Court has vacated the death sentence and imposed life imprisonment. When compelling mitigation exists such as that existing in this case, some of which was found by the trial

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

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION BY GIVING LITTLE WEIGHT TO THE STATUTORY MITIGATOR OF AGE AT THE TIME OF THE OFFENSE BASED ON APPELLANT'S DEMEANOR AT TRIAL AND HIS FINDING THAT APPELLANT WAS STREET SMART.

In the sentencing order, the trial court gave little weight to statutory mitigation of the age of the appellant at the time of the offense.[6] The reasons for determining that this statutory mitigator should be given little weight were:

1. The appellant's demeanor on the witness stand.
2. There were no significant emotional or psychological problems to reduce maturity level.
3. Appellant was "street smart" to devise a plan to remove $4,000.00 from mother's bank account.
4. Appellant was able to live in a high crime area without a job.
5. Devised and planned the crime in the instant case. (R1708,09)

The appellant asserts that the trial court abused its discretion in giving little weight to this statutory mitigator in view of the evidence presented at trial and in mitigation, and the improper consideration of evidence.

DEMEANOR OF APPELLANT AT TRIAL

The trial judge gave a lot of weight to his observations of the Sinclair at trial and his performance on the witness stand. Appellant asserts that it is improper for the trial court to consider such factors in assessing the propriety of this mitigator. First, at the time of the offense appellant was approximately 205 months old and at the time of sentence was

---

[6] Florida Statute 921.141(6)(g).

approximately 212 months old. The appellant aged more than 3 percent from the time of the offense and sentence. The appellant was not previously incarcerated and experienced more than six months in jail before trial -- an undoubtly somber and maturing experience. The courtroom is an extremely controlled environment and intimidating environment and the appellant was undoubtedly coached on how to behave in the courtroom and on the witness stand. For the factors listed above, this Court should discourage trial judges from using such subjective determinations based on circumstances that are far removed from the actual offense to be used as a tool to diminish the weight given statutory mitigation. It is ironic that the findings of the trial judge that the appellant was articulate, clear thinking and calm which would support the contention that the appellant was a good candidate for rehabilitation was used against the appellant to negate mitigation.

EMOTIONAL OR PSYCHOLOGICAL PROBLEMS

The trial judge determined that the appellant had no significant emotional of psychological problems at the time of the offense. This finding is contrary to the evidence. First, the testimony of appellant's mother that appellant had trouble adjusting to the move to Florida and was upset about going to school on the "retarded bus" was ignored by the trial court. Additionally, the unrefuted testimony of appellant's friend was that appellant was suicidal in the days leading up to the shooting.

"STREET SMART"

There was evidence introduced that on the day of the shooting, Sinclair had an appointment with his mother to visit the bank concerning missing bank deposits. The evidence was that appellant was "slow," easily influenced by others, and exploited by his peers. In fact, Sinclair needed assistance to fill out an employment application for a job at Wendy's. (S267) The evidence concerning the missing money at the bank was unrefuted that Sinclair did not have the mental ability to think of an idea like that. (S270) Nonetheless, the trial judge found that "Clearly, the defendant was "street smart" at the time of the crime. The defendant was able to devise a plan to remove $4,000.00 from his mother's bank account." This finding was not supported by the evidence, and made the weighing of the age mitigator unreliable.

LIVE IN HIGH CRIME AREA

There was no evidence presented whatsoever concerning Sinclair's neighborhood. Such a finding is not supported by the evidence and made the weighing of this statutory mitigator unreliable.

DEVISED THE CRIME HEREIN

Even taking all of the state evidence at face value, there was nothing complex about this crime. If the state's theory of the case is to be believed, this was an armed robbery gone bad made by a scared kid worrying about the coming confrontation with his mother that afternoon.

ARGUMENT

The appellant contends that when the accused is eighteen years one month at the time of the offense there is a presumption the statutory mitigator should be given great weight because society has a responsibility in overseeing the welfare of the young. In Ellis v. State, 622 So.2d 991 (Fla. 1993) this Court stated that it was gravely concerned over the inconsistencies upon which this statutory mitigator was being weighed for minors. This Court concluded that for minors the "mitigating factor of age must be found and weighed, but the weight can be diminished by other evidence showing unusual maturity." Ellis at 1001. Concerning the instant case, there is no immediate change in maturity on the eighteenth birthday. Likewise, to say that since 5 weeks passed since the time Sinclair was a minor and the instant offense this statutory mitigator should be considered any less is arbitrary and should be ignored. Appellant contends that under Ellis there is a strong presumption that the statutory mitigator is present and should be given weight. This mitigator should be given little weight only if the state provided ample competent evidence that Sinclair possessed unusual maturity at the time of the offense. A review of the trial judge's sentencing order above demonstrates that Sinclair was an average boy of dull intelligence, and that evidence of unusual maturity was absent. See Morgan v. State, 19 F.L.W. S290, 293 (Fla. June 24, 1994) The trial judge improperly weighed the mitigating factor herein and resulted in an

unreliable judgement and sentence, and this court should reverse the sentence of death and reduce the sentence of appellant to life.

POINT V

THE TRIAL COURT ERRED WHERE IT FAILED TO FIND STATUTORY MITIGATION OF NO SIGNIFICANT HISTORY OF CRIMINAL ACTIVITY WHERE SINCLAIR HAD ONE PRIOR MISDEMEANOR ARREST AND WAS NEVER CONVICTED OF A CRIME PRIOR TO THE INSTANT OFFENSE.

In the sentencing order, the trial court found that the statutory mitigating circumstance whether defendant has no significant history of prior criminal history[7] was not proven by the greater weight of the evidence. The appellant asserts that the trial court erred when it failed to find such mitigation where there was competent proof that such mitigation factor was present.

INTRODUCTION

This Court has recognized that trial judges experience difficulties in uniformly addressing mitigation evidence pursuant to the dictates of Eddings v. Oklahoma, 455 U.S. 104 (1982). In Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), this Court provided guidelines to clarify the issue. When addressing mitigating circumstances proposed by the defendant, the trial court must expressly evaluate in its written order each mitigating circumstance to determine whether it is supported by the evidence. Whether a mitigating circumstance has been reasonably established by the greater weight of the evidence is a question of fact. Campbell at 419 Like other questions of fact, the appellate court will presume that the finding is correct if

[7] Florida Statute 921.141 (6)(a).

supported by sufficient, competent evidence in the record. This Court applied and further synthesized the guidelines set forth in Campbell in Nibert v. State, 574 So.2d 1059 (Fla. 1990) This Court reiterated that a mitigating circumstance must be reasonably established by the greater weight of the evidence. Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. Nibert at 1062.

SENTENCING ORDER

In making the determination that Sinclair had no prior significant history of criminal activity, the trial court relied on the following factors:

1. Associated himself with known criminals.

2. Spent much of his time, day and night, in a high crime area of South Melbourne.

3. Numerous felonies, i.e. forgeries and uttering forgeries, in order to withdraw money from mother's account.

4. Carried a firearm in a concealed manner.

5. Apprehended by the police as he fled from a stolen police car.
(R1705.06)

There was no evidence of the first two factors presented at trial, and if such evidence was presented, it would not be competent evidence of significant criminal activity.

FORGERIES

The evidence is confusing as to whether there was any actual criminal activity involved in Sinclair's, along with friends, withdrawing funds from the bank. The evidence showed that a woman friend and another associate went to the bank to withdraw funds from a bank with the woman posing as Sinclair's mother. Sinclair supplied bank information to the others to perpetrate this activity and did not immediately tell his mother. However, the record also shows that this was a joint bank account of Sinclair and his mother. Appellant contends that since there is no evidence that Sinclair reported to the bank that the funds were stolen, or concealed this activity with his friends to the bank. Although Sinclair's actions showed flawed judgement and was not a nice thing to do, there was no competent evidence presented that there was any criminal activity involved.

CONCEALED FIREARM

The appellant concedes that appellant's admission that he procured a firearm for self-protection after his house was sprayed by gunfire by unknown gunmen, is competent evidence of criminal activity.

FLEEING FROM POLICE

The appellant concedes that appellant obstructed law enforcement when he fled from a stolen vehicle as a juvenile.

ARGUMENT

The trial court relied upon competent evidence of criminal activity to strike the no significant history of prior

criminal activity mitigating circumstance. To do so, the trial judge had to determine that Sinclair's prior criminal activity was "significant." The appellant argues that the trial court abused its discretion in determining that Sinclair's past criminal activity was significant based upon the ruling of other trial judges in other capital cases.

The following is a list, although not exhaustive, of cases where the defendant was found to have engaged in prior criminal activity, yet the statutory mitigating circumstance at issue was nonetheless found:

Peterka v. State, 19 F.L.W. S232 (Fla. April 21, 1994) where the defendant had two prior convictions for theft; obtained a handgun and drivers license by fraud; cashed in a $300.00 money order of a friend by taking the friends identification;

Stein v. State, 632 So.2d 1361 (Fla. 1994) where the defendant was carrying a concealed weapon at the time of his arrest;

Mordenti v. State, 630 So.2d 1080 (Fla. 1994) the trial court found no significant prior criminal history even though the defense did not request a jury instruction on the issue;

Trepal v. State, 621 So.2d 1361 (Fla. 1993) where defendant had a prior conviction for the illegal manufacture of amphetamines;

Valentine v. State, 616 So.2d 971 (Fla. 1993) where the defendant made threatening and harassing phone calls to his ex-wife before and after the murder;

Ponticelli v. State, 593 So.2d 483 (Fla. 1992) where the defendant was carrying a concealed firearm and engaged in drug activity prior to the murder;

Klokoc v. State, 589 So.2d 219 (Fla. 1991) this Court specifically upheld the trial court factual determination of no significant prior criminal history where defendant had committed repeated acts of violence (rape) against the wife and family, threatened to kill his son, bugged the house of a family member, and carried a concealed firearm;

McKinney v. State, 579 So.2d 80 (Fla. 1991) where there was a history of alcohol and drug abuse;

Penn v. State, 574 So.2d 1079 (Fla. 1991) this Court specifically upheld the trial court factual determination of no significant prior criminal history where defendant had convictions for traffic violations, passing worthless checks, grand theft and where there was a significant history of cocaine use; and,

Caruthers v. State, 465 So.2d 496 (Fla. 1985) where there was a prior conviction for theft.

One purpose of the review of capital cases by this Court is to maintain the orderly and uniform application of Florida's capital sentencing scheme. Dixon, supra Based upon the review of the past cases listed above it is clear that the trial court abused its discretion in rejecting the no prior significant history of criminal activity mitigating circum-

stance.[8] This abuse of discretion compromised the weighing of aggravating and mitigating circumstances and the finding that the sentence of death is proper is unreliable. This requires a new sentencing hearing.

---

[8] Appellant admits that the limited prior criminal activity of Sinclair could be weighted against the mitigating circumstance, but to find it did not exist is clearly error.

POINT VI

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS AS EVIDENCE STATEMENTS AND CLOTHING SEIZED WHERE APPELLANT'S CONSENT TO MAKE A STATEMENT OR SEARCH HIS RESIDENCE WAS INVOLUNTARY.

Facts

On January 20, 1993, Investigator Donald Bauman of the Palm Bay Police Department was returning from lunch when at about 1:00 pm he heard on the radio that there were units responding to Wakefield Street in reference to a taxi cab that struck a house. (R1346) After hearing that there was a possible shooting, Bauman responded to the scene to begin an investigation. (R1346) At the scene he conferred with Officer Rebecca Smith who informed him that it appeared that the cab driver had been shot. (R1347) Bauman called the taxi service to learn where the cab was heading for, and determined that the cab driver was dispatched to pickup a fare at 1407 Gibbs Street and to drive to 1294 Wakefield. (R1348) Bauman went to the 1294 Wakefield address and learned that the house was vacant but that a person named Edrick Plain had lived there the month before. (R1349)

Officer Rebecca recalled that there was criminal activity in the vicinity in the past, and Bauman looked up the report in the agency computer. (R1351) The report showed that Edrick Plain from Wakefield Drive, Kevin Sinclair who lived nearby on Raintree Street, and Samuel Lavender who lived at 1402 Gibbs Street were involved in the previous incident. (R1352) Investigator Bauman felt this was a good lead to followup.

(R1353) Bauman and Detective Santiago went to Gibbs Street and conducted a neighborhood canvass. (R1353) Bauman spoke to Yvette Busby who resided at the address were the cab came for the last pickup. (R1354)

Busby stated that she knew Plain, Sinclair and Lavender and that Sinclair had been staying at her house for the past couple of days. (R1354) Bauman the spoke to Busby's mother, Irene Wilson, who stated that Sinclair was looking for a ride home and that she had left him alone at the house at approximately 12:30pm. (R1355) After gathering further information on there leads, they went to Sam Lavender's house. (R1356) Lavender stated that he saw Sinclair outside Busby's house around noon. (R1358) While at the police station they received a call from Busby who stated that two individuals by the name of "Tony" and "Anthony" told her that earlier that day Sinclair was talking about calling a taxi cab robbing the driver. (R1358) They then questioned Terrance Rawls who stated that Sinclair was using a lot of cocaine and was talking about taking his own life. (R1360) While trying to gain further information about Tony and Anthony they decided to interview Sinclair. (R1361) Bauman called Sinclair's house and spoke to Sinclair's mother and explained that they were investigating a shooting of a cab driver and would like to ask Sinclair some questions which she agreed. (R1362)

Bauman and Detective Santiago along with five other investigators went out to the house. (R1364) The other officers

came for officer safety or backup and Bauman and Santiago wore bullet proof vests because they had evidence that linked Sinclair to the shooting. (R1364) Bauman knocked on the door and Sinclair's mother let Bauman and Santiago in. (R1365) Bauman thanked Sinclair and his mother for allowing them to come out at that time. (R1368) Bauman then had Sinclair fill out an interview form and tape recorded the interview. (R1368) Bauman did not give Sinclair his Miranda Rights. (R1369) After questioning, Bauman asked to see the clothing Sinclair was wearing. (R1369) Sinclair went to retrieve the clothing with Detective Santiago following him. (R1370) Sinclair produced a shirt and short that were soiled with a suspect stain. (R1371) Bauman asked if he could have the clothing for further examination which Sinclair agreed. (R1371) The Officers then left back to the station. (R1372)

Consent was not voluntary based on the totality of circumstances.

Where the validity of a confession and search rests on a consent, the State has the burden of proving the necessary consent was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority. Florida v. Royer, 460 U.S. 491, 497 (1983) In the case sub judice, Investigator Bauman testified that the Appellant showed no hesitation in signing an interview form and he didn't use any intimidation, harassment or threats to get him to sign it. (R1362) Appellant contends that this kind of conclusory testimony by Bauman is nothing more than a showing that Appellant

submitted to his showing of lawful authority.

A determination that consent was voluntarily given is a finding of fact to be made in light of all circumstances. It is a matter which the government has the burden of proving. United States v. Mendenhall, 446 U.S. 544, 557 (1980) The factors to aid in this determination include:

> 1. The voluntariness of the defendant's custodial status;
>
> 2. The presence of coercive police procedures;
>
> 3. The extent and level of the defendant's cooperation with the police;
>
> 4. The defendant's awareness to his right to refuse consent;
>
> 5. The defendant's education and intelligence; and
>
> 6. The defendant's belief that no incriminating evidence will be found.

United States v. Lopez, 911 F.2d 1006, 1010 (5th Cir. 1990). The court should further consider whether the person who consented was detained and questioned for a long or short time, was threatened physically, intimidated or punished by the police, or was in custody or under arrest when the consent was given. United State v. Chaidez, 906 F.2d 377, 380-381 (8th Cir. 1990).

Examining the totality of the circumstances, Appellant's consent to get his clothing was not voluntarily made. In the instant case, Sinclair was not given his Miranda rights and had been questioned by officers with bullet proof jackets.

Sinclair had just turned 18 years old and was of "dull normal intelligence." There was no inquiry by the detectives of Sinclair of whether he was under the influence of drugs or alcohol. Nor was there any inquiry as to his educational status or intelligence level. Moreover, the police likely had probable cause to arrest Sinclair at the time based upon the tip given by Yvette Busby, and Bauman admitted that at the time of the questioning Sinclair was the focus of the investigation.

The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation. As the United States Supreme Court observed in Florida v. Bostick, 501 U.S. 406, 410 (1991), the cramped confines of a bus are one relevant factor which should be considered in evaluating whether a passengers consent is voluntary. Undoubtedly, this Court could find that a young boy with a low IQ being directed by the officers and his mother was a coercive environment equal to an interrogation room of police headquarters. Finding that the consent was given in such a coercive environment in combination with the totality of other circumstances, this Court should conclude that the consent was involuntarily given and the evidence obtained therefor should have been suppressed.

POINT VII

CONSTITUTIONALITY OF SECTION 921.141, FLORIDA STATUTES.

1. The Jury

a. Standard Jury Instructions

Appellant made numerous requested changes to the Florida Standard Jury Instructions. (R 1835-1852) The trial court denied all requested changes. (R 1525) The Appellant submits that 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.

Felony Murder/Pecuniary Gain

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.

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.

b. 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. Rickets, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 490 U.S. 638 (1989).

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."

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.

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.

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.[10] 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 encroaches on the right to vote, it violates the Fifteenth Amendment as well.[11]

The election of circuit judges in circuit-wide races was first instituted in Florida in 1942.[12] Prior to that time,

---

[10] 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.

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

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

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. 613 (1982); Connor v. Finch, 431 U.S. 407 (1977); White v. Register, 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).[13]

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.

Florida's history of racially polarized voting, discrimination[14] and disenfranchisement,[15] and use of at-large

---

[13] 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.

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

[15] 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

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

---

in practice has never been so applied."

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.

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 gambit 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.

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).

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.[16] See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v.

---

[16] 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 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.

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 not retroactive) with Nibert v. State, 574 So.2d 1059 (Fla. 1990) (applying Campbell retroactively), Maxwell (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[17] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven 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

---

[17] 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.")

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 disfavor 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).[18] 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 mitigating circumstances sufficient to outweigh the presumption.[19] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the United States Constitution. See

---

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

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

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 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. Park, 860 F.2d at 1553. The instruction given in this case also states that sympathy should play no role in the process. 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 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 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 on the foregoing cases, argument and authorities, Appellant respectfully requests this Honorable Court:

as to Points I, II, VI and VII, reverse and remand for a new trial;

as to Points III, IV and V, vacate his judgment and sentence of death and impose a sentence of life.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D. E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

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. Kevin Sinclair, #123120 (42-2093-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 31st day of August, 1994.

GEORGE D. E. BURDEN
ASSISTANT PUBLIC DEFENDER