IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

BRODERICK WENDELL MONLYN,

Appellant,

v.

CASE NO. 82,779

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR MADISON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is a capital case. The record on appeal consists of twenty volumes, and references to it will be by the letter "T."

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Madison County on October 27, 1992 charged Broderick Monlyn with one count of first degree murder, one count of robbery with a deadly weapon, and one count of kidnaping while armed (R 2441-42). He pled not guilty to those charges, and the pretrial matters proceeded in the normal manner for cases of this type, except that the court moved the venue of the trial from Madison County to Lake City (T 2450, 2784)). Later, the defense or state filed the following motions or notices relevant to this appeal:

1. Notice of intent to offer evidence of other crimes, wrongs, or acts (T 2694).

2. Motion to Suppress Statements of Defendant (T 2739). Granted in part, denied in part (T 2739-38).

3. Special Jury Instructions Request (T 2964-66). Denied (T 2027-29).

4. Supplemental Request for Additional Jury Instruction (T 2971-72). Denied (T 2306).

5. Written Objection to Standard Jury Instruction on Aggravating Circumstance Heinous, Atrocious, or Cruel F.S. 921.414 (5)(h). (T 2973-76).

6. Defendant's Requested Penalty Phase Jury Instructions (T 2977-87).

Monlyn was tried before Judge Vernon Douglas, and the jury found him

guilty as charged on all counts (T 2967). After additional evidence, argument, and law, it also recommended, by a vote of 12-0, that he die (T 2970).

Following that recommendation, the court sentenced the defendant to death. Supporting that punishment, it found in aggravation:

> 1. Monlyn had a prior conviction for a violent felony.
>
> 2. He committed the murder during the course of a robbery or kidnaping.
>
> 3. The murder was committed for financial gain.
>
> 4. It was especially heinous, atrocious, or cruel.
>
> 5. It was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(T 3930-3035).

In mitigation, the court found none of the statutory mitigators, but concluded he was affectionate and considerate toward his family, was helpful to others, had made a good adjustment to prison, and had behaved well at trial (T 3038-40).

As to the robbery while armed with a deadly weapon and kidnaping while armed convictions, the court imposed consecutive life sentences (T 3041).

This appeal follows.

STATEMENT OF THE FACTS

Broderick Monlyn and his relatives had lived across the road in rural Madison County from the Alton Watson farm for years (T 827). Monlyn was a small man, about five feet, four inches tall and weighed 145 pounds (T 1463). Watson was 72 years old, but was five feet ten inches tall, weighed about 200 pounds and was strong (T 968, 1463). Monlyn had his own house, which was near one that his grandmother lived in (T 1116).

Now Monlyn liked to fish, and Watson had a pond on his property that the Defendant had from time to time taken some fish from (T 1004). One time, in 1990, about 18 months before the homicide, he and a cousin and a friend had trespassed on Watson's property and were enjoying passing the time at the small lake. Watson, however, interrupted their afternoon by driving up in a truck, getting out of the vehicle, telling the men to "Hold it right there," and brandishing a high powered rifle in their faces (T 1001, 1011). Monlyn had a pistol and as he reached for it he told his cousin he could have "gotten" Watson (T 1001). The other boy hit his hand, and the trio left. When they had gone about 75 yards and were off Watson's land, the defendant fired the gun several times in the air "towards" Watson (T 1003, 1021). He, in turn, squatted behind his truck and fired one shot towards them (T(1003).

Several months later, Monlyn and his cousin were in prison together. One day while they were talking, the defendant told him he was going to kill Watson (T 1009). Immediately before the homicide, Monlyn was in the Madison County jail, and he told another inmate he wanted to be out of jail for his birthday. He also would kill the first person he saw so he could get a ride (T 1059, 1092). He never said, however, that that person would be Alton Watson (T 1116).

The next day, October 6, 1992, he did escape from the jail with help from other inmates (T 1093). During the next couple of days, he apparently went to his grandmother's house, broke into his own to get some clothes and money (T 1452), and stole a shotgun from his uncle's truck to protect himself from animals (T 1431).[1] He stayed one night in Watson's barn because he had been told the police were looking for him and would be coming to his house (T 1453, 1456). At trial, one of his cousins related that Monlyn told him he was going to rob Watson of his truck and money and go to Mexico (T 1106). Monlyn said he never planned to rob anyone (T 1456).

He loitered about the area for a day and spent a second night in Watson's barn. Early on the morning of October 8, Watson came into it, and surprised

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[1] Monlyn either took or was given a sleeping bag, a sweatshirt, and a bedspread (T 845).

Monlyn as he was trying to leave (T 1459). The shotgun was propped near a wall, and both men saw it and grabbed for it (T 1461). They struggled over it with Watson shoving the smaller and lighter Monlyn about (T 1464). At this point he only wanted to leave, but Watson would not let go of him (T 1464). The gun then came apart as Watson was holding the defendant from behind. He grabbed him by the neck and was "slamming him around." (T 1469) Monlyn, by this time, had the barrel of the weapon and he began to swing the piece over his head, hitting Watson (T 1468). They struggled from the barn into the yard. By this time Watson was bleeding heavily and had stopped his attack on the defendant (T 1470). Monlyn tied his feet and hands together, gagged him, drug him into the barn, and left, taking his truck.[2] His wallet, with no money in it, was found near the body (T 836)

Watson had more than 30 wounds on his body, most about the face and upper torso (T 947). There were some "defensive" type injuries, but no stab wounds (T 948, 955).

The defendant took Watson's truck, drove through some fields, and finally

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[2] The medical examiner said he could not tell the orders of the blows and admitted there was no evidence Watson had been hit after being gagged (T 956, 970, 983-84).

got onto a road (T 835).

He abandoned the truck in Lake City, bought a bike, and ran into a girl friend there (T 1130, 1149). When asked about how much money he had, he said he had to "improvise" and that he had about $20 (T 1131). His friend let him stay at her trailer, but she called the police, who quickly responded (T 1137). They found him inside, in the bathroom (T 1160). When arrested he had $25. His hand was swollen, and he a cut on his forehead (T 1194).

Watson died as a result of wounds to his head.

SUMMARY OF THE ARGUMENTS

Monlyn presents this court with 13 issues for it to consider. The first 8 deal with the guilt phase portion of his trial, and the remaining five focus on matters relating to the court's death sentence.

ISSUE I. Dr. Floro, the medical examiner, said that Watson was alive after he had been tied up. "And there is no rhyme or reason for me or anybody else to tie up a person who is already dead or dying, unconscious. He's not fighting." The court allowed that testimony, but it was wrong in doing so because what this expert said exceeded the limits of his expertise, and was in any event, something the jury could just as easily concluded without any expert's help.

ISSUE II. Dr. Floro also said that he saw now evidence of a bite mark on Watson's body. When Monlyn testified, he said he had bitten the victim on the hand. The prosecutor asked the defendant for an explanation of the medical examiner's testimony refuting what he said. The court erred in allowing that testimony asking this defendant to explain why that expert might be wrong. Such inquiry only strongly suggested that Monlyn was lying.

ISSUE III. The state also asked Monlyn why he had denied knowing Watson when arrested and why he had not sought to get him aid after fleeing the latter's farm. The first inquiry was fairly susceptible of being interpreted as a comment

on the defendant's right to remain silent. The second presented the defendant as a remorseless killer, an issue of character he had not introduced and which the state could not also present to the jury.

ISSUE IV. As part of its case in chief, the state called the victim's wife to testify that Alton Watson habitually carried $200-$300 in cash on him. It provided no other evidence that on the day he was killed he had that amount of money in his wallet. While personal habits can confirm or support that in a particular instance a person had, for example, a large sum of money, it cannot by itself establish that fact. The court here erred in letting the state prove Mr. Watson had a large amount of money on him when he was killed by relying solely on his wife's testimony of his habit of doing so.

ISSUE V. During the state's closing argument, the prosecutor said Monlyn "would have done Alton Watson a big favor if he had shot him." By focussing on the pain the victim suffered, the prosecutor invited the jury to find the defendant guilty of first degree murder for emotional reasons rather than a dispassionate inquiry into the defendant's guilt.

ISSUE VI. Johnny Craddock testified for the state that before the murder, Monlyn had told him he wanted to get out of jail for his birthday, and he was going to kill the first person he saw. That statement had no probative value except to exhibit

the defendant's bad character, and the court should have excluded it.

ISSUE VII. Monlyn requested the court specifically instruct the jury on the concerning circumstantial evidence. The court, of course, rejected that request based on decisions from this court. Considering the special circumstances of this case that was error. When this court removed the circumstantial evidence instruction from the standard jury instructions it left to the trial court's discretion whether, in specific instances, it should be read to the jury. Here, the trial court abused that discretion in refusing to instruct the jury on this special type of evidence.

ISSUE VIII. The reasonable doubt instruction given, which was the one provided in the standard jury instructions, is unconstitutional because it provides an inadequate definition of reasonable doubt.

ISSUE IX. The trial court, over defense counsel's objection, instructed the jury on the cold, calculated, and premeditated aggravating factor using the instruction disproved by this court. That error became reversible error because the facts did not support giving it.

ISSUE X. The court found Monlyn committed the murder in a cold, calculated, and premeditated manner, but the facts support the equally plausible conclusion that Watson surprised Monlyn as the latter slept in his barn. During the ensuing

struggle over a shotgun, Monlyn got the upper hand, and killed Watson. Nothing showed any calm planning. Instead, the homicide was the result of this defendant's rage overcoming him.

ISSUE XI. Although the trial court gave the newest instruction on the heinous, atrocious, or cruel aggravator, the terms used to give that guidance suffer the same deficiency as those used in earlier, defective instructions. They lack any precise meaning.

ISSUE XII. While the court gave an instruction on mitigating evidence, it never defined what the jury could consider as such. That was error because, unlike aggravating factors, what the jury can consider to reduce a sentence of death is so broad and ill defined that the jury needs specific, special guidance about what it can consider in mitigating a capital sentence.

ISSUE XIII. Despite a defense request, the court refused to instruct the jury that could not consider separately the aggravating factors of pecuniary gain, and that the murder was committed during the course of a robbery. Well settled law prevents the court from doubling aggravating factors in sentencing a defendant to death. Recent recognition by the United States Supreme Court of the elevated importance of the jury's sentencing recommendation, suggest that the jury receive detailed instructions concerning that recommendation. That the court in this case

gave them no limiting guidance regarding the problem of doubling of aggravators was error.

ARGUMENT

ISSUE I

THE COURT ERRED IN ALLOWING THE MEDICAL EXAMINER TO TESTIFY THAT THE VICTIM SUFFERED MORE BLOWS TO THE HEAD AFTER HE HAD BEEN BOUND AND GAGGED AND WAS STILL ALIVE, A VIOLATION OF MONLYN'S SIXTH AND FOURTEENTH AMENDMENTS' RIGHTS.

Dr. Bonifacio Floro, the medical examiner, testified about the injuries Alton Watson received during his fight with Monlyn. As such his testimony was typical of that forensic experts give in murder cases.

The murder here, however, was somewhat different in that the victim had been bound hand and foot. Exploring the sequence of events during the struggle, the prosecutor asked:

> Q. Do you have an opinion as to whether or not the binding and the gags were inflicted before or after the infliction of other blows?
>
> A. Well, it must have been put there before the infliction of the other blows.
>
> Q. Why do you say that?
>
> A. Well, as I said, Mr. Watson died of several other blows to the head, and I don't know which came first. And there is no rhyme or reason for me or anybody else to tie up a person who is already dead or dying, unconscious. He's not fighting.

> MR. HUNT: I object to this testimony as being speculation, and it goes beyond his expertise as a medical doctor.
>
> MR. BLAIR: Of course, Your Honor, Dr. Floro is qualified as a forensic pathologist and not, per se, as a clinical pathologist, and he is entitled to express his opinion based on all of the evidence.
>
> MR. HUNT: But it amounts to an argument and speculation when he talks about "there's no rhyme or reason."
>
> THE COURT: I'll allow his testimony up to that point--or up to this point.

(T 956-57).

Monlyn's lawyer was correct. Dr. Floro's testimony exceeded the limits of his expertise, and the court erred in not sustaining his objection.

Experts, unlike routine witness called to testify at a trial, can offer an opinion regarding their examination of evidence relevant to their expertise. Section 90.702 Fla. Stats (1993). Section 90.702 allows such testimony when it helps or assists the jury resolve the issues before that body. Consequently, if the expert offers an opinion on matters outside of his area, it is inadmissible. Likewise, if the testimony does not assist the jury, or said otherwise, the jury can reach a conclusion without his or her opinion, such testimony is inadmissible. Johnson v. State, 393 So. 2d 1069 (Fla. 1980) (Factors affecting reliability of eye

witness identification are within understanding of average juror.)

In this case, Dr Floro's opinion that "there's no rhyme or reason for me or anybody else to tie up a person who is already dead or dying, unconscious." was a common sense conclusion the jury could well have reached without any prompting from this witness. It provided no assistance to the jury, in effect commenting on the defendant's mental state at the time of the homicide, an issue beyond this expert's specialty. Dr. Floro was qualified as an expert in forensic pathology. His expertise did not extend to probing the mind of Watson's assailant to determine his intent. Yet, that is what his testimony did. What the defendant thought or did not think when he tied Watson was beyond his expertise. See, Drew v. State, 551 So. 2d 563 (Fla. 4th DCA 1989)(Defense expert's testimony about the purpose Drew entered victim's home and fired gun was inadmissible.)

The testimony was also inadmissible because the jury just as easily could have reached that conclusion without his assistance. See, Johnson, cited above. In Shaw v. State, 557 So. 2d 77 (Fla. 1st DCA 1990), the First District Court of Appeal held that the trial court had erred (though harmlessly) in allowing a pathologist give his expert testimony that "the deceased was not engaged in a struggle immediately prior to her death." While that is the extent of the appellate court's holding, we can glean from it that opinions by medical experts about

matters which require no special talents in understanding and interpreting facts should be prohibited. Instead, the jury, composed of men and women from the community and usually experienced in drawing conclusions from facts and inferences from them, can as easily and probably with greater accuracy, make the appropriate conclusions. They do not need an expert to prod them along or suggest a conclusion that has "no rhyme or reason" to the contrary.

Floro's testimony not only was error, it was reversible error. The only question the jury had to resolve was Monlyn's intent when he killed Watson. The jury could have believed the victim surprised him and a struggle over the shotgun ensued. Dr. Floro's inadmissible testimony, however, would have supported the state's contention that the resulting homicide was premeditated rather than the act of a depraved mind, as Monlyn argued. His testimony could have affected the jury's deliberations, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), and this court cannot say with easy confidence that the court's error in admitting this expert's testimony had no affect on the jury's verdict.

This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE II

THE COURT ERRED IN OVERRULING MONLYN'S OBJECTION TO THE PROSECUTOR ASKING THE DEFENDANT ON CROSS-EXAMINATION IF THE MEDICAL EXAMINER WAS CORRECT IN THAT HE SAW NO EVIDENCE OF A BITE MARK ON THE VICTIM'S HAND, CONTRARY TO WHAT MONLYN SAID, A VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

During Dr. Floro's testimony, the state asked its witness "Did you find any evidence, Dr. Floro, of wounds caused by anything other than blunt trauma; for example stab wounds or bites or anything of that nature?" "No sir." "All of the wounds that you observed, then, were consistent with blunt trauma injury inflicted by that weapon?" "That's correct, sir." (T 955)

Later, Monlyn took the stand, and when the prosecutor examined him, he asked about a bite mark:

> Q. Did you bite him?
>
> A. As hard as I can.
>
> Q. Now, you heard the medical examiner, Dr. Floro, say that he didn't see any evidence of bite marks or other--
>
> MR. HUNT: Judge, I'm going to object, and I'd like to approach the bench. . . . Judge, my objection is that Dr. Floro, to my recollection, never said one way or the other whether there were bite marks on him. He didn't testify there was; however, he did not testify there wasn't.

wasn't.

MR. BLAIR: Judge, I phrased the question because I had access to the defendant's statement. I knew what he said. I asked Dr. Floro, "Did you see evidence of any other trauma, such as bites or cuts, or anything other than blunt-force trauma," is the way I phrased it. But in my question was bite mark.

MR. HUNT: Well, if he wants to ask him whether he bit him, that's fine. But I don't think it's proper to ask him what somebody else is talking about The jury heard the testimony. What was said was said. But to try to repeat Dr. Floro's testimony in the form of a question is wrong.
. . .

MR. BLAIR: I think it's entirely proper to ask him if he has an explanation as to why there might not have been a bite mark on him at the time of the autopsy.

(T 1555).

After further argument, the court allowed the inquiry (T 1556).

Q. You heard Dr. Floro, the medical examiner, when he testified?

A. Yes.

Q. Do you recall hearing him say anything about any bite marks?

A. Yes, I remember him saying it.

Q. And what he said was he didn't see any evidence of bite marks.

A. Yes.

Q. Is that right?

A. Yes.

Q. Do you have an explanation as to why or how you could bite Mr. Watson hard enough that he is going to drop this barrel--

A. There was--

Q. -- and not leave any evidence of it?

A. Well, there was a mark on his hand. I saw that. I saw a mark on his hand. . . .

Q. But you heard Dr. Floro say there was no evidence of bit marks.

A. Yes, I heard that.

Q. And your explanation to that would be that Dr. Floro saw something, but did not think it was a bite mark?

A. I don't know what my explanation is. I don't have one. But I know I bit him on the hand that morning.

(T 1557-58).

The court erred in allowing the state to extensively question Monlyn about the bite mark and why Dr. Floro had not found it. Such a mistake unfairly contributed to this defendant's convictions.

The law in this area and its rationale was nicely articulated by the Fourth

District Court of Appeals' opinion in Boatwright v. State, 452 So. 2d 666 (Fla. 4th DCA 1984):

> Then, over defense objection, the prosecutor asked the witness whether each of the earlier witnesses had been lying. This effort to isolate and thereby discredit the witness is improper for a number of reasons. It is elemental in our system of jurisprudence that the jury is the sole arbiter of the credibility of witnesses. Barnes v. State, 93 So. 2d 863 (Fla.1957). Thus, it is an invasion of the jury's exclusive province for one witness to offer his personal view on the credibility of a fellow witness. Bowles v. State, 381 So. 2d 326 (Fla. 5th DCA 1980). Moreover, the fact that two witnesses disagree does not necessarily establish that one is lying. Lying is the making of a false statement with intent to deceive. Absent some evidence showing that the witness is privy to the thought processes of the other, the first witness is not competent to pass on the other's state of mind.

Id. at p. 668. Accord, Duarte v. State, 598 So. 2d 270 (Fla. 3d DCA 1992).

Echoing the Fourth District's reasoning in Boatwright, this court in Knowles v. State, 632 So. 2d 62 (Fla. 1993) held that the trial court erred in allowing the prosecutor to ask the defendant whether he thought two state's witnesses were lying. They claimed Knowles said he would give his father a surprise one day, and that he would begin shooting people in the trailer park where he live. Because Knowles could not remember making those statements, this court found the questions and answers harmless. "Because the improper questioning concerning

the veracity of the state's witness did not necessarily lead to the conclusion that Knowles was lying, there is no reasonable possibility that the error affected the outcome of Knowles' trial." Id. at 66.

The state's improper questioning here strongly implied Monlyn was lying on the stand before the jury when he claimed he bit Mr. Watson. When pressed to explain why Dr. Floro had not found any bite marks, Monlyn had nothing to say except "I know I bit him on the hand that morning." (T 1558)[3]

The biting had crucial importance in Monlyn's defense because after the defendant bit Watson, the latter let go of the gun and grabbed him from behind. Monlyn then hit him over the head several times trying to get away from this bigger and heavier man. Thus, if Monlyn did not bite Watson's hand, the struggle happened different than the way he portrayed it, or at least the jury could have believed so in rejecting this defendant's bite claim. The error, therefore, with a reasonable degree of possibility affected the outcome of Monlyn's trial. This court should, therefore, reverse the trial court's judgment and sentence and remand for a

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[3] Monlyn had his pathologist examine Dr. Floro's notes, and the pictures that the police provided of Mr. Watson's body. Regarding a bite mark on one of his thumbs he said, "But there is at least one injury on the base of his thumb that very clearly could be from someone's tooth. Also, it could be, though, from some sharp edge of the gun barrel. I just don't know." (T 1692)

new trial.

ISSUE III

THE COURT ERRED IN FAILING TO GRANT MONLYN'S REQUEST FOR A MISTRIAL WHEN THE PROSECUTOR ASKED THE DEFENDANT WHY HE HAD NOT TOLD ANYONE HE HAD GOTTEN INTO A FIGHT WITH THE VICTIM, AND IF HE HAD NOT REALIZED THAT WATSON WOULD DIE IF HE DID NOT RECEIVE MEDICAL ATTENTION, VIOLATIONS OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

In the last issue, Monlyn focussed on the prosecutor's improper cross-examination of him regarding the conflict between his testimony and the medical examiner's evidence about a bite mark on the victim's hand. The state made other mistakes when it interrogated the defendant.

Towards the end of its questioning, the State Attorney asked the defendant why he had "denied any knowledge" of Watson's murder when arrested. Monlyn replied that he did not know the victim, and that he "didn't know that I had killed somebody. When I left, Mr. Watson was alive, and I didn't know he was hurt as bad as he was." (T 1595) The prosecutor then asked, "Well, you didn't say, 'Well, I got into a scuffle with a fellow. I don't know his name, and I hit him over the head a few times?'" (T 1595)

Monlyn's lawyer objected and moved for a mistrial because the question was a comment on the defendant's right to remain silent. The state responded,

"I'm not using silence. There has been no indication that he has indicated his desire to remain silent. He has indicated that he gave a statement inconsistent with what he said here in court. He said that he denied it. And then when I asked him why he denied it, he said, well, he didn't know who it was, and I think that that opens the door for further cross-examination." (T 1596-97)

The court sustained the objection. "It's beginning to get to imply that he had some duty, so I will sustain it from going that far." (T 1597) Unsatisfied, Monlyn asked for a mistrial, arguing that "Simply admonishing the prosecutor not to do it again is unsufficient." (T 1597) The court denied that request.

Immediately after, the prosecutor continued its attack on the defendant:

> Q. Mr. Monlyn, I believe you indicated that when you left there, you didn't realize how badly Mr. Watson was hurt.
>
> A. I didn't know how bad he was hurt.
>
> Q. So you didn't realize that unless he received medical treatment that he would die?
>
> A. No. When I first known it--
>
> MR. HUNT: Judge, I am going to object to the last question. May I be heard at the bench?
>
> THE COURT: Yes, sir.

(T 1599).

Monlyn's lawyer objected to the question because it implied that Mr. Watson "would have lived with medical attention. And you are stating in the presence of this jury that he would have lived with medical attention, and because he didn't get it he would have died." (T 1599-1600)

The court permitted the question, but then sustained the objection, allowing the prosecutor to ask Monlyn what his opinion of his medical condition was (T 1600). Unsatisfied, Monlyn's lawyer again asked for a mistrial. "Judge, this is two serious blunders on the part of the prosecution within the space of about five minutes in front of this jury." (T 1601) The court denied that request, and it also refused to give a cautionary instruction to the jury that is should disregard the state's last question (T 1605).

The court erred in its rulings, however, and the impact of the state's improper questions when taken singly or together with the question asked in the last issue created an unfair prejudice that could only have denied Monlyn his constitutionally guaranteed right to a fair trial.

A. "Well, I got into a scuffle with a fellow. . . "

The standard for assessing such comments is whether they are "fairly susceptible" of being interpreted by the jury as a comment on the defendant's failure to testify. State v. Kinchen, 490 So. 2d 21, 22 (Fla. 1985); State v.

Marshall, 476 So. 2d 150, 151 (Fla. 1985).

In this case, the state's question "Well, you didn't say, 'Well, I got into a scuffle with a fellow. I don't now his name, and I hit him over the heard a few times?'" clearly implicated Monlyn in some criminal activity. The state's question, when put in legalese amounts to "Why didn't you give an inculpatory statement to the police?" The Fifth Amendment requires the state to prove the defendant's guilt, and not expect the defendant to contribute to it. Whether he knew he had the right to remain silent or not, the problem here is that the prosecutor asked Monlyn why he did not contribute to his conviction by admitting he got into a fight with "a fellow." He clearly implied that he expected Monlyn to have come forward and implicate himself in some crime. Such an expectation violated his right to remain silent and have the state prove his guilt. See, Dixon v. State, 627 So. 2d 19 (Fla. 2d DCA 1993).

The state responded to Monlyn's objection arguing that Monlyn never indicated any desire to remain silent. "He denied knowing Watson when arrested, but tried to clarify that statement by claiming he did not know Watson's name, although he could recognize him. "[A]nd I think that that opens the door to further cross-examination about why he did not tell them then." (T 1596-97)

Not so. The prosecutor's question amounted to a comment on what Monlyn

would have to have said to avoid the inconsistency the state perceived. Implicitly, because he did not mention the fight, he was lying. Such a question is fairly susceptible of being interpreted as a comment on this defendant right to remain silent. Stone v. State, 548 So. 2d 307 (Fla. 2d DCA 1989).

B. "So you didn't realize that unless he received medical treatment that he would die?"

As defense counsel said in his objection to this testimony, "There has been no testimony by anyone that he would have lived with medical attention. And you are stating in the presence of this jury that he would have lived with medical attention, and because he didn't get it, he would have died." (T 1600-1601) Indeed, Dr. Floro, the medical examiner said Watson had received fatal injuries (T 938-39), so the state's question misled the jury to believe that not only had Monlyn beaten the victim, he had then refused to get help that may have saved him.

Such a question, besides being contrary to the evidence, put the defendant in an unfairly bad light as a remorseless killer. In Richardson v. State, 604 So. 2d 1107 (Fla. 1992), the defendant shot the woman he had lived with for several years. He did so as several of her children watched. During its closing argument, the state asked the jury to show Richardson as much pity as he showed his victim.

That was error, though harmless. Accord, Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989). It was error because it encouraged the jury to find Richardson guilty, not because the evidence proved him so, but as the understandable emotional response to a senseless killing.

So, the prosecutor's question here encouraged the jury to ignore Dr. Floro's testimony and convict Monlyn of first, rather than second degree murder because he had shown no pity, no interest in saving the man he had beaten.

Of course, the state can, as is its right and tendency, argue these errors were harmless. One, may be so, perhaps two, but here the state made several mistakes. The cumulative effect of these errors, particularly when the court refused to give any curative instructions so prejudiced Monlyn in the eyes of the jury that the mistakes could have played a role in their decision to convict him. Rhodes, cited above at 1206.

This court should, therefore, reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE IV

THE COURT ERRED IN ADMITTING THE TESTIMONY OF MRS. WATSON THAT HER HUSBAND HABITUALLY CARRIED $200-$300 IN CASH BECAUSE SHE COULD NOT SAY THAT ON THE DAY OF HIS DEATH SHE HAD PERSONAL KNOWLEDGE HE HAD THAT AMOUNT ON HIM, A VIOLATION OF MONLYN'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

The state called, as its first witness, Mrs. Mattie Watson, the wife of Alton Watson, the man it had accused Monlyn of killing. She told the jury about the events as she saw them on the morning of her husband's death. Defense counsel objected to what she had to say after describing that. "Judge, I would object to any further testimony from this witness. I deposed her, and at this point she has stated every material fact that could be presented by her testimony. . . . So I see no reason to keep her on the stand any further." (T 787) The prosecutor said he had a few other questions, some of which focussed on her husband's habit of carrying at least one hundred dollars, and often several hundred dollars in cash in his wallet (T 791). After identifying it, she said:

> Q. Do you know how much money Mr. Watson had in his wallet on October the 8th.
>
> A. I don't know exactly how much. . . . And when he cashed a check, it was usually a check for two or three hundred dollars. And he always carried a hundred

dollars, when he called mad money, in his wallet, because I'd take his mad money occasionally.

Q. And was that in a hidden place in his wallet?

A. Yes. It was always tucked hidden in his wallet.

Q. An as far as you know, was that hundred dollars still hidden in his wallet when the wallet was recovered?

A. I didn't see it just now.

Q. To the best of your knowledge and information and belief then, Mr. Watson would have somewhere between two and three hundred dollars with him at the time of his death?

A. Yes.

(T 791).

After Monlyn had presented his defense, the prosecutor wanted to recall Mrs. Watson to re-emphasize her testimony about the money in her husband's wallet. "The defendant took the stand and testified there were multiple credit cards but no money in Mr. Watson's wallet. She's already testified about his habits with respect to money, but I expect to elicit testimony with respect to credit cards and also further testimony with respect to his habits regarding money." (T 1920)

Defense counsel objected to that claiming "No money in the wallet is repetitive. She's already testified. There's already been testimony about that.

She's already testified about his habits regarding money. That's re-plowing the same ground and that's not proper use of rebuttal testimony. " (T 1921). The court, overruled Monlyn's objection and allowed Mrs. Watson to repeat her testimony about the money in the wallet. The court erred in letting her mention anything about that subject when she first testified, and it only compounded the error by allowing the state to recall her to repeat what she had already said.

Section 90.406 Fla. Stats. (1993) comes as close as any statutory law to addressing the problems presented by this issue.

Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice.

People, however, do not have "routine practices," they have habits, so strictly, that section has no applicability to the problems presented by this issue. Professor Erhardt, however, believes differently, and with the weight and prestige of his name, who can disagree? Erhardt, Florida Evidence, Section 406.1 (1995 edition) Evidence of a person's habit tends to show that what a person did habitually he probably did in a specific instance. Significantly, Florida courts have allowed such evidence when it corroborates the event. State v. Wadsworth,

210 So. 2d 4, 6 (Fla. 1986) (Evidence of alcoholism can corroborate that the defendant was drunk on the day in question. It cannot, however, by itself establish that fact); North Broward Hospital District v. Johnson, 538 So. 2d 871 (Fla. 4th DCA 1989). That is, habit evidence, by itself, cannot prove the event, it can only support other proof establishing it.

That is important for this case. The state produced only Mrs. Watson's testimony of her husband's habit to prove that on the day he was killed he had at least one hundred dollars in his wallet. There was no other evidence to prove it. Thus, the court erred in admitting her testimony of Mr. Watson's habit without any evidence that on the day of his death he had money in the wallet.

The court also erred in admitting the habit evidence because its relevance was not to show that he had money in the wallet but to prove that because the police found none when they looked, Monlyn must have stolen it. That is, the state's logic went like this: Because Alton Watson habitually carried at least one hundred dollars in his wallet, he must have done so on the day he was killed. Because none was found, Monlyn must have taken it.[4] The habit evidence was not used to corroborate some fact but to prove another.

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[4] The crime lab in Tallahassee may have found a $100 bill in a hidden compartment in the wallet (T 2519).

The court, therefore, erred in admitting the evidence Monlyn stole money from the victim. In proving the robbery it had charged the defendant with committing, it naturally argued this evidence proved the crime (T 2056-59). Monlyn also took the truck, but abandoned it in Lake City so he could buy a bicycle (T 1499). The jury could have reasonably concluded two things. First, as the prosecutor recognized, taking the vehicle was "just an afterthought." (T 2049). Second, the taking was not permanent, but temporary, and hence not a robbery.

The court's error, therefore, became reversible because if the state produced insufficient evidence of the robbery, the jury may not have convicted him of the murder under a felony-murder theory. Additionally, in the penalty phase portion of the trial, the state would have had insufficient evidence he committed the homicide for pecuniary gain or that it was committed during the course of a robbery. Thus, the error infected not only the reliability of the jury's guilty verdict but their death recommendation and the court's death sentence.

This court should reverse the court's judgment and sentence and remand for a new trial.

ISSUE V

THE COURT ERRED IN DENYING MONLYN'S MOTION FOR MISTRIAL MADE DURING THE STATE'S CLOSING ARGUMENT DURING THE GUILT PHASE PORTION OF THE TRIAL, A VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The state had the initial closing argument in this case, and during it, it said the following:

> Now, another argument that I think is likely to be made--certainly the suggestion has been made through the testimony of witnesses here--is that if he had really wanted to kill Mr. Watson, why didn't he shoot him. Not only did he have a shotgun shell in that gun, but Mr. Watson had two guns in his truck. He could have selected two other guns when he was stealing that gun from his uncle's truck. If he really wanted to kill him, he would have just shot him.
>
> Well, I submit to you that he would have done Alton Watson a big favor if he had shot him. It would certainly have been a less painful death, and he would have been--
>
> MR. HUNT: Judge, I object. May we approach the bench. . . . The argument that Mr. Watson would have been better off had the defendant shot him is not a comment on the evidence. It's an inflammatory argument. It's an improper argument and should not have been made. . . .I don't see any remedy at this point except to grant a mistrial.

(T 2070-71).

> MR. BLAIR: Judge, I don't think it merits any argument or any response here. Mr. Hunt has introduced --the two guns were in the truck of Mr. Watson. Obviously he intended to show that jury that if he really wanted to shoot him, he could have shot him with one of those weapons. Mr. Hunt has elicited through the testimony of several witnesses that that shotgun was capable of shooting him, but he chose another method. And the method he chose was much less humane than shooting him. I think it's a proper comment and a reasonable conclusion to be drawn from the evidence.
>
> MR. HUNT: But the issue at this point is whether he actually committed the crimes, not whether it was humane. That's not the issue. In a penalty phase that could be the issue, but that's not the issue, now.
>
> THE COURT: I'm going to deny the motion for mistrial.

(T 2071).

The court also refused to give a requested curative instruction to the jury, noting that "I think it's a fair comment on the evidence, based on the defendant's testimony and the opening statements of both sides and a reasonable view and interpretation of the evidence." (T 2072-73) The trial judge erred in denying the motion for mistrial.

The law in this area is simple, and its application straight forward. Closing argument assists the jury analyze the evidence presented at trial. United States v. Door, 636 F. 2d 117, 120 (5th Cir. 1981). Accordingly, the prosecutor commits

error when it elicits the jury's sympathy for the victim or his family. Johnson v. State, 442 So. 2d 185 (Fla. 1983) ("The victim's family will be facing the holiday season one short."); Harper v. State, 411 So. 2d 235 (Fla. 3d DCA 1982) ("The Defendant is sorry and so are the victim's wife and three children. They are sorry too."). In short, closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." King v. State, 623 So. 2d 486, 488 (Fla. 1993), quoting Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985).

Nevertheless, appellate courts hesitate in granting a new trial unless the inflammatory argument vitiated the fairness of the trial.

Monlyn, therefore, has two problems to overcome. First, did the prosecutor's comment that "It would certainly have been a less painful death" had the defendant shot him inflame the jury? Second, if so, did that comment so bias them that only a new trial can correct the state's improper error?

As to the first issue, inflammatory arguments divert the jury's attention away from the evidence presented at trial and focus it instead on emotional considerations. Such comments encourage the jury to find the defendant guilty out of sympathy for the victim rather than the evidence forces that conclusion. Watts v. State, 593 So. 2d 198, 203 (Fla. 1992). Here the state's comment,

inviting the jury to consider the pain Mr. Watson would have suffered if he had been shot rather than bludgeoned to death, fits the definition this court provided in Watts. As Monlyn's lawyer noted, "In a penalty phase that could be the issue, but that's not the issue, now." (T 2072) It was not because the jury would have focussed on the pain and agony the victim suffered before his death. At the prosecutor's invitation, they would have then compared the way Watson actually died with he lack of prolonged torture he would have endured had he been killed with a single shot from the shotgun. Neither is a desirable way to die, which only emphasizes the tendency of the jury to vote their sympathies for Watson and his wife, who found him bound and gagged (T 786).

The court, of course, ruled that what the prosecutor said was a fair comment based on the defendant's testimony and the opening statements. Such justification, however, misconstrued the thrust of Monlyn's argument and evidence. It was not that Watson would have died a less painful death had he been shot. It was that if the Defendant had wanted to commit a first degree murder, why did he use a loaded shotgun to beat him to death? The more expeditious and obvious way would have been to use the gun as it was intended, not as a club. That he used the gun as a club supports his conclusion that Watson surprised him in the barn, that they struggled over the gun, and that Monlyn beat him with it when this much

larger and heavier man would not let go of him. The beating death amounted to second degree murder, not first degree.

If the prosecutor improperly inflamed the jury, was this diversion so extreme "as to vitiate the entire trial? Id. To answer that question, several factors are relevant: the severity of the misconduct, any action taken by the court to minimize the improper comment, and the likelihood the defendant would have been convicted anyway. Rosso v. State, 505 So. 2d 611, 614 (Fla. 3d DCA 1987).

As to the severity of the comment, this case, of course, involved a murder, and such offenses naturally tend to have an elevated emotional level. Sympathy for the deceased victim lurks just below the surface, so that what might have been an annoying comment in a theft case, ignites the jury's passions in a capital murder. Here, by inviting the jury to consider the amount of suffering Monlyn admittedly inflicted on Watson, the prosecutor deliberately introduced an irrelevant issue into this trial. Yet its tendency was to inflame the jury's sympathies for this innocent person who was killed by an escaped convict.

Early on, Monlyn asked the court to change the venue for his trial. He recognized, and the court did also when it granted the request (T 2784), that the local prejudice so pervaded the community that he could not get a fair trial there. Indeed, Monlyn, a black man was tried in Lake City, itself a rural county in North

Florida for killing a white, elderly person in neighboring Madison County. The racial implications are obvious. See, McClesky v. Kemp, 481 U.S. 279, 291, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

Heightening this already tense atmosphere, the state called Watson's wife to testify, and she started crying on the stand.[5] (T 786) It introduced evidence the two men had had a confrontation over the defendant's fishing on the victim's property a year or two before (T 1001, 1011). It apparently ended with shots being fired by both men (T 1003, 1021, 1003). Finally, Monlyn had made threats on Watson's life while in prison. The conclusion the state wanted the jury to draw was obvious: Monlyn had no love for Watson.[6] Yet, it went much too far when it invited the jury to consider the suffering Watson suffered at the Defendant's hands as further evidence not only of the ill will between the two men, but of the Defendant's intention to kill.

As to any effort to cure the improper comment, the trial court, of course, made none since it saw no error (T 2071).

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[5] Monlyn makes no allegation the state should not have called her. See, Justus v. State, 438 So. 2d 358 (Fla. 1983).

[6] On the other hand, during the year and a half since the fish pond incident, Monlyn must have had several opportunities to kill Watson, but had not done so.

Finally, would the jury have convicted Monlyn even if the prosecutor had avoided making the comparison? To answer that, we must first consider the Defendant's position. He admitted he murdered Watson. He denied he had the premeditated intent to do so (T 2133). Often distinguishing between the level of culpability for first and second degree murder is exceedingly difficult. In Rogers v. State, 660 So. 2d 237 (Fla. 1995) this court found insufficient evidence to sustain a conviction for first degree murder even though the defendant had gotten a gun from his car before catching a ride with the victim and his girl friend. The victim was killed in a struggle over the gun after Rogers fondled the girl and tried to get her to drive the car where he wanted it to go. See also, Knowles v. State, 632 So. 2d 62 (Fla. 1993).

Thus, finding the court's error harmless is fraught with problems since the only issue Monlyn contested, his mental state, was left to the jury for their decision. Unless the evidence is so clear, as it was in Rogers, courts shy from invading their domain, involving as it does, matters of witness credibility and evidentiary weight.

In this case, the state presented insufficient evidence Monlyn had the premeditated intent to kill Watson. If this court disagrees, the argument presented there applies here regarding the harmlessness of the court's error. The evidence of

his mental state lacks the overwhelming certainty this court has required for similar comments to have been harmless. This court cannot say beyond a reasonable doubt that the state's improper comment had no effect on the jury's verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Because it may have had some impact on their decision, this court should reverse the trial court's judgment and sentence and remand for a new trial.[7]

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[7] This improper guilt-phase argument also constituted error in connection with Monlyn's sentencing under, Payne v. Tennessee, ___ U .S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

ISSUE VI

THE COURT ERRED IN ADMITTING THE TESTIMONY OF JOHNNY CRADDOCK REGARDING STATEMENTS MONLYN MADE SEVERAL WEEKS BEFORE THE HOMICIDES FOR WHICH HE WAS CHARGED.

By way of a Motion to Suppress Statements of Defendant (T 2739-43), and again at trial (T 1055-56), Monlyn asked the court to exclude the testimony of Johnny Craddock regarding what the defendant had told him. The court denied the request (T 1058) and admitted Craddock's testimony that the day before Monlyn escaped from the Madison County Jail, the defendant had told him that he was going to escape from jail, get a shotgun, and kill the first person he saw who had a car (T 1059). The court erred in allowing this testimony.

Section 90.803(3)(a)2 Florida Statutes (1990) controls this issue:

> The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even if the declarant is available as a witness:
>
> (3) Then existing mental, emotional, or physical condition.
> (a) A statement of the declarant's then existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
> 2. Prove or explain acts of subsequent conduct of the

declarant.

This court's opinion in Jones v. State, 440 So. 2d 570 (Fla. 1983) illustrates how that exception to the general prohibition against the admission of hearsay works. In that case, the defendant was arrested for a traffic infraction about seven days before he murdered a police officer. At the time he was taken into custody, he said "he was tired of the police hassling him, he had guns, too and intended to kill a pig." The trial court admitted that statement, and "After detailed study of the record" this court agreed with the lower court. "Appellant's statement of his intention to kill a police officer contains sufficient probative value to draw the inference that the act was done." Id. at 577.

If 90.803(3)(a)2 is given its literal impact then we would all have to worry because statements made years ago would come back to hunt us. Instead, there should be some reasonable limit to admitting prior statements of future intent. In Jones this court had to do a "detailed study of the record" before it affirmed the lower court's ruling. Evidently the amount of time between the statement and the act troubled this court.

If a seven day gap bothered this court in that case, thus, while what Monlyn said was relevant to the state's case against him, its prejudicial value, considering the very lengthy time between what he said and did as well as his condition when

he made the statements, outweighed whatever logical relevance they had. This court should reverse the trial court's judgment and sentence and remand for a new trial. All the statements did was exhibit his bad character.

ISSUE VII

THE COURT ERRED IN REFUSING TO GIVE THE REQUESTED JURY INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE, A VIOLATION OF MONLYN'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

During the charge conference at the end of the guilt phase portion of Monlyn's trial, the defendant's lawyer asked the court to instruct the jury on circumstantial evidence. As he told the court, "Well, certainly you can't argue that it's an incorrect statement of the law. But any information we can give the jury that would help explain the law to be applied to this case and make them understand it would be helpful." (T 2026) The state objected, and the court refused to give the requested guidance (T 2026-27). Under the special circumstances of this case, that was error.[8]

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[8] The requested instruction was the one previously included in the standard jury instructions (T 2966):

> Circumstantial evidence is legal evidence and a crime or any fact to be proved may be proved by such evidence. A well-connected chain of circumstances is as conclusive, in proving a crime (fact), as is positive evidence. Its value is dependent upon its conclusive nature and tendency.
>
> Circumstantial evidence is governed by the following rules:
>
> 1. The circumstances themselves must be proved beyond a reasonable doubt.
> 2. The circumstances must be consistent with guilt and

The law in this area begins with this court's decision in In re Standard Jury Instructions in Criminal Cases, 431 So. 2d 599 (Fla. 1981). Until that case, the standard jury instructions in criminal cases included the instruction on circumstantial evidence requested in this case and included as footnote 1. That is, if the evidence supported giving the jury that extensive guidance on this special form of evidence, the court had to give it as a matter of law.

In In re Standard Jury Instructions, this court left to the trial judge's discretion whether to instruct the jury on circumstantial evidence. It never disapproved the guidance given the jury, it merely said the court had the choice of whether to give it to the fact finder or not.

> The elimination of the current standard instruction on circumstantial evidence does not totally prohibit such an instruction if a trial judge, in his or her discretion, feels that such is necessary under the peculiar facts of a

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> inconsistent with innocence.
> 3. The circumstances must be of such a conclusive nature and tendency that you are convinced beyond a reasonable doubt of the Defendant's guilt (the fact to be proved).

If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence.

Circumstances which, standing alone, are insufficient to prove or disprove any fact may be considered by you in weighing, direct and positive testimony.

> specific case. However, the giving of the proposed instructions on reasonable doubt and burden of proof, in our opinion, renders an instruction on circumstantial evidence unnecessary.

Id. at 595.

Since then courts have consistently rejected, usually summarily, attacks on trial courts' refusal to specifically instruct the jury on circumstantial evidence. Petri v. State, 644 So. 2d 1346, 1355 (Fla. 1994); Trepal v. State, 621 So. 2d 1361, 1366 (Fla. 1993); Kelly v. State, 543 So. 2d 286, 288 (Fla. 1st DCA 1989); Rivers v. State, 526 So. 2d 983, 984 (Fla. 4th DCA 1988). As far as Appellate Counsel can determine, no court has reversed a trial court's decision refusing to give this instruction. It is with a certain amount of trepidation, therefore, that he now argues that the trial judge abused its discretion in denying Monlyn's requested guidance on circumstantial evidence.

The basic question this court should ask is "What makes this case so special that the circumstantial evidence instruction should have been given?" When viewed as part of a larger whole, several factors combine to compel the conclusion that the court should have instructed the jury on circumstantial evidence.

First, the state's circumstantial case has a deceptively compelling quality. Monlyn, seeking revenge and transportation snuck into Watson's barn and

attacked him early in the morning of October 6. Hitting over the head with part of a stolen shotgun, he eventually subdued the older man. He then bound and gagged him and left taking his truck and money.

The state had a compelling case, and one that proved that Monlyn possibly, perhaps probably, committed a first degree premeditated murder. It was not, however, one that excluded Monlyn's version of what had happened. At least had the jury received an instruction on circumstantial evidence it would have had explicit guidance that it could have so concluded. Instead it had to deduce that well settled law from the burden of proof and reasonable doubt instructions. Because the state had a deceptively strong case, and Monlyn had a reasonable and uncontroverted explanation for the state's evidence, the jury should have received explicit guidance on how to consider circumstantial evidence.

Indeed, it never knew what circumstantial evidence was, although defense counsel in closing argument told them that the evidence was "largely undisputed" that Monlyn killed Watson (T 2080). As such he wove a story using the state's facts and supplemented with his testimony that showed the murder occurring with a far less intent than that argued by the state. Monlyn, fleeing the police after his escape from the county jail, made the fundamental mistake (in hindsight) of staying in Watson's barn overnight. Caught trying to leave by Mr. Watson, the

two men struggled for the gun the defendant had and which was propped against a wall when the victim discovered him early in the morning. Although much older than Monlyn, Watson was taller, heavier, and apparently in very good shape. The outcome of the ensuing struggle was in doubt for quite a while, and not until Monlyn bit Watson's hand, causing the latter to let go of the weapon did the defendant finally get the upper hand. Swinging the barrel of the gun over his head several times he finally subdued Watson.

Thus, Monlyn committed a second degree murder, not one with a premeditated intent. This contention fits with the facts, and it was one the jury could have, should have, returned had the court read them the reasonable doubt instruction. As counsel said, "what is there that is inconsistent with what Broderick Monlyn has told you?" (T 2107) Nothing. The jury should have been informed that his theory was a "well connected chain of circumstances."

Now circumstantial evidence is a subtle legal concept. The jury here could be excused for not fully understanding that the presumption of innocence requires (not permits) the jury to accept the defendant's story since it reasonably explains his actions. Davis v. State, 90 So. 2d 629, 631 (Fla. 1956); McArthur v. State, 351 So. 2d 972 (Fla. 1977). Guidance, as provided in the old standard instruction that "The circumstances must be consistent with guilt and inconsistent with innocence"

was essential. It articulated and emphasized that point with greater clarity than either the reasonable doubt or burden instructions do and with more authority than counsel's argument could have commanded. Such special, specific guidance was needed here considering the apparently strong circumstantial case the state presented.

In short, if this court has recognized that special rules of appellate review apply to issues involving circumstantial evidence, State v. Law, 559 So. 2d 187, 188 (Fla. 1989), the court in this case should have given the jury particular guidance on how to consider this evidence. This is particularly true here where the state's case was strongly, exclusively circumstantial that Monlyn murdered Alton Watson, and the defendant, using the state's evidence, provided a plausible explanation exonerating himself of his first degree murder. Because of the strong emotional undercurrent running through this trial, the jury needed particular guidance and a reminder that "If the circumstances are susceptible of two reasonable constructions, one indicating guilt and the other innocence, you must accept that construction indicating innocence." After all, if the defendant is entitled to an instruction on his theory of defense, Hooper v. State, 476 So. 2d 1253 (Fla. 1985), the jury in this particularly treacherous case should have been given specific guidance so they could have avoided the emotional bogs the facts of

this case produced.

With the defendant on trial for his life, the court should have given t[redacted] guidance he requested on the rules for considering this special type of evidence. This court should reverse the trial court's judgment and sentence and remand for a new trial.

ISSUE VIII

THE COURT ERRED IN INSTRUCTING THE JURY ON REASONABLE DOUBT AS THAT TERM IS DEFINED IN THE STANDARD JURY INSTRUCTIONS FOR CRIMINAL CASES, IN VIOLATION OF MONLYN'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

During the charge conference at the end of the guilt portion of this trial, Monlyn objected to the trial court instructing the jury on reasonable doubt. Specifically he said, "The defendant objects to the giving of the standard instruction on reasonable doubt. We would, again, renew our request to have the instruction given on reasonable doubt that we submitted." (T 2029) The court overruled that objection (T 2030) and gave the jury the standard instruction on reasonable doubt. That was error.

The Constitution requires proof of the defendant's guilt beyond a reasonable doubt in criminal cases. The reasonable doubt standard is "indispensable" because it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), the Court unanimously reversed a first degree murder conviction and death

sentence where the trial court defined reasonable doubt for the jury as follows:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain.
>
> What is required is not an absolute or mathematical certainty, but a moral certainty.

A. General law governing jury instructions.

The trial court judge has a duty to instruct the jury on the law. Rule 3.390(a), Florida Rules of Criminal Procedure, provides in pertinent part: "The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel." Due process requires instructions as to what the state must prove in order to obtain a conviction. See Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 89 L.Ed.2d 1495 (1945) (willfully depriving person of civil rights; jury not instructed as to meaning of "willfully": "And where

the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial."). It is fundamental error to fail to instruct the jury correctly as to what the state must prove in order to obtain a conviction. State v. Delva, 575 So. 2d 643 (Fla. 1991), Sochor v. State, 580 So. 2d 595 (Fla.).

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

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

"Amid a sea of facts and inferences, instructions are the jury's only compass." U.S. v. Walters, 913 F.2d 388, 392 (7th Cir. 1990) (refusal to give theory of defense instruction required reversal of conviction). Arguments of counsel cannot

substitute for instructions by the court. Taylor v. Kentucky, 436 U.S. 478, 488-489, 92 S.Ct. 1930, 56 L.Ed.2d 468 (1978).

B. Florida's standard jury instruction on reasonable doubt.

The source of the standard jury instruction on reasonable doubt is unclear. Decisions of the Florida Supreme Court preceding the promulgation of the standard instructions are contradictory and confusing. In Haager v. State, 83 Fla. 41, 90 So. 812, 816 (1922), the court disapproved of an instruction that a reasonable doubt could not be "a mere shadowy, flimsy doubt," writing:

> Attempts to explain and define what is meant by "reasonable doubt" often leave the subject more confused and involved than if no explanation were attempted. The instruction may be given in such a manner, and with such an inflection of voice, as to incline the jury to believe that there is sufficient doubt to almost require an acquittal, and, in other instances, may be so give as to make the jury feel that they would be guilty of a dereliction of duty if they entertained any doubt of the prisoner's guilt.
>
> In the charge complained of, the court undertook to differentiate between "a mere shadowy, flimsy doubt" and "a substantial doubt." The jury may have understood the distinction, but we are unable to grasp its significance. Every doubt, whether it be reasonable or not, is "shadowy" and "flimsy," and it would be better if judges would give the usual charge on the subject of reasonable doubt without attempting to define, explain, modify, or qualify the words "reasonable doubt."

But in Smith v. State, 135 Fla. 737, 186 So. 203, 206 (1939), the court approved of an instruction using the "shadowy, flimsy doubt" versus "substantial doubt" phraseology without analysis and without any mention of Haager.[9] In any event, as shown below, definition as a "reasonable doubt" as "a substantial doubt" (and thus not a "shadowy, flimsy doubt") is unconstitutional.[10]

C. Pre-Cage federal cases on reasonable doubt instructions.

In Dunn v. Perrin, 570 F.2d 21 (1st Cir. 1978), the court, in reversing the petitioners' state court convictions, condemned the following jury instruction "reasonable doubt":

> It does not mean a trivial or a frivolous or a fanciful doubt nor one which can be readily or easily explained away, but rather such a strong and abiding conviction as still remains after careful consideration of all the facts and arguments...

The court wrote that the instruction "was the exact inverse of what it should have been." Id. at 24. Although it is proper to instruct the jury that a reasonable doubt

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[9] For whatever reason, West Publishing Company assigned no key number to the discussion in Haager, which may explain this oversight in Smith.

[10] The Florida Supreme Court upheld the standard instruction without analysis in Brown v. State, 565 So. 2d 304 (Fla. 1990). The cases cited in Brown are also lacking in analysis. The court has never directly addressed the issues raised in this motion.

cannot be "purely speculative," a court is "playing with fire" when it goes beyond that. U.S. v. Cruz, 603 F.2d 673, 675 (7th Cir. 1979). It is improper to instruct that the government need to prove guilt "beyond all possible doubt." U.S. v. Shaffner, 524 F.2d 1021 (7th Cir. 1975). Further, an instruction equating a reasonable doubt with "a real possibility" has been condemned because it may "be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense." U.S. v. McBride, 786 F.2d 45, 51-52 (2d Cir. 1986).

Jury instructions equating reasonable doubt with substantial doubt have been "uniformly criticized." Monk v. Zelez, 901 F.2d 885, 889 (10th Cir. 1990). It is improper to define a reasonable doubt as "substantial rather than speculative." U.S. Rodriguez, 585 F.2d 1234, 1240-1242 (5th Cir. 1978) (affirming conviction, but noting that a trial court using such an instruction "can reasonably expect a reversal.") An instruction that a reasonable doubt is a "substantial doubt, a real doubt" has been condemned as confusing by the Supreme Court. Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978).

C. Discussion.

In view of the foregoing, the definition of "reasonable doubt" in the standard instructions is unconstitutional. Although negative in its terms, it essentially equates the word "reasonable" with such condemned terms as

"substantial" and "real." (What else can "not possible" mean? It is obvious from cases such as U.S. Rodriguez that "not speculative" is equivalent to "substantial.") All doubts, whether reasonable or unreasonable, are necessarily founded on speculation and possibility. See Haager. As the Court pointed out in Winship, the Constitution requires "a subjective state of certitude" before the defendant can be convicted. The absence of such a degree of certitude necessarily involves a degree of speculation and consideration of possibilities. The standard instruction forbids a not guilty verdict on the basis of a "possible" or "speculative" doubt, although possibilities and speculation can be reasonable and prevent the "subjective state of certitude" required by Winship.

Further, the sentence "Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt." could reasonably be taken by jurors to mean that they should convict even where a reasonable doubt is found, so long as they have "an abiding conviction of guilt." Where a jury instruction is challenged, the question is not what the court thinks the instruction means "but rather what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307, 315-316, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) (emphasis supplied); Cage. Since the jury could have taken the "abiding conviction of guilt" standard as supplanting the requirement of proof

beyond a reasonable doubt, the standard instruction is improper on that ground also. C.f. Dunn, 570 F.2d at 24, n. 3 (court will not expect jury to "intuit a more sensible meaning, at least not when so crucial a concept as reasonable doubt is our focus").

In view of the foregoing, the trial court gave an erroneous instruction relieving the state of its burden of proving guilt beyond a reasonable doubt. Accordingly, this Court should order a new trial.

ISSUE IX

THE COURT ERRED IN INSTRUCTING THE JURY ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR BECAUSE THAT GUIDANCE, AS THIS COURT HAS DECLARED, WAS UNCONSTITUTIONALLY VAGUE, A VIOLATION OF MONLYN'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

At the penalty phase charge conference Monlyn objected to the court instructing the jury on the cold, calculated, and premeditated aggravating factor (T 2285-97). At the end of that hearing he also proposed a special instruction to replace the standard jury instruction on that aggravator (T 2983). The court, however, refused to recognize the validity of his request, deciding to give the "standards" instead (T 2306). That was error.

In Jackson v. State, 648 So. 2d 85 (Fla. 1994), this court found that the standard jury instruction on the cold, calculated, and premeditated aggravating factor was unconstitutionally vague.

> Florida's standard CCP jury instruction suffers the same constitutional infirmity as the HAC-type instructions which the United States Supreme Court found lacking in Espinosa, Maynard, and Godfrey-the description of the CCP aggravator is "so vague as to leave the sentencer without sufficient guidance for

> determining the presence or absence of the factor." Espinosa, 112 S.Ct. at 2928.

Jackson, at 90.

In this case the court gave the jury the same instruction on the CCP aggravator as the court in Jackson had read. The result should, therefore, be the same. The court erred, and this case should be remanded for a new sentencing hearing.

Ah, but what about finding the error harmless? This court refused to do so in Jackson, noting that the trial court found only two aggravators and several nonstatutory mitigators in sentencing the defendant to death. "[W]e cannot say beyond a reasonable doubt that the invalid CCP instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given." Id.

This court has had no similar qualms in affirming death sentences in three other cases that have raised the same issue.

In Fennie v. State, 648 So. 2d 95 (Fla. 1994); Walls v. State, 641 So. 2d 381 (Fla. 1994); and Wuornos v. State, 644 So. 2d 1000 (Fla. 1994) this court recognized that the trial courts had given the unconstitutional instruction to the juries, and the various defendants had properly preserved the issue. Nevertheless,

in each case the courts' errors were harmless. The reasons for these conclusions were obvious. In each case, unlike Jackson, the court found several other aggravators besides CCP. In Fennie, for example, the sentencer concluded that 1) the murder was committed while engaged in the commission of a kidnaping; 2) the crime was committed to avoid arrest; 3) the crime was committed for financial gain; 4) the crime was heinous, atrocious, or cruel, and 5) the crime was cold, calculated and premeditated. Fennie. The court also found some minor, nonstatutory mitigation. Finally, the jury in that case, as in Walls and Wuornos, unanimously recommended death.

This court in Fennie, Walls, and Wuornos, also analyzed the evidence in those cases and concluded that had the jury been properly instructed it would have found the CCP aggravator applicable. While Monlyn argues below that is the wrong analytical approach, using it only fortifies the conclusion that the evidence does not prove beyond all reasonable doubt that he plotted the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The evidence, while arguably showing a coldly premeditated desire to murder on Monlyn's part, could have been disregarded by the jury. Instead, the evidence shows with equal plausibility that Watson had misfortune to catch

Monlyn in his barn before the latter could leave.

The jury nevertheless could have believed that Monlyn coldly, with calculation and premeditation planned to rob Watson. Then using the unconstitutional CCP definition given by the court, it could have concluded that because the robbery was cold, calculated, and premeditated, the murder was also. Such logic, while perhaps sufficient to support a conviction for guilt under a felony murder theory, could not have carried the day with the CCP aggravator. As this court held in Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984), a planned robbery does not mean the resulting murder was also sufficiently premeditated for the CCP aggravator to apply. Thus, had the jury been properly instructed, it may not have concluded this factor applied. Given the weak credibility of the state's witnesses, this court cannot say beyond a reasonable doubt that the jurors who voted for death would have remained steadfast in their opinion without the cold, calculated aggravating factor.

Such reasoning, however, goes against what the United States Supreme Court has determined the proper harmless error analysis should be for jury instruction issues. Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 182 (1993). In Sullivan, the trial court gave the jury an unconstitutional reasonable doubt instruction. The issue facing the nation's high court was whether

that error was harmless. A unanimous court not only said that it was reversible error, it also concluded that the mistake was not amenable to a harmless error analysis.

The court's rationale focussed on two constitutional guarantees: 1) The defendant has the right to have his guilt determined beyond a reasonable doubt, and 2) the jury is the one to make that decision. If the trial court instructed them on reasonable doubt using an unconstitutional instruction, "there has been no jury verdict within the meaning of the Sixth Amendment." Id. at 189. If the jury has not validly determined the defendant's guilt, a reviewing court cannot substitute its judgment for the body that has the constitutional obligation to do so under the guise of a harmless error analysis.

> There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt-not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been absent the constitutional error. That is not enough. . . . The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual finding of guilty.

Id. at 190 (cites omitted. emphasis in opinion.)

Sullivan, because it dealt with a reasonable doubt instruction, has obvious limitations when applied to this case. The fundamental rationale of that opinion, however, is directly relevant and pertinent. That is, any defendant facing a death sentence has 1) the right to have a jury (in Florida) recommend whether he should live or die, and 2) each aggravating factor must be proven beyond a reasonable doubt.

In this case, as with the defendant's guilt in Sullivan, the jury could not determine if Monlyn had committed the murder in a cold, calculated, and premeditated manner because of the defective instruction on that point. There was, therefore, no valid death recommendation, and this court can only speculate about the jury's action had it been given proper guidance. As the nation's high court in Sullivan noted, however, appellate courts cannot do such crystal ball gazing. Here, as in Sullivan, the error remains harmful, and this court must remand for a new sentencing hearing.

ISSUE X

THE COURT ERRED IN FINDING THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, A VIOLATION OF MONLYN'S EIGHTH AMENDMENT RIGHTS.

In sentencing Monlyn to death, the court found that he had committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (T 3035-37). Supporting that aggravator, it found the following facts:

> 1. 18 months to two years before the murder, Watson had caught Monlyn at the former's fish pond, at which time, the defendant had shot a pistol at him.
>
> 2. The night before the murder, Monlyn said he was going to rob Watson of his truck.
>
> 3. The next morning, he waited for Watson to come into the latter's barn.
>
> 4. The defendant "brutally kidnaped" and murdered the victim and robbed him of his truck.
>
> 5. Monlyn inflicted far more injuries than necessary to steal the truck.
>
> 6. He also was armed the entire time and made

no effort to escape without using violence.

7. The defendant had time to contemplate his actions.

8. He "purposefully chose the victim."

9. The number of wounds, particularly the several defensive type wounds evidenced the "coldness" of the defendant's actions.

(T 3035-37).

Thus, the court painted a picture of a man plotting revenge on an unaware victim and laying in wait to catch him because he had caught him fishing in the latter's pond almost two years earlier. There is only one problem with this scenario. If that was Monlyn's plan why did he not shoot him with the shotgun he had and which the two men struggled over? If he wanted to coldly kill the man who had disturbed his fishing months earlier, he would simply have shot him, taken the truck, and fled the area.

Instead, the evidence shows with equal plausibility that Monlyn and Watson had a ferocious struggle over the shotgun. While Monlyn eventually won the fight, his opponent had put up a good struggle and bruised and battered and the defendant (T 1194).

Other evidence supports Monlyn's contention that Watson surprised him as

he tried to leave the barn. First, after the fight, the defendant threw the sleeping bag and other gear he had gotten from relatives into a nearby hay baler rather than taking them with him (T 1444, 1482). Second, if he wanted to steal a car and leave the area, Monlyn would have done so with Watson's truck. Instead, he drove it to Lake City, abandoned it, and bought a bicycle (T 1499). When arrested he had money on him. If he wanted to leave town, he obviously had the means to do so, but had abandoned the vehicle for a bicycle.

Thus, much of the evidence the court used to support finding the murder cold, calculated and premeditated, also aided Monlyn. The large number of blows inflicted on Watson, for example, could simply have come during the protracted struggle. Monlyn, instead of laying in wait for the victim, could have slept in his barn to get out of the elements and to avoid being caught by the police who were looking for him (T 1454). While "the defendant was armed throughout the entire event" the evidence of the struggle tends to prove Watson surprised him and both went for the gun, which was propped against a wall (T 1461).

Finally, if Monlyn wanted to kill Watson, why did he lay in wait in a room inside the barn?

In justifying its conclusion that the CCP aggravator applied, the court cited several opinions from this court to bolster its finding. For example, it relied on

this court's opinion in Hall v. State, 614 So. 2d 473 (Fla. 1993) for the proposition that if a defendant uses more force than necessary to accomplish a theft, the resulting murder can be CCP. In that case, however, Hall and a co-defendant kidnaped a pregnant victim, and took her too a secluded wooded area where they raped and beat her. They then murdered her. Later, they took her car to a store where they killed a deputy sheriff. Hall has facts far more egregious than here where the facts show that Monlyn beat and struggled with Watson. He was not the helpless victim Hall raped and beat.

The trial judge relied on Jackson v. State, 498 So. 2d 406 (Fla. 1986) to support its finding that Monlyn was "armed throughout the entire event, produced a weapon on an unsuspecting victim and made not effort to escape without resorting to the use of violence." As mentioned above, however, the gun was propped against a wall, and Watson probably surprised Watson, as evidenced by the struggle the two men had over the weapon. Andrea Jackson, unlike Monlyn, shot her victim six times at point blank range. Jackson also tricked the policeman-victim into believing she had dropped her car keys, and when he stooped to look for them, she shot him. Unlike that scenario, the one in this case had the defendant and victim locked in a life and death struggle over a shotgun that broke apart as they fought out of the barn into the yard.

The court also relied on Phillips v. State, 476 So. 2d 194 (Fla. 1985). In that case, Phillips waited for the victim, a parole supervisor who had had several run-ins with the defendant for several years, to leave work. He confronted the latter in a parking lot, and shot him twice. As the man fled, Phillips reloaded his gun, and shot and killed him. The trial judge in this case used Phillips to support its contention that Monlyn had "time during the assault, between blows, to contemplate his actions and choose to kill the victim." (T 3037) There is, however, no evidence this defendant ever had any significant period, like Phillips did when he reloaded his gun, to consider what he was doing. Instead, the evidence shows that the two men struggled, after which the defendant tied up the victim, dragged him into the barn, and left. There is no evidence Monlyn hit Watson after he had tied him.[11]

In Turner v. State, 530 So. 2d 45 (Fla. 1987), this court found that Turner had "chosen purposefully" his victims. That conclusion, however, has scant application here, where the evidence shows that Watson surprised Monlyn early in the morning. If he had done so, he would have shot Watson rather than beating

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[11] Monlyn's counsel objected to the state's argument that his client had hit Watson after he had been gagged (T 2321). The court allowed the contention even though no expert and no evidence supported it (T 2322).

him with part of a shotgun.

Finally, without any citation, the court found that the "coldness" of the murder was demonstrated by the several wounds Watson suffered. But, as defense counsel noted, the number of wounds does not establish this aggravator (T 2328-29)[12] King v. State, 436 So. 2d 50 (Fla. 1983); Hamilton v. State, 547 So. 2d 630 (Fla. 1989); Blanco v. State, 452 So. 2d 520 (Fla. 1984).

So, the trial court's reliance on cases from this court poorly support its conclusion that Monlyn killed Watson in a cold, calculated, and premeditated manner, as this court has defined that aggravator Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). The evidence discussed above shows that the murder was committed in a panic or fit of rage with no additional proof Monlyn had carefully planned it.

The court, therefore, erred in finding this murder to have been cold, calculated, and premeditated, and this court should reverse its sentence of death and remand for a new sentencing hearing.

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[12] During the state's closing argument, the prosecutor argued "if beating someone in the head and face twenty-two times like Monlyn Beat Mr. Watson was not cold-blooded, then what was it?" Defense counsel objected to that contention and requested a mistrial. (T 2328-29). The court overruled the objection and denied the mistrial (T 2330).

ISSUE XI

THE TRIAL COURT ERRED IN GIVING THE STANDARD JURY INSTRUCTION TO DEFINE THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

The defense objected to the standard penalty phase jury instruction on the heinous, atrocious or cruel aggravating factor and requested a substitute instruction (T 2971-72). Counsel renewed his objection at the instruction charge conference (T 2279-83) and also proposed two alternatives (T 2972, 2981). He made three objections to this aggravator: 1) The state presented insufficient evidence to support giving the instruction. 2) The standard guidance on this aggravator is inadequate. 3) The standard instruction is, in any event, unconstitutional (T 2282-83). The trial court overruled the objections and refused to give the requested instruction (T 2285). The jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. As Monlyn argues they were given misleading and unconstitutional guidance on this aggravator. Monlyn recognizes that this Court has approved the current standard jury instruction on the heinous, atrocious or cruel aggravating circumstance in Hall v. State, 614 So. 2d 473 (Fla. 1993). He urges, however, that this Court to reconsider the issue.

The trial court followed the standard jury instruction and instructed on the aggravating circumstances provided for in Section 921.141(5)(h), Florida Statutes as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked or vile--and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional facts that show the crime was conscienceless or pitiless, and was unnecessarily torturous to the victim.

(T 2364-65) The instructions given were unconstitutionally vague because they failed to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV U.S. Const.; Art. I, Secs. 9, 16 & 17, Fla. Const.; Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990).

The United States Supreme Court held Florida's previous heinous, atrocious or cruel standard penalty phase jury instruction unconstitutional in Espinosa v.

Florida. This Court had consistently held that Maynard v. Cartwright, which held HAC instructions similar to Florida's unconstitutionally vague, did not apply to Florida since the jury was not the sentencing authority. Smalley v. State, 546 So. 2d 720 (Fla. 1989). However, the Espinosa Court rejected that reasoning since Florida's jury recommendation is an integral part of the sentencing process and neither of the two-part sentencing authority is constitutionally permitted to weigh invalid aggravating circumstances. Although the instruction given in this case included definitions of the terms "heinous, atrocious or cruel", where the instruction in Espinosa did not, the instruction as given, nevertheless, suffers the same constitutional flaw. The jury was not given adequate guidance on the legal standard to be applied when evaluating whether this aggravating factor exists.

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious or cruel aggravating circumstance using the same definitions for the terms as the trial judge used in this case. The Mississippi court told the jury the same definitions of "heinous", "atrocious" and "cruel" as the trial judge told Monlyn's jury. 112 L.Ed.2d at 4, Marshall, J., concurring. The Supreme Court remanded to the trial court stating, "Although the trial court in this case used a limiting instruction to define the `especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L.Ed.2d at 4. Since the

definitions employed here are precisely the same as the ones used in Shell, the instructions to Monlyn's jury were likewise constitutionally inadequate. This Court held that the mere inclusion of the definition of the words "heinous," "atrocious," or "cruel" does not cure the constitutional infirmity in the HAC instruction. Atwater v. State, 626 So. 2d 1325 (Fla. 1993).

The remaining portion of the HAC instruction used in this case reads:

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

(T 1689)(R 123-124). This addition also fails to cure the constitutional infirmities of the HAC instruction. First, the language in this portion of the instruction was taken from State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973) and was approved as a constitutional limitation on HAC in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). However, its inclusion in the instruction does not cure the vagueness and overbreadth of the whole instruction. The instruction still focuses on the meaningless definitions condemned in Shell. Proffitt never approved this limiting language in conjunction with the definitions. Sochor v. Florida, 504 U. S. 527, 112 S.Ct. 2114, 2121, 119 L.Ed.2d 326 (1992). This limiting language also merely follows those definitions as an example of the type

of crime the circumstance is intended to cover. Instructing the jury with this language as only an example still gives the jury the discretion to follow only the first portion of the instruction which has been disapproved. Shell; Atwater. Second, assuming the language could be interpreted as a limit on the jury's discretion, the disjunctive wording would allow the jury to find HAC if the crime was "conscienceless" even though not "unnecessarily torturous." The word "or" could be interpreted to separate "conscienceless" and "pitiless and was unnecessarily torturous." Actually, the wording in Dixon was different and less ambiguous since it reads: "conscienceless or pitiless crime which is unnecessarily torturous." 283 So. 2d at 9. Third, the terms "conscienceless," "pitiless" and "unnecessarily torturous" are also subject to over broad interpretation. A jury could easily conclude that any homicide which was not instantaneous would qualify for the HAC circumstance. Furthermore, this Court said in Pope v. State, 441 So. 2d 1073, 1077-1078 (Fla. 1983) that an instruction which invites the jury to consider if the crime was "conscienceless" or "pitiless" improperly allows the jury to consider lack of remorse.

Proper jury instructions were critical in the penalty phase of Monlyn's trial. However, the jury instruction as given failed to apprise the jury of the limited applicability of the HAC factor when the perpetrator of the homicide does not

have the requisite intent to cause suffering. See, Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). Monlyn was entitled to have a jury's recommendation based upon proper guidance from the court concerning the applicability of the aggravating circumstance. The jury should have received a specific instruction on HAC which advised the jury of the necessary mental state required before HAC could be considered. The deficient instructions deprived Monlyn of his rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution. This Court must reverse the death sentence.

ISSUE XII

THE COURT ERRED IN REFUSING TO GIVE A REQUESTED JURY INSTRUCTION DEFINING MITIGATION, IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

During the penalty phase charge conference the refused most of the requested instructions Monlyn's counsel asked the court to read to the jury. Specifically the defendant asked the court to define "mitigation" for the jury (T 2979).

> Mitigating circumstances are those factors which, in fairness and mercy, may be considered as extenuating or reducing the degree of blame for the offense. Mitigating circumstances also include any aspect of the defendant's background and life which may create a doubt whether death by electrocution is the appropriate sentence for the defendant.

(R 2979).

His requested instruction correctly and completely defined that term, while the standard instructions provided no definition of it. The court's failure to provide some clarifying guidance regarding mitigation created reversible error.

The pivotal case for this issue is the United States Supreme Court's decision in Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).

There, the nation's high court, giving meaning to several pronouncements of this court, held that neither the jury nor the judge can weigh invalid aggravating circumstances. Id. at 120 L.Ed.2d 859. The court explicitly rejected this court's reasoning in Smalley v. State, 546 So. 720, 22 (Fla. 1989) that because the jury does not actually sentence the defendant, they need not receive specific penalty phase instructions. The logic of Espinosa compels the conclusion that the jury must be almost as informed on the law governing the penalty phase considerations as the trial judge. If it is kept ignorant on complete definitions of aggravators, or the full meaning of mitigation, for example, then this court cannot say the jury's recommendation is reliable.[13]

The standard in this area of the law is simple: the defendant is entitled to have the jury instruct on the rules of law applicable to the case and his theory of defense. Hooper v. State, 476 So. 2d 1253 (Fla. 1985). This does not mean the court has to give the jury confusing, contradictory, or misleading guidance. Butler v. State, 493 So. 2d 451 (Fla. 1986). Instead, it must give the jury instructions that, when take as a whole, are clear, comprehensive, and correct. Maynard v. State, 660 So. 2d 293 (Fla. 2d DCA 1995). Further, this court does not presume

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[13] This argument does not allege the standard instructions do not adequately define the mitigating circumstances. Gamble v. State, 659 So. 2d 242 (Fla. 1995).

the standard instructions accurately reflect the law in any particular case. Yohn v. State, 476 So. 2d 123 (Fla. 1985):

> While the Standard Jury Instructions can be of great assistance to the Court and to counsel, it would be impossible to draft one set of instructions which would cover every situation. The standard instructions are a guideline to be modified or amplified depending upon the facts of each case.

Id. at 127.

Here, the court told the jury it would be their duty "to determine whether mitigating circumstances exist which are not outweighed by the aggravating circumstances." (T 2365) The court then told the jury what mitigation it could consider. The court, however, never defined mitigating circumstances. That was error, especially when counsel gave the court an instruction that would have supplied that definition (T 2979).

The standard jury instructions merely provide a list of mitigating factors for the jury to consider. They never define mitigation, a crucial failing since the guidance also provides that "Among the mitigating circumstances that you may consider . . . "(T 2385) (Emphasis supplied.) What the jury may have found mitigated a death sentence in this case was left to their unchanneled discretion, and the standard instructions in that respect were deficient in failing to control it.

They needed a definition of mitigation similar to the one Monlyn supplied, and that the court here failed to define that term was error. In Jones v. State, 652 So. 2d 346, 351 (Fla. 1995), the trial court gave a defense requested definition of mitigation. That guidance, when read with the standard instructions on statutory and nonstatutory mitigation, sufficiently informed the jury that it could consider all the mitigation Jones offered. Without similar, expanded guidance here explaining mitigation, this court cannot reach the same conclusion.

This issue, thus, is different from the dozens of cases this court has decided in which the trial court failed to instruct the jury they could consider nonstatutory mitigation. Hitchcock v. Dugger, 481 U.S. 393, 10 S.Ct. 1821, 95 L.Ed.2d 347 (1987); O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989). The error is more basic, and is similar to giving an inadequate definition of reasonable doubt. Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). Not only did the trial court in this case err in failing to define one of the most basic terms in capital sentencing, its error flawed the reliability of the jury's recommendation. See, Sullivan v. Louisiana, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 182 (1993)(Harmless error analysis not applicable to error resulting from trial court giving an inadequate definition of reasonable doubt.) Of course, the court never defined what aggravation was, but in a sense it did when it gave the jury the

exclusive list of aggravating factors it could consider.

Such method of definition, by limiting what the jury could consider, has no application when explaining nonstatutory mitigation, a term that has considerably more breath than the aggravating factors. Because the scope of mitigation is potentially so large the jury needed explicit guidance what it was. Otherwise, they might have defined the term much more narrowly than contemplated by the law. See, Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)(Sentencer cannot be precluding, as mitigation, "any aspect of a defendant's character or record and any of the circumstances of the offense . . . "); Maxwell v. State, 603 So. 2d 490, 494 (Fla. 1992) ("'Nonstatutory mitigating evidence' is evidence tending to prove the existence of any factor 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' or 'anything in the life of the defendant that might militate against the appropriateness of the death penalty.'")

This court should, therefore, reverse the trial court's judgment and sentence and remand for a new sentencing hearing.

ISSUE XIII

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THEY COULD NOT "DOUBLE" THE AGGRAVATING FACTORS OF PECUNIARY GAIN AND THAT THE MURDER WAS COMMITTED DURING THE COURSE OF A ROBBERY, A VIOLATION OF MONLYN'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

During the penalty phase charge conference, Monlyn asked the court to instruct the jury on the problem of "doubling" of aggravating factors:

> The State may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that aspect as supporting a single aggravating circumstance

(T 2985, see also SR 12-24) This had obvious reference to the possibility that an uninstructed jury might double the pecuniary gain aggravator with the "robbery aspect of this case." (T 2278). The court denied the request (SR 20), but it erred in doing so.

One of the earliest refinements of Florida's death penalty statute involved the situation where at least two of the statutory aggravators arose from a single

aspect of a capital murder. Provence v. State, 337 So. 2d 783, 786 (Fla. 1976). Giving double weight to a single aspect of a case would unfairly tip the death sentencing scales in favor of death. The jury might give the single aspect more weight than it deserves.

Thus, this court has found error in cases where the sentencing court "doubled" the pecuniary gain and robbery aggravators. Maxwell v. State, 443 So. 2d 567, 971 (Fla. 1983).

Until recently, that the jury might not know it could not double aggravators has merited scant attention from this court. The United States Supreme in Espinosa v. Florida, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), giving meaning to several pronouncements of this court, held that neither the jury nor the judge can weigh invalid aggravating circumstances. Id. at 120 L.Ed. 2d 859. The court rejected this court's reasoning in Smalley v. State, 546 So. 720, 722 (Fla. 1989) that because the jury does not actually sentence the defendant, they need not receive specific penalty phase instructions. The logic of Espinosa compels the conclusion that the jury must be almost as informed on the law governing the penalty phase considerations as the trial judge. If it is kept ignorant on complete definitions of aggravators, for example, then this court cannot say the

jury's recommendation is reliable.[14]

The standard in this area of the law is simple: the defendant is entitled to have the jury instruct on the rules of law applicable to the case and his theory of defense. Hooper v. State, 476 So. 2d 1253 (Fla. 1985). This does not mean the court has to give the jury confusing, contradictory, or misleading guidance. Butler v. State, 493 So. 2d 451 (Fla. 1986). Instead, it must give the jury instructions that, when take as a whole, are clear, comprehensive, and correct. Maynard v. State, 660 So. 2d 293 (Fla. 2d DCA 1995). Further, this court does not presume the standard instructions accurately reflect the law in any particular case. Yohn v. State, 476 So. 2d 123 (Fla. 1985):

> While the Standard Jury Instructions can be of great assistance to the Court and to counsel, it would be impossible to draft one set of instructions which would cover every situation. The standard instructions are a guideline to be modified or amplified depending upon the facts of each case.

Id. at 127.

In this case, Monlyn did not request the jury be given "new and improved"

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[14] This argument does not allege the standard instructions do not adequately define the mitigating circumstances. Gamble v. State, 659 So. 2d 242 (Fla. 1995).

guidance over the standard instructions. He wanted the court to give them something, lawyers and judges have known about for twenty years: that the sentencer cannot give double weight to a single aspect of a capital murder. It is a quirk of capital sentencing, however, that jurors have remained ignorant of. Indeed, in sentencing Monlyn to death, the court recognized it could not give double weight to the pecuniary/robbery aspect of Monlyn's crime, and it found that the defendant had committed the murder during the course of a kidnaping rather than the robbery (T 3033). Contrary, to the court's treatment of this issue in its sentencing order, other than counsel's argument (T2342-43), the jury had no guidance to avoid the doubling problem. The trial court, therefore, erred in refusing to give Monlyn's requested jury instruction.

Directly, on point, this court in Castro v. State, 597 So. 259 (Fla. 1992) strongly suggested that trial courts instruct juries on the dangers of doubling of aggravators when that possibility exists.

> When applicable, the jury may be instructed on 'doubled' aggravating circumstances since it may find one but not the other to exist. A limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one, and thus the instruction should have been given.

Id. at 261.

That conclusion was dicta in Castro because this court reversed on other grounds, but the issue has recurred. In Jones v. State, 652 So. 346 (Fla. 1995) this court refused to reach the issue presented here "because defense counsel never requested a limiting instruction. . . " Id. at 351. Justice Anstead, concurring, "would adopt a requirement, with prospective application, that when applicable, trial courts henceforth give a standard limiting instruction similar to that set out in Castro v. State, 597 So. 259 (Fla. 1992). This case presents the issue avoided in Castro and Jones, and this court should hold as it intimated in Castro, and as Justice Anstead explicitly recommended in Jones, that when counsel requests a limiting instruction on the doubling of aggravators, the trial court must give it. That the trial court failed to instruct the jury on this particular problem in this case was error.

Of course, the state could concede error but argue it was harmless. Should this court listen to that siren call? No. While the court found several aggravators, Monlyn has challenged the sufficiency of the evidence on the cold, calculated, and premeditated factor. Moreover, the defendant presented some mitigation, so this court cannot say with an easy conscience that the refusal to give an instruction that may have reduced the weight the jury gave to at least one of the aggravators would

have had no effect on their sentencing recommendation.[15]

This court should reverse the trial court's sentence of death and remand for a new sentencing hearing before a jury.

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[15] The jury's vote has no relevance to the harmless error analysis. C.f., Craig v. State, 510 So. 2d 857, 867 (Fla. 1987).

CONCLUSION

Based on the arguments presented here, the Appellant, Broderick Monlyn, respectfully asks for the following relief: reversal of the trial court's judgment and sentence and remand for a new trial, reversal of the sentence of death and remand for a new sentencing hearing before a jury, or reversal of the sentence of death and remand for resentencing before the court.

Respectfully submitted,

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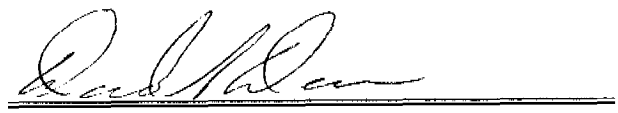
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard B. Martell, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, BRODERICK WENDELL MONLYN, #086458, Union Correctional Institution, Post Office Box 221, Raiford, Florida, on this 29th day of April, 1996.



DAVID A. DAVIS