IN THE SUPREME COURT OF FLORIDA

ROBERT CONSALVO, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 82,780

INITIAL BRIEF OF APPELLANT

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ORIGINAL

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PRELIMINARY STATEMENT

Appellant was the defendant and appellee was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

The symbol "R" will be used to denote Record on Appeal.

STATEMENT OF THE CASE

On October 31, 1991, ROBERT CONSALVO, was charged by indictment with premeditated murder and armed burglary R3343-3343A. Jury selection began on January 19, 1993 R299. At the close of the state's case, and at the close of all the evidence, Appellant moved for judgments of acquittal R2469-70,2471. Appellant's motions were denied R2470,2471. Appellant was found guilty of murder in the first degree as charged in the indictment R3646,3777, and of armed burglary R3647, 3777.

A penalty phase commenced on March 19, 1993 R2744. The jury's recommendation was 11 to 1 for the death penalty R3708. On November 17, 1993 the trial court sentenced Appellant to death for the murder conviction R3771. The trial court departed from the guidelines and sentenced Appellant to a consecutive sentence of life in prison for the armed burglary R3774-76,3770. The trial court filed its sentencing order R3751-68; Appendix. A timely notice of appeal was filed R3782-83. This appeal follows.

STATEMENT OF THE FACTS

GUILT PHASE

Nancy Murray testified that on October 3, 1991, she lived at South Carambola Circle in Coconut Creek R1150. At noon Murray noticed a man open a screened door and raise up the shutter of a residence R1151. The man entered the residence and closed the door R1151. The man had black hair and a black mustache, wore shorts and was holding a towel R1153. Murray called the police R1153. Murray pointed out the person to police R1153. An officer went inside after the man R1154.

Myrna Walker lived in a condominium at 3293 Carambola Circle on October 3, 1991 R1236. Walker saw Appellant at around noontime R1238. Appellant had a towel with him R1242. Appellant and Walker talked as Walker got in her car R1242. Walker returned three hours later and saw a lot of police cars R1244-45. Inside her residence, Walker observed a screwdriver on the floor and her jewelry scattered around R1247. Walker usually kept the jewelry in a dresser drawer R1247. Walker did not give Appellant permission to be in her residence that day R1248. During the evening hours of that same day, Walker permitted police officers to use her telephone R1253. Walker overheard the police say that there had been a stabbing R1253-54. At a later date the police were out scuba diving for a knife R1254.

Officer Greg Williams of the Coconut Creek Police Department testified that he responded to 3293 Carambola Circle at 12:45 p.m. on October 3, 1991 R1161. Williams noticed the screen and rear door had been cut R1162. The shutters were down R1162. Williams heard a noise inside and a shutter went up R1162. Appellant attempted to exit the Walker residence R1163,1166. Appellant had a bunch of items wrapped in a brown towel R1163. Williams yelled for Appellant to halt R1163.

Appellant went inside the residence and Williams followed R1163-64. Williams ordered Appellant to halt and to lay on the ground R1165. Appellant complied R1165. Appellant was handcuffed and searched R1172. A checkbook with the names Sidney and Myrna Walker was removed from his groin area R1173,1177,1183. A checkbook with the name Lorraine B. Pezza and a pocketknife was also found on Appellant R1172-73,1177. Inside the bedroom was a brown towel with some jewelry items and some electronic items R1168. Appellant stated that he had permission to be in the residence R1166. There was a cut in the screen door right where the knob to the door is located R1166. The lock to the sliding glass doors had been pried open R1168. The detective bureau connected prymarks to the screwdriver R1181.

Officer Robert Markland of the Coconut Creek Police Department testified that he helped arrest Appellant on October 3, 1991 R1190, 1192. Markland went into the residence R1191. Appellant was at gunpoint and on the floor R1191. Markland later checked the residence of Lorraine Pezza R1199. There were fresh prymarks between the deadbolt and the doorknob R1199. The prymarks were fresh as they were made that same day R1200.

Sergeant John DiCintio testified that he helped search Appellant after he was taken into custody R1219. Myrna Walker's checkbook was found in Appellant's rear pocket and Lorraine Pezza's checkbook was found in Appellant's groin area R1219-20. DiCintio went to the Pezza residence and found prymarks at the door R1221.

Detective Shackoor was directed to a trash bin surrounded by a three-sided concrete wall that was near the residence R1207. Shackoor found a cloth bag on top of the trash R1209,1213. There were bikes behind the trash container R1211.

Captain Robert Roenbeck of the Coconut Creek Police Department was in charge of the Walker burglary R1261. Roenbeck testified that he inventoried the cloth bag that Detective Shackoor had retrieved and found an assortment of clothing, scotch tape, a playing card, and some Velveeta cheese R1263-64. Roenbeck thought the bag might be relevant R1270. There had been 28 burglaries in that area in the prior six weeks R1270-71. Victor DeAngelo was arrested for the burglaries R1271.

Eva Bell testified that she is a social worker for the Broward County Mental Health Division R1610. On October 3, 1991, at 6:10 p.m., Bell was called to Lorraine Pezza's residence because her family was unable to contact her R1611. Bell knocked on Pezza's door, but there was no answer R1611. Pezza's next door neighbor, Jean Corroppoli, introduced herself R1612. The women conversed R1612. Bell called the police R1614. Officer Walter Westberry arrived around 7:00 p.m. R1614. Westberry knocked at Pezza's apartment, but there was no answer R1615. Bell and Corroppoli went to Corroppoli's apartment R1616. Corroppoli received a phone call and seemed nervous and upset R1617. Apparently her son said he was in jail R1617. Corroppoli said that he had said he had been involved in a murder R1617. Bell remembered that in previous statements she had said that Corroppoli had said her son had said he had been involved in a murder "today" R1642-46. Bell told the officer what Corroppoli had told her R1619. The officer kicked in the door and went inside R1619.

Officer Walter Westberry testified that he responded to 3305 Carambola Circle to meet with Eva Bell R1353. Westberry knocked on the door to 3305, but there was no answer R1354. Westberry kicked in the door R1357. Westberry smelled a pungent odor and turned on the lights

in the kitchen and livingroom R1358. Westberry found a body in the master bedroom R1358.

Sergeant Larry Rogers of the Broward County Sheriff's Office testified that he responded to the scene R1371. Some playing cards were inside the master bedroom and inside the vanity in the bathroom R1474. The cards were loose R1475. Cigarette butts were in the toilet bowl R1375. Four rolls of Scotch tape were in the front bedroom R1479. A pillow was in the spare bathroom sink R1503. There was no blood around the sink R1503. A can of peanut butter, a knife, an apple, and a dried piece of fruit were in the master bedroom R1540. A TV guide dated September 27 was opened to page 53 which had times running from 7:00 p.m. to 10:00 p.m. R1537. The TV remote was on Pezza's bed R1539. The body was lying face down on the bed R1376. Rogers testified that he didn't know at what point the body was moved R1574. When the body was turned over, stab wounds could be seen R1564. The bedsheets contained blood R1493. The bedsheets and everything were removed prior to 10:04 p.m. R1579. Rogers testified that it was possible that the back of the body was seen before 9:50 p.m. R1579. On one of the sheets between the top sheet and Pezza's body was a possible footwear impression in blood R1493. Directly beneath the bed on the floor was part of a knife blade R1487. The portion was the middle section of a knife blade R1555. The blade was never taken to the Medical Examiner's office R1555. A minute amount of blood was found around the knob and on the interior of the front door R1500. The blood was not examined or photographed R1549. Two cuts were made in the patio screen along the frame R1504. One cut was approximately 30 by 45 inches and was large enough to crawl through R1505. There was some type of indentation where the two windows meet R1498. The front door frame was

splintered R1498. The door frame was not reconstructed to determine its condition before it was kicked in R1548. There were 3 possible points of entry R1581. It could not be determined which one was used R1581. Trace evidence -- hairs, fibers, etc. -- were taken R1562. There was some talk that the trace evidence was not examined by a lab R1563. Prints were not lifted from the front window R1582.

A set of keys was found underneath the dumpster on top of the pavement R1462. The keys did not open Pezza's apartment R1519. The canvas tote bag found in the dumpster contained scotch tape, Velveeta cheese, shorts, shirts, and a playing card of the same design as the cards found in Pezza's residence R1469,1472.

Detective Chuck Edel was stipulated to be an expert in the field of blood stain interpretation R1866. Edel went to the scene on October 4, 1991 R1869. Edel doesn't know what position Pezza was in when she was stabbed R1887. Edel opined that Pezza was in a prone position when she bled R1886. Edel opined that Pezza was laying on her bed when she received at least one of the stab wounds R1871. This opinion was due to the blood draining down the side of her body R1872. Pezza's body would have been in a very low position R1872. Edel found no prints on either Pezza's or Consalvo's patio R1879. The cut on Pezza's screen was large enough for Edel to go through R1880. The cut in the Pezza screen was not in the closest area to the Consalvo apartment R1892. The cut was in the middle R1892. There were no prints or scuff marks indicating that anyone shimmied from one patio to the other R1892-93.

Dr. Ronald Wright, the medical examiner for Broward County, was declared an expert in the field of forensic pathology R2061. Wright performed the autopsy on Lorraine Pezza. Wright testified that the cause of death was stab wounds R2085. The range of the time of death

was 3 to 7 days. At the time Wright saw the body on October 4th, it looked as if the body had decomposed for 3½ days R2121. Based on the decomposition, death would have occurred on the evening of September 30th R2121. Wright testified that he would be surprised if death had occurred a week earlier because there would be maggots R2122. The kind of changes seen in Pezza would be highly unlikely to occur before 3 days after death R2067.

Wright testified that there was a stab wound to the right chest which was 3 inches deep R2068-70. The nature of the wound suggests a knife with one dull side and one sharp side R2071. There was a wound to the left chest which went into the heart R2073-74. In Wright's opinion Pezza was lying down when she received this wound R2075. This was the only serious or fatal wound R2083. Pezza would have lived only 20 seconds after the infliction of this wound R2083. There was one stab wound to the back and 5 other superficial wounds R2077-78. The stab wounds to the back was 4 inches deep and went between the ribs R2077. Police brought Appellant's pocket knife for Dr. Wright to examine and Wright told them they had to be kidding R2119. Dr. Wright eliminated Appellant's knife as a possible cause of Pezza's wounds R2080. Wright testified that the broken blade found at the scene could have been part of the weapon involved in the stabbing R2081. Wright testified that restaurant supply knives are made of a higher carbon steel than other cheaper knives and they tend to bend as opposed to break R2102-03. The stab wounds to Pezza could have been made with any knife with a blade longer than 4 inches R2105. Wright could not tell if the knife would be single or double edged R2104.

Dr. Wright testified that he was called on the case on October 3, 1991, at 10:07 p.m. and was told that Pezza had a stab wound to the

chest R2093. Detective O'Neil had called and apparently knew about the stabbing before 10:00 p.m. R2095. From the description, it sounded like a suicide to Dr. Wright thus he didn't go to the scene R2098. There was a past history showing a possible suicide R2091. If he had thought it was a homicide he would have gone to the scene R2098. However, from doing the autopsy, there was no doubt in Dr. Wright's mind that this was not a suicide R2092. In reviewing approximately 2,000 cases of suicide, Wright never saw a case where the deceased had a stab wound to the back R2082.

Jean Corroppoli testified that Appellant was her son R1672. Corroppoli lived next door to Lorraine Pezza R1678. On the date Appellant was arrested, October 3rd, in the early morning hours Corroppoli had to let Appellant in because he had lost his keys R1694-95. Appellant had a small bag with kittens on it R1696. The bag did not match the bag that the police found in the trash dumpster R1696. Appellant grabbed the bag and went into his room R1697. Corroppoli leaned over her bannister and noticed that Pezza's light was on R1781. This was the first time she had noticed the light R1781. As a result, Corroppoli called Pezza's mother that morning R1698,1700. Corroppoli also noticed that newspapers were piled up and noticed a cut on the screen that was always being repaired or broken R1701. When she returned from work, Corroppoli noticed that the papers were gone and the screen was repaired R1703.

Corroppoli testified that later that same day she talked with Eva Bell R1707. Corroppoli and Bell were talking when Corroppoli received a call from Appellant R1709. Appellant asked to be bailed out and said that if she didn't bail him out they would implicate him in a murder R1710. Corroppoli told Appellant that the police were next door R1713.

Appellant said, "Oh, shit" R1713. Corroppoli found a towel in her son's room R1717-18. Corroppoli had never seen the towel prior to that day R1719. There was a dried spot of blood on the towel R1719.

Corroppoli testified that when she was moving she noticed that a knife was missing R1721. The knife was a butcher knife with a straight edge R1721. The knife was a big, heavy knife R1765,1760. She bought it at a restaurant supply place R1722. She may have lost the knife at a picnic R1723. She consistently told Detective Gill that she may have misplaced the knife R1758. She told him she may have lost it at a picnic R1758-59. Corroppoli washed Appellant's shoes after Pezza was missing R1742. There was no blood on the shoes R1742.

Detective Thomas Gill of the Broward County Sheriff's Office responded to the Pezza residence at 8:50 p.m. R1811. Gill testified that he went inside the apartment and looked at the scene R1812. At 10:00 p.m., Gill went to the North Broward Detention Center to speak with Appellant R1815-16. Gill arrived at 10:10 p.m. R1816. Gill advised Appellant of his constitutional rights R1816. Gill told Appellant he wanted to speak with him regarding Pezza's checkbook that was found on his person R1818. The account had been closed out since March of 1991 R1842. Appellant responded by stating that "you are not going to pin that stabbing on me" R1819. Gill testified that he had not known that it was a stabbing R1819. Gill returned to the Pezza residence and looked at the body and saw what appeared to be puncture wounds in the back R1820. There were 2 cigarette filters at the scene R1821. Gill interviewed Jean Corroppoli R1822. Gill testified that Corroppoli told him about a towel sometime after 11:30 p.m. R1823. Corroppoli's house was searched R1828. Gill observed a pinkish colored towel on a top shelf inside a dresser R1830,1832. Shoes were found at

the foot of a bed and were taken because of the apparent shoe print in blood at the crime scene R1831.

Gill testified that Pezza's car was found behind a pawn shop, 2300 yards from the Seaton Villa Motel R1847-49. Pezza owned a 1987 maroon Honda Accord R1827. On October 10th the keys were found in a nearby back yard R1853. The keys did not fit in Pezza's door R1854.

Gill testified that he talked with Corroppoli on October 11th about a knife R1846. Gill testified that Corroppoli never told him she might have misplaced the knife R1949-50. However, Gill admitted that at the deposition Corroppoli did state that she may have misplaced the knife R1951. The pond behind Pezza's apartment was searched for a knife, but none was found R1901. Gill admitted there were inaccuracies in his report R1917-18. There were a number of possible points of entry including the front door, front windows, back window and balcony R1956-57. The front door could also have been a point of exit R1957. No analysis was ever done on the trace evidence gathered by the crime scene unit R1961-62. The shoes that were taken couldn't be matched with anything in Pezza's apartment R1969. Gill doesn't know whether DNA testing was done on the cigarette butts taken from Pezza's apartment R1987. Corroppoli's statement used the term "implicated" and not "involved" in a murder R2028. The term "today" meant October 3rd R2028-29.

Fred Boyd testified that he compares latent footwear for the Broward County Sheriff's Office R2133-34. Boyd compared the design of Appellant's shoe with the impressions on Pezza's bedsheet R2135. The design of the shoes was not similar with the impression on the sheet R2136.

Thomas Messick, an expert in the field of latent print examination, testified that he compared prints given to him with those of Appellant, Lorraine Pezza and Scott Merriman R2328-29. Messick received 74 prints R2329. There were 47 prints of value R2334. Seven of the prints belonged to Pezza R2334. Eighteen belonged to Merriman R2335. Twenty-two could not be identified R2335. Messick could not positively say that 20 of these did not belong to Pezza R2336. Two of them definitely did not belong to Pezza R2336. One was from a rear-view mirror of Pezza's car and the other was taken from a package of scotch tape R2337. The other unidentified prints were found on the bedroom door, the front door, the glass nightstand, the chair in the bedroom, a playing card, the bedroom glass sliding door, and the Velvetta cheese container R2340-43,2349.

Kevin Noppinger testified that he is a DNA analyst for the Broward County Sheriff's Office R2258. Noppinger received a towel found in Appellant's bedroom for examination R2262. The DNA of the blood on the towel matched that of Lorraine Pezza R2266. The frequency match was 1 in 390,000 R2267. Noppinger examined Appellant's shoes for blood, but he could not find any blood R2279. Noppinger did not examine other bloody items in his possession R2279. Noppinger did not analyze the blood on the partial knife blade found at the crime scene R2291. Noppinger did not analyze the blood found on Pezza's door R2292. Noppinger did not see the trace evidence in this case R2286. Noppinger's analysis did not place Appellant at the crime scene R2285.

Sergeant James Kammerer of the Broward County Sheriff's Office testified that he arrived at the Pezza residence at approximately 10:05 p.m. R2310. Kammerer used a particle laser and collected numerous hairs from different parts of Pezza's body R2310. A fiber was

collected from Pezza's left hand R2310. A number of prints were discovered R2311-14. Cigarette butts from an ashtray were taken into evidence R2316. Trace evidence can eliminate people and can be used to trace people to the crime R2322. DNA analysis can be done on the roots of hair R2333. Hair analysis was requested int his case, but Kammerer did not know the results R2324. It is the responsibility of the lead detective to make sure the work was properly collected R2325.

James Andreas testified that he was the director of Presto Network for Publix and he managed and operated the ATM records R1403. Records showed that on September 27, 1991, at 4:07 p.m to 4:09 p.m. three attempts were made to withdraw money from an ATM at Margate Publix were denied R1423-24. At 4:10 p.m. a transaction of $200.00 was made R1424. On September 29, 1991, a number of other transactions were attempted R1428-31. Some of the records did not accurately reflect the attempted transactions R1432-34.

Casey Robinson testified that he was the assistant branch manager of the California Federal Bank R1448. A bank statement of September 19, 1991, showed Lorraine Pezza's account had a balance of $5,101.76 R1454-55. The balance on October 17, 1991, was $3,035.25 R1455. The following withdrawals were from Pezza's ATM account: 9/27/91 - $200; 9/28/91 - $200; 9/28/91 - $60; 9/29/91 - $200; 9/29/91 - $80; 9/29/91 - $20; 9/30/91 - $200; 9/30/91 - $1000 R1456.

Edmund Williamson testified that he was a good friend of Lorraine Pezza and talked to her quite often R2432. Williamson called Pezza on September 27, 1991, at 5:50 p.m. and left a message on her answering machine R2433-34. On September 28, 1991, Williamson left another message on Pezza's machine R2434. Pezza did not return Williamson's calls R2434. The answering machine tape was played R2435-37.

Officer William Hopper testified that on September 21, 1991, he met with Lorraine Pezza at 3:01 a.m. R1121. Pezza stated that she and Appellant had withdrawn $200 from an ATM at 10:00 p.m. R1124. Pezza stated that she placed $140 in the glove box of her car R1124. Pezza stated that at 1:30 a.m., Pezza and Appellant went to Pezza's apartment to listen to some music R1124. Pezza stated that at 2:30 a.m., Pezza remembered the money that she had left in her glove box and went to the diningroom where she had left her keys R1124. Pezza stated that her keys were missing R1125. Pezza stated that she got a spare key and checked the glove box and the $140 was missing R1125. Hopper asked Appellant if he knew anything about the missing items R1125. Appellant said that he did not R1125.

Detective Douglas Doethlaff testified that on September 24, 1991, he spoke with Lorraine Pezza when she phoned the police station R1282. Pezza gave Doethlaff a telephone number -- (305) 968-5817 R1289. Doethlaff called the number and spoke with a person who identified himself as Robert Consalvo R1289. Doethlaff told the person that he was updating the suspect information that had already been filed involving Pezza's missing keys and money R1289-90. Doethlaff told the person that Pezza was requesting more information so that she could follow through on misdemeanor charges R1290. The person indicated that he did not know where the property was or why he was being accused of taking the property R1291. Doethlaff told him that he believed he had taken the property and it was his word against hers and that it would be handled through the courts R1291. The person gave his name, date of birth, address, and telephone number R1291.

Doethlaff testified that he later processed the crime scene of the Walker burglary R1293. Doethlaff also tried to check if the Pezza

residence had been burglarized R1298. The door was shut R1298. Doethlaff placed his business card in the doorjamb R1298. He noticed fresh pry marks on Pezza's door R1308. Doethlaff admitted testifying in a deposition that the pry marks would have been made within a day or two of when he observed them R1310.

Robert Carroll testified that he is a locksmith R1136. Lorraine Pezza had her locks changed on September 27, 1991 R1138. Carroll arrived at her residence at 10:00 a.m. R1139. Pezza was wearing a dress R1139. A Schlage key opened the locks to Pezza's front door R1141. Carroll changed the lock on the mailbox and the front door R1140-41. The front door lock was changed by changing the combination of pins inside the mechanism R1141-42. Carroll left Pezza two new keys for the front door R1142. Carroll was at Pezza's residence for approximately 45 minutes R1143.

William Palmer testified that on October of 1991 he was in the Broward County Jail facing charges of battery on a law enforcement officer and possession of cocaine R2373. Appellant and Palmer talked to each other about their cases R2375. Police had asked another inmate to ask Palmer if he would tell them what Appellant told him R2402. Palmer gave a statement to Detective Gill and had seen him three times since R2402. Palmer was facing 20 years on the charges against him and the state had filed a pleading to declare Palmer a habitual offender on September 16, 1991 R2404. Palmer tried to get his bond reduced, but on October 2, 1991, the judge denied the reduction of bond R2406. Later, Palmer would be released on his own recognizance R2407. Palmer was to report to Detective Gill every day R2407. On November 4, 1991, Palmer walked in court facing 20 years in prison and walked out convicted of a misdemeanor and probation for one year R2409. Detective

Gill spoke on Palmer's behalf before the judge in court R2410. Palmer testified that no promises were made to him and he was not told that his receiving probation was the result of his testifying R2379-80. Palmer believes that his charges were dropped to misdemeanors due to the nature of his case and not due to Detective Gill R2419-20. Palmer testified he was not testifying in this case to help himself R2424.

Palmer testified that he had lied to the police for his own purposes previously R2384. Palmer could not count how many times R2392. Palmer admitted he lied to police 6 or 7 times out of 10 R2418. Palmer has been previously convicted of 8 felonies, but it could be 9 or 10 R2396. Palmer has been arrested 28 times R2402. No charges are presently pending against Palmer that he knows of, but Palmer believes that he might have some other "ghosts in his closet" R2384. Palmer testified that Appellant stated he was in the jail for murder R2376. Appellant said he broke into a woman's house R2376. Appellant and the woman were doing drugs together R2376. Because her boyfriend just died he was going to be sympathetic with her R2376. He went over one day and she didn't answer the door R2376. He knew she was home, but figured she had passed out so he broke into the house R2376. She woke up and yelled that she was going to call the cops R2376. She reached and grabbed the phone R2376. He grabbed her and tried to stop her from calling R2376. She started screaming so he stuck her R2376. Then she really started screaming so he stuck her a couple of more times R2376. Appellant said they struggled a bit R2415.

Palmer testified that Appellant said that he had gone to the residence to get more drugs R2377. Palmer told Detective Gill that Appellant and the woman were doing some drugs that sounded like Percodan or Percocets R2412. Palmer also testified that he overheard

Appellant on the phone one time saying something about getting rid of shoes R2378. Appellant also mentioned a towel R2378. Palmer told Detective Gill that Appellant got one check from the woman's purse and he said he took keys R2413. This was done the night before R2422, 2425. Detective Gill talked to Palmer before his statement was taped R2416. Palmer testified that Gill did not tell Palmer what to say in his statement R2422. Gill told Palmer not to bring up things they don't ask R2422. Palmer had seen news reports about the case R2417.

PENALTY PHASE

The following are the relevant facts to the aggravating and mitigating circumstances presented in this case.

Dr. Abbey Strauss was declared an expert in the area of general psychiatry R3028. Dr. Strauss reviewed Jean Corroppoli's deposition, the report of Dr. Livingston, which included the interview of Jean Corroppoli, the report of Mr. Don Pierce (private investigator) which primarily consisted of information regarding Appellant's brother, the deposition of Mr. Lampert, and an interview of Frank Consalvo R3029-3030. Dr. Strauss came to the conclusion within a reasonable degree of psychiatric certainty that Appellant came from an extremely dysfunctional family with many problems, some of them going back several generations R3031. The family had great turmoil and chaos and was abnormal in many ways R3031. There were no problem-solvers in Appellant's family R3032. Appellant's father was an alcoholic and had some sort of job in an illegal activity R3032.

Dr. Strauss testified there was no sense of love, safety or security in the family R3032. Whenever problems occurred within the family they were met by the father beating the boys with a stick or belt or whatever he could find R3033. The family never tried to talk

things through R3033. The father would disappear for several months at a time R3033. The father provided money, but little else R3034. The mother could not leave her husband despite being frequently beaten R3034. The mother had a number of psychiatric problems and was hospitalized a number of times for depression R3034. The mother was very weak and played a very passive role R3034. She was never able to correct the problems with the family R3034. The father was a tyrant and the mother allowed things to go on R3034.

It was Dr. Strauss' opinion that the family was ashamed and tried to hide things and that other members of the family did not aid and try to comfort the family R3035. Frank Consalvo and Appellant were beaten severely much more than the other children R3036. It appears the family did not celebrate birthdays and other holidays together R3037. These are the types of things that bring families together R3037. There was no sense of love and safety R3037. The conditions led to a paradox in that one had to act bad to get attention and be thought of as good R3038. There was no sense of family tradition R3038. Appellant's father went to prison for attempted murder once R3041. He never wanted the family or children R3041. He was an open alcoholic R3041. The time Appellant's father spent with the children was one of fear and violence R3041.

Dr. Strauss testified that Appellant's family needed to know they were protected R3043. Dr. Strauss testified that Appellant's situation made sense because of the mother's history R3043. Appellant's mother never had role models R3043. Appellant's mother was sexually abused and raped by her father R3043. There was a second generation of family dysfunction R3043. Appellant's mother ran away from home at the age of 14 R3043. She married Appellant's father after the children were

born and when he was on his way to jail R3044. Appellant was a hard worker who was hurt very severely when he broke up with his wife R3045. Appellant later learned she was a prostitute and that she had slept with his brother R3045. Dr. Strauss testified that this again showed how dysfunctional Appellant's family was R3045.

Dr. Strauss testified that despite the violence within Appellant's family the children looked at their father as a god R3046. All Appellant knew was violence, indifference, selfishness, and weak and impulsive behaviors, and instant gratification R3047. Appellant's mother also had a drinking problem R3048. Appellant was genetically handicapped R3048. Appellant lived on the border of Chinatown and Little Italy in New York City which is really a rough neighborhood R3048. Macho behavior was a good vent for his psychological needs R3048-49. Appellant may have been afraid to care, but he was not a sociopath R3049. These things explain how Appellant got to this stage of his life R3050. The dysfunctional family offers an insight as to what went on in Appellant's life and how it resulted in multiple tragedies R3051.

Appellant was periodically placed in foster homes when his mother had mental breakdowns and there was no one to take care of the children R3051-52. Dr. Strauss testified that Appellant can be treated, but that it may be difficult R3052. There was also an incident where Appellant was caught in bed with his brother's fiancee R3059-60. The brother pulled a gun and Appellant pulled a knife R3062. In all probability if Appellant was in a good environment his behavior would have changed R3080.

Gail Russell testified she met Appellant in June of 1991 R3146. Russell and Appellant did simple things together R3148. Appellant was

a nice, normal guy who loved life R3146. He was very well liked by others R3146. When Russell told Appellant that she was going back to her fiancee Appellant cried R3148. Russell testified that Appellant's mother made Appellant feel like he was worthless R3148. Russell testified that Appellant's mother would criticize him in her presence R3149. Appellant's father stabbed Appellant when he was little because Appellant went toward his father's drugs R3151. When Appellant's mother went to the hospital after Appellant's father had been shot by police, the father's girlfriend was already there R3151. Appellant would make excuses for his father R3151. Appellant talked about his father as if he were wonderful R3151.

Michael Rudasill, an instructor at the Broward County Jail, taught s self-study program R3136-37. Rudasill testified that Appellant's productivity in learning was steady and above average R3139. Appellant was in the top ten percent of the students R3139. He was amenable to learning and has the ability to learn R3139-40.

Don Hallerberg, owns a small manufacturing company R3160. Mr. Hallerberg hired Appellant as a machine operator to run milling machines R3162. Appellant was an extremely good learner R3162. Appellant was a good worker R3163. Appellant was an extremely valuable employee R3163. Hallerberg never had trouble from Appellant nor had to worry about him R3163. Appellant worked for Hallerberg for ten months and did an outstanding job R3163. Appellant would work a 47½ hour work week five days a week R3163. Appellant left the job because he could not get a ride to work R3163. Appellant had been coming and leaving work with Curt Nebell R3164. When Appellant moved back with his mother he had trouble getting to work R3164. Hallerberg testified that if it were not for the transportation problem, Appellant would

be eligible for employment today R3165. Hallerberg has nothing but regard and trust for Appellant R3166.

Lynn Kolkmeyer, the administrative manager for Navox Corporation, hired Appellant in June of 1990 R3169-70. Kolkmeyer talked to Appellant on a daily basis R3171. Appellant was a good employee and all the employees liked Appellant R3171. Kolkmeyer associated with Appellant outside of work R3171. Kolkmeyer was a perfect gentleman and was always helpful R3172. For example, after a house-warming party he was the only one who offered to help clean up in the morning R3172.

Robert Bailey worked at Navox Corporation when Appellant worked there R3174. Appellant occasionally worked in Bailey's department R3175. Appellant was an outstanding employee R3175. Bailey saw Appellant outside work and associated with Appellant R3175-76. Bailey had never seen Appellant violent R3176. Appellant was always courteous and respectful R3176. Bailey testified that Appellant was a good friend and the person he knew would never have done the crime he was convicted of R3177. Bailey testified that Appellant does not deserve to have his life taken away for this crime R3177.

Jeffrey Glass is Appellant's attorney. Glass testified that every time he met with Appellant, Appellant has been cooperative R3220. Glass testified that Appellant never showed any signs of violence toward him and there was never any violence in Glass' presence R3220. Appellant has always been courteous R3220.

SUMMARY OF THE ARGUMENT

1. The trial court instructed the jury that proof of unexplained possession by an accused of recently stolen property by means of burglary may justify a conviction. Such an instruction does not apply where there are disputes as to the facts within the instruction and constitutes a comment on the evidence by the trial judge.

2. In closing argument the prosecutor was allowed to argue that the similar facts of a collateral crime proved that Appellant was guilty of the crimes charged. This was error where the collateral crime was not relevant toward proving identity.

3. The trial court failed to hold an adequate inquiry into the state's discovery violation which consisted of late print comparisons which thwarted Appellant's defense.

4. The trial court failed to hold an adequate inquiry into the non-disclosure of test results which thwarted Appellant's defense.

5. The state claimed that Appellant was utilizing a suicide defense. No such defense was presented. It was reversible error to permit the state to utilize this strawman defense in order to introduce evidence and to denigrate Appellant.

6. The admission of hearsay evidence of a theft denied Appellant's rights to confrontation, due process and a fair trial.

7. Appellant was denied due process and a fair trial by use of a false statement which was not relevant to any of the issues at trial.

8. Eva Bell testified to a statement of Jean Corroppoli as to what someone told her. It was reversible error to admit this hearsay.

9. It was reversible error to admit the details of the Walker burglary which were not relevant to this case.

10. Only the grand jury has the authority to amend an indictment. It was reversible error to constructively amend the indictment in violation of the Grand Jury Clause.

11. The indictment never alleged felony murder. It was reversible error to proceed on a theory which was not noticed.

12. It was error to find the avoid arrest aggravator where the evidence did not prove beyond a reasonable doubt that the sole or dominant motive was to eliminate a witness. The error was not harmless.

13. In its sentencing order, the trial court relied on depositions and other materials not presented in open court. Appellant was never noticed that these materials would be used. This was reversible error.

14. The trial court erred in failing to consider and find some of the non-statutory mitigating evidence. The trial court also erred in using an incorrect standard in evaluating other non-statutory mitigating evidence.

15. Death is not proportionally warranted in this case.

16. The admission of the victim's history denied Appellant due process and a fair, reliable sentencing.

17. The victim impact statute allows for arbitrary and capricious imposition of the death penalty; is vague; infringes upon this Court's exclusive right to regulate practice and procedure and violates the ex post facto clauses.

18. The felony murder aggravator is unconstitutional.

19. The trial court erred in failing to adequately define the non-statutory mitigating circumstances.

20. Electrocution is cruel and unusual.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT PROOF OF UNEXPLAINED POSSESSION OF RECENTLY STOLEN PROPERTY BY MEANS OF BURGLARY MAY JUSTIFY A CONVICTION FOR BURGLARY.

At trial, over Appellant's objections R2480-83, the trial court instructed the jury that proof of unexplained possession of recently stolen property by means of burglary may justify a conviction for burglary as follows:

> Proof of unexplained possession by an accused of property recently stolen by means of a burglary may justify a conviction of burglary with intent to steal that property if the circumstances of the burglary and of the possession of the stolen property, when considered in light of all of the evidence in the case, convince you beyond a reasonable doubt that the defendant committed the burglary.

R2699-2700. Such an instruction was improper and denied Appellant due process and a fair trial contrary to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Appellant argued that the instruction does not apply because the proof did not support the instruction R2480-82. The law is well-settled that the instruction on presumptions from unexplained possession of stolen property does not apply where there are disputes as to the facts within the instruction. Jones v. State, 495 So. 2d 856 (Fla. 4th DCA 1986); Currington v. State, 80 Fla. 494, 86 So. 344 (1920); Griffin v. State, 370 So. 2d 860 (Fla. 1st DCA 1979); United States v. Torrence, 480 F.2d 564 (5th Cir. 1973). The instruction in this case, that proof of unexplained possession of property stolen by means of burglary justifies a conviction for burglary, requires the jury to find that the property was stolen by means of burglary before using the presumption. If the jury finds that the property was stolen

by burglary, the burglary issue would be resolved. As explained in Jones v. State, 495 So. 2d 856, 857 (Fla. 4th DCA 1986), in such a situation there is no need for the presumption and the instruction is improper as it goes against the presumption of innocence:

> The only issue at trial was whether Jones intended to steal the car or took it innocently, in other words, whether the car was stolen. The challenged jury instruction, however, states as a fact that the property was stolen and establishes the presumption that the person in possession was the thief. Such an instruction serves no purpose in a case such as this. "[W]here there is conflict in the evidence as to the intent with which property alleged to have been stolen was taken ... the question should be submitted to the jury without any intimation from the trial court as to the force of presumptions of fact arising from ... the testimony." *Currington v. State*, 80 Fla. 494, 86 So. 344, 345 (1920). Under the instruction, before the jury could make the presumption, it would have to find that the property was stolen. If the jury found that the car was stolen, however, it would find Jones guilty and the case would be resolved. In other words, there would not no need for the presumption. The presumption applies in a different type of case, that is, where the property is indisputably stolen and the question is who stole it. The only possible effect of the instruction here was to allow the jury to presume Jones was guilty because he was in possession of the car. This goes against the presumption of innocence inherent in our criminal justice system. *Currington*.
>
> Accordingly, we reverse and remand for a new trial in accord herewith.

In Currington v. State, 80 Fla. 494, 86 So. 344, 345 (1920), this Court likewise noted that "Where there is conflict in the evidence as to the intent with which property alleged to have been stolen was taken ... the question should be submitted to the jury without any intimation from the trial court as to the force of presumption of fact arising from any portion of the testimony."

In the present case the instruction could lead to the conclusion that Appellant was guilty of the Pezza burglary by possession of a canvas bag that had been stolen from the Pezza residence. However, this was in dispute. The defense argued that the bag could have been

removed from the trash rather than stolen R2663-64.[1] Also, it was disputed that Appellant ever had possession of Pezza's canvas bag. Jean Corroppoli, the only witness who saw Appellant in possession of any type of bag, testified that the bag in Appellant's possession was different than Pezza's bag R1696. Clearly, the instruction should not have been given. United States v. Torrence, 480 F.2d 564, 565 (5th Cir. 1973) (instruction should not have been given to jury where witness had denied underlying basis for instruction). Because of the instruction it could also be intimated that the checkbook found on Appellant's person showed he was guilty of the burglary. However, the checkbook was not shown to be stolen. The checkbook was from an account that was closed long before the burglary occurred R1842. Thus, the checkbook was of no value and could have been discarded long ago. The point is, there was great dispute as to whether the checkbook was stolen. Thus, it was improper to give the instruction. Moreover, assuming that the property was stolen, Appellant's possession of the property was never unexplained. Appellant was never asked to explain his possession of the property. Thus, it was improper to give the instruction. Palmer v. State, 323 So. 2d 612, 617-18 (Fla. 1st DCA 1975) (error to give instruction on unexplained possession of stolen property where no predicate laid that defendant had failed to explain or give an unreasonable explanation).

Finally, the giving of the instruction also constitutes an unwarranted comment on the evidence by the trial judge. Barfield v. State, 613 So. 2d 507, 508 (Fla. 1st DCA 1993) (instruction on purchase or sale of stolen property below fair market value amounts to "an improper comment on the evidence by the trial judge an thereby invades

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[1] In fact, Pezza's bag was recovered from the trash R1209.

the province of the jury"). Trial judges are prohibited from commenting upon evidence to the jury. Whitfield v. State, 452 So. 2d 548 (Fla. 1984). This cause must be remanded for a new trial.

POINT II

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE PROSECUTOR ARGUING A COLLATERAL BURGLARY AS SIMILAR FACT EVIDENCE.

Over Appellant's objections R2634-37, the prosecutor in closing argument argued that the similar facts of the Walker burglary proved that Appellant committed the Pezza burglary and murder for which he was charged R2639-42. The trial court overruled Appellant's objections and permitted the argument R2638. This was error.

As will be seen below, the Walker burglary was not admissible as similar fact evidence to prove identity. While it is true that the Walker burglary evidence was admitted on a basis other than proving identity by similar fact evidence,[2] this fact does not permit the evidence to be used for a purpose for which it would not be admissible. In Parsons v. Motor Homes Of America, 465 So. 2d 1285 (Fla. 1st DCA 1985), it was made clear that merely because evidence is admissible for one purpose does not mean that the evidence may be used beyond the scope of that purpose:

> The law is clear that evidence "admissible as to one party or for one purpose, but inadmissible as to another party or for another purpose," may be admitted so long as it is restricted to its proper scope. § 90.107, Fla.Stat. (1981). See also: Fla.R.Civ.P. 1.450(b); Fla.Std.Jury Instr. (Cir.) 2.4. Therefore, the trial court erred in taking the position that once material "is received in evidence, it will be received for any probative value it may have on *any* issues before the court." (emphasis supplied).

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[2] It should be noted that the basis for admitting the Walker burglary was also in error. See Point IX.

465 So. 2d at 1290. Thus, it was error to allow the prosecutor to use the Walker burglary to prove identity through similar fact evidence.

In order for similar fact evidence of other crimes to be relevant to prove identity, there must be uniqueness of the two crimes and the collateral crime is not admissible where it is merely similar to the crime charged. Peek v. State, 488 So. 2d 52 (Fla. 1986); Bricker v. State, 462 So. 2d 556 (Fla. 3d DCA 1985); Crammer v. State, 391 So. 2d 803 (Fla. 2d DCA 1980). The two crimes should be uniquely tied to each other so that the collateral offense is, when compared to the present offense, a "fingerprint type" characteristic. Bricker v. State, supra, at 559.

As this Court explained in Drake v. State, 400 So. 2d 1217, 1219 (Fla. 1981), mere general similarity is not sufficient and the similarity of both offenses must be so unusual so as to point to the defendant:

> A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant.

The admissibility of collateral crime evidence depends on both the similarities and dissimilarities between the crime charged and the collateral crime. Peek v. State, 488 So. 2d 52, 55 (Fla. 1986); Thompson v. State, 494 So. 2d 203 (Fla. 1986).

In the present case, the collateral burglary has no unique or unusual similarities to the crime charged so as to identify one person as the perpetrator of both crimes. The similarities urged in this case are the following: knives were used in both burglaries, both apartments were unoccupied, and both had identical points of entry

R236,238. However, all these were actually dissimilarities. Different knives were involved in the two crimes. Appellant was found in possession of a pocketknife at the Walker burglary while a totally dissimilar knife was used in the crime charged. In fact, the medical examiner specifically excluded Appellant's knife from being used in the crime charged R2080,2119. Both apartments were not unoccupied. Only the Walker burglary involved an unoccupied apartment. The crime charged obviously involved an occupied apartment. The points of entry cannot be said to be similar. In fact, in the crime charged the police could not determine the point of entry except to say that there were a minimum of 3 possible points of entry R1581, while in the Walker burglary there was one certain point of entry. If anything, these differences go against the collateral crime being relevant toward proving identity. The only true similarity is that the burglaries were committed in the same vicinity. The sole common point (location) is not so unusual as to establish a sufficiently unique pattern of criminal activity to justify admission of the collateral crime evidence. Peek v. State, 488 So. 2d 52, 55 (Fla. 1986); Chandler v. State, 442 So. 2d 171, 173 (Fla. 1983). As in Peek, to allow testimony concerning this defendant's collateral crime under these circumstances would be to allow "any collateral crime evidence as long as the crime were of the same type and were committed within the same vicinity." 488 So. 2d at 55; see e.g. Joseph v. State, 447 So. 2d 243 (Fla. 3d DCA 1983) (in each instance the assailants approached the victim in a small car which because the scene of the crime; the assaults were perpetrated by black males; the victims were abducted from a public street during the nighttime hours and the assaults occurred in the same general area of Miami; a knife was used

to threaten the victim in each case and after each assault the victim was released; the collateral crime was inadmissible because these similarities were so general as to be found in a vast number of like crimes); Brown v. State, 397 So. 2d 320 (Fla. 2d DCA 1981) (the court noted that the modus operandi in the two robberies was not unusual and that robberies are committed in such a manner on an everyday basis); Williams v. State, 619 So. 2d 487, 492 (Fla. 1st DCA 1993) (error to admit collateral crime as proof of identity because the "two episodes share only general similarities present in numerous other street robberies" and there was "no identifiable points of similarity pervading both robberies that are so unique or unusual that they point to Appellant as the perpetrator of both crimes").

The use of improper collateral crime evidence is "presumed harmful" because of the danger the jury will misuse the bad character or propensity to crime as evidence of guilt of the crime charged. Peek v. State, 488 So. 2d at 52, 56 (Fla. 1986); Straight v. State, 397 So. 2d 903 (Fla. 1981); Jackson v. State, 451 So. 2d 458, 461 (Fla. 1984); Paul v. State, 340 So. 2d 1249, 1250 (Fla. 3d DCA 1976) ("There is no doubt that this admission [to prior unrelated crimes] would go far to convince men of ordinary intelligence that the defendant of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime"). It is particularly harmful in this case where the prosecutor improperly used it to argue that Appellant was guilty of the Pezza murder and burglary R2639-42. The error may have swayed the jury from a reasonable doubt and tipped the scales in favor of conviction. The error denied Appellant due process and a fair trial contrary to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and

the Fifth, Eighth and Fourteenth Amendments of the United States Constitution. This cause must be remanded for a new trial.

POINT III

THE TRIAL COURT ERRED IN RULING THAT NO DISCOVERY VIOLATION OCCURRED AND IN FAILING TO HOLD AN ADEQUATE INQUIRY INTO THE VIOLATION.

Appellant's defense was that a third party committed the killing. In presenting this defense, Appellant relied on print analysis turned over by the state and as a result Appellant was able to argue to the jury in the opening statement that third party prints were found at the crime scene which were unidentified:

> MR. GLASS: ... Tom Messick will tell you about these playing cards that's key evidence to the State, and it's key evidence to the defendant. They will tell you that there are playing cards strewn about near the bed area of Lorraine Pezza's apartment somewhere in between the bed and a bathroom I think; and one of those playing cards, the same type of playing cards on the back, is found in this bag. But what is interesting that the prosecutor hadn't told you is that there's a fingerprint that they lift off the cards. And they check. Is it Lorraine Pezza's print? No. Is it the defendant's print? No. Is it a third party print? Yes. And you will hear that the police went no further with the prints. They have got a third party print on a piece of evidence that they say is key evidence. Not only hasn't he told you that, but they go no further with it.

R1082-83. During trial the prosecutor called the print examiner, Thomas Messick. Appellant objected on the grounds that there was a discovery violation R2143-44. Appellant's attorney complained that as a result of his opening statement to the jury the prosecutor had Messick perform other work to identify the previously unidentified prints which resulted in the prints being identified to Scott Merriman -- the victim's boyfriend who had died long before the present incident. Appellant's attorney complained that this crippled his defense as he had laid it out to the jury in his opening statement R2143,2149. The prosecutor claimed that he had informed Appellant

prior to opening statements that he had been doing further investigation of the unidentified prints at the crime scene R2146. The prosecutor stated that he asked Messick to check how many of the unidentified prints could belong to the victim R2146. The prosecutor stated that it was after the opening statements that Messick identified previously unidentified prints as belonging to Merriman R2146-47. The trial court ruled there was no discovery violation R2152.

In this case the state left Appellant with a false impression that prints found at the crime scene would not be identified. Leaving false impressions through discovery has been recognized to be a violation of the discovery rules. Brown v. State, 579 So. 2d 760 (Fla. 1st DCA 1991); Smith v. State, 499 So. 2d 912 (Fla. 1st DCA 1986); Hasty v. State, 599 So. 2d 186, 189 (Fla. 5th DCA 1992) (information in possession of police officer is in constructive possession of prosecutor and non-conveyance of information gave defendant false impression which was not corrected until immediately prior to trial and constituted violation).

In Brown v. State, 579 So. 2d 760 (Fla. 1st DCA 1991), the defense attorney told the jury in opening statement that the police investigator would produce no latent prints of the defendant. The opening statement was based on the discovery provided and indications by the police investigator that there were no prints of the defendant on file. After opening statements the police investigator took the defendant's prints and these prints were used for comparison and the comparison was presented to the jury. The appellate court held that a discovery violation occurred because of the prior indications that there were no prints of the defendant were a "functional equivalent" to a false response to a discovery demand. 579 So. 2d at 762.

In Smith v. State, 499 So. 2d 912 (Fla. 1st DCA 1986), seven prints were taken from the scene of the crime -- two of which were unidentified. After the trial began, the state compared the two unidentified prints with the prints of the victim's housemate. The prints matched. On the same morning that the prosecutor received the results of the print comparison the defense learned of the comparison. The appellate court held that there was a discovery violation.[3] See also Barrett v. State, 649 So. 2d 219 (Fla. 1994) (defense relied on lack of evidence of print results, but introduction of mid-trial print comparison resulted in trial by ambush).

In Raffone v. State, 483 So. 2d 761 (Fla. 4th DCA 1986), the prosecution tendered a report that an analysis of a number of items revealed contraband. On the day before trial a supplemental analysis was performed which found cocaine on another item. On the first day of trial, the prosecutor notified the defense of the supplemental report. When the prosecutor attempted to introduce the chemist's testimony as to the supplemental result, the defense objected that the new report impacted on the defense strategy which had been planned after receipt of the first report. The appellate court held that there was a clear discovery violation by lulling the defense into

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[3] In Smith, supra, the court went on to say that there was a full inquiry into the discovery violation and noted that the late disclosure had not prejudiced the defense by causing him to make false claims to the jury:

> Under certain circumstances, such late disclosure tactics could prejudice defense counsel in preparation for trial by causing him or her to adopt a spurious defense. This did not happen in the instant case, however, since there is not evidence indicating that the defense preparation would have been different had the undisclosed evidence been available for trial.

499 So. 2d at 914.

believing one thing would be proven and then ambushing them with a supplemental report:

> In the case at bar, the facts demonstrate a clear discovery violation. The state lulled the defense into believing that it would prove one thing and then, at trial, it set out to prove another. The initial lab report, which was the only such report issued prior to trial, indicated that all of the listed items had been tested and that only three had produced positive results. There is not indication in the record that either defendant had any knowledge that, in fact, only the three items had been tested. The first hint of new, independent evidence to support the trafficking charge came when the state, after the trial had begun, provided a supplemental report, barely hours old, stating that another item had been tested and that it revealed the presence of 52.0 grams of cocaine.

483 So. 2d at 763-64.

The cases above illustrate the principle that a discovery violation occurs where a party tenders what appears to be a complete analysis, without any forewarning that it is not complete, lulling the party into relying on that discovery, but then during trial ambushes the party with an additional analysis. Clearly, there was a discovery violation in this case where Appellant was given discovery, without any indication or hint that it was not complete, leaving him with the false impression that the prints found on the cards at the crime scene would not be identified.

The mandatory inquiry into a discovery violation includes, but is not limited to, the following questions:

(1) whether the violation was inadvertent or willful;

(2) whether the violation was trivial or substantial; and

(3) most importantly, what effect, if any, did it have upon the ability of the (other party) to properly prepare for trial.

Raffone v. State, 483 So. 2d 761, 763 (Fla. 4th DCA 1986); Richardson v. State, 246 So. 2d 771 (Fla. 1971). It is the offending party's

obligation to prove the lack of prejudice cause by the violation. Cumbie v. State, 345 So. 2d 1061, 1062 (Fla. 1971).

Although the trial court made an alternative finding that if there was a violation it was not willful nor prejudicial, the trial court failed to make sufficient inquiries to make such determinations. Most importantly, there was a dispute as to how and when the prosecutor informed Appellant's attorney that comparison of prints would continue. The prosecutor said that a day prior to opening statements he told Appellant's attorney that further comparisons of the unidentified prints were being performed by Thomas Messick. However, Appellant's attorney stated that he was only told this after the opening statements in which he unequivocally told the jury that the prints must have come from an unidentified third party. There was a direct conflict which the trial court totally failed to resolve by inquiring of Thomas Messick. Messick, who was present during the discussion regarding the discovery violation, could have resolved when he was asked to perform further print analysis by the prosecutor -- before or after opening statements.

The lack of such an inquiry cannot be deemed harmless in this particular case. As noted earlier in this point, Appellant had premised his opening argument to the jury that part of the reasonable doubt the jury might have is due to the presence of unidentified third party prints at the crime scene. The trial court failed to make the inquiry of Messick in order to determine whether the prosecutor, or the defense attorney, had caused the representations in the opening statement. As explained in Brown v. State, 640 So. 2d 106 (Fla. 4th DCA 1994), a discovery violation which affects trial strategy and

causes a party to lose credibility with the jury by his opening statements will not be deemed harmless:

> In any event, we do not agree with the state's argument that the violation was harmless. The defendant's case becomes less credible because his attorney had represented facts concerning ownership in opening statement which were subsequently contradicted by the police officer's testimony regarding the defendant's statements to him. Trial strategy would clearly have been affected if the defense had been timely advised of the substance of the defendant's statements as required by the discovery rules. *See Sharif v. State*, 589 So. 2d 960 (Fla. 2d DCA 1991). Learning of statements *after* making affirmative representations in his opening statement necessarily required the defense attorney to engage in "back stepping." The harm was already done.

640 So. 2d at 108. This cause must be remanded for a new trial.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY INQUIRE INTO THE STATE'S DISCOVERY VIOLATIONS OF FAILING TO DISCLOSE TEST RESULTS AND A LETTER THAT WAS USED DURING TRIAL.

During the examination of Detective Gill it was discovered by Appellant that the State had sent crime scene evidence (cigarette butts) to a laboratory for DNA analysis R2017-18. Appellant objected on the ground that there was a discovery violation R2016-21. The trial court ruled there was no discovery violation R2021.

Florida Rule of Criminal Procedure 3.220(b)(x) provides that results of "scientific tests, experiments or comparisons" are to be turned over to the defense. Here, there was an attempted analysis. While the attempt did not render a specific positive or negative result, it did produce a result in that the prosecutor was informed by the laboratory that these positive or negative results were not possible from the evidence sent in R2017-18. Without feedback from the laboratory the prosecutor had no idea that a DNA analysis was not possible, for otherwise why would the evidence ever be sent to the laboratory for analysis. The analysis of the laboratory concluding

that the evidence could not yield DNA results is in itself the result of scientific analysis and thus is itself discoverable. The trial court was wrong in concluding that this lab conclusion could be kept secret by the prosecution.

Although the trial court mimicked words to convey that an adequate inquiry into the discovery violation had occurred, in fact there was not an adequate inquiry. The trial court stated that there was no prejudice in Appellant's ability to prepare for trial. Yet, the trial court never made any inquiries which would support such a finding. The only representations were that Appellant was procedurally prejudiced. Appellant explained, that because he had no information that the prosecution had sought analysis on certain evidence, part of his defense would be that the prosecution's investigation was so incomplete or inadequate that third parties could not be eliminated as suspects. Appellant actually employed the lack of investigation as part of his defense. The trial court even recognized that this had been part of the defense strategy R2021. However, because of the nondisclosure by the prosecution, the defense was ambushed by the revelation during trial that the evidence had been sent to a laboratory R2020-21. Without a specific inquiry into procedural prejudice, there was not sufficient evidence to make a finding that Appellant's ability to prepare for trial was not impaired. Thus, the lack of an adequate inquiry into procedural prejudice cannot be deemed harmless beyond a reasonable doubt.

The trial court concluded the fact that no DNA analysis could be performed on the evidence resulted in no prejudice to Appellant. While such a conclusion may be germane to the lack of substantive prejudice resulting from the evidence, it does not deal with the

procedural prejudice by the failure to disclose. The inquiry should be primarily designed to ferret out procedural prejudice. An inquiry into substantive prejudice will not substitute for a proper inquiry into procedural prejudice. Wilcox v. State, 367 So. 2d 1020 (Fla. 1979); Bovnton v. State, 378 So. 2d 1309 (Fla. 1st DCA 1980) (although inquiry made as to late notification of witness' name and the substance of his testimony, reversal required where no inquiry as to the effect of the breach on the preparation of the defendant's case). This cause should be reversed where there was an inadequate inquiry and the only indications were that there was procedural prejudice present.

The prosecutor committed another discovery violation by utilizing a letter which indicated that the evidence had been sent to the laboratory for analysis R2016; see Supplemental Record of September, 1994, at 161-162. The letter was used by witness Gill to convey that evidence was sent to Daniel Nippes at the laboratory:

> Q [Mr. Marcus] You were asked if the cigarette butts, if anything was done with them. Were you aware of Sergeant Rogers attempt to send them away to a Daniel Nippes?
>
> A [Gill] Yes, I was.
>
> MR. GLASS: Objection. Does he have a report that they didn't give the defense?
>
> MR. MARCUS: It's not a report. It's a letter.

R2015-16. The prosecutor argued that he was not required to disclose the letter since he was not introducing it into evidence. However, the law is clear, any documents or materials that the prosecution used at trial must first be disclosed to the defense, James v. State, 639 So. 2d 688 (Fla. 2d DCA 1994) (discovery violation found for failure to disclose photograph with Court specifically noting that prosecutor's claim he never intended to use the photo was contradicted by the fact

that he had it with him in the courtroom). Fla.R.Crim.P. 3.220(b)(x) requires disclosure of papers or objects that the prosecutor "intends to use" at trial. The rule does not require that the papers actually be introduced into evidence. The fact that the prosecutor actuallyhad possession of the letter in the courtroom and actually utilized it with his witness belies that he was not planning to use it. James, susra. Yet, no inquiry was ever made as to why the prosecutor had come to court with the letter if he did not intend to use it. The inadequate inquiry requires reversal.

POINT V

APPELLANT WAS DENIED DUE PROCESS *AND* A FAIR TRIAL DUE TO THE PROSECUTION'S UTILIZATION OF A STRAW "" DEFENSE WHICH DID NOT EXIST.

Over Appellant's objections R2210-11, 2251-55, the state utilized a strawman defense and then proceeded to rebut the defense in a number of ways. Appellant was denied due process and a fair trial in violation of Article I, Sections 2, 9 and 16 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Appellant's defense in this case was that Lorraine Pezza was killed by a third party. However, the prosecutor created an illusory defense for Appellant, which Appellant never advocated, by claiming that Appellant's defense was that Pezza had committed suicide. In closing argument the prosecutor toldthe jury that Appellant's defense was that the victim committed suicide and then proceeded to quite easily destroy such an illusory defense:

> MR. MARCUS: ... You know, the suicide thing is just so insulting because, you know, she's stabbed in the back. She has those five wounds to her back. She's completely covered up. There is no knife there. So, I guess, the theory, until it fell completely flat on its fact, was that, well, what she did was she broke into the Consalvo home, stole the

> knife, cut her way through the screens, decided to kill herself, stabbed herself in the chest. In the **20** seconds that she had left, she managed to get back to his apartment, hide the knife, and put the bloody towel in his dresser. That's about his only reasonable hypothesis of innocence, and that, I submit to you, is completely impossible; but that's about the best that he has.

R2594. On the other hand, the defense told the jury that he was not advocating such a defense R2659. Appellant complained of the prosecutor's tactic throughout the case and made it perfectly clear that the defense was not claiming Pezza had committed suicide:

> [MR. **GLASS]** ... My remembrance of what was said before the trial began was Mr. Marcus asked if I was going to raise suicide as a defense. I told him that is not our defense in the case, but it is going to come in because of everything that has happened. That position has not changed.... It's not my defense. **R2043.**
>
> * * *
>
> [MR. GLASS] ... I repeat, I'm not claiming she committed suicide. I'm not going to ask the Court to instruct on a suicide defense. **R2190.**
>
> * * *
>
> [MR. GLASS] ... To try to set up -- what the State did was try to set up the suicide defense and then tried to take it out themselves allowing this testimony to come in. It was on the State's side of the case. **R2252.**
>
> * * *
>
> [MR. GLASS] ... They are setting up a suicide defense and then in an anticipation of rebuttal taking it out on their own side is what they are doing. R2254.
>
> * * *
>
> [MR. GLASS] ... As to Dr. Ronald Wright ... it was called to him by the police as a suicide and that's the reason he didn't *go* to the scene, and not that it was a suicide attempt. And I particularly said to him by that they got you off to the wrong track and he said yes. So because of that, the Court has listened to the State and the State says we put forth a suicide defense, and we haven't. R2255.

The medical examiner's testimony was unequivocal that the death was not the result of suicide especially noting the wounds to the back

of the victim R2092,2082. However, the prosecutor, using the guise that Appellant's defense was that Pezza committed suicide, was permitted to introducetestimonyof Richard Ben-Veniste as to conversations he had with Pezza under the guise of rebutting the so-called suicide defense.

It was totally improper for the prosecutor to set up a strawman defense in order to knock it down, For example, in Bayshore v. State, 437 So. 2d 198 (Fla. 3d DCA 1983), the defendant relied on a misidentification defense, Bayshore, supra at 199. No alibi defense was attempted. Id. However, the prosecutor used the victim's statement that he was at his father's house at the night of the crime to infer that the defendant was relying on an alibi defense. Id. The prosecutor then knocked down the strawman which he had created. Id. The prosecutor questioned where the witness was to corroborate the defendant's alibi. Id. The district court reversed the defendant's conviction and condemned the prosecution's act of creating an alibi defense and then destroying it. Id. at 199-200; see also Brown v. State, 524 So. 2d 730 (Fla. 4th DCA 1988).

Appellant was not utilizing a suicide defense as the earlier referenced portion of his arguments show. Suicide was mentioned, but not in terms of a defense. The Medical Examiner testified that the reason he did not examine the body at the crime scene was because it had been reported to him that the death was a suicide R2098. However, it was never claimed by the defense that Pezza had killed herself by stabbing herself in the back. If the defense attorney had done so, the trial court had the obligation to sua sponte stop the trial due to ineffective assistance of counsel. See Fitzpatrick v. Estelle, 505

F.2d 1334 (5th Cir. 1974); United States v. Malekzadeh, 855 F.2d 1492 (11th Cir. 1988).

It cannot be said beyond a reasonable doubt that the prosecutor's tactics of setting up a strawman defense to introduce evidence and argument to knock it down was harmless. Obviously, the creation of the strawman defense was not harmless where the prosecutor used it to ridicule the defense in front of the jury. In addition, the prosecutor used the strawman suicide defense in order to introduce the hearsay statements of Pezza in order to knock down the phantom defense. Because of the strawman created by the prosecutor, Richard Ben-Veniste testified that Pezza made out-of-court statements that her neighbor stole keys and money from her R2223, and she felt taken advantage of and count not get in her mailbox R2226. In other words, the prosecution used the strawman to get in evidence that Pezza was angry with Appellant even though that fact would not relate to the alleged strawman defense. In addition, Ben-Veniste testifiedto a large amount of irrelevant victim impact evidence which was not relevant to whether Appellant was guilty of the offenses charged.

Appellant's convictions and sentences must be reversed and this cause remanded for a new trial,

POINT VI

THE TRIAL COURT ERRED IN ADMITTING HEARSAY EVIDENCE OF A THEFT OVER APPELLANT'S OBJECTIONS.

Over Appellant's objections R1119-20,1194-95,3411,3463, the state was permitted to introduce Officer William Hopper's testimony of Lorraine Pezza's description of an alleged theft that occurred on September 21, 1991. Hopper testified that Pezza told him that she and Appellant had withdrawn $200 from an ATM at 10:00 p.m. R1124. Pezza told Hopper that she placed $140 in the glove box of her car R1124. Pezza told Hopper that at 1:30 a.m., Pezza and Appellant went to Pezza's apartment to listen to some music R1124. Pezza told Hopper that at 2:30 a.m., Pezza remembered the money that she had left in her glove box and went to the diningroom where she had left her keys R1124. Pezza told Hopper that her keys were missing R1125. Pezza told Hopper that she got a spare key and checked the glove box and the $140 was missing R1125. It was reversible error to admit these hearsay statements.

The state's theory for admitting the out-of-court statements was that they were relevant toward showing Appellant's state of mind. However, Pezza's out-of-court statements detailing the facts of the alleged theft simply do not show Appellant's state of mind. Rather, the non-witness' out-of-court statements constitute pure and simple hearsay. E.g. Silveira-Hernandez v. State, 495 So. 2d 914, 915 (Fla. 3d DCA 1986) ("[W]e have not sufficiently made clear that an investigating officer's testimony relating an alleged victim's version of how the crime occurred is pure and simple hearsay even though the officer has interviewed the victim at the scene of the crime and shortly after its commission").

It was also claimed that the out-of-court statements were admissible to show Pezza's state of mind. Such a claim is without merit. First, Pezza's state of mind on September 21, 1991, simply was not in issue. Second, the details of the alleged theft do not demonstrate Pezza's state of mind in any way relevant to the crimes charged. The details of the incident merely describe the incident. Officer Hopper never testified to Pezza's state of mind. Finally, even if Pezza's state of mind approximately a week before the crimes could be said to be minimally relevant, certainly the prejudice substantially outweighed any relevance and thus the evidence would not be admissible for state of mind. Fleming v. State, 457 So. 2d 499, 501-502 (Fla. 2d DCA 1984) ("Even if we were to find Audra's state of mind relevant to this controversy, we would still deem the challenged evidence inadmissible. Certainly the danger that the jury would misuse this evidence for the impermissible purpose of imputing a state of mind to Appellant (specifically, rage resulting from a confrontation, and thus a motive for murder) outweighs the minimal importance of establishing the true purpose of Audra's visit"). The admission of this evidence denied Appellant's rights to confrontation, due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, United States Constitution; Article I, Sections 2, 9 and 16 of the Florida Constitution. This cause must be remanded for a new trial.

POINT VII

THE TRIAL COURT ERRED IN ADMITTING *AN* IRRELEVANT AND IMMATERIAL STATEMENT BY APPELLANT OVER OBJECTION.

Over Appellant's objection R248-49,1194-95,3506, the state introduced Appellant's statement, upon being arrested for the Walker burglary, that he had permission to be in the Walker residence R1166. It was reversible error to allow this statement to be introduced into evidence.

Appellant's statement that he had permission to be in the Walker residence was clearly a false statement.[4] The statement may have had some relevancy toward deciding Appellant's guilt or innocence in the Walker burglary -- but Appellant was not on trial for that crime. The statement was irrelevant and immaterial to the charges for which Appellant was on trial -- the Pezza murder and burglary. Redford v. State, 477 So. 2d 64, 65 (Fla. 3d DCA 1985) (defendant giving false statement as to his name when arrested as it bore no relevance to the crime charged); Clark v. State, 378 So. 2d 1315, 1316 (Fla. 3d DCA 1980) (flight evidence not admissible if not relevant to crime for which defendant is on trial); Postell v. State, 398 So. 2d 851 (Fla. 3d DCA 1981) (evidence relating to arrest is not relevant unless specific probative value is present). Thus, it was error to allow the introduction of Appellant's false statement.

The admission of the irrelevant and immaterial evidence denied Appellant due process and a fair trial. Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Const.; Art. I, §§ 2, 9 and 16, Fla. Const. This cause must be remanded for a new trial.

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[4] Myrna Walker testified that she had never given any such permission R1248.

POINT VIII

THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF EVA BELL TO HEARSAY STATEMENTS OVER APPELLANT'S OBJECTIONS.

Over Appellant's objections R208-224,1194-95,3476, Eva Bell testified that Jean Corroppoli had been apparently told that her son said he had been involved in a murder R1617. It was reversible error to admit this hearsay evidence.

Clearly, Bell's testimony as to the out-of-court statement that Corroppoli told her as to the out-of-court statement that Corroppoli had been told, constitutes hearsay within hearsay. Hearsay within hearsay is not automatically excluded from evidence provided that each of the out-of-court statements falls within one of the hearsay exceptions. Hill v. State, 549 So. 2d 179, 181 (Fla. 1989). The two exceptions used in the court below were the admissions exception under § 90.803(18) of the Florida Statutes and the spontaneous statement exception under § 90.803(1) of the Florida Statutes.

The admission exception under § 90.803(18)(a) was used to justify the admissibility of court statements made to Jean Corroppoli and it provides in pertinent part:

> The provision of § 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
>
> (18) Admissions. A statement that is offered against a party and is:
>
> (a) His own statement in either an individual or a representative capacity;

Obviously, for the out-of-court statement made to Corroppoli to be admissible as an admission by Appellant (the party that the statement is offered against) the state must lay the predicate that the statement was made by Appellant. The identity of the person, in this instance the caller, making out-of-court statement by non-hearsay evidence is

a predicate to admission under either exception. Hargrove v. State, 530 So. 2d 441 (Fla. 4th DCA 1988) (Insufficient foundation for admission of hearsay under spontaneous statement exception to rule where statement was made by an unidentified person in a crowd); Gueits v. State, 566 So. 2d 829 (Fla. 4th DCA 1990) (Insufficient predicate for admission of hearsay under co-conspirator exception to rule where only evidence identifying the defendant as the alleged caller, "Carlos," was the co-conspirator's hearsay statement); Cox v. State, 473 So, 2d 778, 782 (Fla. 2d DCA 1985) (Error to permit witness to testify to contents of telephone conversation with a Mrs. Cox).

Here, the state failed to establish by evidence independent of the hearsay claim that Appellant was the person with whom Corroppoli conversed. Thus, the statement should have been excluded. Harsrove v. State, 530 So, 2d at 442; Gueits v. State, 566 So. 2d at 830. Moreover, it should be noted that the hearsay statement itself does not even sufficiently establish Appellant as the caller. Bell never testified that Corroppoli told her Appellant had called her. Instead, Bell testified that "apparently" Corroppoli's son had talked to her. The use of the word "apparently" is reflective of Bell's conclusion or deduction, rather than Corroppoli's identifying the caller. Also, use of the term "son" does not identify the caller. Thus, the caller was not sufficiently identified as Appellant either through the proper method -- independent of hearsay -- or the improper method -- within the hearsay itself.

Even if the state had laid the proper predicate to admit the statement of the caller, Corroppoli's statement to Bell would not be admissible. It was urged below that Corroppoli's statement was

admissable as a spontaneous statement pursuant to section 90.803(1) which states:

> The provision of s. **90.802** to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
>
> > **(1) Spontaneous Statement. A** spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.

(emphasis added). Below, the prosecutor relied on United States v. Portsmouth Paving Corp., **694 F.2d 312** (4th Cir. 1982) to support its contention that the hearsay was admissible as a spontaneous statement. Portsmouth, however, was decided based on Federal Rule of Evidence 803(1) which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> > (1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Notably absent from the federal rule is the express qualification contained in section 90.803(1) that a spontaneous statement is not admissible "when such statement is made under circumstances that indicate its lack of trustworthiness," Thus, the Portsmouth court did not address the untrustworthy circumstances present at bar. Under Florida law, there must be corroborating circumstances showing the trustworthiness of the statement. Hill v. State, 549 So. 2d **179, 181** (Fla. 1989); § 90.803(1). In this case, the circumstances of the statement do not corroborate the trustworthiness of the statement. In fact, the relaying of the statement shows a lack of trustworthiness. The hearsay statement introduced was that "apparently" Corroppoli's son had told Corroppoli that he had been involved in a murder R1618.

However, Corroppoli's testimony that she had been told that the police were trying to implicate her son in a murder R1710, indicates a lack of trustworthiness of this hearsay.

The purpose of hearsay exceptions is a belief of reliability. There can be no such belief herein and accordingly, Bell should not be permitted to testify about a statement purportedly made by Appellant to Corroppoli's mother when Corroppoli herself refutes the proposed substance of the hearsay within hearsay. Thus, the statement does not qualify as an exception to the rule against hearsay and it was error to introduce the out-of-court statement. The admission of the evidence denied Appellant's rights to confrontation, due process and a fair trial. Fifth, Sixth and Fourteenth Amendments, United States Constitution; Article I, Sections 2, 9 and 16, Florida Constitution. This cause must be remanded for a new trial.

POINT IX

THETRIALCOURTERRED IN ADMITTING COLLATERAL CRIME EVIDENCE OVER APPELLANT'S OBJECTION.

Over Appellant's objections R224-44, 1194-95, 1239-40, the state introduced details of Appellant's burglary of the Walker residence. It was error to overrule Appellant's objections and to allow the admission of this evidence.

Details of the Walker burglary and Appellant's arrest for the burglary were focused on by a number of state witnesses. See pages 1-3 of the statement of facts. As explained in Point II, supra, the facts surrounding the Walker burglary are not relevant as similar fact evidence. Nor are the circumstances of an arrest relevant toward proving the crime charged:

> Although it does not appear that Postell objected to the testimony on the grounds of relevancy, we are compelled to point out that the arrest of the defendant is not an element

> of the crime to be proved, and proof concerning the fact that it occurred, the circumstances of it, and the reasons for it is ordinarily irrelevant. We recognize that it could be argued that the time and place of Postell's arrest, for example, would tend to disprove any contention that Postell was in Philadelphia within an hour of the crime. However, in the present case, Postell's defense was that he was at home in Miami. See *State* v. *Bankston, supra; People v. Wilkins,* 408 Mich. 69, 288 N.W.2d 583 (1980).

Postell v. State, 398 So. 2d 851, 855 fn.7 (Fla. 3d DCA 1981) (emphasis added). The only point of the Walker incident with any relevance was the fact that Appellant was found in possession of a checkbook belonging to Lorraine Pezza. The details of Appellant's arrest and the Walker burglary simply are not relevant other than to show bad character.

It is permissible to show the fact that Appellant had Pezza's checkbook in his possession. However, as noted in Fasenmyer v. State, 383 So. 2d 706 (Fla. 1st DCA 1980), the details of the collateral act are not relevant toward proving the possession or identity of the property:

> We would caution however that the state should not on retrial be allowed to question Van Shrauss generally about other burglaries, and that any such questions should be specifically related to the identity of the gun allegedly used in the Oltmann's burglary. Thus questions asking whether the defendant and Van Shrauss stole guns during other burglaries are not relevant to any issue concerning the identity of the gun used in the crime charged, and could constitute reversible error.

383 So. 2d at 708 (emphasis added). Moreover, even if there is some relevance to the collateral acts, the details of the acts would not be admissible because the prejudice would outweigh the probative value. Bryan v. State, 533 So. 2d 744 (Fla. 1988) (because of danger of unfair prejudice, evidence of burglary was inadmissible even though it showed defendant's possession of murder weapon); Taylor v. State, 508 So. 2d 1265, 1267 (Fla. 1st DCA 1987) (while general fact that

defendant was charged with crime relevance of specific allegations was outweighed by unfair prejudice). Likewise, in the instant case the introduction of the details of the Walker burglary and Appellant's arrest for that burglary were not relevant.

In this case the trial court admitted evidence of the Walker burglary under the talisman of inextricably intertwined or inseparable crime evidence without any real analysis. There is a problem of admitting evidence under a label, whether it be "entire context of the crime" or "inseparable crime evidence" without any analysis. See Ehrhardt, Florida Evidence § **404.9 (1994** Edition) (at page 162: "There are also many appellate decisions that merely apply labels to the evidence without any real analysis"). The talismanic use of the label "inseparable crime evidence" has been, as Professor Ehrhardt indicates, so overextended that the concept "could well swallow the rule." Ehrhardt, Florida Evidence § **404.17 (1994** Edition). The application of "inseparable crime evidence" as a talisman in this case certainly overextends the concept.

Professor Ehrhardt defines "inseparable crime evidence" as when:

> "the act will be *so* linked together in time and circumstance with the happening of another crime, that one cannot be shown without proving another."

Ehrhardt, Florida Evidence, § **404.17,** pages **177-78 (1994** Edition). This Court has applied this standard. Henry v. State, **574** So. 2d **66, 70-71 (Fla. 1991)** ("the facts of the second killing were so inextricably wound up with the first that to try to separate them would have been unwieldy and likely to lead to confusion). It cannot be said in this case that the state could not put on its theory of the Pezza burglary-murder without introducing the details of the Walker burglary. It was error to allow the introduction of this evidence.

Collateral criminal activity is presumptively prejudicial. Straight v. State, 397 So. 2d 903 (Fla. 1981). The collateral crime evidence may have tipped the scales in favor of the prosecution. The collateral crime activity denied Appellant due process and a fair trial contrary to Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. This cause must be remanded for a new trial.

POINT X

IT WAS REVERSIBLE ERROR TO CONSTRUCTIVELY AMEND THE INDICTMENT CONTRARY TO THE GRAND JURY CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Article I, Section 15(a) of the Florida Constitution provides in pertinent part:

> No person shall be tried for capital crime without presentment or indictment by a grand jury....

The Fifth Amendment to the United States Constitution has the exact same requirement with regard to charging a capital crime.

In the present case the Grand Jury charged Appellant with first degree premeditated murder:

> The Grand Jurors of the State of Florida inquiring in and for the County of Broward, State of Florida, upon their oaths do present that ROBERT ANTHONY CONSALVO, between on or about September 27, 1991 and the 3rd day of October, ... did then and there unlawfully and feloniously and from a premeditated desisn to effect the death of a human being, LORRAINE PEZZA, did kill and murder the said LORRAINE PEZZA, by stabbing her with a deadly weapon, to-wit: a knife-type instrument, against the form of the statute in such case pursuant to Section 782.04 of the Florida Statutes.

R3343A (emphasisadded). The grand jury did not charge felony murder. However, during trial the jury was instructed on felony murder R2691, the prosecutor also argued for conviction on a theory of felony murder R2575-76. Proceeding on the felony murder theory constituted a con-

structive amendment of the indictment. See e.g. United States v. Davis, 679 F.2d 845, 851 (11th Cir. 1982) (constructive amendment occurs by jury instructions and evidence expanding the case beyond what is specifically charged); United States v. Cruz-Valdez, 743 F.2d 1547, 1553 (11th Cir. 1984).

Only the Grand Jury has the authority to amend an indictment, State ex rel. Wentworth v. Coleman, 163 So. 316 (1935); Pickeron v. State, 113 So. 707 (Fla. 1927); Dickson v. State, 20 Fla. 800 (1884); Phelan v. State, 448 So. 2d 1256 (Fla. 4th DCA 1984); Russell v. State, 349 So. 2d 1224 (Fla. 2d DCA 1977). There is no jurisdiction to present a theory different than that charged by the Grand Jury. After all, that is the very purpose of the Grand Jury Clause. Florida's Grand Jury Clause for charging a capital crime is identical to the Grand Jury Clause of the United States Constitution.

In Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), the Court noted that the Federal Constitution's Grand Jury Clause prohibits amendment of an indictment by anyone other than the grand jury. In Stirone the Grand Jury Clause was violated even though there was no formal amendment of the indictment. The indictment was, "in effect," amended by the prosecutor's presentation of evidence and the trial court's charge to the jury which broadened the possible basis for conviction:

> And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same.

80 S.Ct. at 273. The Court went on to state the importance of the Grand Jury Clause protection from broadening what the Grand Jury specifically expressed in its indictment:

> The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

80 S.Ct. at 270-271. The Court made it clear that while there may be several methods of committing an offense, conviction maybe onlybased on the method alleged in the indictment:

> The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference. It follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened.

80 S.Ct. at 271. Later, in United States v. Miller, **105** S.Ct. 1811 (1985), the Court reiterated that **it** matters not that multiple methods of committing the offense are proceeded on **by** prosecution as long as they are all alleged in the indictment:

> **The** Court has long recognized that an indictment may charge numerous offenses or the commission **of** any one offense in several ways. As long as the crime and the elements **of** the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means committing the same crime.

105 S.Ct. at 1815 (emphasis added).

As in Stirone, supra, the Grand Jury Clause was violated in this case where the indictment by the Grand Jury charged only one method (premeditation in this case), **for** violation of a particular law, but there was a constructive amendment of the indictment by instructing the jury on a different method (felony-murder in this case) for violation **of** a particular law. In Watson **v.** Jaso, 558 F.2d 330 **(6th** Cir. 1977), the Court noted that a constructive amendment of an

indictment, which only alleged premeditated murder, by adding a felony-murder theory would violate the Grand Jury Clause. However, the Court eventually reversed the conviction on the basis that the constructive amendment violatedthe right to fair notice. **558** F.2d at 338[5] In this case the amendment of the indictment violates the Grand Jury Clause as well as the right to fair notice. See Point X.

In Stirone, supra, the Court made clear that reversal was necessary due to the unauthorized constructive amendment which added a second method of proving the offense which might have been the basis for conviction and which would constitute a conviction on a charge that was never made by the grand jury:

> Here, as in the Bain case, we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with. Yet because of the court's admission of evidence and under it s charge this misht have been the basis upon which the trial jury convicted on a charse the grand jury never made against him. This was fatal error. Cf. Cole v. State of Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644; DeJonge **v.** State of Oregon, 299 U.S. 353, 57 S.Ct. **255, 81** L.Ed. *278.*
>
> Reversed.

80 S.Ct. at 274 (emphasis added). Likewise, reversal is necessary here due to the unauthorized amendment of the indictment which violatedthe Grand Jury Clause. Art. I, Section 15, Florida Constitution; Fifth and Fourteenth Amendments, United States Constitution. Appellant's conviction and sentence for murder in the first degree must be reversed.

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[5] Unlike in Florida, Ohio law permits amendment of indictments by others than the grand jury. 558 F.2d at *337.*

POINT XI

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO PROCEED ON A THEORY OF FELONY-MURDER WHEN THE INDICTMENT GAVE NO NOTICE OF THE THEORY.

The indictment in this case only charged premeditated murder R3343A. Defense counsel filed a motion to prohibit the use of a felony-murder theory due to lack of notice **R3569-71,272.** The trial court denied this motion R272. The jury **was** instructed on **the** theory of felony-murder (burglary).

This lack of notice denied Appellant due process of law and the effective assistance of counsel pursuant to Article I, Sections 2, 9, 16, and **17** of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

An indictment or information is required to state the elements of the offense charged **with** sufficient **clarity** to apprise the defendant what he must be prepared to defendant against. Russell v. United States, **369** U.S. 749, **763-69, 82** S.Ct. **1038, 8** L.Ed.2d 249 **(1962);** Government of Virgin Islands v. Pemberton, 813 **F.2d 626** (3d Cir. **1987);** Givens v. Housewrisht, **786** F.2d 1378, **1380-81** (9th Cir. **1986).** In Givens, the Ninth circuit held that it was a Sixth Amendment violation to **allow** a jury instruction **and** prosecutorial argument on murder by torture (under Nevada law analogous to Florida's felony-murder) where the information charged willful murder (analogous to Florida's premeditated murder). The error **was** harmful as there is virtually no evidence of premeditation.

The first-degree murder conviction must be reduced to second-degree murder. If the Court rejects Appellant's argument, a new trial is required as we cannot know if one or more of the jurors relied on

felony-murder. See McGahagin v. State, 17 Fla. 665 **(1880)**; Owens v. State, 593 So. 2d 1113 (Fla. 1st DCA 1992).

PENALTY PHASE

POINT XII

THE TRIAL COURT ERRED IN FINDING AS *AN* AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED TO AVOID ARREST.

The trial court found as an aggravating circumstance that the crime was committed for the purpose of avoiding or preventing a lawful arrest pursuant to Section 921.141(5)(e) of the Florida Statutes.

The aggravating circumstance under Section 921.141(5)(e), Florida Statutes, is typically found in the situation where the defendant killed a law enforcement officer in an effort to avoid arrest or effectuate his escape. See e.g. Mikenas v. State, 367 So. 2d 606 (Fla. 1978). This Court has held, however, that when the victim is not a police officer, the aggravating circumstance cannot be found unless the evidence clearly shows that elimination of the witness was the sole or dominant motive for the murder. See Scull v. State, 533 So. **2d** 1137 (Fla. 1988); Perry v. State, **522** So. 2d **817** (Fla. 1988); Riley v. State, *366* So. 2d 19 (Fla. 1978). Even where the victim may know the defendant, this factor is not applicable unless the evidence proves that witness elimination was the only or dominant motive. See Geralds v. State, 601 So. 2d 1157 (Fla. **1992**); Perry v. State, supra. The mere fact that the victim knew or could identify the defendant, without more, is insufficient to prove this aggravating factor beyond a reasonable doubt. Id.

The trial court found this aggravator in its sentencing order by accepting the prosecution's hypothesis that Appellant killed Lorraine Pezza in order to eliminate her as a witness to an alleged theft that occurred days prior to her death:

> The state contends that this aggravating circumstance is also applicable to the case at bar. The state argues that it is undisputed that the Defendant and Pezza knew each other and that had she lived, the victim could have easily identified him as the perpetrator of the crime he committed three days earlier ... this Court agrees that the state has met the burden required under Riley v. State in order to **establish** this aggravating factor.

R3759-60. These facts do not establish the avoid arrest factor beyond a reasonable doubt. As stated above, the fact that Pezza could identify Appellant is insufficient to prove this aggravator. At best, it is speculation that Appellant broke in Pezza's apartment in order to eliminate her as a witness to a prior alleged theft. The facts are as consistent with the break-in being for the purpose of burglarizing the residence than a plan to kill to eliminate a witness. After all, when Appellant was first arrested it was for a burglary of another residence. The state presented evidence that Appellant planned to burglarize the Pezza residence for drugs R2377. Also, Appellant never tried to run or hide any facts regarding the alleged theft so as to say he was avoiding arrest for that theft. Furthermore, Pezza was never a witness to any alleged theft by Appellant. She reported her property missing, but she was not a witness to Appellant stealing anything. At best, there was a mere suspicion. Likewise, here there is merely a suspicion that the only or **dominant** motive was to eliminate Pezza because her property was missing from days before. Speculation on the fact that witness elimination "might" have been the motive for the murder is not sufficient for this aggravator to apply. See e.g. Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Riley v. State, 366 So. 2d 19 (Fla. 1978); Bates v. State, 465 So. 2d 490 (Fla. 1985).

The trial court also referred to multiple wounds to speculate that the killing was done to avoid arrest. However, the nature of

the wounds does not prove the motive behind the killing. The trial court relied on the medical examiner's testimony that the wounds could be consistent with a torturous intent. However, the medical examiner was not finding that torture was necessarily involved in the killing. The evidence was also consistent with the lack of torture.[6] In addition, assuming arsuendo, that torture was involved this evidence does not mean that the dominant motive for the killing was to avoid arrest. Rather, torture, if present, could indicate a hateful purpose behind the killing rather than a cold act of eliminating a witness. The point is that the connection between the wounds and the aggravating factor to avoid arrest are far too speculative to prove this factor beyond a reasonable doubt.

It might be argued in the alternative that Appellant killed Pezza in order to eliminate her as a witness from the burglary of the residence. However, this claim must also fail. Jailhouse informant William Palmer testified that Appellant told him Pezza woke up after he had broken into her apartment R2376. She said she was going to call the police and grabbed the phone so Appellant srabbed (and not stabbed) her R2376. She then began screaming R2376. It was as the result of the screaming that Appellant first stabbed Pezza R2376. Pezza then started screaming again so Appellant stabbed her some more R2376. Pezza and Appellant struggledquite a bit R2416. Assuming that

[6] There were some small superficial wounds to the back of Pezza which the medical examiner said could possibly be consistent with torture. The medical examiner did not rule out that the wounds could result from non-torture. It seems logical that these superficial wounds could have also occurred as the result of Appellant's struggle with Pezza [State introduced evidence that Appellant and Pezza struggled a bit R2415].

Palmer testified truthfully,' these facts simply do not show beyond a reasonable doubt that the dominant reason Appellant stabbed Pezza was to eliminate her as a witness. As Appellant told Palmer, Pezza was grabbed when she said she would call police -- she was not stabbed as a result of that comment. Appellant's reaction to Pezza saying that she was calling police would be to stab her, rather than grab her, if his dominant motive was to eliminate her as a witness. Rather, it was Pezza's screaming, and not threatening with police, that caused Appellant to stab Pezza to death. Thus, the stabbing was, at best, a reaction to the screaming rather than contemplated effort to eliminate Pezza as a witness. This Court has recognized that where the evidence shows the victim was shot or stabbed while she was screaming fails to prove a calculated plan to eliminate the person as a witness:

> Next Cook attacks the finding Mrs. Betancourt was killed to avoid arrest, arguing that his statement that he shot her "to keep her quiet because she was yelling and screaming" was insufficient to support the trial court's findings. We agree. The facts of the case indicate that Cook shot instinctively, not with a calculated plan to eliminate Mrs. Betancourt as a witness.

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[7] Palmer was effectively impeached in this case. Although Palmer claimed that he had nothing to gain by testifying against Appellant, the facts indicate otherwise, Prior to the instant case, Palmer was facing 20 years in prison as a habitual offender and had unsuccessfully attempted to have his bond reduced R2404,2406. However, after Palmer allegedly gained information about this case, he was released on his own recognizance and was to report to Detective Gill (the lead detective in this case) every day R2407. On November 4, 1991, Palmer walked in court facing 20 years in prison and walked out convicted of a misdemeanor and probation for one year R2409. Detective Gill spoke on Palmer's behalf before the judge in court R2410. Palmer testified that he had lied to the police for his own purposes previously R2384. Palmer could not count how many times R2392. Palmer admitted he lied to police 6 or 7 times out of 10 R2418. Palmer has been previously convicted of 8 felonies, but it could be 9 or 10 R2396. Palmer has beenarrested 28 times R2402. No charges are presentlypending against Palmer that he knows of, but Palmer believes that he might have some other "ghosts in his closet" R2384.

Cook v. State, 542 So. 2d 964, 970 (Fla. 1989) (emphasis added). Likewise, in Robertson v. State, 611 So. 2d 1228 (Fla. 1993), where a witness (C.J. Williams) testified that the defendant told him "that he had shot the woman because she was screaming,"[8] this court held that the trial court may not draw "logical inferences" to support the aggravator and the evidence did not prove avoid arrest beyond a reasonable doubt.[9]

Similarly, in Garron v. State, 528 So. 2d 353 (Fla. 1988), the defendant shot one victim, and then a witness to the shooting ran to the telephone and called the operator and requested the police. 528 So, 2d at 354. This Court rejected the avoid arrest aggravator under those circumstances:

> The trial judge found that the offense was committed to avoid arrested based on the evidence that appellant shot Tina while she was talking on the telephone with the operator asking for the police. We have stated that when the victim of the murder is not a police officer, proof of intent to avoid arrest by murdering a possible witness must be very strong before the murder can be considered as an aggravating circumstance. Here, there is not proof as to the true motive for the shooting of Tina. Indeed, the motive appears unclear. The fact that Tina was on the telephone at the time of the shooting hardly infers any motive on the appellant's part. Thus, the second aggravating circumstance cannot stand.

528 So. 2d at 360 (citations omitted).

This Court has recognizedthat the fact that witness elimination may have been one of the reasons to commit the murder is not sufficient for this aggravator when the person killed is not a law enforcement officer:

> We have long held that in order to prove this aggravating factor when the victim is not a law enforcement officer, the State must show that the sole or dominant motive for the

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[8] 611 So. 2d at 1230.

[9] 611 So. 2d at 1232.

> murder was the elimination of the witness.... The fact that witness elimination may have been one of the defendant's motives is not sufficient to find this aggravating circumstance. Further, the mere fact that the victim knew the assailant and could have identified him is insufficient to prove the existence of this factor.

Davis v. State, 604 So. 2d 794, 798 (Fla. 1992).

In Davis, the defendant entered an elderly woman's home, killed her by stabbing her twenty-one times, and stole her silver, purse, wallet, pistol, coins, jewelry, ring and car. The defendant was known by the victim because he had done yard work for her. This Court ruled that the evidence was not sufficient to establish that witness elimination was the sole or dominant motive for the murder. Id.

This Court has stricken findings of the avoid arrest factor in other cases where the defendant was known by the victim and killed the victim in the process of taking the victim's property. In Geralds v. State, 601 So. 2d 1157 (Fla. 1992), the defendant was a carpenter who had worked on remodeling the victim's home. A week before the murder the defendant encountered the victim and her children at a mall and learned that her husband was out of town and when her children were at school. The defendant went to the victim's home at a time when she was alone, beat her and stabbed her to death, and took her jewelry and Mercedes automobile. This Court held that the evidence was insufficient to prove that witness elimination was the dominant motive for the murder. Id. at 1164.

In Green v. State, 583 So. 2d 647 (Fla. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1191, 117 L.Ed.2d 432 (1992), the defendant went to this landlords' house to recover a $250.00 check he had given them for his rent. When the wife refused to return the check, he stabbed her to death. When the husband ran into the bedroom, the defendant followed and stabbed him to death. This Court held the evidence

failed to prove that witness elimination was the dominant motive for the murders. Id. at 652.

Thus, this Court has disapproved findings of the avoid arrest aggravating factor when the trial court inferred that witness elimination was the motive for the murder from circumstances similar to those in the present case. In keeping with the rule in Robertson that the trial court cannot use logical inferences to supply deficiencies in the state's proof, this Court should hold that the trial court erred by finding the avoid arrest aggravating factor. The state's evidence did not prove beyond a reasonable doubt that Appellant's sole or dominant motive for the murders was the elimination of witnesses.

In addition, assuming arguendo that the motive for the killing was solely to eliminate Pezza as a witness to the burglary, the avoid arrest and felony murder circumstances must be considered as one aggravating circumstance. If the state's suspicion is correct, the sole purpose of eliminating Pezza as a witness was to successfully complete the burglary without getting caught. It is well-settled that where the commission of one aggravating circumstance is for the sole purpose of committing another aggravating circumstance, it is reversible error to consider both aggravating circumstances separately. See Cherry v. State, 544 So. 2d 184, 187 (Fla. 1989) (aggravating factor burglary doubled with pecuniary gain where "sole purpose for Cherry's burglary was pecuniary gain"); Mills v. State, 476 So. 2d 172 (Fla. 1985).

The error of utilizing the avoid arrest circumstance cannot be deemed harmless. There were only two aggravating circumstances considered in this case -- avoid arrest and during the course of a felony (the burglary). The elimination of the avoid arrest aggravator

leaves only the felony aggravator which was due to the contemporaneous burglary. The jury could find the single episode was an isolated out-of-character act, instead of a representation of a propensity for violence as another aggravator could demonstrate. Once the aggravating circumstance of avoid arrest is eliminated, it cannot be said beyond a reasonable doubt that the jury's recommendation, or the trial judge's decision, would be the same. In fact, this court has consistently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present, e.g. Clark v. State, 609 So. 2d 513 (Fla. 1992); McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Smalley v. State, 546 So. **2d 720**, 723 (Fla. **1989**); Rembert v. State, 445 So. 2d **337** (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988), and has noted:

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders. To secure that goal and to protect against arbitrary imposition of the death penalty, we view each case in light of others to make sure the ultimate punishment is appropriate.
>
> ... We have in the past affirmed the death sentences that were supported by only one aggravating factor, but those cases involved either nothing or very little in mitigation.

Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989) (citations omitted).

In this case, it cannot be said that there was nothing or very little in mitigation. Appellant's turbulent family history is a very, very strong mitigating circumstance when evaluated under the correct standard. The trial court found that "it does not appear to this Court that this murder stems from that abuse or childhood trauma, rather it appears to have bene prompted by purely selfish motives" R3766. The mitigating evidence presented actually explained this observation about selfishness. Appellant's father was a role model for Appellant and was

looked upon "as a god" R3046.[10] The father was the epitome of selfishness. The father never wanted his family or children R3041. The father was a tyrant who disappeared several months at a time R3034, 3033. The father beat Appellant R3036. The time the father spent with the children was one of fear and violence R3041. As a result, all Appellant knew was violence, indifference, selfishness and weak and impulsive behaviors, and instant gratification R3047. The conditions of the family led to a paradox in that one had to act bad to get attention and be thought of as good R3038. Appellant's dysfunctional family offers an insight as to what went on in Appellant's life and how it resulted in multiple tragedies R3051. In Heswood v. State, 575 So. 2d 170 (Fla. 1991), this Court recognized how very significant this type of mitigation can be:

> A great part of Hegwood's ill-fated life appears to be attributable to his mother, described by witnesses as a hard-drinking, lying drug addict and convicted felony who tended to abandon her children and who turned Hegwood in and testified against him, apparently motivated by the reward money offered in this case. Based on the mental health expert's testimony the jury may have believed that Hegwood was mentally or emotionally deficient because of his upbringing.

575 So. 2d at 173.

The evidence is even more mitigating as it shows how Appellant came to lack the problem solving capabilities without resorting to violence. Dr. Strauss testified that there were no problem-solvers in Appellant's family R3032. Whenever problems occurred within the family they would be met by the father beating the boys with a stick or belt or whatever he could find R3033.

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[10] Gail Russell also testified that Appellant talked about his father as if he were wonderful and would always make excuses for him R3151.

Appellant was never guided by any set of family values. There was no sense of love, safety, or security in the family R3032. The family did not celebrate birthdays or holidays R3037. Appellant's mother was of no aid. She was very weak and passive R3034. She allowed the father to act as a tyrant R3034. She had a number of psychiatric problems and was hospitalized a number of times R3034.[11] Other members of the family did not aid and try to comfort the family R3035.

Another mitigating circumstance was that Appellant was an outstanding worker R3163,3171,3175. E.g. Smalley v. State, 546 So. 2d 720 (Fla. 1989); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988). There was evidence of Appellant's potential for rehabilitation. Dr. Strauss testified that Appellant could be treated R3052. This Court has held -- "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). Also, in Holsworth v. State, 522 So. 2d 348, 354-55 (Fla. 1988), while noting that "potential for mitigation" was a mitigating factor this Court found that the "death penalty, unique in its finality and total rejection of the possibility of rehabilitation was intended to be applied to only the most aggravated and unmitigated of most serious crimes." Indeed, evidence relating to the possibility of rehabilitation is deemed so important that exclusion of such evidence requires a new sentencing hearing. Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982); Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987). In a somewhat related mitigating circumstance

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[11] Dr. Strauss testified that the mother's past seemed to explain why the present family was so dysfunctional R3034. She was sexually abused and raped by her father R3034. She ran away from home at the age of 14 and later married Appellant's father after the children were born and she was on her way to jail R3044.

testimony showed that Appellant was amenable to learning and had the ability to learn R3139-40,3162. Such is mitigating in that: it shows potential for good adaption to prison. E.g. Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988) (potential for productivity in prison system is mitigating); Fead v. State, 512 So, 2d 176, 177 (Fla. 1987) (could be productive in prison system).

There was also mitigation presented at sentencing that Appellant was courteous, respectful, a gentleman, well-liked by others and was helpful to others R3172,3176,3146,3220. The positive personality traits of an individual have on many occasions been recognized by this Court as a mitigating circumstance. E.g. Barrett v. State, 649 So. 2d 219, 233 (Fla. 1994) ("positive personality traits"); Perry v. State, 522 So. 2d 817, 821 (Fla. 1988) ("helpful around home"). Yet, the evidence that Appellant was courteous, respectful, a gentleman, well-liked by others, and was helpful to others was never addressed nor considered by the trial court.

There was testimony from Dr. Abbey Strauss that if Appellant had been raised in a different environment his behavior may have been different R3080. Dr. Strauss explained how Appellant lived in a very rough neighborhood and that macho behavior was used as a vent for his psychological needs R3048-49. This evidence speaks for itself as being mitigating. Due to the mitigation present, the existence of onlythe felonyrnurder aggravator will not support the death sentence. E.g. Clark v. State, 609 So. 2d 513 (Fla. 1992).

The error cannot be deemed harmless. The error denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT XIII

THE TRIAL COURT ERRED IN RELYING ON MATERIALS NOT PRESENTED IN OPEN COURT IN SENTENCING APPELLANT.

The trial court's sentencing order shows that the trial court relied on materials never presented in open court. Appellant was never notified by the trial court that it was relying on such information. Appellant was denied due process, effectiveness of counsel, and a fair, reliable sentencing contrary to Article I, Sections 2, 9 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In its sentencing order, the trial court quoted from depositions, of Officer Hopper and Detective Doethlaff, both of which were never presented in open court at either the guilt or penalty phase. The trial court never notified Appellant that it would be relying on the depositions.

The use of Officer Hopper's deposition is particularly egregious. In the sentencing order, the trial court quotes Lorraine Pezza as stating to Officer Hopper that "she was a little scared of Robert" R3753, Appendix at 51. This is a direct quote from Officer Hopper's deposition.[12] Hopper did not testify that "she was a little scared of Robert" because during a pre-trial hearing the trial court had granted a motion in limine to prevent Hopper from testifying to any statements

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[12] Page 12 of Hopper's deposition reads as follows:

Q Let me see. "Pezza did not want to confront Robert?"

A She told me that she was a little scared of Robert.

Appendix at 12. A motion to supplement the record with Hopper's and Doethlaff's depositions has been filed with this brief.

Pezza made about Appellant.[13] R256. The trial court's quotation does not even come from the pre-trial hearing. Only the general subject matter of Pezza's fear was discussed. The exact quote used in the deposition and sentencing order was not mentioned. Again, the trial court had excluded such evidence and never gave Appellant any notice that it would rely on the deposition and use it.

In addition, the trial court also quotes from Detective Doethlaff's deposition in its sentencing order as follows:

> ... Doethlaff further told Defendant that "she was there, you were there. You're going to have to go to court over it and she wants to take action."

R3853; Appendix at 51 (emphasis added).[14] Appellant was never given any notice that the trial court was going to use this deposition.

The same problem of a trial court using a deposition without advising the defense was encountered by this Court in Porter v. State, 400 **So. 2d** 5 (Fla. 1981) wherein this Court held that use of the deposition without noticing the defense violated due process:

> In *Gardner* v. *Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the United States Supreme Court reminded us that the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause. *Gardner* held that using portions of apresentence investigation report without notice to the defendant and without an accompanying opportunity afforded to the defendant to rebut

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[13] At trial, the prosecutor specifically had Hopper testify without stating what Pezza had told him R1125.

[14] Compare page 8 of Detective Doethlaff's deposition:

> Q Do you remember your conversation with him, other than the information on that sheet, which is his name and address and phone numbers?
>
> **A** ... I said "It's your word against hers." I said, "None of the police were there during the time of the incident. She was there. You were there. You're going to have to go to court over it and she wants to take action."

Appendix at 25 (emphasis added).

> or challenge the report denied due process. That ruling should extend to a desosition or any other information considered by the court in the sentencing process which is not presented in open court. Should a sentencing judge intend to use any information not presented in open court as a factual basis for a sentence, he must advise the defendant of what it is and afford the defendant an opportunity to rebut it.
>
> * * *
>
> Neither Porter nor his counsel was advised that this information, gleaned from the deposition, was going to be used. By proceeding in this manner, the trial judge deprived Porter of due process of law.

400 So. 2d at 7 (emphasis added). This cause must be remanded for a new sentencing. Porter, supra; Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

In addition, there appear to be other materials relied on that were not presented in open court of which Appellant was never given notice. For example, the sentencing order specifically speaks of Gail Russell's testifying about Appellant driving Pezza's car:

> The Defendant's girlfriend, Gail Russell, testified that duringthe period of September 27, 1991, until approximately September 30, 1991, the Defendant drove the victim's vehicle and had the keys to the vehicle in his possession.

R3754 (Appendix at 52) (emphasis added). Russell never testified during the guilt phase. She testified only at the penalty phase and her testimony related only to Appellant's character. She did not testify to Appellant driving the victim's car. This information was obtained from some other source. This cause must be remanded for a new sentencing proceeding before a new judge. See Tillman v. State, 522 So. 2d 14, 16 (Fla. 1988) (resentencing was to be before a new judge to avoidpossibilitythat trial judge couldhave been influenced by inadmissible evidence).

POINT XIV

THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND FIND NON-STATUTORY MITIGATING CIRCUMSTANCES AND IN USING AN INCORRECT STANDARD IN EVALUATING OTHER NON-STATUTORY MITIGATING CIRCUMSTANCES.

The following were among the non-statutory mitigating circumstances presented in this case: (1) Appellant has potential for rehabilitation; (2) Appellant is amenable to learning and has the ability to learn; (3) Appellant has some positive personality traits; and (4) if Appellant had been raised in a different environment his behavior may have been different.

As this Court recently reiterated in Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993), mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. The sentencing court "must expressly evaluate in its written order each mitigating circumstance." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). A court must find as a mitigating circumstance those factors "reasonably established by the greater weight of the evidence." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). "The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor." Maxwell v. State, 603 So. 2d 490 (Fla. 1992). In the present case, the trial court failed to consider in its written order, and failed to find the non-statutory mitigating circumstances which were not controverted by any competent evidence as explained below.

There was evidence of Appellant's potential for rehabilitation. Dr. Strauss testified that Appellant could be treated R3052. This Court has held -- "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v.

Dugger, 526 So. 2d 900, 902 (Fla. 1988). Also, in Holsworth v. State, 522 So. 2d 348, 354-55 (Fla. 1988), while noting that "potential for mitigation" was a mitigating factor this Court found that the "death penalty, unique in its finality and total rejection of the possibility of rehabilitation was intended to be applied to only the most aggravated and unmitigated of most serious crimes." Indeed, evidence relating to the possibility of rehabilitation is deemed so important that exclusion of such evidence requires a new sentencing hearing. Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982); Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987). In a somewhat related mitigating Circumstance testimony showed that Appellant was amenable to learning and had the ability to learn R3139-40,3162. Such is mitigating in that it shows potential for good adaption to prison. E.g. Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988) (potential for productivity in prison system is mitigating); Fead v. State, 512 So. 2d 176, 177 (Fla. 1987) (could be productive in prison system). Despite the testimony relating to these important mitigating circumstances, the trial court never considered nor evaluated than in sentencing Appellant.

There was evidence presented at sentencing that Appellant was courteous, respectful, a gentleman, well-liked by others and was helpful to others R3172,3176,3146,3220. The positive personality traits of an individual have on many occasions been recognized by this Court as a mitigating circumstance. E.g. Barrett v. State, 649 So. 2d 219, 233 (Fla. 1994) ("positivepersonality traits"); Perry v. State, 522 So. 2d 817, 821 (Fla. 1988) ("helpful around home"). Yet, the evidence that Appellant was courteous, respectful, a gentleman, well-

liked by others, and was helpful to others was never addressed nor considered by the trial court.

There was testimony from Dr. Abbey Strauss that if Appellant had been raised in a different environment his behavior may have been different R3080. Dr. Strauss explained how Appellant lived in a very rough neighborhood and that macho behavior was used as a vent for his psychological needs R3048-49. This evidence speaks for itself as being mitigating. Yet, the trial court never addressed nor considered this mitigating evidence.

The trial court's failure to address and consider the above mitigating circumstances is reversible error. Campbell, supra. The trial court's failure to find the above uncontroverted mitigating circumstances is reversible error. Maxwell, sunra.

The one mitigating circumstance that the trial court did address was Appellant's turbulent family background. However, it evaluated the turbulent family background by using the incorrect standard. The trial court used the standard that this mitigation need not be found if the "murder was not significantly influenced by the Defendant's childhood experiences" R3763. This standard might be appropriate if it was merely being used to show that Appellant's actions that night were solely caused by his turbulent childhood. However, this was not the main thrust of this mitigating factor.

The trial court used the wrong standard in evaluating the turbulent family background as a mitigating factor. Eddings v. Oklahoma, 102 S.Ct. 869 (1982). In Eddings, the defendant's family history, which included beatings, was rejected as being mitigating on the ground that it was not connected to the murder -- (i.e. that it did not tend to prove a legal excuse from criminal responsibility).

102 S.Ct. at 876. The Supreme Court held that the trial judge used the wrong standard in rejecting family history as a mitigating factor. Id.; see also Lockett v. Ohio, 98 S.Ct. 2954 (1978) (aspects of defendant's background are mitigating). In other words, it is not necessary that the family history be the cause for the killing to be mitigating.

In Brown v. State, 526 So. 2d 903 (Fla. 1988), this Court recognized that using the standard that mitigating factors had to be based on facts surrounding the crime was improperly used by the trial court in evaluating the disadvantaged childhood and abusive parent mitigators:

> We point out that the trial judge was incorrect in concluding appellant's "disadvantaged childhood, his abusive parents, and his lack of education and training, did not establish mitigation in the eyes of this court or in the eyes of the law." ... Mitigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant.

526 So. 2d at 908 (citations omitted).

Like the Supreme Court in Eddings, this Court has also recognized it is reversible error for the trial court to reject a mitigating factor on the basis of utilization of a wrong standard, See Mines v. State, 390 So. 2d 332, 337 (Fla. 1980) (trial court improperly used "sanity" standard in rejecting mental mitigator of being under extreme mental or emotional disturbance); Campbell v. State, 571 So. 2d 415, 418-19 (Fla. 1990) (trial court improperly used "sanity" standard in rejecting "impaired capacity" as a mitigator); Ferguson v. State, 417 So. 2d 639, 644-45 (Fla. 1982).

Appellant's turbulent family history is a very, very strong mitigating circumstance when evaluated under the correct standard. The trial court missed the while point of this mitigation. The trial

court found that "it does not appear to this Court that **this** murder stems from that abuse or childhood trauma, rather it appears to have bene prompted by purely selfish motives" **R3766**. The mitigating evidence presented actually explained this observation about selfishness. Appellant's father was a role model for Appellant and was looked upon "as a god" R3046.[15] The father was the epitome of selfishness. The father never wanted his family or children R3041. The father was a tyrant who disappeared several months at a time R3034, 3033. The father beat Appellant R3036. The time the father spent with the children was one of fear and violence **R3041**. As a result, all Appellant knew was violence, indifference, selfishness and weak and impulsive behaviors, and instant gratification R3047. The conditions of the family led to a paradox in that one had to act bad to get attention and be thought of as good **R3038**. Appellant's dysfunctional family offers an insight as to what went on in Appellant's life and how it resulted in multiple tragedies R3051. In Hegwood v. State, **575** So. 2d 170 (Fla. 1991), this Court recognized how very significant this type of mitigation can be:

> A great part of Hegwood's ill-fated life appears to be attributable to his mother, described by witnesses as a hard-drinking, lying drug addict and convicted felony who tended to abandon her children and who turned Hegwood in and testified against him, apparently motivated by the reward money offered in this case. Based on the mental health expert's testimony the jury may have believed that Hegwood was mentally or emotionally deficient because of his upbringing.

575 So. 2d at 173.

The evidence is even more mitigating as it shows how Appellant came to lack the problem solving capabilities without resorting to

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[15] **Gail Russell** also testified that Appellant talked about his father as if he were wonderful and would always make excuses for him R3151.

violence. Dr. Strauss testified that there were no problem-solvers in Appellant's family R3032. Whenever problems occurred within the family they would be met by the father beating the boys with a stick or belt or whatever he could find R3033.

Appellant was never guided by any set of family values. There was no sense of love, safety, or security in the family R3032. The family did not celebrate birthdays or holidays R3037. Appellant's mother was of no aid. She was very weak and passive R3034. She allowed the father to act as a tyrant R3034. She had a number of psychiatric problems and was hospitalized a number of times R3034. Other members of the family did not aid and try to comfort the family R3035.

The bottom line is that when this mitigating evidence is analyzed without the use of an incorrect, artificial standard it is quite powerful. As Dr. Strauss testified, the dysfunctional family offers an insight into Appellant's life and how it resulted in tragedy R3051. In all probability, if Appellant was in a different environment his behavior would have changed R3080. The errors described in this point denied Appellant due process and a fair, reliable sentencing contrary to Article I, Sections 9 and 17 of the Florida Constitution, and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT XV

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). Its application is reserved for "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

As explained in Point XII, the avoid arrest aggravator is not legitimately applicable in this case. This leaves only one aggravating circumstance -- the felony murder which was contemporaneous to the murder. As noted in McKinney v. State, 579 So. 2d 80, 81 (Fla. 1991), the death sentence will only be affirmed in cases supported by one aggravating circumstance only in cases where there is either nothing or very little in mitigation:

> Having found that two aggravating circumstances are unsupported by the record, this death sentence is now supported by just one aggravating circumstance -- that the murder was committed during the course of a violent felony. As we have previously noted, "this Court has affirmed death sentences supported by one aggravating circumstance only in cases involving 'either nothing or very little in mitigation,"' *Nibert v. State*, 574 So. 2d 1059, 1063 (Fla. 1990) (quoting *Songer v.* State, 544 So. 2d 1010, 1011 (Fla. 1989)). Here, the trial court found as a statutory mitigating circumstance that McKinney had no significant history of prior criminal activity. In addition, McKinney presented substantial mitigating evidence relating to his mental deficiencies and alcohol and drug history. In light of the existence of only one valid aggravating circumstance present here, the sentence of death is disproportional when compared with other capital cases where this Court has vacated the death sentence and imposed life imprisonment. See Lloyd, 524 So. 2d at 403 (and cases cited therein).

~~See also~~ Clark v. State, 609 So. 2d 513 (Fla. 1992); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d at 1011; Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396

(Fla. 1988). As explained in the previous points, in this cause there was significant mitigation present.

Assuming arguendo that the avoid arrest aggravator is valid in this case, the death sentence would still be disproportional. Proportionality analysis is not based solely on the number of aggravating factors. See Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (although five aggravating factors, including prior violent felony but excluding HAC and CCP, existed -- death was not proportionally warranted); Livinsston v. State, 565 So. 2d 1288, 1292 (Fla. 1988) (death disproportionate when proportional review of two aggravating factors, including a prior violent felony, against mitigating factors). Rather, proportionality review is also based on the quantity and quality of the mitigating evidence. There was substantial mitigation present to make death disproportional. See Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990). As in other cases, the substantial mitigation takes this case from the group of the most unmitigated cases for which the death penalty is reserved. Kramer v. State, 619 So. 2d 274 (Fla. 1993) (death not proportional where two aggravators (prior violent felony and HAC) where mitigators of alcoholism, mental stress, loss of emotional control, good worker, adjustment to prison, were present); Livinsston v. State, 565 So. 2d 1288 (Fla. 1988) (death not proportional where two aggravators (prior violent felony and during the commission of felony) where mitigators of low intelligence, cocaine and marijuana abuse, and abusive childhood were present); Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) (death not proportional despite 5 aggravators found); Jackson v. State, 575 So. 2d 181 (Fla. 1991) (death not proportional despite two aggravators including prior violent felony). The death sentence

in this case violates Article I, Sections 9, 16, and 17 of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

POINT XVI

THE INTRODUCTION OF THE TESTIMONY OF RICHARD BEN-VENISTE REGARDING THE HISTORY OF LORRAINE PEZZA OVER APPELLANT'S OBJECTIONS DENIED APPELLANT DUE PROCESS AND A FAIR, RELIABLE SENTENCE.

During the penalty phase, Appellant objected to the testimony of Richard Ben-Veniste regarding the history of his sister, Lorraine Pezza, on the ground that such evidence was not relevant and whatever relevance it had was outweighed by undue prejudice R2889, 2892-94, 3302. Appellant's objections were overruled and Ben-Veniste's testimony was admitted R2893, 3003. The overkill of such victim impact evidence denied Appellant due process and a fair sentencing contrary to Article I, Sections 2, 9 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The prosecution presented only one witness during the penalty phase -- the victim's brother, Richard Ben-Veniste. Ben-Veniste's testimony covered only one subject -- the history of his sister's life. The testimony was quite extensive and constitutes approximately 15 pages of transcript which was mostly a narration by Ben-Veniste R3000-3018. Ben-Veniste's testimony gave a detailed history of Pezza's education, travel, teaching and work background and her frail health throughout her life. Over Appellant's objections R3002-3003, each juror was given a copy of Pezza's resume R3003.

Assuming arguendo, that victim impact evidence is admissible in the penalty phase (but see Point XVII, infra), the extensive presentation of such evidence, including a resume, violated Appellant's right

to due process and a fair sentencing. In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. **2597,** 115 L.Ed.2d **720** (1991), the Supreme Court noted that while introduction of victim impact evidence did not violate the Eight Amendment as it serves "legitimate purposes" there may be times that "evidence is introduced that is so unduly prejudicial" that it will violate due process. 111 S.Ct. at 2608. The extent and nature of the victim impact evidence in this case was unduly prejudicial and violated due process. This can be further seen by the prosecutor's use of the evidence in this penalty phase opening argument. The prosecutor falsely accused the defense of blaming the victim and stated that the defense was claiming that the victim did not deserve to live **R2991.** However, Appellant never made any such claim at any time. Having made the false claim, the prosecutor then proceeded to destroy the strawman by use of the victim impact evidence to argue that Pezza deserved to live:

> What I do submit you will hear is what has been presented by the defense through their cross-examination of the witness in the original trial, which I submit you will continue to hear today. Somehow placing the blame on the victim, trashing the victim, to continue that line as if the mentally disabled have less reason to life, are less deservins of life than anyone else; and in fact in this case this mentally disabled person was particularly vulnerable to someone line Robert Consalvo.
>
> You are going to learn more about Lori. You are going to learn about the uniqueness as an individual. You are going to hear that this was in essence an extraordinary woman who had to overcome her disability. This is a woman who had a master's degree, college education, was a writer, a teacher, taught the gifted, gifted children. In her manic stage time in which she was able to function and when her children saw her, she was able to do things with them. She was very active with her children. But with Lori after that manic stage came the depressive stage where she couldn't car for them because of her mental illness. In no way does it lessen her right to life like anyone else.

R2991 (emphasisadded). In other words, the victim impact evidence was not presented to merely show the uniqueness of the victim pursuant to

the purpose of the statute -- rather, it was presented to use as a device for rebutting a position that was never offered by the defense.

In his closing penalty phase argument, the prosecutor again utilized the victim impact information in a manner contrary to the statute. The prosecutor used the evidence to compare Appellant and the victim as if sentencing were a contest of virtues. The prosecutor first implied that Appellant was claiming to be a victim (which he actually never claimed) and compared Appellant and Pezza. Finally, the prosecutor used Pezza's uniqueness as an aggravator by stating that she was not the type of person to kill:

> It's apparently very popular to declare everybody's a victim. It absolutely insults the true victims, people who are really harmed. Robert Consalvo is not a victim. He is a victimizer. He is a predator. Be takes advantage, obviously, of the weak, the infirm, the mentally disabled.
>
> You know, when you try a case it's essentially a trial of the defendant. You don't get to hear too much about the victim, and she's depersonalized. Fortunately, you did see a picture of her when she was alive. Murder is really the ultimate act of depersonalization. It transforms a living person with hopes, dreams, and fears into a corpse taking away all that is special and unique about that person. But you did hear some things about her, that she was special and unique. That she possessed tremendous qualities, tremendous accomplishments and all with essentially her hands tied. That with her mental illness she was still able to accomplish great things and try to work through those things. You are supposed to love thy neighbor. You are not supposed to kill you neighbor.

R3097-98 (emphasis added). Appellant was denied a fair and reliable sentencing contrary to Article I, Sections 9, 16, 17 and 21 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. This cause must be remanded for a new sentencing.

POINT XVII

SECTION 921.141(7), FLORIDA STATUTES, WHICH PERMITS INTRODUCTION OF VICTIM IMPACT EVIDENCE IN A CAPITAL SENTENCING PROCEEDINGS IS UNCONSTITUTIONAL.

A. SECTION 921.141(7), F.S., PROVIDING FOR THE ADMISSION OF VICTIM IMPACT EVIDENCE IN A CAPITAL SENTENCING PROCEEDING IS UNCONSTITUTIONAL AS IT LEAVES JUDGE AND JURY WITH UNGUIDED DISCRETION ALLOWING FOR IMPOSITION OF THE DEATH PENALTY IN AN ARBITRARY AND CAPRICIOUS MANNER.

The facts in the present case exemplify why the unguided discretion in application of victim impact evidence can lead to arbitrary and capricious use of such information. Throughout the discussions regarding victim impact evidence, the trial court was unaware of how the evidence applied to the capital sentencing, but ruled that the state was "entitled to take advantage" of it R2903. In turn, the state claimed that victim impact evidence could be used in "counteracting mitigating evidence" and the jury can consider it as they wish R2901,2902. The prosecutor also was not sure that victim impact evidence could not be used to fortify the aggravators and negate the mitigators R2934-35. Despite the fact that such a proclamation is contrary to the purpose of the statute permitting victim impact evidence, the lack of guidance permits improper use of such evidence.

Effective July 1, 1992, the Florida Legislature enacted Florida Statute 921.141(7), part of the Florida capital sentencing statute. This statute was enacted in response to the United States Supreme Court's opinion in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). However, by enacting this statute, the Florida Legislature responded to Payne v. Tennessee, supra, without giving full consideration to the statute's constitutional impact on the Florida capital sentencing procedure set forth in Chapter 921.141, Florida Statutes.

The sentencing scheme provided in Florida law is unlike the law reviewed by the Court in Pavne in that Florida is a "weighing" state: In other words, the law requires a jury and the a judge to weigh specifically enumerated and defined aggravating circumstances that have been proven beyond a reasonable doubt against mitigating circumstances in determining the appropriate sentence. Section 921.141, Florida Statutes. The law reviewed by the Court in Pavne set no such limits. Unlike Florida, Tennessee's capital sentencing law is very broad:

> In the sentencing proceeding, evidence may be presented as to any matter that the Court deems relevant to the punishment and may include but not be limited to, the nature and circumstances of the character, the crime; the defendant's background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated ...

T.C.A. 39-13-204(c) (1982) (emphasis added).[16]

Section 921.141(5), Florida Statutes, specifically limits the prosecution to the aggravating circumstances listed in the statute: "AGGRAVATING CIRCUMSTANCES. Aggravating circumstances shall be limited to the following ..." (emphasis added). Accord, Elledse v. State, 346 So. 2d 998, 1002-03 (Fla. 1977); Provence v. State, 337 SO. **2d 783** (Fla. **1976).** The consideration of matters not relevant to aggravating factors renders a death sentence under Florida law violative of the Eighth Amendment. Sochor v. Florida, 112 S.Ct. 2114, 117 L.Ed.2d 326 (1992);Stringer v. Black, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992).

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[16] It is also noteworthy that Tennessee requires a unanimous verdict of the jury to recommend death; Florida requires only a bare majority.

It might be argued that victim impact evidence is not weighed it is merely considered. This begs the questions of how to apply this statute in a constitutional manner:

> "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly and capricious action." 428 U.S. at 189, 96 S.Ct. at 2932 (opinion of STEWART, POWELL, AND **STEVENS, JJ.).**

Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 1764 (1980).

The concern with randomness and arbitrary sentencing procedures has been the underlying theme of the Supreme Court's death penalty decisions. In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Supreme Court held that the death penalty could not be imposed under the sentencing procedures in effect because of the substantial risk that it would be inflicted in an arbitrary and capricious manner as a result of unbridled discretion. Several years later, in reviewing the Florida statute, the Supreme Court upheld the constitutionality of the death penalty finding that the statutory scheme "seeks to assure that the death penalty will not be imposed in an arbitrary or capricious manner." Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976).

The very problem inherent in this new statute is that one does not know where victim impact evidence factors into the sentencing determination. In the court below it was claimed that victim impact evidence is not to be weighed it is merely to be considered. However, it is the very consideration of factors not inherent in the weighing process that has caused the reversal of several death sentences.

In Burns v. State, 609 So. 2d 600 (Fla. 1992), this Court reversed the death sentence where evidence was introduced concerning the deceased's background and character as a law enforcement officer.

The Court held that it was harmless error as it related to the guilt phase but found it to be reversible error as it related to the penalty phase Specifically, this Court held it was not relevant to any material fact in issue. It is particularly noteworthy that Burns was decided after Payne v. Tennessee. Similarly, in Taylor v. State, 583 So. 2d 323 (Fla. 1991), the Florida Supreme Court reversed for a new penalty phase due to a prosecutor making an argument designed to invoke sympathy for the deceased. 583 So. 2d at 329-330. The Court relied on its prior opinion in Jackson v. State, 522 So. 2d 802 (Fla. 1988), in which it held such argument to be improper "because it urged consideration of factors outside the scope of the jury's deliberation." 522 So. 2d 809. The use of victim impact evidence allowed for imposition of the death penalty in an arbitrary and capricious manner.

B. SECTION 921.141(7), FLORIDA STATUTES, IS VAGUE AND OVERBROAD AND THEREFORE VIOLATIVE OF THE DUE PROCESS GUARANTEE OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Appellant objected that the victim impact statute was vague and overbroad R2892,3686. The trial court agreed that the statute was vague, but upheldthe statute and permitted introduction of the victim impact evidence R2893.

The victim impact statute provides that "such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the communities' members by the victim's death." This language contains no definition or limitations.

A statute, especially a penal statute, must be definite to be valid. Locklin v. Pridgeon, 30 So. 2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. D'Alemberte v. Anderson, 349 So. 2d 164 (Fla.

1977). The statute at issue here clearly fails under any standard of definiteness required by the United States and Florida Constitutions.

The phrase "loss to the community" contains no definition of community or limits on its membership. This could lead anyone testifying or even to death sentencing by petition or public opinion poll.[17] The phrase "uniqueness as a human being" places absolutely no limit on this evidence. Who defines uniqueness?

The Supreme Court has frequently addressedthe issue of vagueness of legislatively defined aggravating circumstances. "Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically asserted that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)." Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 1957-59 (1988). Similarly, in Espinosa v. Florida, 505 U.S. , 112 S.Ct. 2926, **120 L.Ed.2d 854** (1992), the Court held "our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor."

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[17] The Florida Constitution provides "Victims of crime or their lawful representative including next-of-kin of homicide victims, are entitled ... to be heard when relevant ..., to the extent that these rights **do** not interfere with the constitutional rights of the accused." Art. I, § 16. The victim impact statute broadens these rights to the community at large.

Perhaps of greatest concern, victim impact evidence as definedin this statute permits and may foster the special danger of racial or class prejudice infecting a capital sentencing decision. Both the United States Supreme Court and the Florida Supreme Court have recognized the special danger of racial prejudice infecting a capital sentencing decision in a case involving a black defendant and a white deceased. Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986); Robinson v. State, 520 So. 2d 1 (Fla. 1988). The introduction of victim impact evidence can be expected to result in even further discrimination toward defendants and imposition of the death penalty being rendered in an even more arbitrary manner.

Moreover, victim impact evidences leads to discrimination against victims, contrary to the guarantee contained in our constitution of equal protection of the laws, Art. I, § 2, Florida Constitution. This Court has recognized that the victim's lack of social acceptability is not a proper basis for a jury recommendation of life. See Bolender v. State, 422 So. 2d 833 (Fla. 1982); Coleman v. State, 610 So. 2d 1283 (Fla. 1992). Nonetheless, victim impact evidences lends itself to comparing one individual's life against the value of another. Will one victim, depending upon race, social standing, religion, or sexual orientation, be more deserving of a death sentence for his or her killer? Is a murder which does not impact the "community" less heinous than one that does?[18]

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[18] "Recall that the Nazis preyed on people they considered unworthy of life: Jews, Gypsies, homosexuals. The perceived sub-human status of the targets ostensibly justified any manner of outrage against them. Transported and later tattooed like cattle, victims were rated against one another in the fashion of animals. Camp commanders directed the younger and healthier captives rightward, to work; the old and weak, leftward, to die. While there is clearly no moral equivalence between genocide and capital punishment as practiced in the United States, the former by its very extremity highlights the need to resist all

Many reported decisions already reveal examples of attempts to exploit a victim's piety. See e.g. South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207 (prosecutor recited prayer and argued victim's religiousness); Daniels v. State, 561 N.E.2d 487 (Ind. 1991) (prosecutormounted life-size photo of victim in full military uniform and stressed that he had been army chaplain); State v. Huertas, 553 N.E.2d 1058 (Ohio 1990) (victim's mother mentioned son's church going habits); Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983) (witness testified that deceased was choir member at his church). Certainly the prosecution will not argue explicitly that a murder deserves death because the deceased had money or status or was white or religious. Yet characteristics like the articulateness of survivors frequently correlate closely with wealth and social position, thereby serving as surrogates for parameters nobody deems appropriate. So, too, victim attributes will import a certain community status.

In the event the state is permitted to use victim impact evidence, will it become a defense obligation to exploit or devalue victims in order to minimize such evidence or, in fact, to provide mitigation? In any event, devalued victims will be ignored at a minimum or, worst of all, their defects will be aired in sentencing proceedings. Certainly, if there is a principle of relevance to victim impact evidence that makes a victim's personal, familial, and

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officially encouraged invidious distinctions founded on a person's class or caste. To countenance a capital sentence procedure that allows "'those to discriminate who are of a mind to discriminate,'" as does Payne with respect to victims, is to permit "grading" of humans, which Nazism (if nothing else) should brand as utterly beyond the pale. For the victim's status assumes no greater legitimacy as a basis for the lawful act of sparing or condemning a murderer than for the lawless murder itself." Vivian Berger, Payne and Sufferins: A Personal Reflection and a Victim-Centered Critique, 20 Fla.St.L.Rev. 51 (1992).

social worth pertinent evidence in aggravation, worthlessness is these respects become pertinent evidence in mitigations,

Victim impact evidence asks a jury to compare the value of a victim's life to the value of other victims' lives and to the value of a defendant's life, The inherent risk that prejudice on racial, religious, social or economic grounds, will infect this decision are unaccepted under the Florida and United States Constitutions. As such, the vagueness of the victim impact evidence renders this statute unconstitutional.

C. THE FLORIDA CONSTITUTION PROHIBITS USE OF VICTIM IMPACT EVIDENCE.

The Florida Constitutional requires that victim sympathy evidence and argument be excluded from consideration whether death is an appropriate sentence, and provides broader protection than the United States Constitutions for the rights of a capital defendant. This Court recently found significant the disjunctive wording of Article I, Section 17 of the Florida Constitution, which prohibits "cruel or unusual punishment." Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).[19] The Court in Tillman explicitly held that a punishment is unconstitutional under the Florida Constitution if it is "unusual" due to the procedures involved. The allowance of victim sympathy evidence and argument would violate Article I, Section 17. The existence of this evidence is totally random, depending upon the extent of the deceased's family and friends, and their willingness to testify.

The admission of victim impact evidence and argument would also violate the Due Process Clause of Article I, Section 9 of the Florida Constitution. In Tillman, supra, the Court states that Article I,

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[19] This wording is in contrast to the ban on "cruel and unusual punishment" in the Eighth Amendment of the United States Constitution.

Section 9 holds "that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than lesser penalties." Id. at 169. The Florida Supreme Court's opinion in Tillman is clear indication that victim impact evidence violates Article I, Sections 9 and 17 in a capital case, even if it is permitted in other cases.

The admission of victim impact evidence and argument violates Article I, Section 9 and 17 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution for related reasons. First, such evidence introduced into the penalty decisions considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, this proof is highly emotional and inflammatory, subverting a reasoned and objective inquiry which the courts have required to guide and regularize the choice between death and lesser punishments. Third, victim impact evidence cannot conceivably be received without opening the door to proof of a similar nature in rebuttal or in mitigation, further upsetting the delicate balance the courts have painstakingly achieved in this area. Fourth, the evidence invites the jury to impose the death sentence on the basis of race, class and other clearly impermissible grounds.

Victim impact evidence, whether considered a non-statutory aggravating circumstance or merely a factor to "consider" in the sentencing proceeding, encourages inconsistent, unprincipled and arbitrary application of the death penalty and therefore is violative of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 9, 17 and 21 of the Florida Constitution.

*D. SECTION 921.141(7), FLORIDA STATUTES, INFRINGES UPON THE EXCLUSIVE RIGHT OF THE FLORIDA SUPREME COURT TO REGULATE PRACTICE AND PROCEDURE **PURSUANT** TO ARTICLE V, SECTION 2, FLORIDA CONSTITUTION.*

Article V, Section 2 of the Florida Constitution provides that the Supreme Court shall adopt rules for the practice and procedure in all courts.

> Practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion 'practice and procedure' maybe described as the machinery of the judicial process as opposed to the product thereof." In Re: Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972) (ADKINS, J., concurring). It is the method of conducting litigation involving rights and corresponding defenses. Skinner v. City of Eustis, 147 Fla. 22, 2 So. 2d 116 (1941).

Haven Federal Savings and Loan Association v. Kirian, 579 So. 2d 730 (1991).

This Court has relied on these principles to invalidate a wide variety of statutes, involving such topics as juvenile speedy trial (RJA v. Foster, 603 So. 2d 1167 (Fla. 1992)); severance of trials involving counterclaims against foreclosure mortgagee (Haven, supra); waiver of jury trial in capital cases (State v. Garcia, 229 So. 2d 236 (Fla. 1969)); and the regulation of voir dire examination (In Re: Clarification of Florida Rules of Practice and Procedure, 281 So. 2d 204, 205 (Fla. 1973)). The statute at issue here is an attempt to regulate "practice and procedure".

The statute unconstitutionally invades the province of the Supreme Court by providing an evidentiary presumption that victim impact evidence will be admissible at the penalty phase of a capital case, regardless of its relevance toward proving an aggravating or mitigating circumstance. The statute also permits the prosecutor to argue in closing argument evidence that has previously been determined

to be irrelevant in capital sentencing proceedings. See Jackson v. State, 522 So. 2d 802 (Fla. 1988) (prohibiting argument that the victims could no longer read books, visit their families, or see the sun rise in the morning).

Through enactment of the victim impact statute, the legislature has tried to amend portions of the Evidence Code without first obtaining approval of this Court as required by Article V.

The victim impact statute, if it is not an aggravating circumstance, is not substantive law. Rather, if the argument that it is merely evidence to be "considered" is accepted, then it must be legislatively determined relevant evidence. It is for the courts to determine relevancy, not the legislature.

E. APPLICATION OF SECTION 921.141(7), FLORIDA STATUTES, VIOLATES THE EX POST FACTO CLAUSES OF ARTICLE I, SECTION 10 AND ARTICLE X, SECTION 9 OF THE FLORIDA CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 10 OF THE UNITED STATES CONSTITUTION.

The statute in question took effect in **1992**. The offense in this cause occurred in **1991**. Article I, Sections 9 and **10**, of the United States Constitution prohibits Congress from enacting laws that retrospectively apply new punitive measures to conduct already consummate, to the detriment or material disadvantage of the wrongdoer. Through this prohibition, the framers "sought to assure that legislative acts give fair warning to their effect and permit individuals to rely on their meaning until explicitly changed." Weaver v. Graham, 450 U.S. 24, 28-29, 109 S.Ct. **960** (1981).

Florida has also adopted an ex post facto prohibition under Article I, Section 10 of the Florida Constitution. This provision states that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." An ex post facto

law, such as the instant one, applies to events occurred before it existed, which results in a disadvantage to the defendant. Blankenship v. Dugger, 521 So. 2d 1097 (Fla. 1988).

In Miller v. Florida, 482 U.S. 423, 430, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), the Court held a law is ex post facto if "two critical elements [are] present: First, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" (quoting Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960 (1981)). Both elements are present here. The law took effect since the alleged crime, and adds a powerful reason for imposing death as a punishment which was not permitted to be considered at the time of the offense. The previously well-recognized exclusion of such evidence in a number of cases because of its inflammatory, non-statutorily aggravating nature is stark recognition of the new law's substantial disadvantage. Grossman v. State, 525 So. 2d 833 (Fla. **1988)** (holding similar victims' rights statute unlawful to apply to capital sentencing); Booth v. Marvland, 107 S.Ct. 2529 (1987) (declaring such evidence violative of the Eighth Amendment), overruled Payne v. Tennessee, **111** S.Ct. 2597 (1991).

At the time of the defendant's crime, Florida law prohibited the consideration of victim impact evidence as a sentencing consideration. This is clearly a substantial substantive right which is protected by the ex post facto clause of the United States Constitution and the Florida Constitution. In the event the statute is deemed to be purely procedural and therefore not violative of the ex post facto clause, it must be considered a violation of the separation of powers and the

Supreme Court's exclusive jurisdiction to adopt rules for the practice and procedure of all courts.

POINT XVIII

FLORIDA STATUTE 921.141(d), THE FELONY MURDER AGGRAVATOR, IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

Florida Statute 921.141(5) violates both the Florida and United States Constitutions. The use of this aggravator renders Appellant's death sentence unconstitutional pursuant to Article I, Sections 2, 9, 12, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Appellant filed a motion to declare this aggravator unconstitutional R3709-13,3247,3256. The trial court denied the motion R3260. The jury was instructed on this as an aggravating circumstance and the trial court found it as an aggravator R3110,3757-58.

Aggravating circumstance (5)(d) states:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Fla. Stat. 921.141.

All of the felonies listed as aggravators are also felonies which constitute felony murder in the first degree murder statute. Fla. Stat. 784.04(1)(a)2.

The decisions of the United States Supreme Court have made clear that under the Eighth and Fourteenth Amendments an aggravating circumstance must comply with two requirements before it is constitutional, (1) It "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235, 249 (1983). (2) It "must reasonably

justify the imposition of a more severe sentence compared to others found guilty of murder," Zant, supra, at 2742, 77 L.Ed.2d at 249-250.

It is clear that the felony murder aggravator fulfills neither of these functions. It performs no narrowing function whatsoever. Every person convicted of felony-murder qualifies for this aggravator. It also provides no reasonable method to justify the death penalty in comparison to other persons convicted of first degree murder. All persons convicted of felony murder start off with this aggravator, even if they were not the actual killer or if there was no intent to kill. However, persons convicted of premeditated murder are not automatically subject to the death penalty unless they act with "heightened premeditation." See Fla. Stat. 921.141(5)(i). Rogers v. State, 511 So. 2d 526 (Fla. 1987). It is completely irrational to make a person who does not kill and/or intend to kill automatically eligible for the death penalty whereas a person who kills someone with a premeditated design is not automatically eligible for the death penalty. It is clear that this aggravating circumstance violates the Eighth and Fourteenth Amendments pursuant to Zant, supra

Three different state supreme courts have heldthis aggravator to be improper under state law, their state constitution, and/or federal constitutional grounds. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); Engberg v. Meyer, 820 P.2d 70, 87-92 (Wyo. 1991); State v. Middlebrooks, 840 S.W.2d 317, 341-347 (Tenn. 1992); Tennessee v. Middlebrooks, 113 S.Ct. 1840 (1993) (granting certiorari); Tennessee v. Middlebrooks, 114 S.Ct. 651 (1993) (dismissing writ of certiorari as improvidently granted).

In State of North Carolina v. Cherry, 257 S.E.2d 551, the Supreme Court of North Carolina held that when a defendant is convicted of

First Degree Murder under the felony rule, the trial judge is not to submit to the jury at the penalty phase of the trial, the aggravating circumstance concerning the underlying felony. The Court in Cherry held that:

> We are of the opinion, that nothing else, appearing the possibility that the defendant convicted of felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to an "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the Statute we hold that when a defendant is convicted of First Degree Murder under the felony murder rule, the trial judge shall not submit to the jury, at the sentencing phase **of** the trial, the **aggravating** Circumstances concerning the underlying felony.

The North Carolina Supreme Court stated in Cherry that once the underlying **felony** has been **used** to obtain a conviction of First Degree Murder, it has become an element of that crime and may not thereafter **be** the basis for additional prosecution of Cherry. 257 S.E.2d at 567.

This Court should follow these courts and declare this aggravator unconstitutional pursuant to the Eighth Amendment to the United States Constitution and Article I, Section 17, of the Florida Constitution.

It is also clear that this aggravating circumstance is essential to death eligibility in this case. The jury was only instructed on (and the judge only found) two aggravating circumstances. Florida law is clear that if there is only one aggravating circumstance, a death sentence must be reduced to life imprisonment, unless there is little or nothing in mitigation. Songer v. State, 544 So. 2d **1010**, 1011 (Fla. **1989**); Caruthers v. State, 465 So. 2d 496 (Fla. **1985**); Rembert v. State, 445 So. 2d 337 (Fla. 1984). Here, there is substantial mitigation. Thus, felony murder was essential to make this case first degree murder and for death eligibility.

This Court should declare the aggravator unconstitutional and reduce the death sentence to life imprisonment or at least remand for resentencing.

POINT XIX

THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY DEFINE NONSTATUTORY MITIGATING CIRCUMSTANCES.

Defense counsel moved the trial court to give a number of special jury instructions defining nonstatutorymitigating circumstances which were applicable to this case R2958. For example, defense counsel wanted physical abuse and mental abuse as a child specifically listed as non-statutory mitigating circumstances R2958. The trial court denied all the special instructions R2960. Appellant also offered an instruction defining the mitigating circumstances and this was also denied R2951,3701. Failing to instruct on special nonstatutory mitigating Circumstances on motion of defense violates due process and the Eighth Amendment requirement that all mitigating evidence be considered in a death sentencing proceeding.

An attorney's argument will not substitute for a proper jury instruction. See Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA 1981). Abstract instructions relating to a defense theory are insufficient; such instructions must be "precise and specific rather than general and abstract." United States v. Mena, 863 F.2d 1522 (11th Cir. 1989). This is true even where standard jury instructions are involved. See Harvey v. State, 448 So. 2d 578, 580-81 (Fla. 5th DCA 1984) (error to blindly adhere to standard instructions as they are "no immutable postulates from Olympus"). Jurors will only be properly able to understand what specific nonstatutory mitigating evidence is being offered if they are given instructions on such evidence.

This Court has held that it **cannot** be presumed that a trial judge knows what mitigating circumstances are being offered. Campbell v. State, **571** So. 2d **415,** 419 (Fla. 1990). Likewise, a lay jury cannot be presumed to adequately understand what is being offered as mitigation without proper instruction to guide it.[20]

Parker v. Dusser, 111 S.Ct. 731 (1991) also supports the proposition that juries must be told what the nonstatutory mitigation is upon request. In Parker, the Supreme Court found the appellate review inadequate because this Court failed to consider the nonstatutory evidence in declaring error harmless and finding the jury override valid. The Court noted the difficulty in defining nonstatutory mitigation:

> Nonstatutory evidence, precisely because it does not fall into any predefined category, is considerably more difficult to organize into a coherent discussion; even though a more complete explanation is obviously helpful to a reviewing court, from the trial judge's perspective it is simpler merely to conclude, in those cases where it is true, that such evidence ,.. does not outweigh the aggravating circumstances.

Parker, 111 S.Ct. at *738.* It is error not to give the defendant's requested written instructions on possible mitigating circumstances. State v. Cummings, 389 S.E.2d **66, 80** (N.C. 1990).[21]

Given the lack of clarity in defining nonstatutory mitigation as recognized in Parker, putting this issue before the jury in lump form,

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[20] Certainly, if a trial judge with training and experience needs guidance, a lay jury would require more guidance.

[21] The Court in Cummings noted that because the non-statutory mitigating circumstances "were not presented on an equal footing" with the statutory circumstances the jury "could easily believe that the unwritten circumstances were not **as** worthy as those in writing." 389 S.E.2d at 81. It was also noted that "jurors, as well as all people, are apt to treat written documents more seriously than items verbally related to them. Had the circumstances been required to directly address each of them." Id.

with no instructions on what can mitigate, invites the jury to decide for itself what is mitigating. The refusal to instruct on the nonstatutory mitigators rendered a reasonable probability of the jury ignoring relevant mitigating evidence contraryto the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections **9**, 16 and **17** of the Florida Constitution.

POINT XX

ELECTROCUTION IS CRUEL AND UNUSUAL.

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

This unnecessary pain and anguish shows that electrocution violates the Eight Amendment. See Wilkerson v. Utah, **99** U.S. 130, **136 (1878)**; **In** re Kemmler, 136 U.S. 436, 447 **(1890)**; Coker **v.** Georsia, 433 U.S. 584, **592-96** (1977). A punishment which was constitutionally permissible in the past becomes unconstitutionally cruel when less painful methods of execution are developed. Furman v. Georsia, 408

U.S. 239, 279 (Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J., dissenting). Electrocution violates the Eighth Amendment and the Florida Constitution, for it has no become nothing more than the purposeless and needless imposition of pain and suffering. Coker, 433 U.S. at 592.

CONCLUSION

Based on the foregoing arguments, this Court should vacate Appellant's convictions, andvacate or reduce his sentences, and remand this cause for a new trial or grant relief as it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELLA TERENZIO, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 26th day of May, 1995.

Jeffrey L. Anderson
of Counsel

IN THE SUPREME COURT OF FLORIDA

ROBERT **CONSALVO,**	)	
Appellant,	)	
VS.	)	CASE NO. 82,780
STATE OF FLORIDA,	)	
Appellee.	)	

A P P E N D I X