IN THE SUPREME COURT OF FLORIDA

JASON JAMES MAHN,

Appellant,

v. : CASE NO. 83,423

STATE OF FLORIDA, :

Appellee. :

_____/

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 201170
LEON COUNTY COURTHOUSE
FOURTH FLOOR NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On April 27, 1993, Jason James Mahn was indicted for two counts of first degree murder for the deaths of Debra Jean Shanko and Anthony Shanko. (R 1-2) In a separate information, the State charged Mahn with armed robbery, cruelty to animals and criminal mischief. (R 3-5) These charges arose from the same events as the murder counts. The trial court consolidated the two cases for trial. (R 66-67)(Tr 17) Before trial, the issue of Mahn's mental competency to proceed to trial was raised and litigated. (The competency hearing was held on July 13-14 & 16, 1993, and a separately numbered three volume transcript is in the record on appeal. Psychological evaluations are in the record at R 39-58) The trial court found Mahn competent to stand trial. At a jury trial, the court granted a judgment of acquittal to the cruelty to animals and criminal mischief charges. (Tr 1095-1099) The jury found Mahn guilty of both first degree murder charges and the armed robbery. (R 119-120; Tr 1265) Although the jury was not given a verdict form requiring a selection of felony murder or premeditated murder theories, the court inquired after the verdict and learned that the jury rested its verdicts on the premeditation theory. (Tr 1266-1271)

The jury returned its verdicts on November 16 1993, and on the following day, the penalty phase of the trial was conducted. (R 119-120) On Count One of the indictment charging the murder of Debra Shanko, the jury recommended a sentence of life

in prison. (R 128, Tr 1701) As to Count Two, charging the murder of Anthony Shanko, the jury recommended a death sentence. (R 128, Tr 1701) Circuit Judge Frank L. Bell conducted a sentencing hearing on January 25, 1994, and imposed sentence at a separate proceeding on February 23, 1994. (R 130-236, 236-273) Judgments and sentences were rendered on the same day. (R 276-306) The court sentenced Mahn to death for each murder, overriding the jury's recommended sentence for the murder of Debra Shanko, and to seventeen years for the robbery. (R 278-280) (orders imposing the death sentences are attached to this brief as Appendix A & B). In the findings of facts in support of the death sentences, the court found the same three aggravating circumstances applied to both murders: (1) Mahn had a previous conviction for a violent felony based on a 1992 robbery conviction and the contemporaneously committed murder in this case; (2) the homicides were heinous, atrocious or cruel; and (3) the homicides were committed in a cold, calculated and premeditated manner. (R 287-290, 299-301) In mitigation, the court found that no statutory mitigating circumstances were established. (R 290-292, 302-303) Regarding nonstatutory mitigating circumstances, the court found the seven offered by the defense to be established: (1) Jason's dysfunctional family background; (2) Jason's remorse for the crimes; (3) Jason's youth and possible responsiveness to long term care; (4) Jason's history of alcoholism and drug abuse; (5) Jason's mental and emotional problems; (6) Jason's suffering physical and mental abuse by his mother and a series of stepfathers and

boyfriends; and (7) Jason's freely given voluntary confession to the crimes. (R 292-294, 304-305)

Mahn filed his notice of appeal to this Court on March 18, 1994. (R 307)

Facts -- Guilt Phase

Michael Mahn is Jason Mahn's father. (Tr 693) . He married Jason's mother in Wisconsin, but they separated when Michael Mahn moved to Florida when Jason was 9 ½ months old. (Tr 721, 723-724). Mahn said he tried to re-establish contact with Jason on a couple of occasions about four years later, but was told that Jason's mother did not want him contacting Jason. (Tr 722, 725). He knew that Jason and his mother had moved to Arizona or Texas. (Tr 725). Michael Mahn had no contact with Jason until Jason turned 18-years-old in 1992 and telephoned him from Texas. (Tr 722). Michael invited Jason to move to Florida and assisted him in finding a job and getting an automobile. (Tr 694-696). During the year Jason was in Florida, he would live in Michael Mahn's home with his girlfriend of thirteen years, Debra Shanko, and her son, Anthony Shanko. (Tr 694-696) . Jason would live there off and on between jobs or when he would run out of money. (Tr 695-696) . He stayed in the house a total of four months during the one-year period. (Tr 720-721).

On April 1, 1993, Jason had moved into his father's home and was working at a nearby restaurant. (Tr 696-697). Although Jason had been making payments to his father for the automobile

his father had purchased for him, he had told his father he was unable to pay the repair bill on the car. (Tr 696). Michael Mahn was preparing the sell the 1984 Toyota in order to pay off his charge card where he had paid the repair bill. (Tr 696). Michael said that was an agreement he had with Jason. (Tr 696-697). Therefore, on that day, which was Jason's 20th birthday, Michael Mahn was delivering the car to the potential purchaser. (Tr 698). Jason came in from work about 4:30 p.m. and voluntarily assisted his father in washing the car in preparation for delivery to the purchaser. (Tr 716). Jason expressed no bitterness about the fact that the car would be gone and assisted his father on his own initiative. (Tr 716).

Michael Mahn delivered the car to the potential purchaser, she kept the car and drove him home at 9:00 p.m. (Tr 698). when he returned, Michael talked to Debbie for a while and left again about 9:30 or 9:45 p.m. (Tr 698). At that time, Jason was in his room, Anthony was sleeping, and Debbie was exercising with weights. (Tr 700). Jason came out of his room and went to the kitchen to get something to drink just as Michael was leaving the house. (Tr 700). Jason was dressed in maroon sweat pants and a t-shirt at the time. (Tr 700). Michael went to the Carousal Lounge and had three or four drinks, stopped for a hamburger, and returned home. (Tr 701).

When Michael returned, he noticed that Debbie's Thunderbird, usually parked in the driveway, was gone. (Tr 702). The garage door was open. (Tr 702). The garage door had been closed since his red Corvette, which he rarely drove, was

parked inside. (Tr 702). The front door of the house was unlocked and slightly open. (Tr 702). Inside, Michael saw blood all over the floors and walls. (Tr 703). As he walked down the hallway, he saw Debbie lying across the hallway on the floor with her head partially into the doorway to Jason's room. (Tr 703). Michael realized she was dead. (Tr 703). He continued into the master bedroom and found Anthony there on the bed. (Tr 703-704). He noticed a large wound in Anthony's chest. (Tr 704). Anthony was on his side and still alive. (Tr 704-705). Anthony said it hurt when he tried to talk. (Tr 705). Michael did not want to use the telephone in the bedroom, it was off the hook and covered with blood. He knew that the telephone in the living room was not working properly. (Tr 705). He went outside to his truck and used his cellular phone to call 911. (Tr 705).

Officer Tai Nguyen arrived at the residence at 1:25 a.m. (Tr 426-427). He met Michael Mahn outside and proceeded into the home. (Tr 427-429). He found Debbie's body in the hallway and Anthony on the bed in the master bedroom still conscious. (Tr 429-430). He noted there were trails of blood leading into and out of the bedroom. (Tr 430). Michael advised him that Jason was his son and he was no longer present at the house. (Tr 431).

Emergency Medical Services personnel arrived and assisted Anthony. (Tr 466-486). Officer Greg Moody assisted the EMTs in transporting Anthony out of the house. (Tr 466-470). Before Anthony was placed into the ambulance, another police officer,

Officer Pate, asked Anthony who had been responsibility for his wounds. (Tr 468). Anthony responded that Jason did it. (Tr 469). Anthony was suffering from a sucking chest wound and constantly told the persons assisting him that it was difficult to talk, that it hurt when he talked, and he said he was dying. (Tr 473, 478). The emergency room physician, Dr. Krnanbir Gill attempted to assist Anthony. (Tr 490-500). Gill said that he knew that Anthony's only chance of survival was immediate surgery to stop the bleeding and assist his breathing. (Tr 493-495). Unfortunately, Anthony went into cardiac arrest and died before he reached the operating room. (Tr 495-497). The stab wounds Anthony suffered had cut the vena cava, the largest blood vessel that supplies the heart. (Tr 500). Dr. Gill said that there was only a small chance of survival with these types of injuries. (Tr 500).

Dr. John Lazarchick, a pathologist with the Medical Examiner's Office, performed autopsies on both Debra Shanko and Anthony Shanko, (Tr 808). Lazarchick also viewed the scene of the homicides. (Tr 810-813). An examination of Deborah Shanko's body showed almost 40 stab wounds. (Tr 817). A number of these wounds were very superficial, some were defensive wounds, and some wounds penetrated the chest and abdomen. (Tr 814). Five of these wounds were potentially fatal. (Tr 848). One wound penetrated the liver and cut a major vein. (Tr 848). Two other wounds caused the collapse of the lungs, making it difficult to breath, (Tr 848). Two additional wounds caused tearing of internal organs, including the stomach, and severed

major blood vessel. (Tr 848). The medical examiner could not say if any one of these wounds was fatal or if a combination of the wounds caused death. (Tr 848-849). Debra Shanko essentially bled to death. (Tr 849). Additionally, the medical examiner testified that a number of these superficial wounds were consistent with a struggle or a fight over the knife. (Tr 864-867). He also stated that the wounds she received would not have immediately incapacitated her. (Tr 867). She would have be able to get up and move around. (Tr 867). The medical examiner also observed a great amount of blood in various areas around the house. (Tr 808-813, 870). He could not tell if the struggle necessarily occurred at the area of the house where a concentration of blood was located or whether the struggle occurred elsewhere the victim moved and bled in that location. (Tr 870). The medical examiner was not able to determine how the struggle occurred or necessarily what scenario of event happened. (Tr 867).

The autopsy of Anthony Shanko showed six stab wounds, one of which was fatal. (Tr 849). The medical examiner also found evidence of the surgery to the stab wound in his chest, and he consulted with the trauma surgeon to determine the size of the original wound. (Tr 852-853). This wound ultimately caused death, it went into the liver and cut the major artery in that area. The second wound, possibly a defensive wound, was located on the right arm. (Tr 854-855). The third wound was on the right arm close to the elbow. (Tr 856). There was a fourth wound on the left arm, which may have been a defensive wound,

but the medical examiner could not be sure.(Tr 857-858). Other wounds were located on the left leg and the right buttocks. (Tr 858-859). The fatal wound to the chest region went through the ribs and between the ribs and into the liver. (Tr 859).

Three days later, on April 4, 1993, Jason Mahn was apprehended in Oklahoma, driving Debra Shanko's Thunderbird. (Tr 879-925). A police officer noted he was driving about 10 MPH over the speed limit, did a routine license check, and determined the automobile was reported stolen with a possible homicide suspect driving it. (Tr 880-881). when the officers attempted to stop Jason, he fled and a highspeed chase followed. (Tr 879-887). After Jason crashed the car, he fled on foot and later hopped on a train. (Tr 887-888, 907-913). The personnel on the train alerted the police, and when the train stopped, the police were waiting. (Tr 908-912, 914-917). Jason again fled on foot, but officers pursued him and ultimately arrested him. (Tr 916-925). Jason had no weapons and was not wearing any shoes. (Tr 922-924, 912). He was dirty from black soot from the train and cold and wet from exposure. (Tr 936).

Jason gave statements about the homicides to police detectives in Oklahoma. (Tr 948-953, 981-982, 1001-1009, 1029-1056, 1058-1082, 1084-1092). Bobby Darrell Gertin of the Oklahoma Highway Patrol was present at the time Jason was in the booking area of the Claremore Police Department. (Tr 946). Jason asked him for a cigarette, and Gertin told him that he could not have one because the booking cell area was a non-smoking area. (Tr 947-948). Jason said that he would tell him

anything he wanted to know if he would give him a cigarette. (Tr 948). Gertin gave him a cigarette. (Tr 948). Jason said that he killed both of them. (Tr 948). Gertin asked who? (Tr 948). Jason responded his father's girlfriend and his brother, Anthony. (Tr 948). Jason said he did it to get back at his father because his father always told him he was no good and that he took his car away. (Tr 948). He said he got a knife and stabbed Anthony. (Tr 948). He thought the first stab wound would kill him. (Tr 948). Instead, Anthony fought and screamed, and he had to stab him additional times. (Tr 948). After the scream, Debra came into the room, and he had to take care of her. (Tr 948). Jason tried to get his father's Corvette but could not find the keys. (Tr 949). He took the Thunderbird, started it, and then thought about having no money, so he went back inside. (Tr 949). He got $400 out of Debra's bank bag. (Tr 949). When he returned to the Thunderbird, he had locked the doors. He used a brick to break the window out of the car. (Tr 949). Gertin also noticed that Jason had cuts on his right hand. (Tr 950). Jason said he got those when Anthony was fighting him. (Tr 950). Jason did not say anything about taking care of Debbie before he attacked Anthony. (Tr 952). He did not mention a plan to kill her. (Tr 952). He said that he took care of her because she came into the room after Anthony's attack. (Tr 952-953).

Roy Heim of the Tulsa Police Department also testified about a statement Jason made to him about the homicides. (Tr 1001-1009). Heim had given Jason a map and asked him to point

out where he had traveled since the homicide. (Tr 1001-1002). During this conversation, Jason indicated there were two knives involved, but he only used one of them. (Tr 1002). He used the same knife to stab his brother and his father's girlfriend. (Tr 1002). He took the bank bag out of Debbie's bedroom and it had about $400 in it. (Tr 1002). Jason stated that he shot up some cocaine before the murder. Jason also said he had two hits of LSD on a white blotter prior to the murder. (Tr 1002). Jason did not say how much prior to the murder he used the cocaine or the LSD. (Tr 1002-1003). Heim said that they did not pursue further questions on that point. (Tr 1002-1003, 1009). Jason indicated that he did not have any problems with his father's girlfriend. (Tr 1003). Heim was of the understanding that a videotaped statement had been taken of Jason, but he was not involved in that statement. (Tr 1004).

Micky Perry testified about videotaped interviews made with Jason at the Claremore Oklahoma Police Department, (Tr 1028-1029). Perry said that at the time of the statement, Jason was suffering from several cuts on his hand, a finger and a couple of scratches on his elbow. (Tr 1032-1033). Jason indicated that he received the cuts when he was stabbing Anthony. (Tr 1033).

The videotaped statement was played for the jury and Mahn stated the following:

Jason grew up in Wakesah, Wisconsin. (Tr 1042). He lived with his mother his whole life until he finally met his natural father and moved to Florida roughly a year earlier. (Tr 1042).

He told the officers he was 20-years-old, and he was charged with a robbery and was out on bound from Pensacola. (Tr 1043). He said he had been in trouble while he was living with his mother, he never had money and would have to steal. (Tr 1044). He was living with his father in Florida off and on, but his father told him he was worthless and he should kill him. (Tr 1044).

Jason said that at the time of the incident, he felt as if, "I just couldn't live no more." (Tr 1045). He wanted to kill himself because his life was so miserable. (Tr 1045). He was too scared to kill himself. (Tr 1045). Jason said Debbie and Anthony Shanko did not do anything to him and they did not deserve what happened to them. (Tr 1045). Jason was sick of life, he was sick of everybody telling him he **was** weak and stupid. (Tr 1045). He wanted to kill himself; he did not want to live anymore. (Tr 1045). Jason said he was weak and could not do it. (Tr 1045). He had been wanting to kill himself for five or six years, probably since he was fourteen. (Tr 1053).

Jason related the facts of the killing. (Tr 1046). Close to midnight, Debbie, Anthony, and he were the only three at home. (Tr 1046). There was no confrontation or argument. (Tr 1047). Both Debra and Anthony were asleep. (Tr 1047). Anthony was asleep when he went to his room and stabbed him. (Tr 1048). Debbie awoke and entered the room and told Jason to stop. (Tr 1047-1048). Jason thought the killing would be quick; he thought they would die quickly after one stab wound. (Tr 1048). Jason used a knife he got from the kitchen drawer. (Tr 1050).

He left the two knives that he took on his dad's dresser. (Tr 1050).

At the time he left the house, Jason did not know they were dead. He got into the car and he left. He said he tried to get away as far away as he could. (Tr 1049). He had to break the window out of the car, and he also took $400 from the house before he left. (Tr 1050). The money was in a sack, he thought it was Debbie's, (Tr 1050).

Jason drove around, ultimately driving into the woods in Louisiana and then to Dallas, where he picked up the hitchhiker who was with him at the time he was apprehended in Oklahoma. (Tr 1051-1052). The homicides happened on Jason's birthday, the same day his father took his car **away.** (Tr 1053) . He had just turned 20. (Tr 1053). He was mad at his father because he did not think he cared about him. (Tr 1053). Jason always tried to do everything he could for his father. (Tr 1053). He wanted to be a good person. He tried his best to succeed. (Tr 1053) . He showed the officer the cuts on his hand and said they were caused when Anthony turned the knife around on him. (Tr 1055). Jason said he was bleeding quite a bit when he left he residence. (Tr 1056).

A second interview was conducted on videotape and played for the jury. Jason related the incident again. (Tr 1059). On the day of the murders, he had been working and living at his father's house. (Tr 1059). He arrived home about 4:00 p.m. (Tr 1059) . Around 11:OO p.m., Jason walked into Anthony's room and stabbed him with a knife he had obtained from the kitchen. (Tr

1060-1061). Everything went hectic. (Tr 1060). Debbie, who apparently heard Anthony screaming, came into the room, and everything became hectic. Jason stabbed Debra, too. (Tr 1060-1061). Jason left both knives in the master bedroom. (Tr 1062).

After the stabbing, Jason started running around trying to find keys to the car to get away. (Tr 1062). Debbie was on her bed at the time. (Tr 1062). Jason did not remember where Anthony was. (Tr 1062). Michael Mahn was still out of the house. (Tr 1062). Jason tried to take his father's Corvette, but he could not find the keys. (Tr 1063). Debbie, who was still alive, told him to take her car and leave. (Tr 1063). She told him the keys to her car were in a basket in her room. (Tr 1063) . Jason took Debbie's Thunderbird. (Tr 1063) . He ran to the car, started it, and then ran back inside trying to find the keys to other car. (Tr 1063-1064). When he returned, the Thunderbird was locked, and he had break the window with a rock. (Tr 1064). He was running back and forth from the house to the car, perhaps three or four times. (Tr 1064-1065). On one of these trips, Debbie was sitting on the couch in the living room asking why he had done it. (Tr 1065). Jason finally fled with the $400 he found in Debbie's bank bag in a drawer. (Tr 1066-1067).

Jason drove to his girlfriend's house, but her house was dark and she was sleeping. (Tr 1067-1068). Jason drove to Perdido Key and saw people partying. (Tr 1068). He stopped, and at that time, he noticed there was blood on the outside of

the car, which he wiped off with his shirt. (Tr 1068). The clothes he had with him had not been packed; he just grabbed them after the stabbing and threw them in the car, (Tr 1069). Jason forgot his shoes and was still barefooted at the time of his apprehension, (Tr 1069). The shirt he used to wipe the blood with was still in the car. (Tr 1069) .

Jason drove through Louisiana and rented a hotel room that night in Baton Rouge. (Tr 1071). He left around 10:00 the next morning. (Tr 1071). The second night, he stopped in Shreve Port. (Tr 1072) . At this stop, he spent the night with a prostitute. (Tr 1072-1073). Next, he drove to Garland, Texas to visit some friends and then to Oklahoma. (Tr 1073-1075). He had picked up the hitchhiker along the way before he went to Texas. (Tr 1074-1076). Jason indicated that he acted alone. He threw the bank bag in the trash just outside the motel room in Baton Rouge. (Tr 1079-1080).

Jason said that Debbie did not deserve to die and Anthony did not deserve to die. (Tr 1081). Jason made comments about when he was 16-years-old, he started practicing witchcraft and sold his soul. (Tr 1081). He said he has had demon activity. He has awakened in the middle of the night to find himself walking around the neighborhoods. (Tr 1081-1082). He has heard voices, and he knows he did not mean to kill Debbie. (Tr 1082).

Officer John Cummings of the Claremore Police Department also related an interview with Jason. (Tr 1083-1084). This statement was not videotaped. (Tr 1085) . Cummings specifically asked Jason if he used drugs that day and about the last time

he used drugs. (Tr. 1085). Jason told him he used drugs at least three days to a week earlier. (Tr 1085-1086, 1089). Jason did not say that he had used drugs since the homicides, in fact, he said he had not used any. (Tr 1086-1087). Jason had used cocaine. He had not had LSD recently. (Tr 1089-1090). At that time, he never told Officer Cummings that he had heard voices. Jason **also** said that his motive for the killing was his anger at his father; he wanted to hurt him. (Tr 1087). Cummings was present when Jason told Officer Heim that he had used drugs prior to the murders. (Tr 1089).

The defense moved for a judgment of acquittal at the close of the state's case. (Tr 1094). The trial court granted the judgement of acquittal to the animal cruelty count and the criminal mischief count. (Tr 1095-1099). Two murder charges and robbery count went to the jury. (R 1095-1099). The jury convicted Jason of those three crimes.

Penalty Phase and Sentencing

The State presented one witness during the penalty phase of the trial. (Tr 1317). Robert Grant compared the finger-prints on a robbery judgement identifying Jason Mahn as the defendant. (Tr 1317-1318). Grant did not have any knowledge concerning the role that Jason Mahn played in this robbery. (Tr 1319). The defense presented several witnesses who testified about Jason's family background and mental condition. Additionally, the defense presented witnesses who testified about

the nature of Jason's prior robbery conviction, and Jason himself testified.

Jason's step grandmother, Maxine Diane Laue, testified about some of Jason's growing up experiences. (Tr 1322). She married Jason's grandfather when Jason was young. (Tr 1322, 1333). Although she lives in Wisconsin, for a period of time, she lived in Arizona and had an opportunity to see Jason approximately every other weekend, (Tr 1323-1324). She visited the residence where Jason lived with his mother, Roxanne Thortis. (Tr 1324). Jason and his mother lived in a trailer with his mother's boyfriend, Dale, at the time. (Tr 1324). They moved to another trailer, and later they moved in with Jason's Uncle. (Tr 1324-1325). The boyfriend was gone by this time. (Tr 1324). Jason and his mother then moved to Texas just before Christmas of 1988. (Tr 1325). Ms. Laue had the opportunity to visit that home on one occasion, (Tr 1325) . She said the house was dirty, dishes were in the sink with food on them, food in the refrigerator was uncovered, there were clothes laying everywhere -- the house was always a mess. (Tr 1325). The house was not just cluttered, it also was not clean. (Tr 1326).

Ms. Laue described the circumstances around Jason's mother leaving Wisconsin with Jason. (Tr 1326). Roxanne was married at the time to a James Dunkle. (Tr 1325-1326). However, she met another man and left with him, (Tr 1326-1327). She left without warning, taking Jason out of school. (Tr 1327). James Dunkle was given no notice that his wife was leaving, and for a

period of time, he was looking for her and Jason. (Tr 1327). Jason's mother typically worked as a waitress during this time. (Tr 1327).

When asked if Jason's natural father, Michael Mahn, ever took any interest in Jason's life, Ms. Laue responded, "No, not at all." (Tr 1328). Jason's mother also treated him in a way that you could tell she did not like Jason. Jason was a burden to her. (Tr 1328-1329). Roxanne never acted like a mother, (Tr 1329). She partied a great deal and was out of the home drinking . (Tr 1329). Ms. Laue saw roach clips and marijuana cigarette butts in the home. (Tr 1329-1330). She also smelled marijuana on Jason's mother. (Tr 1330). When Jason's mother corrected him, she would scream, jerk him around, and tell him he was stupid. (Tr 1330). She corrected him constantly about everything. (Tr 1330). He could never make a statement or finish a thought before she interrupted him and corrected him about something. (Tr 1330). She would strike Jason with her hand, and sometimes, she would threaten him with a wooden spoon. (Tr 1331) . Jason's mother frequently told him that she hated him and that he was a pain. (Tr 1331).

Roxanne's relationship with men, according to Ms. Laue, was not a choosy one. (Tr 1331). She had a series of boyfriends, and she would sleep with these men in the house when Jason was there. (Tr 1331). She also indicated there were occasions when Roxanne would sleep with these men in front of Jason. (Tr 1332). She said on one occasion when she was visiting, Roxanne went into Jason's bedroom wearing only her

underpants, apparently to wake him up for school. (Tr 1332). Additionally, Jason complained one time when he was helping his grandmother do yard work that his mother was making him take showers with her. (Tr 1332). She always dressed in a sexually suggestive manner. (Tr 1334). He was about nine or ten years old at the time. Ms. Laue also indicated that Roxanne was an habitual liar. (Tr 1333-1334). Jason tried talking to his mother about her lying to him, and her response was to beat him. (Tr 1334-1335). Jason's grandfather, owned a bar and, Jason would help around the bar sweeping up just to be with his grandfather. (Tr 1335).

Ms. Laue indicated that Roxanne eventually married James Dunkle. (Tr 1335). Jason was about 5 or 6-years-old at the time and Dunkle adopted him. (Tr 1336). Jason's legal name is Dunkle. (Tr 1336). Roxanne stayed with Dunkle until she ran off to Arizona with a man she met. (Tr 1336). Jason's mother hid a lot of feelings from Jason. (Tr 1337). For example, when Jason's grandmother and aunt died, Jason's mother would pretend, supposedly for Jason's sake, that everything was just fine. They never really talk about the deaths. (Tr 1337-1338).

Ms. Laue spent a couple of weeks with Jason during Thanksgiving of 1991. (Tr 1351). He visited them and was not a discipline problem at all. He would help his grandfather with yard work. (Tr 1352). She said there was a time, after that, that she refused to let him come to her house because he had been in a fist fight with his boss. (Tr 1353). Jason would not

talk about the fight. This was the first time she knew Jason to be in a fight. (Tr 1354).

Kenneth J. Kelson, Jr., is the vice-president of Florida Electric Company. (Tr 1355-1356). Jason's father, Michael Mahn, called him and asked about the possibility of Jason obtaining a job. (Tr 1356). Kelson hired Jason as a helper, and he worked for him for about three weeks. During that time, he performed well on the job, and he left on good terms. (Tr 1357). Kelson had no problems with Jason while he was employed there. (Tr 1358). Kelson's general impression was that Jason's feelings toward his father, Michael, were fine. (Tr 1358-1359). He never heard Jason say anything about Debra or Anthony Shanko. (Tr 1359-1360).

John Lewis Albritton was the attorney who represented Jason on the earlier robbery charge. (Tr 1363). He explained Jason's role in that case. (Tr 1363). Jason was the driver of an automobile, while a friend of Jason's left the automobile and snatched a purse from a nurse from Sacred Heart Hospital in the parking lot of a Taco Bell. (Tr 1363). Apparently, the woman was knocked to the ground at the time the purse was taken. (Tr 1363). Jason was not directly involved in the taking of the purse from the woman. (Tr 1363). He merely drove the automobile. (Tr 1364). The evidence did not indicate that Jason ever exerted any force or violence toward the woman. (Tr 1364). Jason made a statement during the trial saying that they had it planned to rob someone that night. (Tr 1365). The statement indicated that his friend and co-defendant in the

case was ready to knock somebody in the head and take all of their money. (Tr 1366). Jason said "no" to that plan, and he urged his friend to go home. (Tr 1366). Albritton testified that Jason and his friend, Kelly, agreed to commit the crime and that Kelly was willing to hit someone in the process. (Tr 1371). After Kelly made the statement about hitting someone, Jason told him "no, lets not," and go home instead. (Tr 1371). The evidence did show that Jason and his friend tried to use some of the credit cards taken from the woman. (Tr 1368-1369).

Charles A. Thomas, Jr., a clinical psychologist, was appointed to evaluate Jason for this case. (Tr 1375). He found Jason was competent to stand trial, that he was sane and knew right from wrong at the time of the offense. (Tr 1375-1376). Thomas concluded that Jason suffers from mental disorders. (Tr 1376). He has a long history, going back to at least age 12, of behavioral problems in and outside of school. (Tr 1376). Juvenile referrals for aggressive acts, thefts, assaults, and fighting. (Tr 1377). After age 15, Jason was put on probation for a period of time for assault charges. (Tr 1377). Thomas diagnosed Mahn with anti-social personality disorder. (Tr 1377). He describes the criteria for making that diagnosis in various symptoms. (Tr 1377). He concluded the contributing factor to the homicide was Jason's extremely dysfunctional family background. (Tr 1379). This disfunction included his parents being separated when he was 3-months-old, living with his mother, alone, and with his mother's husbands and boy-friends. (Tr 1379). He lived with an Aunt and Uncle for

awhile, (Tr 1379), and numerous residences during his early teenage years. (Tr 1379). He was physically abused by his mother and the men who lived with her. (Tr 1380). There was an extreme amount of physical abuse while he was growing up. (Tr 1380). Jason reported being sexually abused while growing up as well. (Tr 1380). He had no male figure or father figure to identify with. (Tr 1380). Jason's mother was preoccupied working two jobs and with the men in her life. (Tr 1380).

Thomas said the impulsive part of Jason's personality and aggressiveness toward others is a behavior that is common in family settings where there is no strong parental figures or no values. (Tr 1381). Jason learned from a variety of sources and none that were very strong; he had no moral family background. (Tr 1381). Someone with Jason's background and personality disorder would be much more prone to criminal behavior. (Tr 1383). Jason did report some experiences with an individual who was into Satanism. (Tr 1383-1384). However, Thomas did not conclude that this exposure was out of the norm of what Jason's peers might be talking about. (Tr 1384). And, Thomas was also of the opinion that if Jason were really involved with Satanism, obsessed with it, he would have more of a lack of control than he did and would have talked about this more than he did during the evaluation. (Tr 1385-1386).

There were reported prior suicide attempts. (Tr 1386). In October of 1991, Jason took an overdose of aspirin and Contact tablets after problems with his girlfriend. (Tr 1386). He was taken to the emergency room and discharged the same day. (Tr

1386). Part of Jason's personality involves impulsive behavior and not thinking of the consequences for his actions. He just focuses on the moment. (Tr 1387). As far as his relationship with his father, some people said he idealized his father and was looking forward to living with him. (Tr 1387). However, Jason was **also** not happy with the structure and rules his father imposed. (Tr 1387-1388). There was some question about whether he was jealous of Anthony. (Tr 1388). However, Thomas did not find any strong evidence of intense hostility toward Jason's father, (Tr 1388). Jason was disappointed in the relationship to some extent regarding some of the things that happened between him and his father. (Tr 1388). Thomas also talked to Michael Mahn who was of the opinion that Jason was not a very steady individual and difficulty holding a job. (Tr 1389). When Jason was 14-years-old, he and his mother did see a psychiatrist for a few sessions for depression, but they did not continue treatment. (Tr 1389).

Thomas said that some of the reports Jason made was an intentional exaggeration of psychological symptoms. (Tr 1391). He concluded that Jason does not conform his conduct to lawful society, but he was unable to define whether he had the ability to do so. (Tr 1393). Thomas found no psychotic condition in Jason and no credible evidence that Jason was controlled by demons. (Tr 1395). However, Thomas did reiterate that Jason does have symptoms which are not exaggerated or faked. (Tr 1397). Thomas was unable to say whether these symptoms impaired Jason's ability to conform his conduct with the law.

(Tr 1397-1398). Jason expressed remorse for what he had done, and he said the victims did not deserve to die. (Tr 1398). Thomas did not believe that Jason was drawing any pleasure from what he had done. (Tr 1398-1399).

Margaret Lou Finn, Jason's cousin, testified. (Tr 1401). Jason's mother and Margaret's mother are sisters. (Tr 1402). She has known Jason most of her life, and he lived in her home occasionally. (Tr 1402). Those times were always before he came to Florida. (Tr 1402). She said that Jason used to talk about the demons, Satan, and the devil quite a bit. (Tr 1402-1403). He would tell her that he could see horns behind peoples ears at night, and he called the devil on the telephone.(Tr 1403). He said you could knock on the bathroom mirror and the devil would appear. (Tr 1403). Margaret was frightened by his comments. (Tr 1403). She also heard Jason talking about these types of things to other people pretty frequently. (Tr 1404). Once he got an axe and went down the street saying he was going to kill the demons because they were chasing him. (Tr 1404). Another time he got a baseball bat saying he was going to do the same thing. (Tr 1404).

Occasionally, Jason would become violent, and then, he would become very nice to everyone. (Tr 1430). Margaret mentioned that the fights that Jason would get into were with other teenage boys his age. (Tr 1434-1435). She saw Jason use LSD once shortly after he moved into her house. (Tr 1431). She had not seen him under the influence of other drugs, other than alcohol. (Tr 1432-1433).

Reanne Turner Ceamars, Jason's Aunt and Jason's mother's sister, testified about Jason's background. (Tr 1436). She lived with Jason and Jason's mother for a period of time while they were in Wisconsin. (Tr 1437). Jason was about two or three-years-old at the time. (Tr 1437). She moved in to help take care of Jason. (Tr 1437). During that time, Jason's mother, Roxanne, was not home very often. She was going to school and working nights and weekends. (Tr 1437). She also had constant relationships with men. (Tr 1438). Jason had no male figure to look up to for any length of time. (Tr 1438). None of these men seemed to take an interest in him. (Tr 1438). Roxanne's relationship with these men was purely sexual. (Tr 1438). James Dunkle, the man Roxanne ultimately married and who adopted Jason, Reanne liked at first. (Tr 1443). However, he started drinking and became abusive towards Roxanne and Jason. (Tr 1443). One day, Roxanne picked up Jason from school, left Dunkle, and moved to Arizona. (Tr 1443). No one knew where she was for a few weeks. (Tr 1443). Jason was about 6 or 7-years-old. (Tr 1443). Reanne fulfilled the role of substitute mother for Jason. (Tr 1439). She observed her sister disciplining Jason. She was loud and frantic and she would swing her arms and kick her feet and tell him she hated him. (Tr 1439). Roxanne would also tell Jason she wished he were dead. (Tr 1440). This was a constant verbal assault. (Tr 1440). Roxanne would tell him that she wished he had never been born and that he had ruined her life. (Tr 1440). She also

told her sister to have her daughter get an abortion because it would ruin her life to have a child. (Tr 1440).

Jason would bring pets home occasionally. (Tr 1442). One time, he brought home a small kitten that was starving. (Tr 1442). Roxanne would get rid of these pets somehow. (Tr 1442). When Jason was about 3-years-old, she disciplined him for playing with matches by turning on the gas stove and putting one hand on each burner. (Tr 1440). Reanne did not believe Jason was a violent person. (Tr 1441-1442). She noted times when Roxanne would be hitting him with her fist, hands, and feet and he would not strike back. (Tr 1442). On one occasion, he did call the police to have her arrested because he did not want to be hit. (Tr 1442).

When Reanne visited the home, the house was always dirty. Roxanne was a terrible housekeeper. (Tr 1444). Reanne caught a rat on top of the refrigerator. (Tr 1444). She also visited where Jason, at 16-years-old, was living in the garage. (Tr 1445). At that time, he did not even have a key to the house. (Tr 1445). After living there for a while, Jason, on his own, obtained a hot plate and a small refrigerator. (Tr 1445). He went to the dump and found a couch, some tables, and some carpeting. (Tr 1445). The room was full of candles and demon-type cult things. (Tr 1445-1446). The room was never clean and the garaged smelled. (Tr 1446). He had no heating or air-conditioning in the garage. (Tr 1446). Roxanne worked at restaurants, several different ones, including a topless place. (Tr 1447).

Roxanne finally became involved with a man named Tommy Thortis, whom she later married. (Tr 1448). Thortis had an abusive effect on Roxanne and Jason. (Tr 1447-1448). Yelling and physical abuse were prevalent. (Tr 1447). Once, Reanne saw Roxanne bruised from a fight with Thortis the previous night -- Christmas Eve. (Tr 1448). Reanne thought that when Jason moved to Florida, he was very happy because he had found what he was looking for **all** of his life -- his father. (Tr 1449). He had been looking for his father for a long time and she had even assisted him. (Tr 1449). When she saw him after he came to Florida, he seemed very proud. He looked clean-cut and well-dressed. (Tr 1449-1450). He had found his father and loved him. Jason wanted his father to be proud of him. (Tr 1450). Reanne commented that she loved her sister, but that her sister should have never had a child because she was only interested in herself and had no patience with children. (Tr 1450).

Reanne also related an incident which occurred after James Dunkle adopted Jason. (Tr 1457). Jason was visiting Dunkle and Dunkle's girlfriend's son, who was about the same age as Jason. (Tr 1457). The two boys got into a fight. (Tr 1457). Jason kept backing away, but his father kept pushing him into the fight. He said Jason was such a wuss and continued to push him back into the fight. (Tr 1457). Reanne thought Jason got into the fight because the two boys were competing for their father's attention. (Tr 1458).

A friend of Jason's, Steven Comb, testified. (Tr 1458). He had known Jason about three years. (Tr 1459). He first met

him at a gas station. (Tr 1459). At that time, he thought Jason was a little hyperactive. (Tr 1459). Later, the two used drugs together; they did numerous drugs together: acid, pot, crack, cocaine, and crank. (Tr 1459). He and Jason used LSD together at least four or five times. (Tr 1459-1460). They only used crack cocaine once, they used speed or crank three or four times, and marijuana use was almost everyday. (Tr 1460). They used cocaine at least ten times together. (Tr 1460). Jason drank heavily as well. (Tr 1460). When they were drinking, Comb had never known Jason to start a fight. (Tr 1461). He saw him in one fight, but Jason sort of ran away. (Tr 1461). He said Jason is moody. (Tr 1459). On one occasion, Jason discussed demons. (Tr 1462). Jason came to Danny Vines house and asked to borrow an axe because he was fighting the devil. (Tr 1462). Comb did not know whether Jason was under the influence of drugs. (Tr 1462). Jason had a friend named Heather, who was a heavy drug user; she shot up cocaine. (Tr 1463). She was a big influence on Jason. (Tr 1463). Comb was also aware of the time when Jason attempted suicide. (Tr 1463-1464). He went to the hospital and waited for Jason. (Tr 1464). (Tr 1470). Jason's car meant a lot to him, and that it would bother him for it to be taken away. (Tr 1471). However, Comb related one incident where Jason was upset, thinking Heather was going to leave him, and he rammed his car into the tree several times. (Tr 1472-1473).

Eddie Peterson was another friend of Jason's. (Tr 1476). In fact, Jason lived with him for the 35-40 days prior to the

time he moved back into his father's house, three days before the homicide. (Tr **1476).** Peterson said Jason never said anything toward Debra or Anthony Shanko other than he liked them. (Tr 1477). Peterson did not think Jason hated his father. In fact, Jason looked up to his father, and he wanted to be the son his dad wanted him to be. (Tr 1477). However, Jason gave the impression that he did not like his dad too much for threatening to pull his bond a few times. (Tr **1477-1478).** Jason also told Peterson that he was afraid to go home because he was afraid of going back to jail. (Tr 1479). Peterson said during the time Jason lived with him that he drank everyday. (Tr 1479-1480).

David Keith Butler testified that he had known Jason for three years. (Tr 1490). The first time he saw Jason he noticed he was acting wired and spaced-out. (Tr 1491). Butler had seen other people like that in the past and he immediately drew the conclusion that Jason was on acid, LSD. (Tr 1491). He saw Jason regularly for about five months over the next several years. (Tr 1491). Jason used LSD on a regular basis. Jason told him that he loved LSD. (Tr 1492). The second time Butler saw Jason, he was tripping and he tripped for two straight months, everyday. (Tr 1492). Jason told him he had used or tripped on LSD **over 500 times** before he moved to Florida. (Tr 1493). Jason told him that he stopped using LSD and other drugs before he moved to Pensacola. (Tr 1501). Jason also used crack cocaine, alcohol, and **marijuana.** (Tr 1493). In Texas, Jason had a nickname -- "Acid Head" -- because of his LSD

usage. (Tr 1493). Jason was different from the rest of Butler's friends. (Tr 1494). Jason was the only person he knew that was in his own world most of the time. (Tr 1495). This was true even though Butler's group of friends were drug users. Jason was wired compared to the rest of them. (Tr 1495). Butler described a fight that Jason got into over a cigarette. (Tr 1496-1497). Jason lost the fight. (Tr 1497-1498).

John Bingham, a licensed mental health counselor, testified. (Tr 1507). A particular area of expertise for Bingham is substance abuse counseling. (Tr 1508-1511). Bingham had extensive experience treating people with substance abuse problems for approximately 25 years. (Tr 1512) . He said that LSD is a chemical classified as hallucinogenic. (Tr 1512). Persons using LSD a great deal, hundreds of times, suffer various affects. (Tr 1513). The range of affects can vary from very little to extensive problems. (Tr 1513-1514). A person with pre-existing mental health problems can become a lot worse with the chronic use of LSD. (Tr 1514). These individuals can become paranoid or psychotic and go into altered states of consciousness. They can believe things exist that simply are not there. (Tr 1514).

Bingham examined Jason, (Tr 1514-1515), and concluded Jason's personality and behavior is consistent with an individual who has abused multiple drugs, including LSD. (Tr 1515). Bingham concluded that the extensive use of various drugs over a period of time could impair someone's ability to conform their actions to the law. (Tr 1515). Bingham acknowledged that

he could not tell that Jason was paranoid or psychotic, and he agreed that Jason was exaggerating some of his symptoms. (Tr 1516). However, Bingham's opinion was based on Jason's past history that was provided by several other sources in addition to his own statements. (Tr 1516). Bingham verified much of Jason's history through other sources. (Tr 1517). Dr. Bingham said he could not rule out the fact that drugs had something to do with the homicides. (Tr 1519).

Jason's mother, Roxanne Marie Thortis, testified about Jason's growing up years. (Tr 1530-1566). She said Jason's legal name is Jason James Dunkle. (Tr 1531). However, he has used other names besides Dunkle and Mahn during his lifetime. (Tr 1531). For three years in grade school, he used the last name Watson and represented himself as the son of Jason James Watts. (Tr 1531). One year in middle school, he wrote his name as Jason James Lyons, as Jim Lyons son. (Tr 1531). Dale Watts and Jim Lyons were men that Roxanne had relationships with at one time or another. (Tr 1531).

Roxanne was sixteen when she became pregnant and seventeen when Jason was born. (Tr 1531-1532). She did not finish that year of school, but returned to school the next year for the 11th and 12th grade. (Tr 1532). Jason's father, Michael Mahn, left when Jason was 3-months-old. (Tr 1532). There was no contact between Jason and his father from that period until Jason found his father in Florida a couple of years earlier. (Tr 1532). Michael did come back about six months after he moved away, asking her to go with him. (Tr 1558). He would not

stay in Wisconsin. (Tr 1558). Michael also made clear that the invitation for her to move to Florida did not include Jason. He wanted her to leave Jason with her mother. (Tr 1564).

After Jason moved to Pensacola, he received his GED. (Tr 1563). Michael telephoned her to tell her the news. (Tr 1563). He said, 'The little bastard, or little shit, can you believe he did that.", meaning get his GED. (Tr 1563). Roxanne did say that Michael was proud that Jason got his GED. (Tr 1565).

Jason did not have a single father figure during his lifetime. (Tr 1532-1533). Roxanne's mother died when Jason was a child, and she had been the primary caretaker for him while Roxanne was at school or work. (Tr 1533). Jason was dismayed by her death. (Tr 1533). Roxanne's younger sister was also at home, and Jason had a relationship with her, but she died three months after Roxanne's mother died. (Tr 1533). Roxanne had relationships with six men from the time Jason was 3-months-old until she married Tommy Thortis. (Tr 1533). They lived in nine different places, and Jason attended seven different schools. (Tr 1533). Jason spent a couple of years at each school. (Tr 1534).

At one point in grade school, James Dunkle, his father, took him out of school in Arizona and took him back to Wisconsin, (Tr 1534). This was done without Roxanne's consent. (Tr 1534). Jason was there a year before Roxanne could get the money to buy a plane ticket to get him back. (Tr 1534-1535). Roxanne's sister lived in the area and checked on him periodically. (Tr 1535). Dunkle took Jason to Wisconsin because his

house and business was in Roxanne's name, and he wanted to make sure that he could get his business back after he signed the divorce papers. (Tr 1535).

Roxanne said Jason did not have many close friends growing up. He seldom invited any friends to the house. (Tr 1535). He had one girlfriend named Heather. (Tr 1535). However, Roxanne did not know that Heather was a drug addict. (Tr 1536).

Jason's mother was the primary disciplinarian when Jason needed correcting. (Tr 1536). She would spank him with a wooden spoon until it broke, and then she used a belt and her hands. (Tr 1536). On average, she bought five to eight wooden spoons a month. (Tr 1536). The men that lived with her also participated in disciplining Jason, and she left everyone of these men because of that. (Tr 1536). James Dunkle abused Jason at a young age, and abused her. (Tr 1536). Dale Watts drank and started knocking Jason around. (Tr 1537). She came home one night to find Jim Lyons with Jason up against a wall. Jason suffered two cracked ribs. (Tr 1537). Lyons was beating Jason because Jason had told him that he had seen Roxanne and him making love the night before. (Tr 1537). Jim Lyons hit Jason with a large paddle and a belt. (Tr 1537). Dale Watts drank a lot and hit Jason. (Tr 1538). One time he hit Jason in the head, and Jason paid no attention to it. (Tr 1538). Jason had a bruise. (Tr 1538). After seeing this, Roxanne started paying more attention, but she worked two jobs, one during the day and one at night. She came home late at night, and Jason would be in bed. (Tr 1538). Tommy Thortis, to whom she is

presently married, also physically abused Jason. (Tr 1538). Roxanne admitted both Thortis and she abused Jason. (Tr 1538). Tommy would hold Jason while she beat him. (Tr 1538). She said the neighbors got upset over this and called the police two or three times. (Tr 1538-1539). Around the tenth time they came in the second month, the police said they had to take her to jail, however, Jason would not press charges. (Tr 1539). Tommy Thortis was gone by this time, and no charges were pressed against him. (Tr 1539). On occasion, when Jason was beaten by both Roxanne and Tommy Thortis, Roxanne said she **was** not using an instrument. Tommy would use his belt. (Tr 1539). Roxanne said on one occasion she struck Jason with a lead pipe. (Tr 1550). Tommy also beat Roxanne. (Tr 1539-1540). Jason tried to intervene one time when Tommy was striking Roxanne with a metal candle holder. (Tr 1540). Tommy then turned his aggression toward Jason. (Tr 1540).

Roxanne testified that she thought Jason went to school everyday, but he did not. (Tr 1540). Jason was reprimanded at Garland High School, and when Roxanne went to the school, she discovered that Jason had hardly gone to school for the whole year. (Tr 1540-1541). He left for school in the morning and came home about the time school was over, but for the entire 9th grade year, he was essentially not in school. (Tr 1541). Roxanne never noticed if he brought home books. (Tr 1542). She was working two jobs, and she was rarely home at night. (Tr 1542). Jason later got a job, but the work was sporadic. (Tr 1542). Once or twice, he gave his mother some money from his

paycheck. (Tr 1543). She encouraged him to find a 40-hour per week job, even at $5 an hour, but he was unable to do so. (Tr 1543). Jason was 16 or 17 at the time. (Tr 1543).

Jason asked about his father a great deal when he was young, and when he became a teenager, those questions increased. (Tr 1543). Roxanne was afraid of Michael Mahn. (Tr 1543). When Jason would ask about his father, she would tell him that he did not want to know about him. (Tr 1544). She said there was no contact between Michael Mahn and **Jason** from the time Michael left him until Jason made contact with him in Florida. (Tr 1544).

Roxanne always worked two jobs. (Tr 1544-1545). She worked five nights a week and only had a few minutes between jobs. (Tr 1545). She never prepared dinner. She taught Jason to make soup, macaroni and cheese, hamburgers, and to use the microwave. (Tr 1545). She bought groceries and paid the rent. (Tr 1545). She did not spend time with or talk to Jason. (Tr 1545). Between her two jobs, when she was home for five or ten minutes, she would scream and yell about what had to be done, and then tell Jason she would see him in the morning. (Tr 1545). At one point, Roxanne asked her brother to take Jason because she was beating him, and he would not behave for her. (Tr 1546). Another time, Jason lived in a juvenile facility for troubled teenagers, Buckner Boys Home in Texas. (Tr 1546). Another time, in Arizona, she asked that her son be put on probation and for help in raising him after she had found marijuana on him. (Tr 1546). She was told Jason would receive

testing and counseling. (Tr 1546). She thought this would be a good. (Tr 1547). However, it did not work out that way. (Tr 1547). She took Jason to a psychiatrist for a brief time and thought it helped a little bit. (Tr 1547).

Roxanne said Jason loved animals and would bring animals home. (Tr 1547-1548). He was generally nonviolent. (Tr 1548). Many times she beat him, but he never raised a hand to her. (Tr 1548). Because of her two jobs, she did not pay enough attention to him. Sometimes a week would go by and she would not have seen Jason, (Tr 1549). She would write a note for him. (Tr 1549). Occasionally she would call Jason from her second night job, but usually, she did not find him at home. (Tr 1549).

Jason moved into the garage at one house. Roxanne went into that area perhaps once a month. (Tr 1549). She would look for drugs or alcohol, but never went in there to clean. (Tr 1549). She lived in the house, and he lived in the garage. (Tr 1550). Jason was 15-years-old at the time. (Tr 1550).

Jason Mahn testified in his own defense during the penalty phase. (Tr 1572). He said his legal name is Jason James Dunkle, but he chose to use the last name of Mahn. (Tr 1573). He could not really say why he used his natural father's name, other than to say he did not want to be living in his house and have a different name. (Tr 1573). Jason said he was excited when he found his father. (Tr 1573-1574). After talking to him a couple of times, Michael invited Jason to Florida. (Tr 1574). Jason was excited about going to Florida and about learning

that he had a father. (Tr 1574-1575). Life was not treating him well where he was, and he thought he might have a chance. (Tr 1575). Jason said he loved Debbie Shanko and considered her one of his good friends and felt sorry for her death and missed her. (Tr 1576-1577). In fact, Jason said he liked her more than his dad because she was nice to him. (Tr 1577). He said Anthony was nice, too . (Tr 1577). Jason thought he was coming off of LSD at the time of the homicides. (Tr 1602) . He did not tell the police officers that during the statement because he was afraid it would get him in more trouble. (Tr 1602).

The prosecution called a rebuttal witness, James D. Larson. (Tr 1621-1622). Dr. Larson is a clinical psychologist who evaluated Jason. (Tr 1622). He found no signs of formal thought disorder and thought Jason was in contact with reality. (Tr 1625). He tested Jason for malingering, but noted there is no one test, and the decision about malingering is a professional judgement. (Tr 1626). Larson's testing came back with a highly exaggerated profile based on the three tests he used. (Tr 1627-1628). Mahn denied the use of drugs or alcohol on the day of the murders, and denied being under the influence of delusions or hallucinations. (Tr 1628). Larson was of the opinion that Jason did not have any type of mental disease or infirmity. (Tr 1631). He did find Jason suffered from anti-social personality disorder. (Tr 1631).

SUMMARY OF ARGUMENT

1. Because Mahn had been disruptive in a previous trial, the court had a remotely operated electronic stun belt placed on Jason as a restraining device. During a break in the trial during jury selection, security personnel activated the device and shocked Jason. Jason was too emotionally distraught to return to the courtroom. Jury selection resumed without Jason's presence. He returned to the courtroom the following day, the second day of trial. During the second trial day, defense counsel asked that the electric stun belt be removed. Counsel reported a complaint that the guards in charge of the stun belt remote who had the power to shock Jason had been teasing and taunting him. The court denied the request to remove the stun belt. On the third day of trial, the court replaced the stun belt with leg shackles. The use of the electric stun belt on Jason during this trial violated a number of his constitutional rights. First, the use of any restraining device is an assault on the dignity of the individual and the court proceedings. The use of the electric stun belt was far more that necessary to achieve the security of the courtroom. Certainly, the security benefits of the stun belt was outweighed by the detrimental impact it had on Jason's mental stability during trial. Jason's rights to due process and a fair trial were denied. Second, after the guards stunned Jason with the electrical belt, Jason was visibly in mental and emotional distress. Although, Jason's competency to stand trial had been extensively litigated pretrial, his acute distress after being

shocked may have impaired, at least temporarily, his continued competency to proceed. In failing to insure Jason's continued competency, the court violated Jason's rights to due process, a fair trial and counsel at trial. Third, the use of the electric stun belt deprived Jason of his right to be present during a critical portion of his trial -- jury selection. Fourth, the use of the stun belt deprived Jason of the right to effectively communicate with counsel during trial.

2. Jason Mahn had no intent to commit a robbery or theft at the time of the homicides. There was no evidence that the murders were motivated by a desire to take property. Jason took the money and automobile after the homicides in order to flee. The evidence of this afterthought-taking was insufficient to prove the robbery. Mahn now asks this Court to reverse his conviction for robbery with directions that he be discharged on that offense.

3. The trial court improperly found three aggravating circumstances. First, the homicides were not cold, calculated and premeditated because these were intra-family killings done in the heat of passion, fueled by jealousy and rage. The homicides were also not heinous, atrocious or cruel. Jason thought the victims would die quickly from a single stab wound. Therefore, the element that the perpetrator intend to cause suffering by the manner of death chosen has not been established. Finally, the court improperly used a robbery conviction as a previous conviction for a violent felony since the underlying facts of the case showed that Jason was not on the

scene, never intended that violence be used in the taking of the property and never came in direct contact with the victim.

4. The trial court failed to properly find and weigh mitigating circumstances established by the evidence. First, the court failed to find the two statutory mitigating circumstances based on Jason's mental condition. Additionally, the court, although finding Jason's mental condition as a nonstatutory mitigating circumstance, abused its discretion in affording it "little weight." Third, the court failed to consider Jason's youth as either a statutory or nonstatutory mitigating circumstance. And, fourth, the court improperly rejected Jason's history of drug and alcohol abuse as a mitigating circumstance.

5. The trial court erred in overriding the jury's recommendation of a life sentence for the homicide of Debra Shanko. Substantial mitigating circumstances existed upon which the jury could have reasonably based its decision. In overriding the jury, the trial court improperly substituted its opinion concerning the sentence for the jury's. The death sentence must be reversed,

6. The death sentences imposed for both homicides in this case are disproportionate. When compared to other similar, and some instances more aggravated, cases where this Court reversed death sentences, the sentences imposed here cannot stand.

7. This Court held the standard jury instruction on the cold, calculated and premeditated aggravating circumstance to be unconstitutional in Jackson v. State, 648 So.2d 85 (Fla.

1994). The trial court in this case did not have the benefit of Jackson, since the trial was held before Jackson was decided. Although the defense objected to the standard instruction as unconstitutionally vague, the court used the unconstitutional standard instruction. Use of this unconstitutional instruction tainted the penalty phase of Mahn's trial.

8. The defense objected to the standard penalty phase jury instruction on the heinous, atrocious or cruel aggravating factor as unconstitutionally vague and requested a substitute instruction. Counsel renewed his objection at the close of the instructions. The trial court overruled the objections and refused to give the requested instruction and used the standard jury instruction. The jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. Mahn recognizes that this Court has approved as constitutional the current standard jury instruction on the heinous, atrocious or cruel aggravating circumstance in Hall v. State, 614 So.2d 473 (Fla. 1993). However, he urges this Court to reconsider the issue in this case.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN PERMITTING THE JASON MAHN TO BE RESTRAINED DURING PORTIONS OF THE TRIAL BY THE USE OF A REMOTELY ACTIVATED ELECTRIC STUN DEVICE.

Before the trial began, the trial court admonished Jason about disrupting the proceedings. (Tr 18-22) The court noted that in a previous trial, Jason had been disruptive during jury selection and that such behavior would not be tolerated in this trial. (Tr 18-22) A remotely operated electronic stun belt was placed on Jason as a restraining device. (Tr 112) During a break in the trial during jury selection, an incident arose and security personnel shocked Jason with the device. (Tr 112-118) The details of the incident were not placed on the record. (Tr 112-118) A hearing in chambers on this matter was held. (Tr 112-118) Jason was distressed. (Tr 112) Counsel noted for the record that Jason was emotional, crying and sitting with his head on the table. (Tr 112) Defense counsel suggested the possibility of having the stun belt removed. (Tr 112) Jason concluded he was too emotionally distraught to return to the courtroom. (Tr 112-118) The trial judge arranged a video hookup to the holding cell and defense counsel was equipped with a radio headset in order to communicate with his client. (Tr 112-119, 212) When court reconvened, the court told the jury that Jason had chosen not to be present, but he had a TV monitor and radio communication with his lawyer. (Tr 119) Jury selection resumed without Jason's presence. (Tr 124) During voir dire, several prospective jurors expressed displeasure

over Jason's absence. (Tr 240-247) Some jurors complained about the costs of providing a video link to the courtroom for him. (Tr 240-242) Another prospective juror was concerned that he was drawing conclusions about why Jason was not present because no reason for his absence was explained. (Tr 245) Finally, one juror felt it was an invasion of privacy for Jason to be able to observe the jurors and be able to pass judgement on them out of their sight. (Tr 247) The court instructed the prospective jurors that this was not to be a consideration for them. (Tr 242--247) An exchange between the judge and the jurors advised the jurors that certain rules had to be followed or the appellate courts would reverse the case for retrial. (Tr 243-244) Jason remained out of the courtroom for the remainder of the day through the conclusion of jury selection. (Tr 325) He returned to the courtroom the following day, the second day of trial. (Tr 325)

Sometime into the second trial day, defense counsel asked that the electric stun belt be removed. (Tr 504) He pointed out to the court that Jason had not been disruptive during the proceedings. (Tr 504) Additionally, counsel reported a complaint that the guards in charge of the stun belt remote, who had the power to shock Jason, had been teasing and taunting him. (Tr 504) The complaint was that they made comments such as "We're going to zap you just to see if you're still alive." (Tr 504) Counsel also complained the guards were calling Jason rude names and "treating him without dignity." (Tr 507) The

court noted Jason's past unpredictable behavior and left the stun belt in place. (Tr 504-506)

At the beginning of the third day of trial, the trial judge changed his position, ordered the stun belt removed and substituted leg shackles as a restraining device. (Tr 574-580) In making this decision, the court made the following statements:

> Let me tell you something that's come up and it really doesn't have anything to do with the merits of this case, but it's something that's going to have to be addressed. It deals with this stun belt and the fact that the other day one of these guys activated it. We did not go into it, we didn't find out what caused it. No one asked for a hearing. I don't want to have a hearing in the middle of this trial because it doesn't have anything to do with what were doing, but it's not forgotten. He made a complaint yesterday that they were teasing him and taunting him. We didn't have a hearing on that either, okay, because that really doesn't have anything to do with the merits of this case either.
>
> After I got out of court yesterday, someone that is in my opinion unimpeachable and has no reason to exaggerate or otherwise, heard a comment, had nothing to do with what Mr. Mann [sic] said, but another comment that makes me question whether or not someone should have their hand on a button with somebody else on the other end of an electronic device. Again, I don't want to get into a hearing on it because it doesn't make any difference in this case. It doesn't go to the merits of this case, but it certainly makes me question the finger on the button, whether or not someone has psychologically in enough good and -- enough good judgment to have their finger on the button, and I'm very concerned about it.
>
> By the same token, all of that aside, it does not improve Mr. Mahn's stock, his stock doesn't rise in relation to whether or not he's unstable, whether ox not he's unpredictable and all those things and the

> reason why he's got it on to begin with. What I'm concerned about is the criteria and the fact that it is very, very subjective as to who's got their finger on the button and when it's going to be activated, and that bothers me a lot.

(Tr 574-575)

The use of the electric shock stun belt in this trial, where a man was on trial for his life with a possible decision being to shock him with sufficient electricity to kill him, is truly a macabre scene more fitting of a Hitchcock tale than a trial in an American courtroom. Although the judge made the decision to remove the electric stun belt, the damage to the fairness of this trial was already done. Rather than enhancing the predictability of Jason's behavior, which was the court's concern, the use of the electric stun belt increased the likelihood of unpredictable, emotional behavior. Jason was not merely controlled by the stun belt, he was tortured. Jason was mentally unstable, young defendant on trial for his life. He was electrically shocked, outside of courtroom during a break, for some reason not established on the record. The State never offered any justification for this action. This use of the electric stun belt resulted in mental and emotional distress prompting Jason to chose to remain out of the courtroom for the remainder of that trial day's proceedings -- the critical stage of jury selection. His absence, in turn, prejudiced him in the eyes of prospective jurors. His ability to communicate with counsel was limited to a radio link to a headset counsel was forced to wear. Furthermore, his mental ability to communicate with counsel and participate in jury selection decisions was no

doubt impaired by the effects of the electrical shock. The following day, when Jason was composed enough to remain in the courtroom, he still had to endure taunting, teasing and threats from the guards with the power to activate the electric shock at will. Jason, already an emotionally unstable person whose competency had been questioned, was physically and mentally threatened with the arbitrary use of the electric shock. Even a dog contained by an underground electric fence is not subjected to arbitrary threat of electric shocks since consistent boundaries are in place. Jason was not afforded even this level of consideration at his trial.

The use of the electric stun belt on Jason during this trial violated a number of his constitutional rights. First, the use of any restraining device is an assault on the dignity of the individual and the court proceedings. Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970). Consequently, when restraints are necessary, they must be the least intrusive and restrictive possible and still accomplish the court's security needs. Illinois v. Allen; Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986); see, also, Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, L.Ed.2d 126 (1976); Jones v. State, 449 So.2d 253 (Fla. 1977); Zygadlo v. State, 341 So.2d 1053 (Fla. 1977); Shultz v. State, 131 Fla. 757, 179 So. 764 (Fla. 1938); Zygaldo v. Wainwright, 720 F.2d 1221 (1983). The use of the electric stun belt was far more that necessary to achieve the security of the courtroom. Even passive restraints such as shackles should be

rarely used. Ibid. Certainly, the security benefits of the stun belt was outweighed by the detrimental impact it had on Jason's mental stability during trial. Jason's rights to due process and a fair trial were denied. Art. I, Sec. 9, 16 Fla. Const.; Amends. V, VI, XIV U.S. Const.

Second, after the guards stunned Jason with the electrical belt, Jason was visibly in mental and emotional distress, as defense counsel noted during the hearing in chambers which ensued. Although, Jason's competency to stand trial had been extensively litigated pretrial, his acute distress after being shocked may have impaired, at least temporarily, his continued competency to proceed. The trial judge, upon seeing Jason's mental distress, was required to explore this issue and insure Jason was mentally capable of participating in the trial and communicating with counsel. Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); Lane v. State, 388 So.2d 1022 (Fla. 1980); Pridgen v. State, 531 So.2d 951 (Fla. 1988). In failing to insure Jason's continued competency the Court violated Jason's rights to due process, a fair trial and counsel at trial. Art. I, Secs. 9, 16 Fla. Const., Amends. V, VI, XIV U.S. Const.

Third, the use of the electric stun belt deprived Jason of his right to be present during a critical portion of his trial -- jury selection. He had the absolute right to be present in the courtroom and physically present at the site where any challenges to prospective jurors were made. Art. I, Secs. 9, 16

Fla. Const.; Amends, V, VI, XIV U.S. Const.; Fla.R.Crim.P. 3.180; Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934); Coney v. State, 653 So.2d 1009 (Fla. 1995); Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982); Turner v. State, 530 So.2d 45 (Fla. 1987). Although a defendant may voluntarily absent himself from any portion of his trial, ibid, Jason's absence was not shown to be voluntary. Jason was mentally distressed after being stunned by the activation of the electric stun belt. He was immediately faced with the choice of reentering the courtroom, with the stun belt still in place, or returning to the holding cell. He chose the holding cell. However, the court never inquired if this choice was freely and voluntarily made or whether the mental and physical impact of the electrical shock was affecting his decision. Furthermore, the court never inquired if the continued use of the stun belt was having a coercive effect on his decision. Jason's constitutional right to be present a jury selection was violated. Ibid.

Fourth, the use of the stun belt deprived Jason of the right to effectively communicate with counsel during trial. Jason's ability to communicate with counsel was affected by the impact the stun belt had on Jason's mental and emotional state. After the stun belt was activated and Jason was stunned, his mental distress caused him to be unable to return to the courtroom for the remainder of jury selection. Although equipped with radio communication, there is no indication Jason was in a state of mind to be able to use it. Furthermore, the

following day when Jason returned to court, the stun belt's presence on his body and the threat of arbitrary use had to have affected his mental ability to communicate with counsel. Jason's right to counsel at trial was violated. Art. I, Secs. 9, 16 Fla. Const.; Amends. V, VI, XIV U.S. Const.

Jason Mahn's constitutional rights were violated by the use of the electric stun belt as a restraint during trial. He asks this Court to reverse his case for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN PERMITTING THE CHARGE OF ROBBERY TO BE SUBMITTED TO THE JURY SINCE **THE EVIDENCE** WAS **INSUFFICIENT TO** PROVE MORE THAN A THEFT.

Jason Mahn had no intent to commit a robbery or theft at the time of the homicides. The violence was prompted by Jason's mental and emotional turmoil and his conflicted relationship with his father. There was no evidence that the murders were motivated by a desire to take property. Jason took the money and automobile after the homicides in order to flee. Although the jury found Jason guilty of robbery, the jury also indicated, when polled, that the murder convictions were based on a premeditation theory. (Tr 1266-1271) Additionally, the trial judge, after the penalty phase, specifically found the taking of the car and money to be an afterthought, and he concluded the evidence did not support the aggravating circumstance that the homicide was committed during a robbery. (R 289-290) See, Knowles v. State, 632 So.2d 62, 66 (Fla. 1993) ; Clark v. State, 609 So.2d 513, 515 (Fla. 1992). Likewise, the evidence was insufficient to prove the robbery charge itself. Mahn now asks this Court to reverse his conviction for robbery with directions that he be discharged on that count.

Recently, in Jones v. State, 652 So.2d 346 (Fla. 1995), this Court again explained the need for the threat or force element of robbery to be part of a continuous series of events with the taking of the property. This Court wrote,

> Robbery is the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear. §812.13(1), Fla.Stat. (1989)(emphasis added). An act is considered in the course of the taking if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events. §812.13(3)(b), Fla.Stat. (1989). Thus, a taking of property that otherwise would be considered a theft constitutes robbery when in the course of the taking either force, violence, assault, or putting in fear is used. We have long recognized that it is the element of threat or force that distinguishes the offense of robbery from the offense of theft. Royal v. State, 490 So.2d 44, 46 (Fla. 1986), receded from on other grounds, Taylor v. State, 608 So.2d 804 (Fla. 1992); Montsdoca v. State, 84 Fla. '82, 93 So. 157 (1922). Under section 812.13, the violence or intimidation may occur prior to, contemporaneous with, or subsequent to the taking of the property so long as both the act of violence or intimidation and the taking constitute a continuous series of acts or events.

652 So.2d at 349.

While the taking of property after the use of force can establish a robbery, ibid., taking property after a murder, where the motive for the murder was not the taking of property, is not robbery. Knowles, 632 So.2d at 66; Clark, 609 So.2d at 515; Parker v. State, 458 So.2d 750, 754 (Fla. 1984). The homicides in this case did not occur because Jason Mahn wanted to take $400 and a car. Jason did not know the money was in the house. He found it while trying to find key to a car. He wanted the car to flee the scene of the murders. Additionally, if taking a car had been his original motive, he could easily

have accomplished this at almost any time since he lived in the same household. The homicides were the product of Jason's mental and emotional disturbance and prompted by jealousy for his father's attention. He took the money and car after the violence to effect his escape from the scene. A robbery was not proven beyond a reasonable doubt.

Mahn's robbery conviction is not supported by sufficient evidence and violates his right to due process. Amends. V, XIV U.S. Const.; Art. I, Secs. 9, 16 Fla. Const. He asks this Court to reverse his conviction for robbery with directions he be discharged.

ISSUE III

THE TRIAL COURT ERRED IN FINDING AND CONSIDERING AGGRAVATING CIRCUMSTANCES WHICH WERE NOT PROVEN BEYOND A REASONABLE DOUBT.

A. The Trial Court Erred In Finding That The Homicides Of Anthony Shanko And Debra Shanko Were cold, Calculated And Premeditated.

In his findings of fact to support the death sentences, the trial judge found as an aggravating circumstance that both homicides were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R 262-263). Sec. 921.141(5)(I), Fla. Stat. This Court has defined and applied this aggravating factor as requiring more than the premeditation element for first degree murder. See, e.g., Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla 1986); Preston v. State, 444 So.2d 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981). The evidence must prove beyond a reasonable doubt that a heightened form of premeditation existed--one exhibiting a cold, calculated manner without any pretense of moral or legal justification. Ibid. "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). There must be "...a careful plan or prearranged design to kill...." Rogers v. State, 511 So.2d 526 (Fla. 1987).

In Jackson v. State, 648 So.2d 85 (Fla. 1994), and Walls v. State, 641 So.2d 381 (Fla. 1994), this Court discussed the

four elements which must be established before the CCP circumstance is proved:

> Under Jackson, there are four elements that must exist to establish cold calculated premeditation. The first is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." Jackson [648 So.2d at 89] . . .
>
> * * * *
>
> Second, Jackson requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident." Jackson, ...
>
> * * * *
>
> Third, Jackson, requires "heightened premeditation," which is to say, premeditation over and above what is required for unaggravated first-degree murder.
>
> * * * *
>
> Finally, Jackson states that the murder must have "no pretense of moral or legal justification." ... Our cases on this point generally establish that a pretense of moral or legal justification is any colorable claim based at least in part on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide . . .

Walls, at 387-388. The facts of this case failed to prove each of the four elements required for a CCP finding.

Homicide Of Anthony Shanko Not CCP

The trial court found the homicide of Anthony Shanko to be cold, calculated and premeditated. (R 300) The findings in

the sentencing order for Anthony Shanko's homicide reads as follows:

> The Defendant told several witnesses that he was jealous of the time his father gave to Debbie and Anthony Shanko. Anthony Shanko was in his own home, in his own bed when the Defendant went to the kitchen and took two large kitchen knives. The Defendant by his own admissions started to stab Anthony Shanko when Anthony was asleep and stabbed him up to eight times with one of the large kitchen knives. The Defendant by his own admission waited until his father left the house that night before he committed the murder of Anthony Shanko. The Defendant by his own admission says Anthony Shanko did not deserve this, but he was mad that his father had sold his automobile the day of the murder because the Defendant had defaulted upon his agreement to make the automobile payments. The evidence has established that the Defendant's father had a great deal of love for Anthony Shanko. The Defendant felt that his father was not there for him as a child when he was growing up with his mother. The Defendant by his own admission stated that he had thought about killing Anthony and Debbie Shanko, because he thought that they would die immediately rather than fight and cry and scream. The evidence does not support nor does the Defendant claim that he had any moral or legal justification. The aggravating circumstance was proved beyond a reasonable doubt.

(R 300).

This homicide was not committed in a "cold" manner. Jason killed in a jealous rage while suffering depression and hopelessness. Killings prompted by such emotions are not cold, and they do not qualify for the CCP aggravating circumstance. A rage killing is inconsistent with the calm, cool reflection necessary for the is aggravating circumstance. Thompson v. State, 565 So.2d 1311 (Fla. 1990); Mitchell v. State, 527 So.2d

179 (Fla. 1988). Furthermore, this Court has rejected a CCP finding where an intra-family killing occurred in the heat of passion. Maulden v. State, 617 So.2d 298 (Fla. 1993); Santos v. State, 591 So.2d 160 (Fla. 1991); Douglas v. State, 575 So.2d 165 (Fla. 1991); Garron v. State, 528 So.2d 353 (Fla. 1988); Wilson v. State, 436 So.2d 908 (Fla. 1983), appeal after remand, 493 So.2d 1019 (Fla. 1986). In Santos, this Court explained why intra-family, heat of passion killings do not qualify for the state of mind necessary to support a CCP finding:

> However, the fact that the present killing arose from a domestic dispute tends to negate cold, calculated premeditation. In the recent case of ***Douglas v. State,*** 575 So.2d 165 (Fla. 1991), we rejected a trial court's finding of cold, calculated premeditation in a killing that arose from a domestic dispute associated with a lover's triangle. We did so even thought the evidence showed that the assailant had obtained a rifle, tracked down a woman with whom he had been romantically involved, torturously abused her by forcing her to have sex with her newlywed husband, and then brutally bludgeoned and shot the husband to death as the woman watched. The entire episode lasted some four hours. ***Id.*** at 168 (Ehrlich, Senior Justice, dissenting).
>
> The sheer duration of this torturous conduct, in another context, might have supported beyond a reasonable doubt a conclusion that the killing met the standard for cold, calculated premeditation established in ***Rogers v. State,*** 511 So.2d 526, 533 (Fla. 1987), ***cert. denied,*** 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), i.e., that it was the product of a careful plan or prearranged design.

> The opinion in *Douglas,* however, rested on our conclusion that the killing arose from violent emotions brought on by the defendant's hatred and jealousy associated with the love triangle. In other words, the murder in *Douglas* was a classic crime of heated passion. It was not "cold" even though it may have appeared to be calculated. There was no deliberate plan formed through calm and cool reflection, see *Rogers,* only mad acts prompted by wild emotion.

591 So.2d at 162-163.

The homicide was not committed in a "calculated" manner. As noted in Santos, "[t]here was no deliberate plan formed through calm and cool reflection,...only mad acts prompted by wild emotion." 591 So.2d at 163. This was an impulsive killing committed in an emotionally charged state. Jason was angry and jealous and striking out against his father through Anthony. The selling of Jason's car, while not the sole source of his anger toward his father, may have been the final precipitating event which pushed Jason "over the edge" to commit this crime. The car was sold only a couple of hours before the killing. As a result, any planning of this crime was likely brief and poorly done. The weapon used was a knife readily available in the kitchen. Jason did not think ahead to an escape because he had no clothes packed, and in fact, fled barefooted. This impulsive act was also consistent with Jason's personality disorder which is characterized by impulsive, nonthinking behavior which is oblivious to consequences. There was no evidence of a plan formed with "calm and cool reflection." Santos, 591 So.2d at 163.

Homicide of Debra Shanko Not CCP

The trial court found that the homicide of Debra Shanko was cold, calculated and premeditated. (R 288) In support of this conclusion, the court made findings virtually identical to the findings used in the sentencing order concerning Anthony's Shanko's homicide. (R 300) Only the second sentence of the two findings are different. (R 288, 300) Regarding the homicide of Debra Shanko, the court wrote:

> The Defendant told several witnesses that he was jealous of the time his father gave to Debbie and Anthony Shanko. Debbie Shanko was in her own home, in her own bed, when the Defendant went to the kitchen and took two large kitchen knives. The Defendant by his own admissions started to stab Anthony Shanko when Anthony was asleep and stabbed him up to eight times with one of the large kitchen knives. The Defendant by his own admission waited until his father left the house that night before he committed the murder of Anthony Shanko. The Defendant by his own admission says Anthony Shanko did not deserve this, but he was mad that his father had sold his automobile the day of the murder because the Defendant had defaulted upon his agreement to make the automobile payments. The evidence has established that the Defendant's father had a great deal of love for Anthony Shanko. The Defendant felt that his father was not there for him as a child when he **was** growing up with his mother. The Defendant by his own admission stated that he had thought about killing Anthony and Debbie Shanko, because he thought that they would die immediately rather than fight and cry and scream. The evidence does not support nor does the Defendant claim that he had any moral or legal justification. The aggravating circumstance was proved beyond a reasonable doubt.

(R 288).

Jason did not kill Debra Shanko in "cold" or "calculated" manner. First, the State's theory was that Debra Shanko was an intended victim along with Anthony. Just as discussed regarding the CCP finding for Anthony's killing, this was an impulsive, domestic homicide committed in anger, fueled by frustration and jealousy. This type of crime does not satisfy the "cold" or "calculated" requirements for the CCP factor. For the same reason discussed above regarding the homicide of Anthony, the homicide of Debra Shanko was also not CCP.

An additional fact concerning the killing of Debra Shanko also negates the "cold" and "calculated" elements. The evidence also supports the conclusion that Debra may not have been an intended victim, and she was killed because she confronted Jason. Such a crime was a panic killing after Debra confronted and struggled with Jason. Reactive killings during the stress of being confronted during the commission of another felony do not qualify for he CCP circumstance. See, Hamblen v. State, 527 So.2d 800 (Fla. 1988); Rogers v. State, 511 So.2d 526 (Fla. 1987); Blanco v. State, 452 So.2d 520 (Fla. 1984); Maxwell v. State, 446 So.2d 1031 (Fla.1984) The number and nature of the stab wounds to Debra are consistent with a frenzied attack of someone in a struggle who kills in a panic -- not a cold, calculated and premeditated murder. Mitchell v. State, 527 So.2d 179; Hansbrough v. State, 509 So.2d 1081 (Fla. 1987) ; Nibert v. State, 508 So.2d 1 (Fla. 1987).

The State failed to prove the all elements of the CCP circumstance and the trial judge erred in finding and weighing

568 So.2d at 912; see, also, Santos v. State, 591 So.2d 160 (Fla. 1991). The evidence did not prove that the homicides in this case qualified for the HAC aggravating circumstance.

Homicide Of Debra Shanko Not HAC

The trial court found the homicide of Debra Shanko HAC and wrote his findings as follows:

> The victim, Debbie Shanko, was approximately 36 years old at the time she was murdered. The Defendant waited until his father left the house to sell the Defendant's car, and then took two large knives out of the kitchen to perfect this murder. As he was in the process of murdering Anthony Shanko with Anthony Shanko fighting, crying and screaming, the mother of Anthony Shanko walked into Anthony's bedroom to find the Defendant murdering her son. The Defendant turned on the mother and cut and stabbed her up to 40 times. She suffered more than one fatal blow from the Defendant's knife. Debbie Shanko, from the evidence, put up a fight for her life with her blood covering over most of the house. She had cuts and stab marks over most of her body. She died in the hallway after trying to use the telephones. Her blood was on the telephone sets, but the telephones were inoperable. the telephone in the Defendant's room was off the hook and did not have any blood on the telephone. One could conclude that the Defendant took his telephone off the hook to prevent anyone from calling for help.

(R 289).

This aggravating factor should not have been weighed in the sentencing process. While multiple stab wounds frequently qualify a murder as HAC, such wounds do not necessarily render a homicide especially heinous, atrocious or cruel. Demps v. State, 395 So.2d 501 (Fla. 1981). The manner of the killing

here was directly caused by Mahn's panicked mental state at the time of the killing. In his statement, Mahn said things went "hectic" when Debra came into the room. (Tr 1060) Administering numerous stab wounds is consistent with the frenzied, repetitive attack of someone who is mentally disturbed or panicked. On several occasions, this Court has held that the causal relationship between a defendant's mental state and the severity of the manner of death, such a multiple stab wounds, mitigates the aggravating quality of those wounds. E.g., Amazon v. State, 487 So.2d 8 (Fla. 1986); Miller v. State, 373 So.2d 882 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976). Consequently, the trial court's failure to consider Mahn's mental impairment and passion of the moment when evaluating the aggravated quality of the manner of death in this case renders the finding of this circumstance invalid.

The mental state of the perpetrator is an important factor in determining if this aggravating circumstance is proven. There must be proof the perpetrator desired to inflict pain or **was** utterly indifferent to it. Cheshire v. State, 568 So.2d at 912 (murder in the heat of passion not HAC); Santos v. State, 591 So.2d at 163 (murder in the heat of passion not HAC); Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990)("crime of passion, not a crime that was meant to be deliberately and extraordinarily painful.") In Shere v. State, 579 So.2d 86 (Fla. 1991), this Court rejected the HAC circumstance where the victim had suffered 10 gunshot wounds. Although the evidence

showed the victim died quickly, this Court also held the element of the perpetrator's intent to cause suffering was absent:

> Likewise, there is no evidence to suggest that Shere desired to inflict a high degree of pain. Four of the wounds were potentially fatal, which is an indication that they tried to kill him, not torture him.

579 So.2d at 96. Additionally, this Court has refused to apply HAC circumstance vicariously to co-defendant who did not intend a painful manner of death and no actual control over the killing. Williams v. State, 622 So.2d 456 (Fla. 1993); Archer v. State, 623 So.2d 446 (Fla. 1993); Omelus v. State, 584 So.2d 563 (Fla. 1991). Jason Mahn's crime was not of someone consciously trying to deliberately inflict pain. In fact, in his confession, Jason told the detective that he thought a initial stabbing would cause death quickly. (Tr 948, 1048) The confession indicates Jason did not intend for the victims to suffer. There is no proof of the mental element necessary for a HAC finding.

Homicide Of Anthony Shanko Not HAC

The trial court found the homicide of Anthony Shanko HAC and wrote:

> The victim, Anthony Shanko, was 14 years old at the time he was murdered. The Defendant took the two largest knives out of the kitchen to perfect this murder. The knife used on Anthony Shanko was a serrated knife. The Defendant cut a 2 ½ - 4 ½ inch hole in the chest of Anthony Shanko. Anthony's lung was damaged causing a sucking sound where he was taking air from

> the outside instead of down his mouth. The evidence established that he lived for one to two hours after the stabbing. The evidence established that he suffered great pain prior to dying. Anthony Shanko tried to call for help, but was unable to because the phone failed to work properly. Anthony was trying to defend himself because some of the wounds were defensive wounds. when the Defendant's father, Michael Mahn, returned home, Anthony told him that he was in pain and he was suffering. Anthony was begging the EMS personnel for help and telling them that it hurt to talk. He told EMS that he did not think he was going to make it. In addition to all the pain and suffering Anthony had to endure, he also had to watch the Defendant murder his mother, Debbie Shanko. The pain and suffering of watching and knowing the Defendant is stabbing his mother up to 40 times. Prior to Anthony Shanko dying, the evidence is clear that he knew his mother was dead, because Anthony told the Defendant's father(Michael Mahn) when he returned home that "She's dead. Jason did it. Call 911." He knew what happened to his mother but was helpless to offer her help because of his wounds. This aggravating circumstance was proved beyond a reasonable doubt.

(R 300-301)

The HAC circumstance was improperly applied to the homicide of Anthony Shanko. First, the element that the perpetrator must have selected a manner of death with the intent to cause suffering is not established. The same arguments presented above in reference to the homicide of Debra Shanko are equally applicable here. Jason thought a single stabbing would produce death quickly. Such an intent is completely contrary to the state of mind necessary to establish the WAC circumstance.

Second, the trial judge also improperly relied on Anthony's suffering while witnessing the attack on his mother. This was irrelevant to a determination of whether the homicide of Anthony Shanko was HAC. The crime against Anthony was already completed, therefore, the crime against the mother would not have invoked fear of an impending attack against him. As result, the case is distinguishable from situations found in cases such as Huff v. State, 495 So.2d 145 (Fla. 1986) where the wife witnessed the killing of her husband and knew her death was next. Ibid. at 153.

The trial court improperly found the HAC circumstance as to both homicides. As a result, the death sentences have not been reliably determined and imposed as constitutionally required. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. VIII, XIV U.S. Const. Mahn urges this Court to reverse his death sentences.

C. The Trial Court Erred In Relying On Mahn's 1992 Robbery Conviction To Support The Aggravating Circumstance Of A Previous Conviction For A Violent Felony.

The Court found as an aggravating circumstance that Jason had a previous conviction for a violent felony. (R 287-288, 299-300). Sec. 921.141(5)(b) Fla. Stat. In support of the finding, the court used the contemporaneous conviction for each homicide to aggravate the other. Additionally, the Court relied on Jason's 1992 conviction for robbery to support the finding. This Court has approved the use of contemporaneous murder convictions as a basis to aggravate each other with this

circumstance. See, Knowles v. State, 632 So.2d 62 (Fla. 1993); Trepal v. State, 621 So.2d 1361 (Fla. 1993). Typically, a robbery conviction also qualifies as a foundation for this aggravating circumstance since a statutory element of the offense involves the use or threat of violence. Sec. 812.13, Fla. Stat. In this case, however, the robbery was improperly used because the underlying facts of the robbery failed to establish it as a crime of violence for purposes of this aggravating circumstance in this case.

In Lewis v. State, 398 So.2d 432, 438 (Fla. 1981), this court defined this aggravating circumstance as requiring convictions for "life-threatening crimes in which the perpetrator comes in direct contact with a human victim." Here, the evidence shows that Mahn drove a car and his codefendant got out and snatched a purse from a woman a parking lot. (Tr 1363-1371) Jason had rejected the idea of the use of violence to take money in an earlier discussion with his co-defendant. (Tr 1366-1371) Jason never came in direct contact with the victim and never committed a violent act toward her.

In Mann v. State, 453 So.2d 784 (Fla. 1984), this Court allowed the State to prove that a burglary conviction, which is not inherently a crime involving violence to a person, was, in fact, a violent crime. See, also, Johnson v. State, 465 So.2d 499 (Fla. 1985). Mann had **a** burglary conviction from Mississippi. There were no indications in the record that this burglary involved and assault or even if other persons were present during the crime. The State produced the victim in

that case to testify that Mann had committed a sexual battery during this burglary. This Court approved this procedure of permitting the State to prove the defendant committed a crime involving violence to a person even though the elements of the crime for which he was convicted did not require a violent act or even contact with another. In the case now before the Court, Jason Mahn has done the reverse of this procedure. He has proven that his conviction for robbery, which has statutory elements of force or violence, did not involve his coming in contact with the victim or his commission a violent act on another.

Since the evidence showed that Jason's actions in the 1992 robbery case did not involve his use of violence or his direct contact with the victim, his conviction did not qualify for the aggravating circumstance provided for in Section 921.141(5)(b) Florida Statutes. The trial court erred in relying on the robbery to establish this aggravating circumstance.

ISSUE IV

THE TRIAL COURT ERRED IN FAILING TO FIND CONSIDER AND PROPERLY WEIGH SEVERAL STATUTORY AND NONSTATUTORY MITIGATING CIRCUMSTANCES.

The constitutionality of the death sentencing process depends, in part, upon the sentencer's complete and fair consideration of mitigating factors. Art. I, Secs. 9, 17, Fla. Const.; Amends. VIII, XIV U.S. Const.; Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 S.Ct. 731, 112 L.Ed.2d 812 (1991); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2958, 57 L.Ed.2d 973 (1978). In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court acknowledged the command of Lockett and Eddings and defined the trial judge's duty to find and consider mitigating evidence:

> ...we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding had been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

511 So.2d at 534.

Later, in Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court clarified the trial judge's responsibility to find

mitigating circumstances when supported by the evidence. This Court wrote,

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature. See, Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature .... The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.

Campbell, at 419-420. (footnotes omitted); see, also, Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Santos v. State, 591 So.2d 160 (Fla.1991); Wickham v. State, 593 So.2d 191 (Fla. 1991). These findings must be reduced to a specific discussions of facts, not a mere statement of conclusions, and of "unmistakable clarity" for this Court's review. Mann v. State, 420 So.2d 578, 581 (Fla. 1982); Rhodes v. State, 547 So.2d 1201 (Fla. 1989).

The trial court failed to follow these principles when evaluating the mitigating evidence and when making decisions regarding the finding and weighing of the mitigating factors. This failure has rendered Mahn's death sentence unconstitutionally imposed.

A. The Trial Court Erred In Not Finding As Statutory Mitigating Circumstances That Mahn Suffered From An Extreme Mental Or Emotional Disturbance At The Time Of The Homicide And That Mahn's Capacity To Appreciate The Criminality Of His Acts Was Substantially Impaired.

In his sentencing order, the trial judge rejected both of the statutory mitigating circumstances concerning the mental condition of the defendant. (R 291-292, 302-303) Secs. 921.141(6)(b) & (f) Fla. Stat. The findings regarding these circumstances were identical in sentencing orders for each homicide:

> 2. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
>
> All the doctors that testified in this case found no psychosis in this Defendant. Dr. Thomas testified that the Defendant was faking. Dr. Bingham testified that he was exaggerating, Dr. Larson testified that the Defendant **was** faking and malingering. All doctors that examined the Defendant said he was exaggerating the symptoms. This mitigating circumstance does not exist.
>
> * * * *
>
> 4. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> The doctors that testified in this case indicated that the Defendant had the ability to appreciate the criminality of his conduct and conform his conduct to the requirements of law, but he was unwilling to do so. This mitigating circumstance does not exist.

(R 291-292, 302-303).

The trial judge's findings are not consistent with the testimony of the experts. Regarding the first mitigator (extreme mental or emotional disturbance), it is correct that each expert concluded that Jason exaggerating his psychological symptoms. (R 291-292, 302-303) (Tr 1391, 1516, 1626-1628). However, it is also true that each expert concluded that Jason suffered from mental and emotional disorders which affected his behavior and functioning. (Tr 1376-1399, 1514-1519, 1631-1633). Charles Thomas, a clinical psychologist, testified that Jason suffers from mental disorders which were consistent with the dysfunctional family life of his childhood and the mental and physical abuse he suffered. (Tr 1375-1380) Although Thomas found no psychotic condition, he was of the opinion that Jason does have some genuine psychological impairments. (Tr 1395-1397) John Bingham, an expert in substance abuse counseling, testified that persons who abuse drugs for a long time can develop a range of mental health problems. (Tr 1513-1514) A person who already has mental problems can become much worse with extensive drug usage. (Tr 1514) Jason's behavior was consistent for someone who had abused multiple drugs over a long period of time. (Tr 1515) Bingham did not find Jason to be psychotic, but he could not rule out drug usage as contributing to the homicides. (Tr 1516, 1519) James Larson, a clinical psychologist who testified for the State in rebuttal (Tr 1622-1622), testified that Jason suffers a personality disorder. (Tr 1631) A disorder he described as having characteristics which,

> ...become so exaggerated that they interfere with how the person functions on a daily basis and interfere with how he gets along with other people or they interfere with occupations or they interfere with success in life.

(Tr 1632) Larson further described the disorder as,

> ...designed to describe people that have poorly develop[sic] conscious and compulsive and who normally don't conform to behavior to the requirements of **law.**

(Tr 1633). The trial court incorrectly concluded that the experts' testimony supported the conclusion that Jason's mental problems were all exaggerated or faked.

The factual findings concerning the second mitigator (substantially impaired capacity to appreciate the criminality of conduct or to conform conduct to legal requirements) are also inaccurate. (R 291-292, 302-303) None of the three experts who testified at penalty phase concluded that Jason was able to conform his conduct to the law and simply was unwilling to do so. (Tr 1391-1399, 1514-1519, 1631-1633) Thomas stated that Jason's disorder involves impulsiveness and not thinking of consequences. (Tr 1387) He found that Jason does not conform his conduct to legal requirements. (Tr 1393) However, Thomas was unable to determine if Jason had the ability to conform. (Tr 1393, 1397-1398) Bingham testified that based on Jason's mental problems and drug abuse history, he could not rule out the fact that drugs played a part in the commission of the homicides. (Tr 1519) Larson's evaluation of Jason was that his disorder was characterized by not following societal rules. (Tr 1631-1633) However, Larson never commented on whether

Jason had the ability to follow the laws of society. (Tr 1631-1633)

The trial court's factual basis for rejecting these statutory mitigating circumstances was not supported by the testimony presented. This error has affected the death sentencing process, and Mahn asks this Court to reverse his sentences.

B. The Trial Court Erred In Not Giving Sufficient Weight To Mahn's Mental Problems As A Nonstatutory Mitigating Circumstance.

After rejecting the statutory mental mitigating circumstances, the court found, but gave little weight, to Jason's mental problems as a nonstatutory mitigating circumstance. (R 293, 305) For the same reasons offered to reject the statutory factors, the court decided to give little weight to Jason's mental impairments as a nonstatutory circumstance:

> #5: The Defendant has mental problems as testified by the doctors. They say he has a personality defect. All agree that he understands the difference between right and wrong and will not conform to society's rules. The doctors say he has the ability conform, but not the desire or the willingness to do so. The Court finds that this mitigating circumstance was proven, but gives it little weight in the weighing process.

(R 293, 305)

As argued in subsection A of this issue, the trial court has relied on a misstatement of the testimony and conclusions of the experts. Mahn adopts the argument presented in

subsection A, supra., in support of the argument on this point. The trial court's assignment of weight to this nonstatutory mitigator was not reasonably based on the testimony presented. Consequently, the court abused its discretion in assigning little weight to this circumstance.

C. The Trial Court Erred In Not Finding Mahn's Age Of 20-Years-old To Be A Statutory Or Nonstatutory Mitigating Circumstance.

The trial judge rejected Jason's age as a statutory mitigating circumstance. (R 292, 303) In his sentencing orders, the judge made substantially the same findings concerning this factor. (R 292, 303) An additional sentence in the order in Count II (homicide of Anthony Shanko) notes the age of the victim at fourteen. (R 303) The order for Count I (homicide of Debbie Shanko), reads as follows:

> 5. The age of the Defendant at the time of the crime.
>
> The double murder took place on the Defendant's 20th birthday. None of the doctors that testified said that the Defendant was retarded. The Defendant knew that difference between right and wrong. The Defendant's age at the time of the crime is not a mitigating factor.

(R 292)

Jason turned 20-years-old the day of the homicides. He was not a minor, and the trial court was not legally bound to find this circumstance. Ellis v. State, 622 So.2d 991 (Fla. 1993)(statutory mitigating circumstance of age must be found for defendants under 18). However, the court was obligated to

exercise its discretion to find or not find this factor in a reasonable manner. Here, the court used only two factors to reject the circumstance -- Jason is not retarded and knows the difference between right and wrong. (R 292) While these factors are considerations, they do not tell the whole story about a person's level of maturity. The trial judge failed to consider other factors which impacted Jason's maturity. Jason was mentally and emotionally unstable and a chronic drug abuser. (see the discussion of his mental condition in subsection A & B of this issue, supra., and subsections D, infra.) Jason's school history was terrible. He had been unable to consistently hold a job. He had not functioned as an independent, self-sufficient adult. The evidence did not estabiish that Jason had the ability or maturity to function as a rational adult.

Jason Mahn's lack of maturity qualified him for the statutory mitigating circumstance concerning his age. The trial court erred in not finding age as either a statutory or nonstatutory mitigating circumstance.

D. The Trial Court Erred In Not Finding Mahn's Drug And Alcohol Abuse To Be A Nonstatutory Mitigating Circumstance.

Although Jason's long history of drug and alcohol abuse was well established, the court rejected this fact as a mitigating circumstance. (R 293, 305) Stating there had been no proof that Jason was under the influence of drugs or alcohol

at the time of the homicides, the judge gave Jason's drug and alcohol abuse "no weight." (R 293, 305) The court wrote:

> #4: The Defendant began drinking alcohol at a very young age and would get drunk and fight and cause trouble most of his life. The Defendant has used all sorts of illegal drugs in the past, but the evidence in this case is clear that the Defendant was not under the influence of drugs or alcohol when he committed this double First Degree Murder. He said he wasn't and there is no evidence to suggest such. The Court gives this no weight in the weighing process.

(R 293, 305).

Initially, the court's evaluation of the evidence was not complete. There was evidence supporting drug use prior to the homicides. Jason testified he was coming down off of LSD at the time of the murders. (Tr 1602) In a statement to Officer Heim, Jason said he shot up cocaine and had two hits of LSD prior to the murders. (Tr 1002) Later, in a second statement to Officer Cummings, Jason said he had used drugs three days to a week earlier. (Tr 1085-1090) Jason testified at trial that he did not tell the police about the recent drug use because he was afraid the drug usage would get him in more trouble. (Tr 1602) He thought it would be worse for him if the police thought he was a "junkie." (Tr 1602) The trial judge's conclusion that the evidence was "clear" that Jason was not under the influence of drugs at the time of the crimes is not consistent with the evidence.

A defendant in a capital case does not have to be under the influence of drugs or alcohol at the time of the murders before his history of alcohol and drug abuse is to be

considered mitigating, Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985)(alcohol abuse mitigating even though defendant denied drinking at time of murder) This Court has held that a defendant's drug and alcohol abuse is a mitigating circumstance which must found and considered as a matter of law. E.g. Clark v. State, 609 So.2d 513 (Fla. 1992); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Ross v. State, 474 So.2d 1170. A history of drug and alcohol abuse is a mitigating circumstance. Ibid. The court found Jason's history of drug and alcohol abuse established, but then gave the factor "no weight" in mitigation. A finding of "no weight" actually is a finding that the mitigating factor does not exist, since the court must give any found, legally recognized mitigating circumstance some weight in the sentencing process. Campbell v. State, 571 So.2d 415 (Fla. 1990). This Court clearly stated in Campbell, "Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight." 571 So.2d at 420. Although the court concluded the evidence did not establish that Jason was under the influence of drugs or alcohol at the time of the homicides, this was not a sufficient reason to reject his drug and alcohol abuse history as a nonstatutory mitigating circumstance. Ibid. The court's "no weight" conclusion was equivalent to a rejection of the mitigating circumstance which was not legally permissible. Campbell.

The court failed to properly consider Jason's history of drug and alcohol abuse as mitigation. Mahn's death sentences have been unconstitutionally imposed. Art. I, Secs. 9, 16, 17 Fla. **Const.; Amends. V, VIII, XIV U.S. Const.**

ISSUE V

THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF A LIFE SENTENCE FOR THE HOMICIDE OF DEBBIE SHANKO.

This Court has consistently held that a jury's recommendation of life imprisonment must be given great weight, and:

> In order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so **clear** and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). In developing the meaning of this standard, this court has concluded that if mitigating evidence provides any reasonable basis upon which the jury might have relied, the trial judge must impose a life sentence in accordance with the recommendation. E.g., Morris v. State, 557 So.2d 27 (Fla. 1990); Cochran v. State, 547 So.2d 928 (Fla. 1989); Fead v. State, 512 So.2d 176, 178 (Fla. 1987); Ferry v. State, 507 So.2d 1337 (Fla. 1987). A trial court's sentence of death over a jury's recommendation of life will be affirmed only where the jury's decision is completely unfounded and unreasonable. Carter v. State, 560 So.2d 1166 (Fla. 1990). The fact that the sentencing judge disagrees with the jury's sentencing decision does not authorize an override and the imposition of a death sentence. Stevens v. State, 552 So.2d 1082 (Fla. 1989); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Rivers v. State, 458 So.2d 762, 765 (Fla. 1984).

The jury correctly recommended a life sentence for the murder of Debra Shanko. In rejecting the jury's decision, the

trial court simply disagreed with the jury. Furthermore, the court incorrectly concluded that the jury's decision was unreasonable because only nonstatutory mitigating circumstances were established which could support it. (R 294) The judge stated, "...the jury's recommendation of a life sentence could have been based only on minor, non-statutory mitigating circumstances or sympathy and was wholly without reason." See, Irizzary v. State, 496 So.2d 822 (Fla. 1986)(nonstatutory mitigation sufficient reasonable basis for jury's recommendation of life).

The jury's decision to recommend life for this homicide could have been reasonably based on the mitigating circumstances present in this case. Although, Mahn contends the trial court erred in failing to properly find, weigh and consider much of the mitigation, see, Issue IV, supra., the trial judge found seven nonstatutory mitigating factors established by the evidence. (R 292-294) These factors, alone, paint the picture of this crime and this defendant which demonstrate that the jury was correctly lead to the belief that a death sentence was not warranted.

1. Jason's Dysfunctional Family Background And Lack Of Parenting.

The trial judge gave this nonstatutory mitigating circumstance "substantial weight." (R 292-293) Several witnesses, including Jason's mother, testified to the fact that Jason was a neglected and abandoned child. He grew up with little no parental guidance. As the trial judge recognized,

"This lack of love and attention and caring about the Defendant was real." (R 292) Additionally, the court found, "... the abuse suffered by the Defendant at the hands of his mother and family was real." (R 292) This factor was a reasonable consideration for the jury. **E.g.**, Hegwood v. State, 575 So.2d 170 (Fla. 1991).

2. Mental And Physical Abuse Jason Suffered Growing Up.

Jason's mother and other witnesses confirmed that Jason was abused mentally and physically throughout his childhood. His mother not only neglected him, she also emotionally battered Jason with constant verbal abuse and criticism. Furthermore, Jason's mother and her various boyfriends and husbands physically beat Jason. These beating prompted police intervention more than once. His mother admitted using various objects to beat Jason, including a lead pipe on one occasion. Being beaten became a norm for Jason to the point his mother noticed he did not always react when struck. The trial judge gave this circumstance "substantial weight." (R 293-294) This Court has held child **abuse** a reasonable basis for a jury's life recommendation. E.g. Stevens v. State, 613 So.2d 402 (Fla. **1992)** ; Buford v. State, 570 So.2d 923 (Fla. 1990); Huddleson v. State, 475 So.2d 204 (Fla. 1985).

3. Jason's Drug Addiction And Alcoholism.

The trial judge found that the evidence established that Jason suffered from **a** long history of alcohol and drug abuse.

(R 293) However, the court gave the circumstance "no weight" because the evidence did not prove that Jason used drugs or alcohol on the night of the murders. (R 293) This conclusion was an improper evaluation of this mitigating factor. Alcoholism and drug abuse are legally mitigating even if there is no evidence of use of these substances at the exact time of the murder. See, Issue IV, supra. Additionally, regardless of the weight the judge afforded the factor, the jury was free to give it greater weight. Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988); Robinson v. State, 487 So.2d 1040, 1043 (Fla. 1986). This Court in Amazon v. State, 487 So.2d 8, 13 (Fla. 1986) held that even inclusive evidence of drug use was a sufficient mitigating circumstance for the jury to use to recommend a life sentence.

Evidence of Jason's drug and alcohol abuse certainly warranted more weight than the trial judge gave it. One of Jason's friends, David Butler, who was also a drug user, said Jason was "wired" and "in his own world" most of the time. (Tr 1491, 1494-1495) Upon first meeting Jason, Butler recognized that Jason was using LSD. (Tr 1491) Jason reported using LSD over 500 times. (Tr 1492) While in Texas, Jason earned the nickname "Acid Head." **(Tr** 1493) Butler personally used an assortment of substances with **Jason over** the time they were friends. (Tr 1493-1495) John Bingham, a licensed mental health counselor, and an expert in substance abuse counseling, examined Jason concluded his personality and behavior is consistent with an individual who has abused multiple drugs,

including LSD. (Tr 1515) Bingham stated that the extensive use of various drugs over a period of time could impair someone's ability to conform their actions to the law. (Tr 1515) A person with pre-existing mental health problems can become a lot worse with the chronic use of LSD. (Tr 1514) These individuals can become paranoid or psychotic and go into altered states of consciousness. They can believe things exist that simply are not there. (Tr 1514) Although he could not say Jason suffered a psychotic episode, he could not rule out the fact that drugs had something to do with the homicides in this case. (Tr 1519)

4. Jason's Youth.

This crime occurred on Jason's 20th birthday. Although the court concluded that Jason did not qualify for the statutory or nonstatutory mitigating circumstance concerning youthful age, see, Issue IV, supra. (R 293), the jury was free to consider Jason's age in mitigation of sentence.

5. Jason's Mental Problems.

The court found Jason's mental problems to be a nonstatutory mitigating circumstance. (R 293) The evidence supported the statutory mental mitigating circumstances, but the court improperly evaluated the evidence. See, Issue IV, supra. Nevertheless, the court found Jason's mental condition mitigating and weighed it in the sentencing decision. Again,

the jury could reasonably give more weight to Jason's mental impairments than the judge did.

6. Jason's Voluntary Confession And Remorse For The Crime.

These factors were established by the evidence. The court found them as nonstatutory mitigating circumstances. (R 293-294) These are also factors the jury could have reasonably used in reaching a life recommendation.

This case has many similarities to another jury override case where this Court held a death sentence improperly imposed. In Amazon v. State, 487 So.2d 8, the defendant was 19-years-old. Amazon burglarized his neighbor's house, committed a sexual battery on the woman who resided there with her eleven-year-old daughter. While taking the woman through the house looking for items to steal, Amazon came upon the daughter who was on the telephone calling for help. Amazon attacked and killed the daughter, stabbing her several times. The mother attempted to intervene and she also died from an attack causing multiple stab wounds. The victims bled to death over a fifteen to twenty-minute time period. There was inconclusive proof that Amazon consumed drugs that night. Amazon had a history of drug abuse. A psychologist testified that Amazon had been raised in a negative family setting resulting in lack of emotional maturity and was emotionally crippled. The jury recommended a life sentence. The trial judge found four aggravating circumstances and no mitigating factors. This Court reversed the death sentence and wrote:

The trial judge found no mitigating factors. However, we are persuaded that the jury could have properly found and weighed mitigating factors and reached a valid recommendation of life imprisonment. We believe there was sufficient evidence for the jury to have found that Amazon acted under extreme mental or emotional distur-bance. The defense theory in the guilt phase was that Amazon had acted from a "depraved mind," i.e., commit-ted second-degree murder. There was some inconclusive evidence that Amazon had taken drugs the night of the murders, stronger evidence that Amazon had a history of drug abuse, and testimony from a psychologist indica-ted Amazon was an 'emotional cripple" who had been brought up in a negative family setting and had the emotional maturity of a thirteen-year-old with some emotional development at the level of a one-year-old. Age could also be found as a mitigating factor. Although Amazon was nineteen, an age which we have held is not per se a mitigating factor. *Peek v. State, 395* So.2d 492 (Fla. 1980), *cert. denied, 451* U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), the expert testi-mony about Amazon's emotional maturity suggests that the jury could have properly found age a mitigating factor in this case.

In light of these mitigating circumstances, one may see how the aggravating circumstances carry less weight and could be outweighed by the mitigating factors. The heinous, atrocious and cruel murders were committed in a irrational frenzy. The evidence that Amazon killed to avoid arrest is the unsupported assertion by a detective that Amazon told him this. The defense showed on cross-examina-tion that this statement was not recorded anywhere by the detective, and the jury could well have discoun-ted the evidence. While the fact that the victims knew Amazon could allow inference of the

> aggravating factor, when considered in light of the "frenzied attack" hypothesis, Amazon may well have not considered avoidance of arrest when he killed his victim.

Ibid. at 13.

Mahn's case is less aggravated and more mitigated that Amazon. Like Amazon, Mahn is emotionally crippled because of his horribly abusive childhood. Mahn and Amazon were about the same age at the time of the crimes. Both had a history of drug and alcohol abuse and may have been under the influence of drugs at the time of the killings. Both killed in a manner consistent with an emotional, irrational frenzy. Both killed a mother and child in their own home, Amazon, unlike Mahn, was in the process of burglarizing and stealing. Amazon, unlike Mahn, committed a kidnaping and sexual battery. Mahn, unlike Amazon, was driven by a difficult family situation which caused him to lash out in anger. The jury recommendation of life in this case is certainly as reasonable as the one in Amazon.

Finally, in addition to the factors discussed above, this crime was the result of a domestic dispute. The crime was fueled by the passions and emotions of anger, resentment and jealousy which so often accompany these situations. Jason was angry at his father. This anger, no doubt, was deeply rooted in Jason's feelings of abandonment. Unfortunately, the eruption of these emotions resulted in the deaths two people. However, this Court has consistently acknowledged that murders occurring as the result of these difficult circumstances deserve mitigation and approved of jury life recommendations in

such cases. Douglas v. State, 575 So.2d 165 (Fla. 1991); Downs v. State, 574 So.2d 1095 (Fla. 1991); Fead v. State, 512 So.2d 176 (Fla. 1987); Irizzary v. State, 496 So.2d 822 (Fla. 1986); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Phippen v. State, 389 So.2d 991 (Fla. 1979); Chambers v. State, 339 So.2d 205 (Fla. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1976); Tedder v. State, 322 So.2d 908 (Fla. 1975). Even where significant aggravating circumstances exist, this Court has reversed death sentencing imposed over life recommendations in these cases. Ibid. Jason's case falls in the same category and deserves similar treatment.

The trial court erred in overriding the jury recommendation of life for the murder of Debra Shanko. This Court must reverse this sentence for imposition of life.

ISSUE VI

THE DEATH SENTENCES IMPOSED FOR THE MURDERS OF DEBRA AND ANTHONY SHANK0 ARE DISPROPORTIONATE.

In performing proportionality review, this Court evaluates the totality of the circumstances and compares the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. E.g., Terry v. State, 21 Fla. Law Weekly S9 (Fla. Jan. 1, 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). Such a review in this case demonstrates that the death sentences are not proportional and must be reversed. Art. I, Secs. 9, 17, Fla. Const.

Initially, Mahn adopts the arguments presented in Issue V, supra, concerning the propriety of the trial court's override of the jury's life recommendation for the homicide of Debra Shanko. The reason why the override is improper also demonstrates that a death sentence for that homicide is not proportional. Furthermore, the reasons presented in that issue are also applicable to show that a death sentence for the homicide of Anthony Shanko is likewise disproportionate. There are no substantial differences between the two crimes. The court found the same aggravating and mitigating circumstances. The trial judge did not articulate any substantial differences between the two. In fact, the sentencing orders for the two homicides are virtually identical. (R 284-295, 296-306).

This unfortunate intra-family killing was committed by a mentally and emotionally troubled young man who also suffered

from drug addiction and alcoholism. Having been abandoned and neglected his entire life, he thought he had a new chance when he moved to Florida to be with his natural father he never knew. Jason's mental and emotional problems were too deep-seated to allow him to capitalize on a new chance. His fears, his emotions, his anger which was surely fueled by years of neglect, his jealousy and drug use led him to the brink -- he lashed out and killed.

The state prosecuted this case on the theory that Jason was angry at his father and killed to spite his father. In Klokoc v. State, 589 So.2d 219 (Fla. 1991), this Court dealt with a very similar intra-family killing. Klokoc murdered his teenaged daughter while she slept to retaliate against his estranged wife. Over a two-week period before the murder, Klokoc continually threatened that someone near to his wife would be killed if he did not get his way. This Court concluded the murder was the product of Klokoc's mental condition and reversed for imposition of a life sentence. Mahn's case is substantially the same scenario of a mentally disturbed person whose anger and jealousy led him to kill someone in order to hurt another family member. As tragic as it is, this case does not warrant a sentence of death.

Many other times this Court has been faced with intra-family killings which were caused by mental problems and out-of-control emotions. In almost every one, this Court has concluded that a death sentence was disproportionate. See, e.g. Chaky v. State, 651 So.2d 1169 (Fla. 1995); White v.

State, 616 So.2d 21 (Fla. 1993); Penn v. State, 574 So.2d 1079 (Fla. 1991); Farinas v. State, 569 So.2d 425 (Fla. 1990); Blakely v. State, 561 So.2d 560 (Fla. 1990); Wilson v. State, 493 So.2d 1019 (Fla. 1986); Ross v. State, 474 So.2d 1170 (Fla. 1985); Blair v. State, 406 So.2d 1103 (Fla. 1981). This case is no different.

Jason Mahn's death sentences should be reversed for imposition of sentences of life in prison.

ISSUE VII

THE TRIAL COURT ERRED IN GIVING THE STANDARD JURY INSTRUCTION TO DEFINE THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE.

This Court held the standard jury instruction on the cold, calculated and premeditated aggravating circumstance to be unconstitutional in Jackson v. State, 648 So.2d 85 (Fla. 1994). The trial court in this case did not have the benefit of Jackson, since the trial was held before Jackson was decided. (Tr 1) Therefore, the court used the unconstitutional standard instruction and instructed the jury on the aggravating circumstance provided for in Section 921.141(5)(I) Florida Statutes as follows:

> Aggravating circumstance No. 5, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(Tr 1690) (written instructions at R 124) Use of this unconstitutional instruction tainted the penalty phase of Mahn's trial. His death sentence has been imposed in violation of the Eighth and Fourteenth Amendments and Article I, Sections 9, 16 and 17 of the Constitution of Florida.

In Jackson, this Court also held that the use of the unconstitutional instruction at trial could not be reviewed on appeal unless a specific objection to the instruction was made in the trial court. Ibid. at 90; see, also, Gamble v. State, 659 So.2d 242, 245 (Fla. 1995). Mahn met this requirement. Although Mahn's objection at the jury charge conference

primarily focused on the lack of evidence to support the instruction (Tr 1296-1297), the objection to the constitutionality of the instruction presented to the trial judge in a pretrial motion. (R 83-91) The trial court had the issue before it, and the issue has been preserved for this Court's review.

This use of the unconstitutional instruction cannot be considered harmless error, Unless the state can demonstrate beyond a reasonable doubt that the unconstitutional jury instruction did not contribute to the jury's sentencing recommendation, the error is not harmless. See, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Jackson v. State, 648 So.2d at 90. The state cannot meet its burden.

The jury did not have the proper legal guidance it needed to decide the issue of the existence of the CCP aggravating circumstance. Because the jury was not properly instructed on the law to be applied to the facts on this question, there is no way to determine if the jury reached a correct result. A reviewing court may presume that a properly instructed jury did not reach a decision for which there was insufficient evidence to support it. However, this presumption is not available where, as in this case, the jury was improperly instructed with an unconstitutional instruction, Sochor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992). In this case, there was insufficient evidence to support the CCP circumstance and the jury was not given a legal instruction on how to apply the law to that evidence. It is impossible to

determine if the jury erroneously considered the CCP circumstance, which was not factually supported, in the sentencing equation. The unconstitutional instruction could have mislead the jury's decision.

Mahn's penalty phase trial has been unconstitutionally tainted by the use of the unconstitutional CCP instruction. His death sentence must be reversed and remanded for resentencing with a new jury.

ISSUE VIII

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

The defense objected to the standard penalty phase jury instruction on the heinous, atrocious or cruel aggravating factor and requested a substitute instruction. (R 83-91) Counsel renewed his objection at the instruction charge conference. (Tr 1295-1296) The trial court overruled the objections and refused to give the requested instruction. (Tr 1296) The jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. Mahn recognizes that this Court has approved as constitutional the current standard jury instruction on the heinous, atrocious or cruel aggravating circumstance in Hall v. State, 614 So.2d 473 (Fla. 1993). However, he urges this Court to reconsider the issue in this case.

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

> Aggravating circumstance No. 4, the crime for which the defendant is to be sentenced was essentially[sic] heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with other[sic] indifferences[sic] or even enjoyment of suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was consciously[sic] or pitifully[sic] and was unnecessarily torturous to the victims.

(TR 1689) (written instructions at R 123-124). The instructions given were unconstitutionally vague because they failed to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV U.S. Const.; Art. I, Secs. 9, 16 & 17, Fla. Const.; Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990).

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

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious or cruel aggravating circumstance using the same definitions for the terms as the trial judge used in this case. The Mississippi court told the jury the same definitions of "heinous", "atrocious" and "cruel" as the trial judge told Mahn's jury. 112 L.Ed.2d at 4, Marshall, J., concurring. The Supreme Court remanded to the trial court stating, "Although the trial court in this case used a limiting instruction to define the 'especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L.Ed.2d at 4. Since the definitions employed here are precisely the same as the ones used in Shell, the instructions to Mahn's jury were likewise constitutionally inadequate. This Court held that the mere inclusion of the definition of the words "heinous," "atrocious," or "cruel" does not cure the constitutional infirmity in the HAC instruction. Atwater v. State, 626 So.2d 1325 (Fla. 1993).

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

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

(Tr 1689)(R 123-124). This addition also fails to cure the constitutional infirmities of the HAC instruction. First, the language in this portion of the instruction was taken from State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) and was approved as a constitutional limitation on HAC in Proffitt v. Florida, 428

U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). However, its inclusion in the instruction does not cure the vagueness and overbreadth of the whole instruction. The instruction still focuses on the meaningless definitions condemned in Shell. Proffitt never approved this limiting language in conjunction with the definitions. Sochor v. Florida, 504 U. S. 527, 112 S.Ct. 2114, 2121, 119 L.Ed.2d 326 (1992). This limiting language also merely follows those definitions as an example of the type of crime the circumstance is intended to cover. Instructing the jury with this language as only an example still gives the jury the discretion to follow only the first portion of the instruction which has been disapproved. Shell; Atwater. Second, assuming the language could be interpreted as a limit on the jury's discretion, the disjunctive wording would allow the jury to find HAC if the crime was "conscienceless" even though not "unnecessarily torturous." The word "or" could be interpreted to separate "conscienceless" and "pitiless and was unnecessarily torturous." Actually, the wording in Dixon was different and less ambiguous since it reads: "conscienceless or pitiless crime which is unnecessarily torturous." 283 So.2d at 9. Third, the terms "conscienceless," "pitiless" and "unnecessarily torturous" are also subject to overbroad interpretation. A jury could easily conclude that any homicide which was not instantaneous would qualify for the HAC circumstance. Furthermore, this Court said in Pope v. State, 441 So.2d 1073, 1077-1078 **(Fla.** 1983) that an instruction which invites the jury to consider if the crime was

"conscienceless" or "pitiless" improperly allows the jury to consider lack of remorse.

Proper jury instructions were critical in the penalty phase of Mahn's trial. However, the jury instruction as given failed to apprise the jury of the limited applicability of the HAC factor when the perpetrator of the homicide does not have the requisite intent to cause suffering. See, Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990). Mahn was entitled to have a jury's recommendation based upon proper guidance from the court concerning the applicability of the aggravating circumstance. The jury should have received a specific instruction on HAC which advised the jury of the necessary mental state required before HAC could be considered. The deficient instructions deprived Mahn of his rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution. This Court must reverse the death sentence.

CONCLUSION

For the reasons presented in Issue I, Jason Mahn asks this Court to reverse his convictions for a new trial. In Issue II, Mahn asks this Court to reverse his robbery conviction with directions that he be discharged on that offense. Alternatively, in Issues III through VIII, Mahn asks this Court to reverse his death sentences and remand for imposition of sentences of life imprisonment.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN #201170
Assistant Public Defender
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by ~~delivery~~ U.S. mail to Richard Martell, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Jason James Mahn, on this 18th day of January, 1996.

W.C. McLAIN

IN THE SUPREME COURT OF FLORIDA

JASON JAMES MAHN,	:	
Appellant,		
v.	:	**CASE NO. 83,423**
STATE OF FLORIDA,	:	
Appellee.	:	
_____/		

A P P E N D I X

TO

INITIAL BRIEF OF APPELLANT

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. **93-1738**

JASON JAMES **MAHN,**

Defendant.

ENTENCING ORDER **(COUNT 1)**

SUMMARY OF OFFENSES AND EVIDENCE

The Defendant, Jason James Mahn's, parents were divorced when he was **approximately** one year old. The Defendant was raised by this mother and stepfathers and a series of his mother's boyfriends. The Defendant moved many times, but spent considerable time in Texas and Oklahoma. The Defendant was constantly in trouble with law enforcement and school officials for causing problems. When the Defendant was **approximately** 18 years old, he located his father and asked him if he could move in with **him** if he **came** to Pensacola, Florida to live. The Defendant's father, Michael **Mahn,** and the Defendant were total strangers, but the father agreed, if the Defendant would work and **go** by the house rules,

The Defendant's father had lived with Debbie and Anthony Shanko as a family for the last 12 years. There was much love between the Defendant's father, Michael Mahn, and Debbie and Anthony Shanko.

The Defendant moved to Pensacola and moved into the home of his father with Debbie and Anthony Shanko. The father tried to help the Defendant secure jobs and encourage him to finish his education through the GED program. The Defendant would move in and out of the house based upon his ability to support himself through his jobs. The Defendant needed an automobile and with the help of his father the Defendant purchased a used automobile that was financed with the assistance of the father. It was expected that the Defendant would work and make the payments on his automobile. According to the Defendant's father, the Defendant could not or would not keep a job and the father advised him that he was going to sell the Defendant's automobile. The Defendant's father did sell the automobile and had left his home on April 1, 1993, to deliver the car to the new owner. After the father left his home that night, the Defendant waited until Debbie and Anthony Shanko were asleep and went into the kitchen and secured two large kitchen knives. The Defendant went into the bedroom of 14 year old Anthony Shanko and began stabbing him through the bedding comforter. Anthony began to scream, cry and fight for his life. While the Defendant was stabbing Anthony Shanko, his mother, Debbie Shanko, walked into the bedroom and the Defendant began to attack the mother. Anthony Shanko had approximately 8 wounds on his body and the mother, Debbie Shanko, had approximately 40 wounds on her body.

The Defendant took approximately $400.00 in cash from Debbie Shanko's room and stole her automobile. The Defendant took the backroads from Pensacola to Oklahoma. He stopped along the way and paid for the services of a prostitute. He bragged to a friend in Texas that he had killed five people in Pensacola.

When law enforcement tried to stop him outside of Tulsa, Oklahoma, he led them on a high speed chase that covered several counties and speeds that exceeded 125 **M.P.H.** in rain and darkness. When the Defendant was apprehended, he confessed to killing Debbie and Anthony Shanko.

This Court can conclude that the Defendant, Jason James Mahn , was mad and upset at his father for not being there for him as a child and when he was growing up. This Court can conclude that this Defendant was upset and mad at his father for selling his automobile on the day of these murders. This Court can conclude that to strike back at his father, he would kill two innocent people that had never done anything to the Defendant except show him love. This Court can conclude that this Defendant wanted to kill the two people that his father loved as his family. This Court can conclude that this was an act of revenge to make the father suffer through the deaths of his love ones.

The Defendant was tried before this Court on November 8, 1993 - November 16, 1993. The jury found the Defendant guilty of both counts of the indictment. (Count 1 - Murder in the First Degree of Debbie Shanko; Count 2 - Murder in the First Degree of Anthony Shanko) The jury also found the Defendant guilty in Case No. 93-2193 of Robbery with a Deadly Weapon which case was consolidated **for trial. The same jury** re-convened **on November 17, 1993. and evidence in support of aggravating factors and mitigating** factors

was heard. On November 17, 1993, the jury returned an eight to four recommendation that the Defendant be sentenced to death in the electric chair in Count 2 for the First Degree Murder of Anthony Shanko. The same jury returned as to Count 1; the First Degree Murder of Debbie Shanko, that the Defendant be sentenced to life in prison without the possibility of release for twenty-five years. On December 13, 1993, the Court requested from counsel for the defense a memorandum regarding what Statutory and Non-Statutory Mitigating Factors the defense would rely upon at sentencing. The Court received on January 21, 1994, the response from defense counsel advising which Statutory and Non-statutory Mitigating Factors they would rely upon at sentencing. On January 25, 1994, the Court held a further sentencing hearing where both sides made further legal argument. The Court set final sentencing for this date, February 23, 1994.

This Court, having heard the evidence presented in both the guilt phase and penalty phase, having had the benefit of legal memorandums and further argument both in favor and in opposition of the death penalty, finds as follows:

COUNT 1: MURDER IN FIRST DEGREE OF DEBRA JEAN SHANK0

A AGGRAVATING FACTORS

1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The Defendant was convicted of Robbery that occurred in 1992 The Defendant was on bond for the Robbery at the time of this double First Degree Murder. The Defendant was convicted of

the murder of Anthony Shanko. Both of these felonies involve the use or threat of violence to another person. This aggravating circumstance was proven beyond a reasonable doubt.

2. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The Defendant told several witnesses that he was jealous of the time his father gave to Debbie and Anthony Shanko. Debbie Shanko was in her own home, in her own bed, when the Defendant went to the kitchen and took two large kitchen knives. The Defendant by his own admission started to stab Anthony Shanko when Anthony was asleep and stabbed him up to eight times with one of the large kitchen knives. The Defendant by his own admission waited until his father left the house that night before he committed the murder of Anthony Shanko. The Defendant by his own admission says Anthony Shanko did not deserve this, but he was mad that his father had sold his automobile the day of the murder because the Defendant had defaulted upon his agreement to make the automobile payments. The evidence has established that the Defendant's father had a great deal of love for Anthony Shanko. The Defendant felt that his father was not there for him as a child when he was growing up with his mother. The Defendant by his own admission stated that he had thought about killing Anthony and Debbie Shanko, because he thought that they would die immediately rather than fight and cry and scream. The evidence does not support nor does the Defendant claim that he had any moral or legal justification. The aggravating circumstance was proved beyond a reasonable doubt.

3. The capital felony was especially heinous, atrocious, or cruel.

The victim, Debbie Shanko, was approximately 36 years old at the time she was murdered. The Defendant waited until his father left the house to sell the Defendant's car, and then took two large knives out of the kitchen to perfect this murder. As he was in the process of murdering Anthony Shanko with Anthony Shanko fighting, crying and screaming, the mother of Anthony Shanko walked into Anthony's bedroom to find the Defendant murdering her son. The Defendant turned on the mother and cut and stabbed her up to 40 times. She suffered more than one fatal blow from the Defendant's knife. Debbie Shanko, from the evidence, put up a fight for her life with her blood covered over most of the house. She had cuts and stab marks over most of her body. She died in the hallway after trying to use the telephones. Her blood was on the telephone sets, but the telephones were inoperable. The telephone in the Defendant's room was off the hook and did not have any blood on the telephone. One could conclude that the Defendant took his telephone off the hook to prevent anyone from calling for help.

The State has asked the Court to find two additional aggravating facts:

1. 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.

It is true that the jury convicted the Defendant of Robbery with a Deadly Weapon. It is also true that the taking of the property ($400.00 and an automobile) is only incidental to the killing and

not a motive for it. The evidence seems to indicate that he took the victim's property as an afterthought after he kills the victim.

2. The Capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The evidence seems clear that he planned to kill Debbie Shanko and the fact that she came to Anthony Shanko's bedroom when she heard her son screaming does not make this aggravating fact applicable.

While the State certainly has an argument that these two aggravating factors apply, it can not be said that they have been proven beyond a reasonable doubt. Therefore, the Court neither finds nor has it considered these two aggravating factors.

None of the other aggravating factors enumerated by statute is applicable to this case and none other was considered by this Court. None except as previously indicated in Paragraph 1 - 3 above was considered in aggravation.

B. MITIGATING **FACTORS**

STATUTORY MITIGATING FACTS

In its sentencing memorandum, the Defense requested the Court to consider the following statutory mitigating circumstances:

1. The Defendant has no significant history of prior criminal activity.

The evidence in this case has established that the Defendant has a prior conviction for Strong Arm Robbery in which violence was used against the victim. The Defendant was out of jail on bond for the Strong Arm Robbery when this First Degree Murder took place. The medical experts testified that the Defendant's own admissions and the testimony of the Defendant's family establish that the Defendant had been in trouble with law enforcement and school authorities constantly throughout most of his life. This mitigation circumstance does not exist.

2. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

All the doctors that testified in this case found no psychosis in this Defendant. Dr. Thomas testified that the Defendant was faking. Dr. Bingham testified that he was exaggerating. Dr. Larson testified that the Defendant was faking and malingering. All doctors that examined the Defendant said he was exaggerating the symptoms. This mitigating circumstance does not exist.

3. The Defendant acted under extreme duress or under the substantial domination of another.

No evidence has been presented to the Court that the Defendant acted under extreme duress or under the substantial domination of another. This mitigating circumstance does not exist.

4. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

The doctors that testified in this case indicated that the Defendant had the ability to appreciate the criminality of his conduct and conform his

conduct to the requirement of law, but he was unwilling to do so. This mitigating circumstance does not exist.

5. The age of the Defendant'at the time of the crime.

The double murder took place on the Defendant's 20th birthday. None of the doctors that testified said that the Defendant was retarded. The Defendant had recently received his GED. The Defendant knew the difference between right and wrong. The Defendant's age at the time of the crime is not a mitigating factor.

NON-STATUTORY MITIGATING FACTORS

The Defendant has asked the Court to consider the following non-statutory mitigating factors:

1. Family Background
2. Defendant's remorse
3. Potential for rehabilitation
4. Alcoholism, drug use/dependency
5. Mental problems that do not reach the level of statutory mitigating factors.
6. Abuse of the Defendant by his parents
7. Voluntary confession

#1: The testimony of the Defendant as well as some family and the experts shows that the Defendant was brought up by his mother and a series of stepfathers and boyfriends of his mother. The Defendant was given little guidance as he grew up and was left to his own devises growing up as a child This lack of love and attention and caring about the Defendant was real. The Court finds the abuse suffered by the Defendant at the hands of his mother and family was real. The Defendant came from

a broken home, but so have many children that do not take up a life of crime. The Court finds this to be a mitigating circumstance and the Court gave it substantial weight in the weighing process.

#2: The Defendant upon being arrested in the State of Oklahoma gave a recorded video statement. He said that the victim, Debbie Shanko, did not deserve what the Defendant did to her. When he gave a voluntary confession, he did not display grief. The Court gives this little weight in the weighing process.

#3: The Defendant is young and it is possible that long term care might help this Defendant, but it is clear that the Defendant has tried to mislead all the doctors that examined him. The Court gives this little weight in the weighing process.

#4: The Defendant began drinking alcohol at a very young age and would get drunk and fight and cause trouble most of his life. The Defendant has used all sorts of illegal drugs in the past, but the evidence in this case is clear that the Defendant was not under the influence of drugs or 'alcohol when he committed this double First Degree Murder. He said he wasn't and there is no evidence to suggest such. The Court gives this no weight in the weighing process.

#5: The Defendant has mental problems as testified by the doctors. They say he has a personality defect. All agree that he understands the difference between right and wrong and will not conform to society's rules. The doctors say he has the ability to conform, but not the desire or the willingness to do so. The Court finds that this mitigating circumstance was proven, but gives it little weight in the weighing process.

#6: The testimony of the Defendant as well as some family and the experts shows that the Defendant **was brought** up by his mother and a series of stepfathers and boyfriends of his mother. **The Defendant was given little guidance as he grew** up and was left to his own devices growing up as **a child. This lack of love and attention and caring about the Defendant was real. The Court finds the abuse suffered by the Defendant at the hands of'his mother and family was real. The Defendant came from a broken home, but so have many children that do not take up a life of crime. The Court finds this to be a mitigating**

circumstance and the Court gave it substantial weight in the weighing process.

#7: It is a fact that the Defendant gave a voluntary confession. At the time of his confession, the police had substantial physical evidence as well as a dying declaration that the Defendant was the person that committed this double First Degree Murder. Law enforcement did not need the confession to successfully convict this Defendant of the crimes charged. This mitigating circumstance has been proven by the evidence and the Court gave it little weight in the weighing process.

The Court has very carefully considered and weighed the Aggravating and Mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The Court finds that the jury's recommendation of a life sentence could have been based only on minor, non-statutory mitigating circumstances or **sympathy** and was wholly without reason. In this case the evidence of mitigation is miniscule in comparison with the enormity of the crime committed.

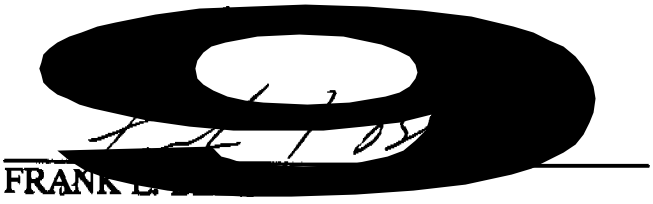
In this case the sentence of death is so clear and convincing that virtually no reasonable person could differ, and a **jury** override in light of the standard pronounced in Tedder **v.** State, 322 **So.2nd, 908 (Fla.** 1975) would be warranted. Bolender v. State, 422 **So.2nd,** 833,837 (Fla. 1982). See also **Zeigler** v. State, 16 FLW, S, 257,258 (April **19, 1991).**

Accordingly, it is

ORDERED AND **ADJUDGED** that the Defendant, Jason James **Mahn,** is hereby sentenced to death for the murder of Debra Jean **Shanko.** The Defendant is hereby **committed to the** custody **of the Department of** Corrections of the State of Florida for **execution of this sentence as provided by law.**

MAY GOD HAVE MERCY ON HIS SOUL.

DONE AND ORDERED in Pensacola, Escambia County, Florida this 23rd day of February, 1994.



FRANK [illegible]
CIRCUIT JUDGE

Copies furnished to:

Brenda Neel, Assistant State Attorney
F. T. Ratchford, Jr., Counsel for Defendant
Jason James Mahn, Defendant

IN THE CIRCUIT COURT IN AND FOR ESCAMBIACOUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. 93-1738

J A S O N JAMES MAHN,

Defendant.

SENTENCING ORDER COUNT 2)

SUMMARY OF OFFENSES AND EVIDENCE

The Defendant, Jason James Mahn's, parents were divorced when he was approximately one year old. The Defendant was raised by this mother and stepfathers and a series of his mother's boyfriends. The Defendant moved many times, but spent considerable time in Texas and Oklahoma. The Defendant was constantly in trouble with law enforcement and school officials for causing problems. When the Defendant was approximately 18 years old, he located his father and asked him if he could move in with him if he came to Pensacola, Florida to live. The Defendant's father, Michael Mahn, and the Defendant were total strangers, but the father agreed, if the Defendant would work and go by the house rules.

The Defendant's father had lived with Debbie and Anthony Shanko as a family for the last 12 years. There was much love between the Defendant's father, Michael Mahn, and Debbie and Anthony Shanko.

The Defendant moved to Pensacola and moved into the home of his father with Debbie and Anthony Shanko. The father tried to help the Defendant secure jobs and encourage him to finish his education through the GED program. The Defendant would move in and out of the house based upon his ability to support himself through his jobs. The Defendant needed an automobile and with the help of his father the Defendant purchased a used automobile that was financed with the assistance of the father. It was expected that the Defendant would work and make the payments on his automobile. According to the Defendant's father, the Defendant could not or would not keep a job and the father advised him that he was going to sell the Defendant's automobile. The Defendant's father did sell the automobile and had left his home on April 1, 1993, to deliver the car to the new owner. After the father left his home that night, the Defendant waited until Debbie and Anthony Shanko were asleep and went into the kitchen and secured two large kitchen knives. The Defendant went into the bedroom of 14 year old Anthony Shanko and began stabbing him through the bedding comforter. Anthony began to scream, cry and fight for his life. While the Defendant was stabbing Anthony Shanko, his mother, Debbie Shanko, walked into the bedroom and the Defendant began to attack the mother. Anthony Shanko had approximately 8 wounds on his body and the mother, Debbie Shanko, had approximately 40 wounds on her body.

The Defendant took approximately $400.00 in cash from Debbie Shanko's room and stole her automobile. The Defendant took the backroads from Pensacola to Oklahoma. He stopped along the way and paid for the services of a prostitute. He bragged to a friend in Texas that he had killed five people in Pensacola.

When law enforcement tried to stop him outside of Tulsa, Oklahoma, he led them on a high speed chase that covered several counties and speeds that exceeded 125 M.P.H. in rain and darkness. When the Defendant was apprehended, he confessed to killing Debbie and Anthony Shanko.

This Court can conclude that the Defendant, Jason James Mahn , was mad and upset at his father for not being there for him as a child and when he was growing up. This Court can conclude that this Defendant was upset and mad at his father for selling his automobile on the day of these murders. This Court can conclude that to strike back at his father, he would kill two innocent people that had never done anything to the Defendant except show him love. This Court can conclude that this Defendant wanted to kill the two people that his father loved as his family. This Court can conclude that this was an act of revenge to make the father suffer through the deaths of his love ones.

The Defendant was tried before this Court on November 8, 1993 - November 16, 1993. The jury found the Defendant guilty of both counts of the indictment. (Count 1 - Murder in the First Degree of Debbie Shanko; Count 2 - Murder in the First Degree of Anthony Shanko) The jury also found the Defendant guilty in Case No. 93-2193 of Robbery with a Deadly Weapon which case was consolidated for trial. The same jury re-convened on November 17, 1993. and evidence in support of aggravating factors and mitigating factors

was heard. On November 17, 1993, the jury returned an eight to four recommendation that the Defendant be sentenced to death in the electric chair in Count 2 for the First Degree Murder of Anthony Shanko. The same jury returned as to Count 1; the First Degree Murder of Debbie Shanko, that the Defendant be sentenced to life in prison without the possibility of release for twenty-five years. On December 13, 1993, the Court requested from counsel for the defense a memorandum regarding what Statutory and Non-Statutory Mitigating Factors the defense would rely upon at sentencing. The Court received on January 21, 1994, the response from defense counsel advising which Statutory and Non-Statutory Mitigating Factors they would rely upon at sentencing. On January 25, 1994, the Court held a further sentencing hearing where both sides made further legal argument. The Court set fmal sentencing for this date, February 23, 1994.

This Court, having heard the evidence presented in both the guilt phase and penalty phase, having had the benefit of legal memorandums and further argument both in favor and in opposition of the death penalty, finds as follows:

COUNT 2: MURDER IN FIRST DEGREE OF ANTHONY SHANKO

A. AGGRAVATING FACTORS

1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The Defendant was convicted of Robbery that occurred in 1992. The Defendant was on bond for the Robbery at the time of this double First Degree Murder. The Defendant was convicted of the murder of Debra Jean Shanko. Both of these felonies involve the use or threat of violence to

another person. This aggravating circumstance was proven beyond a reasonable doubt.

2. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The Defendant told several witnesses that he was jealous of the time his father gave to Debbie and Anthony Shanko. Anthony Shanko was in his own home, in his own bed, under his own comforter on his bed when the Defendant went to the kitchen and took two large kitchen knives. The Defendant by his own admission started to stab Anthony Shanko when Anthony was asleep and stabbed him up to eight times with one of the large kitchen knives. The Defendant by his own admission waited until his father left the house that night before he committed the murder of Anthony Shanko. The Defendant by his own admission says Anthony Shanko did not deserve this, but he was mad that his father had sold his automobile the day of the murder because the Defendant had defaulted upon his agreement to make the automobile payments. The evidence has established that the Defendant's father had a great deal of love for Anthony Shanko. The Defendant felt that his father was not there for him as a child when he was growing up with his mother. The Defendant by his own admission stated that he had thought about killing Anthony Shanko, because he thought that Anthony would die immediately rather than fight and cry and scream. The evidence does not support nor does the Defendant claim that he had any moral or legal justification. The aggravating circumstance was proved beyond a reasonable doubt.

3. The capital felony was especially heinous, atrocious, or cruel.

The victim, Anthony Shanko, was 14 years old at the time he was murdered. The Defendant took the two largest knives out of the kitchen to perfect this murder. The knife used on Anthony Shanko was a serrated knife. The Defendant cut a 2 1/2 - 4 1/2 inch hole in the chest of Anthony Shanko. Anthony's lung was damaged causing a sucking sound where he was taking air from the outside instead of down his mouth. The evidence established that he lived for one to two hours after the stabbing. The evidence established that he suffered great pain prior to dying. Anthony Shanko tried to call for help, but was unable to because the phone failed to work properly. Anthony was trying to defend himself because some of the wounds were defensive wounds. When the Defendant's father, Michael Mahn, returned home, Anthony told him that he was in pain and he was suffering. Anthony was begging the EMS personnel for help and telling them that it hurt to talk. He told EMS that he did not think he was going to make it. In addition to all the pain and suffering Anthony had to endure, he also had to watch the Defendant murder his mother, Debbie Shanko. The pain and suffering of watching and knowing the Defendant is stabbing his mother up to 40 times. Prior to Anthony Shanko dying, the evidence is clear that he knew his mother was dead, because Anthony told the Defendant's father (Michael Mahn) when he returned home that "She's dead. Jason did it. Call 911." He knew what happened to his mother but was helpless to offer her help because of his wounds. This aggravating circumstance was proved beyond a reasonable doubt.

None of the other aggravating factors enumerated by statute is applicable to this case and none other was considered by this Court. None except as previously indicated in Paragraph 1 - 3 above was considered in aggravation.

B. MITIGATING FACTORS

STATUTORY MITIGATING FACTS

In its sentencing memorandum, the Defense requested the Court to consider the following statutory mitigating circumstances:

1. The Defendant has no significant history of prior criminal activity.

The evidence in this case has established that the Defendant has a prior conviction for Strong Arm Robbery in which violence was used against the victim. The Defendant was out of jail on bond for the Strong Arm Robbery when this First Degree Murder took place. The medical experts testified that the Defendant's own admissions and the testimony of the Defendant's family establish that the Defendant had been in trouble with law enforcement and school authorities constantly throughout most of his life. This mitigation circumstance does not exist.

2. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

All the doctors that testified in this case found no psychosis in this Defendant. Dr. Thomas testified that the Defendant was faking. Dr. Bingham testified that he was exaggerating. Dr. Larson testified that the Defendant was faking and malingering. All doctors that examined the Defendant said he was exaggerating the symptoms. This mitigating circumstance does not exist.

3. The Defendant acted under extreme duress or under the substantial domination of another.

No evidence has been presented to the Court that the Defendant acted under extreme duress or under the substantial domination of another. This mitigating circumstance does not exist.

4. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

The doctors that testified in this case indicated that the Defendant had the ability to appreciate the criminality of his conduct and conform his conduct to the requirement of law, but he was unwilling to do so. This mitigating circumstance does not exist.

5. The age of the Defendant at the time of the crime.

The double murder took place on the Defendant's 20th birthday. The victim was 14 years old. None of the doctors that testified said that the Defendant was retarded. The Defendant had recently received his GED. The Defendant knew the difference between right and wrong. The Defendant's age at the time of the crime is not a mitigating factor.

NON-STATUTORY MITIGATING FACTORS

The Defendant has asked the Court to consider the following non-statutory mitigating factors:

1. Family Background
2. Defendant's remorse
3. Potential for rehabilitation
4. Alcoholism, drug use/dependency
5. Mental problems that do not reach the level of statutory mitigating factors.
6. Abuse of the Defendant by his parents
7. Voluntary confession

#1: The testimony of the Defendant as well as some family and the experts shows that the Defendant was brought up by his mother and a series of stepfathers and boyfriends of his mother. The Defendant was given little guidance as he grew up and was left to his own devises growing up as a child. This lack of love and attention and caring about the Defendant was real. The Court finds the abuse suffered by the Defendant at the hands of his mother and family was real. The Defendant came from a broken home, but so have many children that do not take up a life of crime. The Court finds this to be a mitigating circumstance and the Court gave it substantial weight in the weighing process.

#2: The Defendant upon being arrested in the State of Oklahoma gave a recorded video statement. He said that the victim, Anthony Shanko, did not deserve what the Defendant did to him. When he gave a voluntary confession, he did not display grief. The Court gives this little weight in the weighing process.

#3: The Defendant is young and it is possible that long term care might help this Defendant, but it is clear that the Defendant has tried to fool all the doctors that examined him and tried to mislead them. The Court gives this little weight in the weighing process.

#4: The Defendant began drinking alcohol at a very young age and would get drunk and fight and cause trouble most of his life. The Defendant has used all sorts of illegal drugs in the past, but the evidence in this case is clear that the Defendant was not under the influence of drugs or alcohol when he committed this double First Degree Murder. He said he wasn't and there is no evidence to suggest such. The Court gives this no weight in the weighing process.

#5: The Defendant has mental problems as testified by the doctors. They say he has a personality defect. AU agree that he understands the difference between right and wrong and will not conform to society's rules. The doctors say he has the ability to conform, but not the desire or the willingness to **do so.** The Court finds that this mitigating circumstance was proven, but gives it little weight in the weighing process.

#6: The testimony of the Defendant as well as some family and the experts shows that the Defendant was brought up by his mother and a series of stepfathers and boyfriends of his mother. The Defendant was given little guidance as he grew up and was left to his own devices growing up as a child. This lack of love and attention and caring about the Defendant was real. The Court finds the abuse suffered by the Defendant at the hands of his mother and family was real. The Defendant came from a broken home, but so have many children that do not take up a life of crime. The Court finds this to be a mitigating circumstance and the Court gave it substantial weight in the weighing process.

#7: It is a fact that the Defendant gave a voluntary confession. At the time of his confession, the police had substantial physical evidence as well as a dying declaration that the Defendant was the person that committed this double First Degree Murder. Law enforcement did not need the confession to successfully convict this Defendant of the crimes charged. This mitigating circumstance has been proven by the evidence and the Court gave it little weight in the weighing process.

The Court has very carefully considered and weighed the Aggravating and Mitigating circumstances found to exist in this case, being ever mindful that human life is at

stake in the balance. The Court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present.

Accordingly, it is

ORDERED AND ADJUDGED that the Defendant, Jason James Mahn, is hereby sentenced to death for the murder of Anthony Shanko. The Defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

Count Two shall run consecutive to the sentence imposed in Count One.

MAY GOD HAVE MERCY ON HIS SOUL.

DONE AND ORDERED in Pensacola, Escambia County, Florida this 23rd day of February, 1994.

FRANK L. BELL
CIRCUIT JUDGE

Copies furnished to:

Brenda Neel, Assistant State Attorney
F. T. Ratchford, Jr., Counsel for Defendant
Jason James Mahn, Defendant