IN THE SUPREME COURT OF FLORIDA

MICHAEL THOMAS COOLEN, :

Appellant, :

vs. : Case No. 84,018

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The record on appeal consists of three parts, numbered 1-1366, 1-549, and 1-6. The first part includes documents filed with the clerk, depositions, and transcripts from the penalty and sentencing proceedings. References to this portion of the record will be designated "R", followed by the appropriate page number.

The second part of the record on appeal consists of transcripts from the pretrial motion hearings, jury selection, and the guilt or innocence trial. References to this portion of the record will be designated "T", followed by the appropriate page number.

The final part of the record on appeal consists of a six page supplement filed April 25, 1995. References to this portion of the record will be designated "S", followed by the appropriate page number.

STATEMENT OF THE CASE

A Pinellas County grand jury indicted Michael Coolen, Appellant, on November 10, 1992, for first-degree murder in the stabbing death of John Kellar (R4-5). The State's motion in limine to limit the defense from cross-examining Barbara Caughman-Kellar with respect to subsequent sexual conduct with the victim's fourteen-year-old son which resulted in her being charged with a criminal offense was heard and granted (T5-11).

After a jury had been selected but prior to commencement of trial, Appellant moved to excise portions of his taped statement to police because reference was made to his prior criminal record in Massachusetts (T209-13, R714-28). The court ruled that the tape of the entire statement could be played to the jury because it reflected Coolen's attitude and explained his actions during the incident (T219).

Trial was held before Circuit Judge W. Douglas Baird and a jury on April 12-15, 1994 (T1-549). During the cross-examination of the homicide victim's wife, Barbara Caughman-Kellar, the defense profferred an exhibit containing the police report on the sexual battery complaint filed by her stepson (T337-49, R1008). The court rejected Appellant's contention that the subject matter of the charge bore on the credibility of the witness (T338-45). The court did allow the defense to bring out the fact that the witness had pled guilty to a felony and had been placed on pretrial intervention; but did not permit mention of the nature of the charge (T345-50).

Before Jamie Caughman, the victim's stepson, testified, Appellant moved in limine to bar him from testifying about an incident which allegedly occurred earlier on the evening of the homicide (T361-9). Defense counsel contended that the stepson's testimony about Appellant allegedly pulling a knife on him about an hour prior to the stabbing was an inadmissible prior bad act being used to show propensity (T367-8). The court ruled that the testimony was relevant as part of "the nature of his [Coolen's] conduct that evening" (T369).

In his motion for judgment of acquittal, Appellant argued that the State had failed to adduce any evidence of premeditation (T458-60). The trial judge denied Appellant's motion for judgment of acquittal of first-degree murder (T463-4). The defense rested without calling any witnesses (T464).

During the prosecutor's closing argument, Appellant moved for mistrial on three separate occasions (T500, 508, 516). The court denied each of the motions for mistrial (T500, 508, 516). The jury returned a verdict of guilty of murder in the first degree as charged (T544).

In the subsequent penalty phase, Appellant requested a limitation on the amount of witness testimony that the State would be allowed to present concerning the prior violent felony convictions (R1139-40). He also complained that the State was essentially presenting victim impact evidence with respect to the prior convictions (R1141-2). He further objected to the extraneous material written on the certified copies of the Massachusetts

judgments offered as State exhibits (R1179-82). The trial court overruled each of the objections (R1142, 1182).

During the defense case for mitigation, the State objected to hearsay testimony from witness Kathryn Coolen concerning Appellant's treatment as a youngster at the Judge Baker Clinic (R1189-91). The court sustained the State's objection, but allowed defense counsel to proffer testimony that the Judge Baker Clinic specialized in treatment of hyperactive children; that Coolen was taken there when he was eight or nine years old; and that his mother refused to return because the doctors suggested that she needed counseling as well (R1191-2, 1194-6).

The court also restricted testimony in mitigation by defense witness Matthew D'Ambrozio (R1210-1). This testimony about threats made against Coolen while he was employed at the Department of Public Works was also proffered (R1214-5).

During the penalty phase jury instruction conference, Appellant's request for a special jury instruction on "lack of intent to kill the victim" as a nonstatutory mitigating circumstance was denied (R1259-60). The jury, by a vote of 8-4, recommended that a sentence of death be imposed (R1312).

Sentencing was held June 20, 1994 (R1339-47). The court found one aggravating circumstance applicable; conviction of prior violent felony [section 921.141 (5) (b), Fla. Stat. (1991)] (R1340, 1088-9, see Appendix). In mitigation, the court found that no statutory mitigation existed and that nonstatutory factors of employment background, participation in self-help

programs while in jail, and being a caring relative were established (R1341-4, 1091-9, see Appendix). The judge gave no weight whatsoever to the nonstatutory mitigating factors of employment background and participation in self-help programs (R1342-5, 1096, see Appendix). He gave "only slight or marginal weight" to the "caring relative" mitigating factor (R1344-5, 1098-9, see Appendix). The court found that the aggravating circumstance outweighed the mitigation and imposed a sentence of death (R1345-6, 1099-1100, see Appendix).

On June 30, 1994, the court heard and denied Appellant's motion for new trial (R1103, 1108, S5). A timely notice of appeal was filed July 7, 1994 (R1109). The Public Defenders of the Sixth and Tenth Circuits were appointed to represent Coolen on appeal (R1121).

Jurisdiction lies in this Court pursuant to Article V, section 3 (b)(1) of the Florida Constitution and Fla. R. App. P. 9.030 (a)(1)(A)(i).

STATEMENT OF THE FACTS

A. GUILT OR INNOCENCE PHASE

On the afternoon of November 7, 1992, Barbara and John Kellar went to the Bradford Pub on Roosevelt Boulevard in Clearwater (T320-2). While they were drinking beer, they struck up a conversation with Michael Coolen, Appellant, and his girlfriend, Deborah Morabito (T322-3). The two couples drank beer and talked for three or four hours (T323). When the Kellars decided that it was time to go home to check on their children, they invited Coolen and Morabito to accompany them (T323-4).

The Kellars' residence was about one mile from the Bradford Pub (T321). On the way, each of the couples purchased a twelve pack of beer (T324-5). When they arrived at the Kellars' duplex, Coolen and Morabito parked their van in a wooded area behind the apartment (T326-7). The two couples sat outside around the van drinking beer (T327). As Barbara Kellar testified at trial, "we were all buzzed" (T328, 351).

Ms. Kellar's eight-year-old son James saw some fireworks in the van and Coolen agreed to shoot them off for him (T326-8). After Coolen returned to the van, there came a time when Deborah Morabito and John Kellar went into the apartment (T328-9). According to Barbara Kellar's testimony at trial, Coolen put his hand inside her shirt and she pushed him away (T329). Ms. Kellar did not see where Coolen went after this incident (T329).

When her husband returned, the Kellars were by the passenger side of the van (T329). Barbara Kellar testified that suddenly,

she saw her husband being backed up to the house and Coolen striking him (T330). She couldn't see whether Coolen had anything in his hand (T330). She heard John Kellar hollering; and ran to him when she saw him fall to the ground (T330). She covered his body and was struck herself by Coolen before he backed off (T330-1).

Barbara Kellar said that Coolen ran to the van and started to drive away (T331). Coolen hit a tree and the Kellars' truck in the process of leaving the yard (T331). It wasn't until she helped her husband into the house and saw all the blood that she realized that he had been stabbed (T332).

When Pinellas County Sheriff's Deputy Kenneth Wright arrived at the scene a few minutes later, he encountered eight-year-old James; who pointed out the van driving by on an adjacent street (T238-9). He decided to pursue the vehicle and stopped it nearby on Roosevelt Boulevard (T239-41). Coolen and Morabito were transported back to the Kellar residence where they were identified by Barbara Kellar (T248-9).

Deputy Dennis Peay testified that he tried to interview John Kellar at the scene but the victim was in too much pain to respond (T270). A helicopter transported Mr. Kellar to Bayfront Hospital in St. Petersburg (T270). Deputy Peay said that when Coolen later learned that Kellar had died, "he was hurt by it" (T291).

The medical examiner, Dr. Marie Hansen, performed an autopsy on the victim November 9, 1992 (T426). She determined that there

were six stab wounds to the body (T427). Two of these stab wounds were potentially fatal (T434, 436). A blood alcohol evaluation on the victim showed a .22 level, well over twice the legal limit for driving (T445-6). Dr. Hansen testified that if a person drank eighteen beers over an eight hour period, a .22 blood alcohol level might be reached (T450). A person who is habituated to alcohol might "be able to walk and do purposeful movements" even at a higher blood alcohol level, whereas a person unused to alcohol "may be dead at that level" (T451).

Deputy Michael Bailey testified that he could smell alcohol on Coolen (T260). Coolen told him that he had been drinking all day (T260). Deputy Peay stated that he determined that Coolen was intoxicated (T282). He observed that Coolen's motions were slow; his eyes were bloodshot; his speech was "somewhat slurred" (T283). If the deputy had stopped Coolen while driving, "he would have been arrested for DUI" (T283, 295).

Detective Michael Madden interviewed Coolen at the Sheriff's Administration Building around 2;00 a.m., approximately four hours after the stabbing (T398,401-2). The tape of this interview was played to the jury (T404-5). In his statement, Coolen admitted stabbing John Kellar with the knife which had been seized from the pocket of Deborah Morabito's coat (R716-8, T257-8). He explained that he was "playing word games" with Barbara Kellar, when John Kellar "copped an attitude" (R718). Appellant saw "something silver" in John Kellar's hand and thought that it might be the "little bitty twenty-two" handgun that Kellar had

said he owned (R716). Coolen continued:

> that's when I saw the flash, I don't know what he had in his hand. But I told you, he told me he had a twenty-two. It could of been a little fucking twenty-two, pull it back, that fucking twenty-two will kill me. So I stabbed him. And I ran.

(R720).

Barbara Kellar testified that her husband had owned both a shotgun and a small twenty-two pistol (T353-4). However, he did not bring them out anytime on the evening of the homicide (T353-5). She denied that her husband had fired the pistol that evening (T356). She admitted that she requested her brother-in-law to take the guns out of the house the day after the incident, but denied that the removal had anything to do with the pistol being fired (T355-6).

Barbara Kellar further denied that there was any argument between her husband and Coolen (T357). According to her, John Kellar "never said anything" and Coolen "came out of nowhere" (T357). John Kellar had a Busch Light beer can (silver in color) in his hand during most of the evening (T361).

James Caughman, Barbara Kellar's son, agreed that John Kellar had owned a twenty-two handgun, but he didn't see it that evening (T382). James testified that John Kellar got angry with Michael Coolen just before the stabbing because Coolen was picking up his beer (T383, 389-90). He described the stabbing incident as "fighting over the beer can" (T376).

Over objection, James was allowed to testify to an incident that allegedly occurred earlier that evening between Coolen and

himself (T361-9). The boy related at trial that he was lighting off fireworks with Coolen (T374). Then, while they were playing tag, James stepped on the door of the van (T374). The boy testified:

> he [Coolen] took me away from the van, put me on the ground and he took the knife out of his pocket and told me not to step on the door again.

(T374). James further alleged that Coolen threatened him with the knife and that he was scared (T380, 387).

On cross-examination, James was impeached by his deposition where he said that Coolen showed him the knife and told him that it was expensive (T380). At deposition, James specifically denied that Coolen ever threatened him with the knife (T381). The boy had to concede that he said at deposition that he wasn't threatened (T381). On further questioning, James admitted that while they were playing with fireworks, he had thrown one at his parents and Debbie Morabito (T388). James denied that Coolen had reprimanded him for throwing the firecracker (T388-9).

Over further defense objection, Detective Madden was permitted to testify to what James Caughman had told him two days after the homicide (T 395-7). The detective stated:

> He [James] started to climb up in it [the van] and Michael [Coolen] came up from behind him. Pulled him by the shirt. Pulled out a knife. Threatened him with it. He said it was a shiny silver knife. Folding knife. That he told him, "Don't do that again or I'll kill you.

(T398).

B. PENALTY PHASE

Michael Bylsma testified for the State with regard to the circumstances surrounding incidents in 1980 and 1987 which resulted in Appellant being convicted for violent felonies (R1145-68). The incident in the fall of 1980 started when Bylsma and a friend noticed that two cars had all of their tires flat and they saw Coolen running around with a knife (R1147-8). As Coolen ran past a porch where two girls were sitting, he "took a swipe at them with his knife" (R1149). This infuriated Bylsma's companion, John Zackular, who started chasing Coolen up the street (R1149). Bylsma followed (R1149).

Eventually, they cornered Coolen by a chain link fence (R1149). Zackular and Bylsma each had half of a broken brick in their hands (R1149). Zackular challenged Coolen to fight, but Bylsma tried to stop him because Coolen had a knife (R1150). Coolen then lunged at Bylsma and stabbed him three times (R1150-1). Bylsma was in a coma for three months after the stabbing (R1151-2). On cross-examination, Bylsma admitted that Coolen was running in the direction of his own home, while he and Zackular were chasing him (R1159). Bylsma also agreed that Zackular had a brick in his hand and wanted to fight Coolen (R1159, 1162).

The second incident occurred after Coolen had served time in prison for stabbing Bylsma. On Halloween evening in 1987, the Stadium Cafe in Everett, Maasachusetts, conducted a competition for the best costume (R1152). Bylsma was seated at the bar, when

Coolen entered, wearing a costume (R1153). Coolen motioned to Bylsma and said, "I'm going to get you" (R1153-4). When Bylsma left his barstool yelling, "Come on, if it's going to take this"; the bartender jumped over the bar and ejected Coolen (R1153, 1164). Once Coolen had been escorted from the bar, Bylsma's family and friends stood in the doorway and outside the cafe (R1154, 1170-3). Bylsma's brother, John Ellis, Jr., testified that Coolen went to his car on the other side of the street and pulled out a club with a spike in it (R1170-3). Coolen was "jumping up and down" and shouting, "I'll kill youse all, come on" (R1171, 1173).

Later that night when Bylsma returned home, Coolen followed in his vehicle (R1154). As Bylsma started up the stairs, he heard Coolen saying, "Mikey, Mikey, we got some unfinished business to settle" (R1154). Coolen was behind him carrying a bat and a butcher knife (R1154). Bylsma decided to pretend that he was reaching for a pistol and told Coolen, "You deserve it ... now I can kill you" (R1155). As Coolen retreated, Bylsma followed him to the middle of the street (R1155). According to Bylsma's testimony, Coolen started his car and attempted to run Bylsma over (R1155).

Bylsma's stepfather, John Ellis, Sr., testified that minutes later, Coolen was back outside their home beating on the electric meter with a baseball bat (R1177). Coolen was shouting that he would burn the house down and kill the whole family (R1177-8). The police arrived and apprehended Coolen (R1178).

Coolen pled guilty to three separate charges of assault with a dangerous weapon, one for each of the weapons with which he confronted Bylsma (R1181). The state introduced into evidence four other Massachusetts convictions for violent felonies (including the one for stabbing Bylsma) which Coolen pled to in 1980 (R1181-2).

In the defense case for mitigation, Kathryn Coolen, Appellant's aunt, testified that during the first sixteen years of Appellant's life, their families saw each other almost every week (R1184-5). She characterized Appellant's mother as "terribly strict and dominant to the point she was abusive" (R1186). She said that Appellant was "very hyper" as a child (R1186). The mother's solution was to chain him in the backyard like a dog from the time he was three until he reached the second grade in school (R1186-7). His mother "had a bad habit of pinching him terribly all the time", hitting him and calling him foul names (R1187). Although the parents showed much affection to Appellant's sisters, they showed none to him and his brother (R1188).

While Appellant's mother did not frequent bars, she did a lot of drinking at home (R1189). When the witness attempted to testify about what occurred when Appellant and his mother went to the Judge Baker Clinic (juvenile psychiatry), the State's hearsay objection was sustained (R1189-92).

Judy O'Connor, daughter of Kathryn Coolen and Appellant's cousin, recalled family visits when they were growing up (R1197-8). She characterized Appellant's parents as "mean" and said

that they often yelled at Appellant and his younger brother (R1199). Even when Appellant hadn't done anything, his mother "would hit or smack him" "just in case he wanted to get in trouble" (R1199). She remembered seeing Appellant and his brother tied to trees when they were young (R1200). On the other hand, their sister "could do no wrong and was sweet and wonderful in the parents' eyes" (R1200). Neither of the parents showed much affection to Appellant (R1200-1).

A videotaped deposition given by Michelle Garrity, Appellant's younger sister, was played for the jury (R1216-25). She testified that Appellant was ten years older than her and that he often babysat when she was growing up (R1217-8). He was a kind brother who was never violent towards her (R1218-9).

In November 1989, Appellant moved in with her, her husband and their daughter (R1220). He resided with them for six or seven months (R1220). He contributed to household expenses and helped take care of their infant daughter (R1220-2). Even after Appellant moved out of their house, he continued to babysit for them (R1223-4).

When Appellant was 29, his 23 year-old brother, Ronald, died in an auto accident (R1225). Garrity testified that Appellant was "really bothered" by the loss of his brother (R1225).

Other witnesses testified that Appellant was a hard worker when he was employed. William Najar, the owner of a sign shop, testified that he had known Appellant since he was six or seven because their families socialized together (R1203). Appellant

worked for his business off and on as a laborer (R1204-5). He was a willing worker and Najar would have employed him full-time if there had been enough business (R1205-6).

An officer with the Middle Sixth [sic] County Sheriff's Department, Matthew D'Ambrozio, testified that he had been a co-worker with Appellant on a road crew some years ago (R1207-8, 1212). They became close friends (R1208). Over the years, Appellant babysat his children (R1208-9). D'Ambrozio said that he had never seen Appellant "blow up" or even argue with other people (R1209-10).

Debra Morabito, Appellant's companion on the night of the homicide, testified that she had known Appellant for about sixteen years (R1226). He had never been abusive or violent towards her during the entire time she knew him (R1228). On the other hand, he drank excessively at times (R1228). She considered him to be an alcoholic and had suggested to him that he go to Alcoholics Anonymous (R1229-30).

Morabito further testified that Coolen "became a different person" when he drank (R1229). He didn't know when to stop (R1229). Morabito estimated that on the day of the homicide, Coolen had consumed twenty beers (R1230).

Because a defense witness did not appear at trial, a stipulation was read to the jury that Coolen had willingly participated in the Narcotic Anonymous program at the Pinellas County jail since November 1992 (R1268).

C. PRESENTENCE HEARINGS

Appellant made a sworn statement to the court and asked that the jury's recommendation be overridden (R1322-30). He expressed remorse for causing Kellar's death and asserted that he never intended to kill the victim (R1322). Appellant stated that Kellar had described "in detail" the two guns he owned (R1322). When he returned to the group after setting off fireworks with James, Debbie Morabito told him that John Kellar had been firing his pistol "at a tree or something" (R1325).

Coolen denied that he had pulled his knife on the boy, James, chased him, or otherwise threatened him (R1326). He denied that he had stuck his hand down Barbara Kellar's shirt (R1326). He stated that the incident was precipitated when Barbara made a funny comment and he put his hand on top of her leg (R1327). John Kellar took offense and told him not to touch his wife (R1327). Appellant replied to Kellar that he "should chill out" and turned to walk away (R1327). Out of the corner of his eye, Coolen saw a flash of silver in Kellar's hand (R1327).

Knowing that the handle of Kellar's pistol was mother-of-pearl, which glows a silvery gray at night; Coolen jumped to the conclusion that he was about to be assaulted (R1327). He stated:

> I reacted, and according to Detective Madden may have overreacted. But that overreaction is due to the alcohol in my system.

(R1328).

Coolen also pointed out that he had been highly intoxicated

when the stabbing incident with Michael Bylsma occurred in 1980 (T1328-9). He also pointed out that Bylsma's testimony at trial had not included the fact that Coolen had been hit in the face with a brick before the stabbing took place (R1329). Appellant attributed his troubles with the law to his drinking problem (R1329).

In conclusion, Coolen said that he hadn't meant to harm Kellar and that he wouldn't attack someone "for no reason at all as suggested in this courtroom. I was protecting myself. I reacted to the threat that I was under and believe existed at that time." (R1330).

At the second presentence hearing, Appellant supplemented his sworn statement and pointed out discrepancies in the State's sentencing memorandum (R1352-64). First, Appellant disputed the State's conclusion that the most serious wound inflicted on the victim was the last (R1353). He pointed out that three of his seven prior violent felony convictions were for assault with a dangerous weapon, rather than assault and battery (R1353-4). These all occurred in the same incident with Michael Bylsma in 1987 (R1354). He said that he was twenty feet away from the victim when these assaults took place (R1354, 1360-1).

Appellant further testified that when he went to the bar on Halloween night in 1987, he had no idea that Bylsma or his family would be there (R1355-6). He had painted his face because he wanted to participate in the costume party (R1356). Coolen explained that he had been subjected to many threats from

Bylsma's friends during his employment at the Department of Public Works and when he had attempted to drive a taxicab to supplement his income (R1356-9). When he entered the Stadium Cafe on Halloween night, he was pushed and shoved by Bylsma's friends before the bartender escorted him out (R1359-60). Coolen asked the judge to take these circumstances into account when considering his reaction; he admitted that "threats were made" (R1360).

Referring to his other prior convictions, Appellant stated that he had always been attacked first and usually by more than one individual (R1361-2). He asserted that if his blood alcohol level had been tested on the night he stabbed Kellar, it would have matched or exceeded Kellar's (R1362). He also was under the influence of drugs at that time, as evidenced by the marijuana and cocaine found in the van (R1362). He reiterated that all his prior troubles with the law came when he was intoxicated (R1363-4). Coolen concluded his statement by expressing sorrow that Kellar had died and denying that the killing was premeditated (R1364).

SUMMARY OF THE ARGUMENT

Viewed in the light most favorable to the State, the evidence fails to prove a premeditated killing. One eyewitness, the victim's wife, testified that Appellant simply "came out of nowhere" and stabbed the victim for no reason. Her testimony showed no proof that Appellant reflected and deliberated before the stabbing. The other state's eyewitness described an ongoing pattern of hostility between the two drunken men which culminated in a fight. From Appellant's own statement to the police, the jury could find that he reacted unreasonably in self-defense. When there is evidence that the killer acted from an honest belief that he was defending himself but this belief is unreasonable, the killing is not justifiable; but neither is it premeditated murder.

The portion of Appellant's tape recorded statement to the police which referred to his prior criminal record and prison sentences in Massachusetts should have been excised. The general rule that a evidence of a defendant's prior criminal history is overly prejudicial and inadmissible should have been applied here. Although the prosecutor claimed that the prior record was probative of Coolen's state of mind, in closing argument he clearly used it to argue bad character and propensity for violent behavior.

The child, James Caughman, should not have been permitted to testify about a separate incident where Coolen allegedly pulled a knife on him earlier in the evening. This was simply forbidden

bad character evidence rather than "state of mind", as contended by the prosecutor. Even if it could be viewed as inseparable crime evidence, any probative value was outweighed by the prejudice to Appellant.

Appellant was impermissibly restricted in his cross-examination of key state witness Barbara Caughman-Kellar by the court's ruling that he could not bring out the nature of the pending criminal charges against her. The error was clearly prejudicial because the credibility of her testimony was essential to the state's case of premeditation.

In the penalty trial, Appellant's right to present evidence in mitigation was violated when the court refused to let Appellant's aunt testify about the reason why he didn't receive needed psychiatric counseling when he was a child. Although the evidence was hearsay, it was highly relevant to the proposed mitigating circumstance of family background. The Eighth Amendment prohibits a state from applying its hearsay rule of evidence to bar relevant mitigating evidence offered by a capital defendant.

The prosecutor was allowed to feature the injuries received by Michael Bylsma in the 1980 incident where Appellant was convicted of a violent felony as a reason for the jury to recommend death. This was simply a nonstatutory aggravating circumstance. Likewise, the extraneous material on the foreign judgments was prejudicial, should have been deleted upon Appellant's request; and was used to make the impermissible argument that because Appellant had spent most of his adult life in prison, he

should now be executed.

During the charge conference of the penalty trial, Appellant requested a special instruction on "Jack of intent to kill the victim" as a mitigating circumstance of the offense. Although unartfully worded, the jury should have been allowed to consider Appellant's belief that he was acting in self-defense as a mitigating circumstance. Contrary to the court's ruling, the jury's verdict of premeditated murder did not necessarily reject the possibility that the killing was motivated by Appellant's honest but unreasonable belief that he was acting in self-defense.

There was substantial uncontroverted evidence that Appellant was highly intoxicated when the stabbing took place. There was also evidence that Appellant undergoes a personality change when he drinks and that he can't control his drinking. The sentencing judge unreasonably rejected this evidence as proof of the statutory mitigating circumstance of substantially impaired capacity. He further erred by failing to find that this evidence at least proved a nonstatutory mitigating factor.

Appellant presented "a reasonable quantum" of evidence that his family background should have been found to be a nonstatutory mitigating circumstance. The sentencing judge erred by failing to make this finding. The judge further erred when he found that two nonstatutory mitigating circumstances had been established, yet refused to give them any weight whatsoever.

Comparison of the facts of this case with those of similar cases show that a sentence of death is disproportionate here. A

death sentence supported by a single aggravating circumstance is not affirmed by this Court unless there is nothing or very little in mitigation. This Court has even found a death sentence disproportionate where there were two proven aggravating factors, but the homicide occurred during a sudden quarrel between intoxicated drinking companions.

ARGUMENT

ISSUE I

THE EVIDENCE WAS INSUFFICIENT TO PROVE A PREMEDITATED KILLING

The jury heard two essentially different eyewitness accounts of Coolen's stabbing of John Kellar as well as Appellant's exculpatory statement to the police. Neither the testimony of Barbara Caughman-Kellar nor that of James Caughman established proof that Coolen premeditated the homicide. While the jury rejected Appellant's claim of self-defense, that alone cannot establish premeditation. When evidence is insufficient to prove the element of premeditation, a verdict for first-degree murder cannot be sustained. Hoefert v. State, 617 So. 2d 1046 (Fla. 1993); Cochran v. State, 547 So. 2d 928 (Fla. 1989); Hall v. State, 403 So. 2d 1319 (Fla. 1981); Jenkins v. State, 120 Fla. 26, 161 So. 840 (1935).

The testimony of Barbara Caughman-Kellar showed that prior to the incident her husband and Deborah Morabito had gone inside the apartment (T329). She continued:

> I was sitting on the side of the van. Michael [Appellant] put his hand down my shirt and I pushed him off and I never saw him again.
>
> Q. Did he say anything to you when he did that?
>
> A. I don't recall that he did.

(T329). After John Kellar and Morabito had returned to the van, the witness said that she didn't know where Coolen was (T329).

Her husband was standing beside her on the passenger side of the van (T329). She described the stabbing as follows:

A. After that we sat there for a two minute time period, if that, and all of a sudden I remember John being pulled away. I just watched. I saw John being backed up to the house. I went to John. As he got close to the house he fell to the ground. I covered him.

Q. Was he being struck by Michael?

A. Yes.

Q. Could you see if Michael had anything in his hand?

A. No.

Q. Do you know how many times he was struck by Michael?

A. No.

Q. What was your husband doing while he was being struck?

A. Hollering. Moaning,

Q. Did you see your husband strike Michael at all?

A. No. He never had a chance.

Q. You say he wound up on the ground on the dirt between the van and the residence?

A. Right back up to the house.

Q. What did you do when that was occurring?

A. I ran to John and covered him.

Q. Did you get struck yourself?

A. Yes.

Q. Do you recall how many times?

A. No.

Q. Did you know at the time that you had been stabbed?

A. No. I didn't know John had been either.

(T330-1).

On cross-examination, the witness emphasized her inability to explain the incident. She was questioned:

Q. Do you have any idea why the argument broke out between your husband and Mr. Coolen?

A. What argument?

Q. The incident.

A. There was no argument,

Q. What precipitated it?

A. There was no argument.

Q. Just came out of the blue?

A. Michael came out of nowhere. There was no argument. John never said anything.

(T356-7).

James Caughman, on the other hand, testified that Appellant and John Kellar had shown mutual hostility prior to the incident. He was asked:

Q. Did your step-dad get angry that night at all? Upset at anybody?

A. Yes.

* * *

Q. What did he get upset about?

A. Michael picking up his beer can.

(T383). On cross-examination, the witness reiterated:

Q. Did John get mean or angry with anybody

that night ?

A. Michael.

Q. Just with Michael?

A. Yes.

Q. What did he say to Michael to get mean with him?

A. He said, "Don't pick up my beer again".

(T389).

James Caughman also testified that Appellant was angry at John Kellar that evening because "my dad picked up his beer" (T388). He attributed the stabbing incident to "fighting over the beer can" (T376).

To summarize, the state witness accounts are contradictory and neither provides sufficient evidence of premeditation. The testimony of the victim's wife portrays a sudden attack occurring without reason. Under Florida law, premeditation means "a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide". Spinkellink v. State, 313 So. 2d 666 at 670 (Fla. 1975), quoting from McCutchen v. State, 96 So. 2d 152 (Fla. 1957). One might speculate that Coolen deliberated before the incident began, but there is no evidence to prove that he did. As this Court said when reversing a conviction for first degree murder in Jenkins v. State, 120 Fla. 26, 161 So. 840 (1935), "the evidence of premeditated design ought to be supported by something more than guess work and suspicion". Accord, Weaver v. State, 220 So. 2d 53 at 59 (Fla. 2d DCA), cert. den.,

225 So. 2d 913 (Fla. 1969) ("point of time at which the specific intent to kill is inferentially formed cannot be left to guess-work and speculation").

With regard to the testimony of James Caughman, he basically described hostile words between two drunks which culminated in "fighting over the beer can" (T376). This is also inconsistent with a premeditated design to kill. To borrow from Judge Glickstein's dissenting opinion in Demuriian v. State, 557 So. 2d 642 (Fla. 4th DCA 1990):

> To say that there was premeditation here is to say there is premeditation in every record on appeal of fatal fights - drunk or sober - that come in and out of this courthouse.

557 So. 2d at 645.

When Appellant moved for judgment of acquittal, the prosecutor pointed to the "number of stab wounds, [and] the force that was used" as sufficient evidence of premeditation for the case to go to the jury on the charge of first degree murder (T462). The court ruled that there was adequate evidence of premeditation from the surrounding circumstances, explaining:

> at some point the defendant decided to use the knife and inflict the fatal wound. Something he thought about doing. Took the knife out and did it.

(T464).

Considering first the prosecutor's contention, Appellant agrees that under some circumstances "the nature and manner of the wounds inflicted" may be circumstantial evidence of premeditation. See, Larry v. State, 104 So. 2d 352 at 354 (Fla. 1958).

However, this factor is especially relevant in cases where the defendant claims that the stabbing was accidental. Compare, Wilson v. State, 493 So. 2d 1019 (Fla. 1986) (sufficient evidence of premeditation where one victim shot from a distance after being brutally beaten with a hammer; but insufficient evidence of premeditation where other victim was a bystander stabbed to death during struggle over a pair of scissors); Demuriian, supra. (four defensive wounds on victim's arm plus six stab wounds to the chest apparently inflicted with the victim lying on her back conflicted with defendant's version of an accidental stabbing during a struggle). At bar, there is nothing inconsistent about the wounds inflicted on Kellar with Appellant's explanation that he believed that he was acting in self-defense when he went into a stabbing frenzy. As this Court recognized in Mitchell v. State, 527 So. 2d 179 (Fla. 1988), a number of stab wounds inflicted with great force is consistent with a rage, panic, or stabbing frenzy. The Mitchell court concluded:

> A rage is inconsistent with the premeditated intent to kill someone, and there was no other evidence of premeditation.

527 So. 2d at 182. The same is true in the case at bar.

Turning to the trial judge's ruling that deciding to take out the knife and use it was sufficient evidence of premeditation; if this were true, every homicide committed with a weapon would be first degree premeditated murder. It is not the decision to use a weapon that constitutes premeditation, but "a fully-formed conscious purpose to kill, which exists in the

mind of the perpetrator for a sufficient length of time to permit of reflection". Sireci v. State, 399 So. 2d 964 at 967 (Fla. 1981), cert. den., 456 U.S. 984 (1982). "It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned". Id., citing Larry v. State, 104 So. 2d 352 (Fla. 1958).

The prosecutor blurred the distinction between this requisite conscious purpose to kill and the defendant's simply being conscious of what he was doing. The prosecutor argued to the jury in closing:

> The Defendant had to make a conscious decision to go . . . to the area where the victim was.
>
> He had to make the second conscious decision of unhooking the button that held the knife. Had to take the knife out. Then he had to make a further conscious decision of the first stab wound.
>
> * * *
>
> After those three stab wounds the victim would not have died. The Defendant then had further conscious decisions to make. What was the conscious decision that he made then? I'm going to keep on stabbing him. That's the conscious decision that he made.

(T512-3). Nowhere in his argument however, did the prosecutor identify a time where Appellant deliberated before making these "conscious decisions". Indeed, the prosecutor seems to have merely used the words "conscious decision" to mean voluntary act. The argument only makes a case for manslaughter under section 782.11, Florida Statutes (1993) (unnecessary killing to prevent

unlawful act), not premeditated murder.

Finally, Appellant's statement to the police is consistent with the evidence and with the absence of premeditation. Certainly the jury could have found that Appellant reacted unreasonably and was therefore guilty of some type of unlawful homicide. But even the prosecutor did not dispute Appellant's contention that he honestly believed from a subjective viewpoint that he was in danger from "something silver" in the victim's hand. A key part of the prosecutor's argument was devoted to portraying Coolen as a person whose "mind works a different way than yours or mine" (T508, see also T507, 515-6). Implicit in this argument is the recognition that while Appellant perceived a threat which was not real and overreacted to it, he did not have the reflective state of mind necessary for premeditation to exist.

Other circumstances support the reasonable hypothesis that the evidence at bar fits what some courts and commentators call "imperfect self-defense". As explained by the Maryland Court of Appeals:

> If the trier of fact is convinced that the defendant honestly believed that the use of force was necessary to avoid serious bodily injury, but also finds this subjective belief to be unreasonable under the circumstances, the defendant is guilty of manslaughter, not murder. The murder charge is defeated because the defendant's subjective belief is mitigating evidence which negates the State's proposed proof of malice. However, because the jury found the defendant's subjective belief to be unreasonable, the defendant is without complete justification or excuse for the criminal act and must be convicted of voluntary manslaughter.

Simmons v. State, 313 Md. 33, 542 A. 2d 1258 at 1261 (1988). Some other states have statutes which codify the imperfect defense. For instance, Pennsylvania law provides in the voluntary manslaughter statute:

> (b) Unreasonable belief killing justifiable.- A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing . . . but his belief is unreasonable.

18 Pa. C.S.A. § 2503. See also, Ch. 720, Illinois C.S.A. § 5/9-2 (2) (reduces crime from first to second degree murder); In re Christian S., 7 Cal. 4th 768, 30 Cal. Rptr. 2d 33, 872 P. 2d 574 (1994)"

In Florida, there has been no general development of the doctrine of imperfect self-defense. However, there has been some recognition by this Court that there are circumstances where an intentional killing is neither justifiable nor premeditated murder. In Popps v. State, 162 So. 701 (Fla. 1935), this Court wrote:

> a plainly unnecessary killing, even in defending one's self against an unlawful personal attack being made by the person slain, may be deemed manslaughter, where a plea of justifiable homicide . . . is interposed as justification, but such defense is not sufficiently supported to constitute an absolute bar to conviction . . . .

162 So. at 702 (e.s.). More recently, in Banda v. State, 536 So. 2d 221 (Fla. 1988), this Court wrote in striking the CCP aggravating circumstance:

> a colorable claim exists that this murder was

> motivated out of self-defense, albeit in a form clearly insufficient to reduce the degree of the crime.

536 So. 2d at 225 (e.s.). While this language in Banda is dicta insofar as establishing a doctrine of imperfect self-defense, it clearly contemplates the existence of a form of self-defense sufficient to reduce the degree of the crime without providing complete justification.

As applied to the facts at bar, Appellant's statement to the police provided a reasonable hypothesis that the killing was motivated by self-defense under circumstances that it was neither premeditated nor completely justified. Coolen told the police that the two couples had been drinking beer all evening and he had been "playing word games with his [the victim's] old lady" (R716, 718, 726). He said that Kellar "got a bad attitude" over this joking with his wife (T716-8, 726)[1]. Kellar "had gone in the house and come out and there was something in his hand" (R716). Because Kellar had told him earlier in the evening that he owned "a little bitty twenty-two" handgun, Appellant feared that the silver object in Kellar's hand might be the pistol (R716, 718, 720-1). He conceded that he never saw the gun on the evening; he didn't know "if he had it on him or not or whatever" (R718). Coolen reacted or overreacted by pulling the knife out and stabbing Kellar several times (R716-7, 720-1, 726).

All of Coolen's statement is consistent with the testimony

[1] This description of some hostility is consistent with Jamie Caughman's testimony.

of the state witnesses at trial that Kellar had a silver-colored beer can in his hand when the incident began (T360-1, 376). The most incriminating part of Coolen's statement to the police was where he admitted that he acted on his paranoid belief that the silver object was a weapon without any hesitation or concern that he might be mistaken:

> All right, to me that's a hunk of steel, I don't give a shit if it's a beer can, a, or whatever, or a bobby pin. To me it's steel. I've done eight years in a can. I don't take chances. Because I'd rather be alive and be stupid and do a couple of years in a can than be real dumb, and be beside my brother in the ground.

(R721). This outburst (which immediately preceded Appellant's learning that Kellar had died) is ample evidence from which a jury could convict Appellant of second degree murder.[2] At the same time, it clearly shows no premeditated design to kill Kellar.

When the state's case fails to exclude a reasonable hypothesis that the homicide occurred without premeditation, a first degree murder conviction cannot be sustained. Hoefert, susra; Smith v. State, 568 So. 2d 965 (Fla. 1st DCA 1990); Tien Wang v. State, 426 So. 2d 1004 (Fla. 3d DCA), rev. den., 434 So. 2d 889

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[2] §782.04 (2), Fla. Stat. (1993) provides:

> The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree....

(Fla. 1983); Hall, supra. Appellant's statement to the police was consistent with all the evidence and revealed at most a reckless state of mind and unreasonable self-defense rising to a level of culpability no higher than second degree murder. Accordingly, the trial judge should have reduced the charge from first degree murder when the case was submitted to the jury. As other errors occurred which require a new trial, when Coolen is retried it should be for a maximum charge of second degree murder.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO EXCISE PORTIONS OF HIS TAPED STATEMENT TO THE POLICE WHICH REFERRED TO HIS PRIOR CRIMINAL RECORD AND PRISON SENTENCES IN MASSACHUSETTS.

After a jury had been selected, but prior to the commencement of trial, the court heard a defense motion to redact Appellant's taped statement to Detective Madden so that the jury would not hear about his criminal record and prison sentences in Massachusetts (T209-19). Specifically, Appellant moved to excise the following statements from the tape:[3]

> I've done eight years in the maximum prisons up in Massachusetts (T210, R716-7).
>
> I've done time in Massachusetts (T211, R718).
>
> I've done eight years in a can (T212, R721).
>
> there's only poor little me with a shit bum record that's sixteen feet long that says (inaudible), who are they going to believe. Not the ex-criminal, not the ex-felon, because he's an ex-felon and an ex-criminal and piece of shit. So he must lie.
>
> Is Massachusetts the only state that you've gone to prison in (T212, R724).

Appellant argued that these statements referred to his prior

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[3]The deletion of two other statements was also requested by trial counsel. One referred to Appellant's ability to use a knife (R720) and could lead the jury to infer that he had stabbed other people in the past. The other referred to the suicide of Deborah Morabito's husband (R725) which was totally irrelevant. In the interest of maintaining a coherent and concise argument, Appellant is only arguing at length about the statements referring directly to prior criminal record. However, he is not waiving the admissibility of these other prejudicial statements and requests that this Court order them stricken as well.

criminal record which would not otherwise be admissible into evidence (T213).[4]

The prosecutor conceded that a defendant's prior criminal record was not admissible to prove his propensity to commit a crime, but argued that "this is the defendant's explanation of his state of mind" (T214). The prosecutor relied heavily on this Court's opinion in Jackson v. State, 498 So. 2d 406 (Fla. 1986) which approved admission of the defendant's statement that she shot a police officer who was placing her under arrest because "she wasn't going back to jail" (T215-7, 498 So. 2d at 410). The trial judge agreed with the prosecutor's contention that Appellant's statements had relevance beyond the fact of his prior criminal record (T219). He ruled that the jury could hear the entire tape of Appellant's statement (T219). Appellant renewed his objection at the time that the tape was offered at trial and the court noted it (T404).

In Green v. State, 190 So. 2d 42 (Fla. 2d DCA 1966), the court wrote:

> For decades in Florida – in fact since 1886 – convictions have been reversed because of admission of evidence of other offenses wholly independent of the case being tried. Such evidence must be excluded if it has no direct bearing in proof of the instant case and where the only probative value is to prove a wholly extraneous offense.

190 So. 2d at 45. More recently, this Court explained in Craig

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[4]See, McGuire v. State, 584 So. 2d 89 (Fla. 5th DCA 1991) (conviction reversed where witness stated that the defendant had been "doing time in Georgia").

v. State, 510 So. 2d 857 (Fla. 1987):

> In a criminal trial, it is generally improper to admit evidence tending to show that the accused committed crimes other than those of which he stands accused. This rule is but a specific application of the more general principle that all evidence must be relevant to a material issue. But 'collateral crime' evidence is given special treatment because of the danger of prejudicing the jury against the accused either by depicting him as a person of bad character or by influencing the jury to believe that because he committed the other crime or crimes, he probably committed the crime charged.

510 So. 2d at 863.

At bar, the evidence admitted was even more prejudicial to Appellant than mere commission of other offenses; it showed convictions and prison sentences. The jury might infer from hearing that Appellant was confined in a maximum security prison that he was an especially dangerous offender. Hearing that he had a criminal record "sixteen feet long" would lead the jury to believe that he was an incorrigible habitual offender. Florida courts have reversed convictions where the prejudice from evidence of prior wrongdoing put before the jury was absolutely trifling by comparison. See, Dixon v. State, 426 So. 2d 1258 (Fla. 2d DCA 1983) (evidence of defendant's prior arrests); Hardie v. State, 513 So. 2d 791 (Fla. 4th DCA 1987), rev. denied, 520 So. 2d 586 (Fla. 1988) (police officers' testimony that they were acquainted with defendant suggested prior criminal conduct); Russell v. State, 445 So. 2d 1091 (Fla. 3d DCA 1984) (reference to "mug shots").

The question at bar is whether Coolen's references to his

prior prison sentences and long criminal record were so relevant to a material fact in issue that the probative value of his statements outweighed the heavy prejudice. Compare, Kelvin v. State, 610 So. 2d 1359 at 1365 (Fla. 1st DCA 1992) (applying balancing test to reject evidence of prior conviction, contested deportation order and status on bond as motive for engaging in gun battle with police). The trial court's reliance on this Court's decision in Jackson v. State, supra, dictates a close analysis and comparison between the facts in Jackson and those at bar.

In Jackson, the defendant shot and killed a police officer who had arrested her and placed her in the back seat of the officer's patrol car. This Court approved admission of witness testimony that Jackson admitted shooting the officer "because she 'wasn't going back to jail"'. 498 So. 2d at 409. The Jackson court held that the statement was relevant to prove motive. Likewise, the statement was also relevant to the disputed issue of premeditation.[5]

At bar, however, the disputed issue was put into focus by Coolen's statement to Detective Madden that he "react[s] very quickly" and Madden's reply, "Maybe you over react sometimes" (R717). Coolen went on to say:

> I saw something in his hand. I saw something, whether it was a figment of my imagi-

[5]On resentencing, Jackson contended that she "perceived the struggle with Officer Bevel as an attempted rape and shot the officer as the result of a panic attack". 648 So. 2d 85 at 87 (Fla. 1994).

> nation or not, I saw something in his hand, whether I was wrong or not. I'd rather be safe than sorry....

(R717). Evidence of Coolen's past prison sentences might shed light on the question of why he reacts quickly; but that is irrelevant to the issue for the jury to decide - whether the stabbing was justifiable self-defense or whether it was a homicidal overreaction. Contrary to the prosecutor's assertion, Coolen's past prison sentences had nothing to do with any motive to stab Kellar (T216-7). While the prison sentences may have been marginally probative of Coolen's state of mind, there was other state-of-mind evidence. Certainly the prejudice from allowing the jury to hear about maximum security confinement outweighs the probative value of attributing a cause to quick reflexes.

Of even less relevance is Coolen's comment about his prior criminal record - "sixteen feet long". This was elicited by Detective Madden when he asked Coolen what he thought the "consequences should be" (R724). Coolen replied with a pessimistic assessment of his chances to prevail on a claim of self-defense because of his prior criminal history (R724). In the first place, whether or not an accused expects to be convicted at trial is immaterial and inadmissible. Compare, Saperito v. State, 490 N.E. 2d 274 (Ind. 1986) (defendant's reference in letter to his expected sentence if convicted was properly deleted). Secondly, Coolen's lack of knowledge that the Rules of Evidence could bar admission of his prior record doesn't act as a waiver.

A case on point is Paul v. State, 340 So. 2d 1249 (Fla. 3d DCA 1976), cert. den., 348 So. 2d 953 (Fla. 1977). When Paul was questioned following his arrest, he admitted to committing seventeen other burglaries. This statement was admitted at his trial. The court reversed the conviction because the evidence of being a habitual offender deprived the defendant of a fair trial. Coolen's sixteen foot long prior record is comparable to Paul's seventeen prior burglaries as far as the extent of prejudice conveyed to the jury.

Any representation by the State that Coolen's prior criminal record was not being offered to prove bad character and propensity for violent behavior was refuted by the prosecutor's closing argument. Throughout the argument, the prosecutor emphasized that Coolen's "mind works a different way than yours or mine" (T508, see also T497, 515). Besides being objectionable as a "golden rule" argument (T508, 516), the prosecutor's argument also highlights Coolen's alleged propensity to become violent. The prosecutor underscored this improper factor when he summed up:

> we know about Michael Coolen because we listened to the tape. We know the background and experiences that he, unsolicited, told us about himself.

(T515, see also T508). In other words, Coolen's conduct was shaped by being in maximum security prison and he should be viewed by the jury as a dangerous person with a criminal mind.

Appellant was further prejudiced by the prosecutor's argument that Coolen was commenting "on his own credibility" when he

expressed pessimism about the probable outcome of his trial (T516-7). The prosecutor emphasized Appellant's "shit bum record" and asserted that Coolen "didn't believe it the night that he was telling Detective Madden that story" (T516-7).

In short, the best proof of why the prosecutor wanted Coolen's statements about his prior criminal record included in the tape played to the jury is the fashion in which the prosecutor argued Coolen's criminal propensity as the reason to disbelieve his defense. Accordingly, this Court should now reverse Appellant's conviction and remand for a new trial.

ISSUE III

THE TRIAL COURT ERRED BY ADMITTING TESTIMONY FROM JAMES CAUGHMAN ABOUT A THREAT APPELLANT ALLEGEDLY MADE TOWARDS HIM EARLIER BECAUSE ITS SOLE RELEVANCE WAS TO PROVE BAD CHARACTER.

Prior to James Caughman's testimony as a state witness, defense counsel moved in limine to exclude any mention of an incident which allegedly occurred earlier in the evening where Coolen allegedly threatened the child witness with the knife that was used in the stabbing. The judge noted that the state had not furnished the ten day notice required for Williams Rule evidence (T364). The state contended that the incident was "inextricably intertwined" with the other events of the evening and disagreed that it was being offered as Williams Rule evidence (T364-5).

The prosecutor further argued that the alleged threat to the child was relevant to show Coolen's state of mind on that evening (T365-8). He explained:

> our theory of the case is this is a guy who's handy with a knife. Bought it that day. Unprovoked he pulls out knives. This is something that happened, certainly within the hour . . . but slight provocation or no provocation, he pulls a knife on a nine-year-old.

(T366). Defense counsel responded that the state was simply offering character evidence with an inadmissible prior bad act (T367). The prosecutor then defined what he called "state of mind" as:

> That he [Coolen] overreacts at the slightest provocation or no provocation. Is willing to pull a knife for no reason....

The judge ruled that the testimony would be admissible because "it shows the nature of his conduct that evening" (T369).

In accord with this ruling, Jamie Caughman was permitted to testify that after Coolen let him shoot off some fireworks, Coolen and he were playing tag (T374). Then, according to Jamie:

> I went to step on the door over at the van and he took me away from the van, put me on the ground and he took the knife out of his pocket and told me not to step on the door again.

(T374). On cross-examination, Jamie was impeached when he denied testifying at his deposition that Appellant had shown him the knife and told him that it was expensive (T380). Jamie agreed that at deposition he had said that Coolen never threatened him with the knife (T381).

The impeachment of James Caughman opened the daor far Detective Madden to testify regarding Jamie's statements to him shortly after the homicide (T396-7). Detective Madden testified:

> James explained that he was going back towards the van that Michael and Deborah were in. That they come [sic] to the house in. He started to climb up in it and Michael came up from behind him. Pulled him by the shirt. Pulled out a knife. Threatened him with it. He said it was a shiny silver knife. Folding knife. That he told him, "Don't do that again or I'll kill you".

(T397-8).

If believed by the jury, depicting Appellant as someone who would threaten a nine-year-old at knifepoint would cause overwhelming prejudice. Although the prosecutor contended that he was introducing "state of mind" evidence, he failed to explain

how it was to be distinguished from the Rule of §90.404 (1), Florida Evidence Code regarding character evidence:

> (1) Character Evidence Generally. Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion....

The prosecutor's assertion that the incident with Jamie showed that Coolen was "handy with a knife" and that he "overreacts" with little or no provocation also demonstrates why it should be inadmissible. Either the state was offering the separate incident to prove a character trait or else it was being introduced to prove propensity to confront people with a knife. Under either theory, the evidence should be inadmissible. Cf., §90.404 (2) (a), Florida Evidence Code (similar fact evidence . . . inadmissible when the evidence is relevant solely to prove bad character or propensity); Bolden v. State, 543 So. 2d 423 (Fla. 5th DCA 1989) (argument that prior crime was relevant to show a "pattern of conduct" was "exactly why the evidence was inadmissible").

The more difficult question is whether the alleged incident with Jamie was admissible as "inextricably intertwined" with the charged offense. As this Court explained in Griffin v. State, 639 So. 2d 966 (Fla. 1994), inseparable crime evidence is not Williams Rule evidence. The basis for its admission is not the similarity of facts but because "it is a relevant and inseparable part of the act which is in issue". 639 So. 2d at 968. Accordingly, inseparable crime evidence is governed by sections 402 and

403 of the Florida Evidence Code which provide for general admission of relevant evidence unless the probative value is outweighed by unfair prejudice. Id.at 970; Gorham v. State, 454 So. 2d 556 at 558 (Fla. 1984), cert. den., 469 U.S. 1181 (1985).

Weighing in favor of admitting Jamie's testimony about Coolen's allegedly pulling a knife on him is the proximity in time (within an hour) of the charged homicide. See, Hunter v. State, Case No. 82,312 (Fla. June 1, 1995) [20 FLW S251 at S253]. Weighing against its admission is its lack of relevance to any material fact genuinely in dispute.

For instance, in Medina v. State, 466 So. 2d 1046 (Fla. 1985), this Court found no error where a witness testified that the defendant had stabbed him in a separate incident after the charged homicide. The Medina court found this testimony relevant to connect the knife seized from the defendant's car at his arrest with the defendant himself and the homicide victim. See also, Amoros v. State, 531 So. 2d 1256 (Fla. 1988). In the case at bar by contrast, there was no question but that Coolen stabbed Kellar with the knife that he had purchased earlier that day. Coolen told Detective Madden about his purchase of the knife, his use of it in stabbing Kellar, and what he did with it after the stabbing (R716-8, 720-1). Thus, Jamie's testimony was not necessary in any way to show Coolen's possession of the knife used in the homicide.

Another case for comparison is Gorham v. State, 454 So. 2d 556 (Fla. 1984), cert. den., 469 U.S. 1181 (1985). There,

evidence was presented of the defendant's use of the victim's credit cards to go on a shopping spree after the homicide. While this evidence consisted of other crimes (illegal use of credit cards) and characterized the defendant as a greedy person, this Court held that the prejudice was outweighed by the relevance of linking the defendant to the victim and the merchandise purchased with the credit cards to bullets identical to those the victim was shot with. At bar however, the incident where Appellant allegedly threatened Jamie with the knife shows only a propensity for Appellant to overreact in a violent manner.

The case most comparable to the facts at bar is that of Castro v. State, 547 So. 2d 111 (Fla. 1989). Several days before the defendant Castro stabbed the homicide victim to death with a steak knife, he had tied up another person in the same apartment and threatened to stab him with a steak knife. This Court held that the witness who had been threatened on the earlier occasion should not have been allowed to testify about the event because it only tended to show "bad character and propensity for violent behavior". 547 So. 2d at 115. The same is true in the case at bar.

Finally, we should consider what the prosecutor argued to the jury for the best insight into why the evidence was offered in the first place. The prosecutor stated in closing argument:

> How does he react to that child? He pulls out a knife and threatens him. Now, is that a rational reaction? No. But that was Mr. Coolen's reaction. Was that in self-defense also? Did he pull the knife on the eight-year-old in self-defense when he threatened

> him on the driver's side of the van? That gives you an insight into Michael Coolen and the way his mind worked.

(T498-9).

> We know that just a few minutes before when the child was jumping on the side of the van he reacted and threatened the child with a knife. So how does he react now when she [Barbara Caughman] rebuffs him? He responds and he takes out his frustrations on her husband and comes up from behind and attacks him.

(T500). Clearly, the prosecutor was arguing the incident with Jamie as similar fact evidence which proved Coolen's propensity for violent behavior. The jury was told to discredit Coolen's claim that he thought he was defending himself from being shot by Kellar on the basis that he allegedly threatened a child who posed no danger to him. Jamie's testimony was not "inseparable crime" evidence (it could easily have been deleted without impairing the context of the homicide or misleading the jury), but simply highly prejudicial evidence of bad character and propensity for violent behavior, Accordingly, this Court should vacate Coolen's conviction and sentence and remand for a new trial where testimony about Appellant's alleged pulling of a knife on the child is excluded from evidence.

ISSUE IV

THE TRIAL COURT IMPERMISSIBLY LIMITED APPELLANT'S CROSS-EXAMINATION OF STATE WITNESS BARBARA CAUGHMAN-KELLAR BY NOT ALLOWING QUESTIONING ABOUT THE NATURE OF THE CRIMINAL CHARGES AGAINST HER.

In Breedlove v. State, 580 So. 2d 605 (Fla. 1991), this Court restated the law regarding cross-examination of witnesses about criminal charges:

> While defense witnesses may be impeached only by proof of convictions, the rule regarding prosecution witnesses has been expanded. Thus, this Court has stated: "'[I]t is clear that if a witness for the State were presently or recently under actual or threatened criminal charges or investigation leading to such criminal charges, a person against whom such witness testifies in a criminal case has an absolute right to bring those circumstances out on cross-examination[.]'"

580 So. 2d at 608 (citations omitted).

In the case at bar, the State moved in limine prior to trial to prevent cross-examination of the key witness, Barbara Caughman-Kellar, with regard to pending criminal charges which had resulted in her placement in a pretrial intervention program (T5-7). The State maintained that since the witness had not been adjudicated, she had a Fifth Amendment right not to answer questions about the specifics of the offense (T7). The State further argued that any relevance was outweighed by the prejudice (T7). Defense counsel argued that the credibility of the witness was in issue (T8-11). The court ruled that sexual conduct of the state witness on another occasion was not sufficiently relevant

to this trial and granted the State's motion in limine (T11).

During trial, immediately following the direct examination of Barbara Caughman-Kellar, this ruling was revisited (T337-50). Defense counsel stated that the evidence would show that the witness engaged in sexual conduct with the victim's fourteen-year-old son on the evening of her husband's funeral (T337). Sexual battery charges were filed against the witness (T337). The charge was later reduced to solicitation and the witness entered the pretrial intervention program (T337-8).

After argument, the court eventually ruled that defense counsel:

> may bring out the fact that you [the witness] were charged with a felony subsequent to this incident and that you are currently on PTI. He is not allowed to suggest what that felony is nor is he allowed to get into the facts of these circumstances. Only the fact that at this present time you are on PTI. There are charges pending that will be dropped if you successfully complete it.

(T348). In accord with that ruling, Barbara Caughman-Kellar was only cross-examined to the point that she admitted that a charge had been filed against her and that she was currently in a pretrial intervention program (T350).

It was error to restrict Appellant's cross-examination of this key witness so severely. A case directly on point is Bell v. State, 614 So. 2d 562 (Fla. 3d DCA 1993). As in the case at bar, the state witness had pending charges and invoked the Fifth Amendment to avoid answering questions about the charges. The Bell court held that defense counsel had an absolute right to

identify the nature of the charges against the witness. In the first place, pending charges against a witness are a matter of public record. Acknowledging the specific crime with which the witness has been charged cannot incriminate the witness. Accordingly, the Bell court reversed the conviction because the proposed questions "were extremely relevant to [the witness's] credibility and were the proper subject of cross-examination". 614 So. 2d at 563. Accord, Breedlove, supra; Lee v. State, 318 So. 2d 431 (Fla. 4th DCA 1975); Patterson v. State, 501 So. 2d 691 (Fla. 2d DCA 1987).

The impermissible restriction on Appellant's cross-examination also resulted in a violation of his federal constitutional rights as guaranteed by the Confrontation Clause of the Sixth Amendment. As explained by Justice Rehnquist's opinion in Delaware v. Van Arsdall, 475 U.S. 673 (1986):

> a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness.... A reasonable jury might have received a significantly different impression of [the witness's] credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination.

475 U.S. at 680. As in Van Arsdall, the issue at bar involves limiting cross-examination of a state witness about other criminal charges. The remaining question according to Van Arsdall, is whether the error is harmless.

In the case at bar, it cannot be doubted that the credibility of Barbara Caughman-Kellar was of paramount importance. Her

version of the evening's-events included testimony about Coolen making a pass at her (T329). She claimed that she "pushed him off" (T329). She did not testify about any flirtatious behavior on her own part. She accused Coolen of suddenly attacking her husband for no reason whatsoever (T329-30, 357).

Appellant's version on the other hand, as contained in his statement to Detective Madden, relies heavily on the "word games" between the witness and himself as provoking John Kellar. Because Coolen realized that Kellar was angry, he was inclined to perceive a weapon in Kellar's hand even though none apparently existed. Thus, the credibility of Barbara Caughman-Kellar's testimony is essential for any inference of premeditation.

Accordingly, the restriction of Coolen's right to cross-examine the victim's wife on the nature of the criminal charges against her was not harmless error. Coolen should now be granted a new trial.

ISSUE v

APPELLANT'S CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE IN MITIGATION WAS VIOLATED WHEN THE TRIAL JUDGE BARRED A DEFENSE WITNESS FROM TESTIFYING ABOUT THE REASON THAT APPELLANT DID NOT RECEIVE NEEDED PSYCHIATRIC TREATMENT WHEN HE WAS A CHILD.

During the penalty trial testimony of Kathryn Coolen, Appellant's aunt, the state objected when the witness started to testify about Appellant, while a child, being taken to the Judge Baker Clinic which specializes in juvenile psychiatry (R1189). At the bench conference, defense counsel stated that the witness would testify that when Appellant's mother took him to the Judge Baker Clinic, the doctors advised counseling for both mother and son (R1190). The mother refused to undergo counseling so Appellant never received any treatment for his problems (R1190-1). The state objected that this testimony would be hearsay and contended that since Coolen's mother was now dead, it would not be possible to rebut it (R1190-1). The judge said, "I don't think his mother is on trial here" and ruled that "beating on her now that she's dead [was not] relevant" (R1192).

As a result of this ruling, the jury never got to hear that when Coolen was eight or nine years old, he was taken to the Judge Baker Clinic because he was getting into mischief at school (R1195). His mother reported to the witness that the clinic had told her that she needed counseling as well (R1195). The witness reported how Appellant's mother reacted:

> She was very angry. She said, I'm trying to do good with my kid, I take him over there and they tell me I need counseling with him because half his problem was her. She would not do that. She said, there's nothing wrong with me, it's him, he's the one that's driving me crazy....

(R1195). The witness further said that she believed that Appellant's mother did have a problem; "she definitely needed counseling and she didn't get it" (R1196).

The United States Supreme Court has held in a line of cases deriving from Lockett v. Ohio, 438 U.S. 586 (1978), that the Eighth and Fourteenth Amendments, United States Constitution, are violated when a death sentence is imposed without proper consideration of all mitigating circumstances. As summarized by the Court in McCleskey v. Kemp, 481 U.S. 279 (1987), one of the Eighth Amendment considerations in capital sentencing is:

> States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it ta consider any relevant information offered by the defendant.

481 U.S. at 306.

At bar, the reaction of Appellant's mother to the Judge Baker Clinic's suggestion that both she and her child needed counseling is relevant evidence related to family background, which was one of the nonstatutory mitigating circumstances proposed by Appellant. It is also relevant mitigating evidence in that it shows that Appellant had social adjustment problems at the age of eight or nine, Professional counseling was recommend-

ed, but his mother's obstinate character prevented treatment which might have changed the course of Coolen's development.

The state's objection to the hearsay nature of the testimony should not have been sustained. In Green v. Georgia, 442 U.S. 95 (1979), it was held that a capital defendant's right to present mitigating evidence in a penalty proceeding outweighs a State's interest in applying its hearsay rule of evidence to exclude relevant testimony. The applicable statute in Florida, 5921.141 (1), Fla. Stat. (1993) recognizes this:

> Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

It should be noted that the statute guarantees only the defendant a fair opportunity to rebut hearsay; the state is not accorded equal treatment.

Construing this statute, this Court wrote in State v. Dixon, 283 So. 2d 1 (Fla. 1973):

> a narrow interpretation of the rules of evidence is not to be enforced, whether in regards to relevance or to any other matter except illegally seized evidence.

283 So. 2d at 7. In other words, probative value is the key to admissibility, rather than whether the evidence would have been received at the guilt or innocence stage of the proceedings.

Since Dixon, this Court's decisions on whether the state can exclude hearsay offered by the defendant in a capital penalty trial have not been entirely consistent. In Stewart v. State,

549 So. 2d 171 (Fla. 1989), this Court took a very broad view of admissibility:

> The exclusionary rules of evidence are inapplicable to sentencing proceedings in capital cases except where failure to apply the rules would result in a violation of the state or federal constitution.

549 So. 2d at 174. However, a substantial retreat was taken from this position in Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), vacated on other grounds, _ U.S. _, 112 S. Ct. 3020, 120 L. Ed. 2d 892 (1992). The Hitchcock court wrote in holding that hearsay statements offered by the defendant had been properly excluded:

> While the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded.

578 So. 2d at 690. Most recently, in Guzman v. State, 644 So. 2d 996 (Fla. 1994), this Court treated an issue where the trial judge limited testimony from defense witnesses in a most cursory manner:

> We emphasize that trial judges should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life.

644 So. 2d at 1000.

At this point, this Court should return to Justice Adkins' opinion in Dixon and emphasize that probative value is the touchstone of admissibility of evidence in a capital penalty trial. As noted in Dixon, the trial judge's discretion to exclude evidence is "merely a necessary power to avoid a needlessly drawn out proceeding where one party might choose to go

forward with evidence which bears no relevance to the issues being considered". 283 So, 2d at 7.

As shown above, the excluded witness testimony at bar was highly relevant to the proposed mitigating circumstance of family background. Moreover, this type of family history is routinely admitted in capital penalty proceeding. Often it comes in through testimony of a mental health professional who has interviewed family members and compiled an entire report based on hearsay. There is no reason to apply a more restrictive standard to testimony of a family member who has first hand knowledge.

Additionally, Appellant challenges the state's assertion that it would have been impossible to rebut the proffered testimony. Although the declarant, Appellant's mother, was deceased, the testimony could possibly have been rebutted by records from the Judge Baker Clinic or testimony from other family members about the circumstances surrounding the non-treatment of Coolen's childhood behavior disorders. Any rule which would prevent a capital defendant from putting on mitigating evidence relating to transactions with a person now dead would be unfairly prejudicial and unconstitutional.

Finally, the error in restricting Appellant's right to offer evidence in mitigation is not harmless in the case at bar. The first reason is because we can only speculate as to whether the jury might have given significant weight to the excluded testimony= Of equal significance is the fact that Appellant put on other evidence concerning his family background; but the trial

judge did not find that the mitigating circumstance had been established (R1094, see Appendix). When a defendant presents "a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance . . . the trial court must find that the mitigating circumstance has been proved". Nibert v. State, 574 so. 2d 1059 at 1062 (Fla. 1990). If the proffered testimony is added to the other evidence admitted concerning Coolen's family background, a "reasonable quantum" would surely be achieved.[6]

Because the erroneous and unconstitutional exclusion of Kathryn Coolen's testimony could have affected the jury's recommendation and certainly affected the trial court's finding of mitigating circumstances, Appellant's sentence of death should now be vacated and resentencing ordered.

[6]In Issue IX infra, Appellant argues that the sentencing judge should have found the nonstatutory mitigator proven anyway.

ISSUE VI

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO GO TOO FAR IN PRESENTING DETAILS OF COOLEN'S PRIOR CONVICTIONS, ALLOWING INTO EVIDENCE EXTRANEOUS WRITTEN INFORMATION ON THE PRIOR JUDGMENTS, AND ALLOWING THE PROSECUTOR TO FEATURE THIS IRRELEVANT AND PREJUDICIAL MATERIAL IN CLOSING ARGUMENT.

Prior to commencement of the penalty phase, defense counsel asked the court to place limits on the testimony of witnesses concerning the details of Coolen's prior convictions (R1139-40). In particular, counsel noted that some of the prosecutor's planned presentation sounded like "victim impact evidence as to the prior convictions" (R1141). The court overruled Appellant's objection (R1142).

The prosecutor proceeded to elicit from Michael Bylsma the extent of the injuries he suffered from the stabbing incident in 1980. Bylsma testified that he was in a coma for three months and was asked how long he had spent in a wheelchair (R1151-2). On redirect examination, the prosecutor further dwelt on Bylsma's injuries:

> Q. In 1987, was your physical condition as it is now?
> A. Yes, sir.
> Q. Is this as good as you've been able to move around?
> A. No, sir, day by day I get better, but I could not do anything besides walk slow.
> Q. All right. So the way you're moving now in 1994 is even better that you did in 19871
> A. Yes, sir, but my doctor says --

(R1167).

With regard to the certified copies of the Massachusetts judgments, the prosecutor acknowledged that the documents also showed "some other things that go with the court hearings" (R1179). Among "other things", one document showed that Coolen pled guilty to a lesser charge (R1179-80). Defense counsel offered to stipulate to the convictions but asked that the other notes and docket entries be eliminated (R1180). He argued that the other material was "hearsay and prejudicial, more than just a judgment and sentence" (R1181). The court overruled Appellant's objection and allowed the Massachusetts documents to go to the jury without any deletions as State Exhibits 1 and 2 (R1182, 1010-1).

This Court has consistently held that the prosecution may introduce testimony about the circumstances surrounding a prior violent felony conviction rather than being limited to the bare written judgment. E.g., Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992). However, "the line must be drawn when that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value". Rhodes v. State, 547 So. 2d 1201 at 1205 (Fla. 1989). In Rhodes, this Court reversed in part because irrelevant evidence describing the "physical and emotional trauma and suffering" of the victim in the prior violent felony was admitted. 547 So. 2d at 1205. The Rhodes court further observed that the certified copy of the judgment along with testimony from the detective assigned to the investigation was "more than suffi-

cient" to establish the aggravating circumstance and "the circumstances of the crime". 547 So. 2d at 1205, n.6.

Again in Trawick v. State, 473 So. 2d 1235 (Fla. 1985), this Court reversed for a new penalty trial where detailed testimony about the injuries received by a surviving witness was admitted into evidence and considered by the jury. Because "the jury heard evidence and argument that did not properly relate to any statutory aggravating circumstance", the recommendation was tainted. 473 So. 2d at 1240-1.

At bar, the testimony from Bylsma about the disabling injuries he received in the 1980 incident falls directly within the same category of irrelevant and prejudicial evidence held reversible error in Rhodes and Trawick. The error was made especially prejudicial by the prosecutor's use of Bylsma's disability in closing argument. Referring to Bylsma, the prosecutor stated:

> Folks, the reason that you should recommend death in this case limped into this room and lifted his left arm, and the record should reflect he couldn't lift his right arm, lifted his left arm to be sworn in.

(R1287). It could not be more clear that he was urging the jury to weigh a nonstatutory aggravating circumstance - Bylsma's disability - in the penalty recommendation. Compare, Duncan v. State, 619 So. 2d 279 at 282 (Fla. 1993) (error in admitting photograph of victim in unrelated crime was harmless error because it was "not urged as a basis for a death recommendation").

Turning to the extraneous information on the certified copies of the Massachusetts convictions, this Court considered a similar claim in Dailey v. State, 594 So. 2d 254 (Fla. 1991). Because the notation about a charge being dropped was "inconspicuous", the Dailey court found the error to be harmless. 594 so. 2d at 258. At bar however, the prosecutor's use of the documents in his closing argument was anything but harmless.

The prosecutor argued to the jury:

> the reality of Michael Coolen is he's been in prison for about 12 of the last 14 years. I'm going to show you that with the judgments and sentences.

(R1277). After Appellant's objection was overruled (R1277-9), the prosecutor went on to repeat that "Coolen has been in prison for most of the last 14 years" (R1279). He then detailed the charges on the documents, including "armed assault with intent to murder, to wit, automobile" (R1289-90). In fact, the charge to which Coolen pled was a lesser of this offense (R1011, p.6). Thus, the prosecutor also went beyond the evidence of Appellant's prior convictions during argument on this aggravating circumstance.

In Fitzgerald v. State, 227 So. 2d 45 (Fla. 3d DCA 1969), the court reversed a conviction where the prosecutor argued that the defendant had "spent the better part of his life in jail". 227 So. 2d at 46. Again in Brown v. State, 284 So. 2d 453 (Fla. 3d DCA 1973), the court found reversible error where the prosecutor used the admitted fact of the defendant's three prior convictions to argue; "this little thief doesn't deserve your sympa-

thy". 284 So. 2d at 454. This Court, in Sherman v. State, 255 So. 2d 263 (Fla. 1971) found fundamental error in a prosecutor's argument which used a prior conviction as a basis for telling the jury:

> He just violates the law, and it has got to come to a stop sometime...

255 So. 2d at 265.

As in these examples, the prosecutor's argument at bar was prejudicial error because it invited the jury to disregard the relevant evidence and to recommend death for the defendant because he had already spent much of his life in prison. When combined with the improper argument urging the jury to recommend death because of the injuries received by Bylsma in the 1980 incident, the cumulative effect was to deny Coolen a fair penalty trial. As this Court wrote in Bertolotti v. State, 476 So. 2d 130 (Fla. 1985):

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

476 So. 2d at 134. Contrary to this Court's admonition, the prosecutor's argument at bar invited an emotional response to the injuries received by a prior victim and to the amount of time which Coolen had served in prison - both nonstatutory aggravating factors. Accordingly, the jury's penalty recommendation of death was tainted and a new penalty trial should now be held,

ISSUE VII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST FOR A PENALTY JURY INSTRUCTION ON "LACK OF INTENT TO KILL THE VICTIM" AS A MITIGATING CIRCUMSTANCE OF THE OFFENSE.

In Issue I, Appellant argued that his statement established a reasonable hypothesis of innocence as to the element of premeditation necessary to convict for first degree murder. A corollary to that argument is that even if a killing motivated by imperfect self-defense can support a conviction for first degree murder, Appellant asserts that the Eighth and Fourteenth Amendments, United States Constitution and Article I, section 17 of the Florida Constitution bar imposition of a death sentence under such circumstances. Compare, Enmund v. Florida, 458 U.S. 782 (1982); Allen v. State, 636 So. 2d 494 (Fla. 1994). At the least, the sentencer (in Florida both the judge and jury) cannot be precluded from giving effect to this circumstance of the crime as relevant mitigating evidence. Penry v. Lvnaugh, 492 U.S. 302 (1989); Lockett v. Ohio, 438 U.S. 586 (1978).

During the penalty phase charge conference, defense counsel requested the trial judge to give specific jury instructions on several nonstatutory mitigating circumstances. One of the proposed nonstatutory mitigating factors (and the only one the court declined to instruct on) was "the defendant's lack of intent to kill the victim" (R1259). The state objected and the judge agreed that it couldn't be given on the ground that the jury had already found Appellant guilty of premeditated murder in

the guilt or innocence trial (R1259-60). Superficially, this ruling would appear correct. However, its effect was to deprive Appellant of jury instruction on a significant defense to the death penalty not necessarily rejected by the jury's verdict; that the killing was motivated by an honest but unreasonable belief on Appellant's part that he was acting in self-defense.

During the guilt or innocence phase of the trial, the jury was instructed on self-defense in accord with the standard instructions:

> A person is justified in using force likely to cause death or great bodily harm if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another...

(e.s.) (R1029, T531).

> The danger facing the defendant need not have been actual, however, to justify the harm. the appearance of danger must have been so real that a reasonablv cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force.

(e.s.) (R1030,. T532). These instructions correctly reflect the law that a complete defense to use of deadly force is available only to those whose belief in the necessity to use deadly force is not only actual, but also reasonable. As the court wrote in Harris v. State, 104 So. 2d 739 (Fla. 2d DCA 1958):

> Of course, it is the law that men do not hold their lives at the mercy of unreasonable fears or excessive caution of others, and if from such motives human life is taken there is no justification.

104 So. 2d at 744.

Although a killing motivated by "unreasonable fears or excessive caution" is not justifiable, it does not follow that such killings are entirely unmitigated. In Issue I, supra, Appellant pointed out that a number of states have statutes which specifically reduce the level of culpability for homicides committed with an unreasonable belief that they are justifiable. Issue I also pointed out Florida decisions which suggested that there are circumstances under which self-defense is not justifiable, but would reduce the degree of the offense. However, Appellant's jury was never instructed on any theory of limited or "imperfect" self-defense at any stage of the trial.

It must be conceded that Appellant's request for a penalty jury instruction on "lack of intent to kill the victim" was hardly a model of clarity. Nonetheless, the lack of any instruction meant that the jury was never allowed to consider what is undeniably the most mitigating aspect of this homicide - that Appellant honestly but unreasonably thought that he was in danger of being shot by the victim's tiny .22 caliber pistol.

In Jackson v. State, 502 So. 2d 409 (Fla. 1986), this Court held that when the death penalty is sought on a non-triggerman, the penalty jury must be instructed on the principles of Enmund v. Florida, 458 U.S. 782 (1982).[7] The Jackson court did not require any interrogatory form to be returned; only an instruc-

[7]Enmund held that the Eighth and Fourteenth Amendments bar imposition of a death sentence on an accomplice to a murder in absence of proof that the accomplice attempted to kill or intended ox: contemplated that human life would be taken.

tion that the jury must find that the defendant had sufficient culpability before a death sentence could be recommended. The sentencing judge was then directed by Jackson to make specific written factual findings in the sentencing order addressing the Enmund issue.

By analogy, this Court should require a special penalty jury instruction anytime that an issue is raised which would bar imposition of the death penalty on the defendant. Accordingly, error was committed at bar when Coolen's jury was never instructed that the death penalty may not be constitutionally imposed on a defendant who actually believed that the circumstances justified his use of deadly force in self-defense, even though that belief was mistaken and unreasonable.

Even if this Court disagrees that proving imperfect self-defense constitutionally bars a death sentence, reversible error was still committed when the jury was precluded from considering the evidence of imperfect self-defense as a mitigating circumstance. In Penry v. Lynaugh, 492 U.S. 302 (1989), the United States Supreme Court discussed the role that moral culpability must play in determining the appropriate punishment:

> the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime.

492 U.S. at 319 quoting from California v. Brown, 479 U.S. 538 at 545 (1987) (O'Connor, J., concurring) (e.o.). Penry went on to hold that a sentence of death violates the Eighth and Fourteenth Amendments when the penalty jury is not "provided with a vehicle

for expressing its 'reasoned moral response' . . . in rendering its sentencing decision". 492 U.S. at 328.

Appellant's penalty jury was likewise deprived of an appropriate vehicle for expressing a 'reasoned moral response' to the circumstances of his crime when the judge refused to grant an instruction which would allow Appellant to argue effectively that a killing motivated by self-defense - even if unreasonable - should be considered as a nonstatutory mitigating factor. Accordingly, a new penalty trial before a properly instructed jury should now be ordered.

ISSUE VIII

THE SENTENCING JUDGE ERRED BY REJECTING THE STATUTORY MITIGATING CIRCUMSTANCE OF SUBSTANTIALLY IMPAIRED CAPACITY, OR AT LEAST FINDING THAT APPELLANT'S DRINKING PROBLEM AND USE OF INTOXICANTS ESTABLISHED A NONSTATUTORY MITIGATING CIRCUMSTANCE.

There was substantial unchallenged evidence that Coolen was highly intoxicated from drinking beer all day when this homicide took place. The victim's wife, Barbara Caughman-Kellar, testified at trial that she and her husband along with Appellant and his girlfriend were all intoxicated from drinking beer on the evening of the incident (T351). She also described the participants as "buzzed" (T328). She admitted that she told Detective Madden that everyone including Coolen was intoxicated (T358).

In the penalty trial, Debra Morabito agreed that there was excessive drinking and estimated that Coolen had consumed about twenty cans of beer that evening (R1230). The evaluation for blood alcohol level performed on the victim, John Kellar, gave a result of .22 (T445). The medical examiner, Dr. Hansen, testified that drinking eighteen beers over a period of eight hours could bring the blood alcohol level to roughly .22 (T450). Thus, there was ample evidence in the record that Appellant was as drunk as Kellar and that his blood alcohol level was also in the neighborhood of .22 when the stabbing occurred.

Further evidence of Appellant's intoxication came from the arresting police officers. Deputy sheriff Bailey testified that

he could smell alcohol on Coolen (T260). Deputy Peay observed that Appellant had bloodshot eyes, slow motions, and "somewhat slurred" speech (T283). His balance was unsteady when he was standing (T283). Deputy Peay would have arrested Coolen for DUI if he had stopped him while driving (T283, 295).

Debra Morabito also testified during the penalty phase that she considered Coolen to be an alcoholic (R1229). Appellant drank excessively at times; "he just didn't know when to stop" (R1229). Coolen "became a different person" when he drank (R1229). She had previously told Coolen that she thought he had a drinking problem and "should go to AA" (R1229-30).

The sentencing judge acknowledged that Appellant had been drinking when the stabbing took place (R1093, see Appendix). However, he apparently rejected this as a sufficient basis in itself for finding the statutory mitigating circumstance. The sentencing order makes several references to the fact that some of the defense witnesses did not describe Coolen "as alcoholic or someone with a serious personality disorder" (R1093-4, see Appendix). The court also pointed to the lack of expert testimony regarding Appellant's "substance abuse or family background" (R1094, see Appendix). Another prominent defect in the sentencing order is the court's apparent disregard for any evidence which was not presented during the penalty trial before the jury [R1093 (comments about Michelle Garrity's videotaped deposition, R1094 ("no pattern of proof emerged from the testimony during the penalty phase", see Appendix).

In the first place, evidence of intoxication is sufficient in itself to prove the statutory mitigating circumstance of substantially impaired capacity, §921.141 (6) (f), Fla. Stat. (1993). In Jones v. State, 648 So. 2d 669 (Fla. 1994), there was evidence that the defendant's blood alcohol level shortly after committing the homicide was .269. 648 So. 2d at 673. This Court approved the judge's finding of the substantially impaired capacity mitigator "consistent with defense counsel's reliance on the evidence of intoxication". 648 So. 2d at 680.

In Nibert v. State, 574 So. 2d 1059 (Fla. 1990), this Court faulted the trial court for failing to find the statutory mitigating circumstance where the evidence showed in part:

> that he was a nice person when sober but a completely different person when drunk; that he had been drinking heavily on the day of the murder; and that, consistent with the physical evidence at the scene, he was drinking when he attacked the victim.

574 So. 2d at 1063. At bar, Appellant presented exactly the same evidence with even more credibility because there were eyewitnesses at the scene who testified at trial.

Regarding Coolen's alcoholism, it should be recognized that Coolen did not get drunk everyday like some types of alcoholics. He told Detective Madden in the statement given after his arrest:

> I don't really drink that much but once in a while I have a few, it's like I'm an alcoholic and ah, ah, just really ain't no help for us jokes, there's, you know, you're either one way or the other, you either abstain all together...

(R715). In other words, Appellant's alcoholism is based upon his

inability to limit his drinking once he starts and to control his behavior when drinking, This was the substance of Debra Morabito's testimony at trial.

Apparently, the sentencing judge did not recognize this fact because he disparaged the evidence of alcoholism by pointing to the testimony of William Najar, a former employer, and Matthew D'Ambrosio, a former co-worker (R1093-4, see Appendix). Since Appellant didn't drink when he was working, it is entirely possible that these witnesses didn't know about Coolen's problem with alcohol. Certainly, it was error for the judge to conclude, "It seems unlikely that under the circumstances the witness would not have noticed any suggestion of alcoholism" (R1094, see Appendix). Being a reliable worker is not necessarily inconsistent with being an alcoholic.'

The sentencing judge was also asked to consider "alcoholism or drug use and dependency" as a nonstatutory mitigating circumstance (R1096-7). Thus, even if the trial judge acted within his discretion in rejecting the statutory mitigating circumstance on the ground that Coolen's intoxication didn't reach the level of "substantial" impairment, he should have found and weighed the evidence as a nonstatutory mitigating factor. Cf., Cheshire v. State, 568 So. 2d 908 at 912 (Fla. 1990) (while statutory mitigating factor requires "extreme" disturbance, "any emotional disturbance relevant to the crime must be considered

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[8]Cf., Nibert v. State, 508 So. 2d 1 at 2 (Fla. 1987) ("when he was not drinking he was a considerate, trustworthy, hardworking person").

and weighed by the sentencer").

The judge wrote in his order:

> The evidence does not suggest that the Defendant was so intoxicated that he was incapable of rational thought and action. The jury, who was [sic] given the voluntary intoxication instruction, agreed and found that the Defendant's actions constituted premeditated murder.

(R1096-7, see Appendix). This is simply the wrong standard to use when considering whether a mitigating circumstance has been proved. After all, had the jury found such extreme intoxication, the crime itself would have been reduced to second degree murder.

The judge further erred when he wrote:

> there was no testimony that the Defendant's prior violent acts were in any way connected to alcohol consumption, refuting the assertion of Mrs. Morabito that the Defendant only got violent when he was intoxicated.

(R1097, see Appendix). In fact, Appellant himself testified at the presentencing hearings that he had been highly intoxicated during the 1980 stabbing of Bylsma and attributed his criminal record to his drinking problem (R1328-9, 1363-4). The State was in a position to rebut this mitigating evidence because Michael Bylsma, John Ellis, Jr., and John Ellis, Sr. all testified during the penalty phase about prior violent incidents involving Coolen. However, the prosecutor never asked any of them for an opinion on whether Coolen was intoxicated at the time. It should also be noted that the State's penalty phase exhibit #2, consisting of prior Massachusetts convictions, documents that Coolen was ordered to undergo "alcohol evaluation and treatment" as a

condition of probation in the 1987 offenses (R1011, p.3, 6). The exhibit further reflects that condition 2 of his bail was "attend Alcoholics Anonymous" (R1011, p.8). Accordingly, the appropriate conclusion is that the evidence of Appellant's intoxication during the prior violent crimes was unrebutted.

Finally, the sentencing judge's citation of Johnson v. State, 608 So. 2d 4 (Fla. 1992), cert. den., 124 L. Ed. 2d 273 (1993) bears further analysis. Johnson stands for the proposition that whether or not voluntary intoxication is a mitigating circumstance "depends upon the particular facts of a case". 608 So. 2d at 13. The facts of Johnson show that the defendant set out with the announced intent to rob someone to get money for more drugs. He further announced that he might have to shoot someone to accomplish his goal. During the next six hours he managed to rob and kill two people in separate incidents. He then disarmed and shot to death a sheriff's deputy who had stopped him. Finally, he engaged in a gun battle with two other deputies and successfully escaped from the scene.

There are two significant reasons why intoxication was rejected as a mitigating circumstance in Johnson. First is that the intoxicants acted as a sort of "chemical courage" which enabled Johnson to commit the crimes he had already planned. Second is that the drug intoxication subsided over the six hour period allowing Johnson to show great physical and mental agility at times. As the Johnson court summed it up:

> There was too much purposeful conduct for the court to have given any significant weight to

Johnson's alleged drug intoxication...

608 So. 2d at 13.

By contrast, the facts at bar demonstrate a case where intoxication is truly a mitigating factor. As was said in Cheshire v. State, supra, "There is no evidence whatsoever that [Appellant] began drinking as a way of developing the 'courage' to commit the murder." 568 So. 2d at 911. Rather, it is clear that Coolen's intoxication was a significant cause of his misperception that he was about to be attacked. Intoxication also affected Coolen's emotional attitude to the extent that what Barbara Caughman-Kellar described as a very friendly conversation (T323) between the two couples turned into a tragic stabbing.

In Ross v. State, 474 So. 2d 1170 (Fla. 1985), this Court held that the trial judge erred by failing to consider testimony about the defendant's drinking problem and the fact that he was drinking when he attacked the victim "as a significant mitigating factor". 474 So. 2d at 1174. The same is true at bar. Accordingly, Coolen's sentence of death should now be vacated and the trial court ordered to conduct a reweighing which would include this established mitigating circumstance.

ISSUE IX

THE SENTENCING JUDGE ERRED BY A) FAILING TO FIND THAT APPELLANT PROVED A NONSTATUTORY MITIGATING CIRCUMSTANCE WITH EVIDENCE OF HIS FAMILY BACKGROUND AND; B) FAILING TO GIVE ANY WEIGHT TO TWO NONSTATUTORY MITIGATING FACTORS WHICH HE DID FIND.

In Campbell v. State, 571 So. 2d 415 (Fla. 1990) and Nibert v. State, 574 So. 2d 1059 (Fla. 1990), this Court detailed the procedure which the capital sentencing judge must follow with respect to findings of mitigating circumstances. When a capital defendant presents "a reasonable quantum" of competent and uncontroverted evidence with respect to a mitigating factor, the sentencing judge must find that the mitigating circumstance has been proved. Nibert, 574 So. 2d at 1062. Once a mitigating circumstance has been found, the sentencing judge cannot refuse to give it any weight in the weighing process. Campbell, 571 So. 2d at 420. At bar, the trial court disregarded both of these tenets.

A) The Sentencing Judge Erred By Failing to Find that Coolen's Family Background Was a Proven Mitigating Circumstance.

Coolen's aunt Kathryn Coolen and his cousin Judy O'Connor testified during the penalty trial concerning what they observed about Appellant's upbringing during family visits. During the first sixteen years of Appellant's life, their families would get together almost every week (R1185). His mother was characterized as "terribly strict and dominant to the point she was abusive"

(R1186). Both witnesses remembered that from about the time Appellant was three, his parents kept him chained like a dog in the back yard (R1186, 1200). When Kathryn Coolen questioned Appellant's mother about this, she replied that it was for his own safety and to keep him from getting into trouble (R1186-7).

Appellant's mother constantly called Appellant and his brother foul names (R1187, 1199). Appellant was pinched and smacked "just in case he wanted to get into trouble" (R1199, 1188). His father did not show him any affection either (R1188, 1200). Neither witness could understand why Appellant's parents were so mean to him (R1188, 1199).

Appellant was the oldest child in his family (R1225). When his younger brother Ronald died in an auto accident at age 23, it had a significant impact on him (R1225, 1187).

In Stevens v. State, 552 So. 2d 1082 (Fla. 1989), this Court termed it "well settled that evidence of family background and personal history may be considered in mitigation". 552 So. 2d at 1086. See also, Santos v. State, 591 So. 2d 160 (Fla. 1991); Freeman v. State, 547 So. 2d 125 (Fla. 1989); Brown v. State, 526 So. 2d 903 (Fla.), cert. den., 488 U.S. 944 (1988). When the sentencing judge at bar rejected Appellant's family background evidence as a mitigating factor, he acknowledged that there was abuse, but wrote:

> it did not reasonably establish that his upbringing created a personality disorder that would explain or mitigate the conduct for which he was convicted in this case. Indeed, the testimony of family members characterized the Defendant as a kind and consid-

> erate person. The Defendant was brought up in a large family with two brothers and three sisters. While not wealthy, they apparently were not particularly impoverished, and his other siblings seem to have developed into perfectly well adjusted, law abiding citizens.

(R1094, see Appendix).

To begin with, evidence of a personality disorder would ordinarily be presented by expert testimony from a mental health professional since only such an expert would be qualified to diagnose a personality disorder. Coolen did not have any mental health experts testify on his behalf. Lack of expert testimony should not result in nonconsideration of the mild physical and substantial psychological abuse which he suffered as a child. After all, it is common knowledge that such childhood experiences have a negative effect on development even when the criteria for diagnosing a personality disorder are not observed.

Secondly, Appellant's positive character traits as demonstrated by testimony that he was "kind and considerate" cannot be used to rebut the mitigating circumstance established by the family background evidence. Positive character traits establish an independent nonstatutory mitigating factor which is relevant to whether the defendant has any potential for rehabilitation. See e.g., McCampbell v. State, 421 So. 2d 1072 at 1075 (Fla. 1982).

Finally, the sentencing judge mentioned that Appellant was raised "with two brothers and three sisters" who "seem to have developed into perfectly well adjusted law abiding citizens".

This statement ignores the fact that one brother died 48 hours after birth and the other died at age 23 (R1224-5). No evidence was presented concerning his brother Ronald's criminal record; indeed the judge seems to have merely jumped to the conclusion that the rest of the family had no scrapes with the law. It should also be recognized that the witnesses Kathryn Coolen and Judy O'Connor testified that Appellant's sisters were treated well by the parents; it was only Appellant and his brother Ronald who were abused (R1187-8, 1199-1200).

In conclusion, Appellant presented sufficient evidence that his family background should have been found to be a nonstatutory mitigating circumstance. The reasons given by the sentencing judge for failing to find family background in mitigation were invalid or unsupported by the record.

B) The Sentencing Judge Failed to Give Any Weisht to Appellant's Employment Background and His Participation in Self-Help Programs Althoush Both Were Found to be Mitigating Circumstances.

In his sentencing order, the judge recited the details of his weighing process and wrote:

> Three non-statutory mitigating circumstances were reasonably established: The Defendant's employment background, the Defendant's participation in self-help programs, and the (Defendant's) quality of being a caring relative. Of these three circumstances, the Court was unable to attribute any weight whatsoever to the first two, and only slight weight to the third.

(R1099, see Appendix). It was error for the court to give no weight to the two proven nonstatutory mitigating factors.

In Campbell v. State, 571 So. 2d 415 (Fla. 1990), this Court set forth the requisite procedure that a capital sentencing judge must follow. With regard to the weighing process, the Campbell court declared:

> 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. Accord, Ferrell v. State, 653 So. 2d 367 (Fla. 1995). This is exactly what the judge did at bar; he found Appellant's employment background and participation in self-help programs as mitigating factors and then dismissed them as having no weight.

Accordingly, this Court should now vacate Appellant's death sentence and remand this case to the trial court with directions to conduct a proper reweighing of all the established mitigating circumstances against the sole aggravating circumstance.

ISSUE X

COOLEN'S SENTENCE OF DEATH IS DISPROPORTIONATE.

When there is but one established aggravating circumstance in a capital case, this Court has adopted as a standard of review that a death sentence will be affirmed "only in cases involving 'either nothing or very little in mitigation'". McKinney v. State, 579 So. 2d 80 at 85 (Fla. 1991).[9] At bar, the sole aggravating circumstance was g921.141 (5) (b), Fla. Stat. (1993); "the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person". As presented in Issues VIII and IX, supra, there were significant mitigating circumstances proved, even though the sentencing judge only gave weight to one nonstatutory factor; "the (Defendant's) quality of being a caring relative" (R1099, see Appendix). In similar cases, this Court has reduced sentences of death to life imprisonment.

For instance, Nibert v. State, 574 So. 2d 1059 (Fla. 1990) is very much on point here. The circumstances in Nibert were comparable in that two men were drinking together when one suddenly stabbed the other to death. As in the case at bar, one aggravating circumstance was proved in Nibert. The mitigating evidence was also comparable; both Coolen and Nibert presented evidence that they were intoxicated at the time of the homicide;

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[9] Quoting from Nibert v. State, 574 So. 2d 1059 at 1063 (Fla. 1990) and Songer v. State, 544 So. 2d 1010 at 1011 (Fla. 1989).

that they underwent personality changes when drinking; and that they both had been abused physically and psychologically as children. The Nibert court concluded that the trial court failed to weigh substantial mitigating factors. Rather than remand the case to the trial court for reweighing, this Court found that a death sentence was disproportionate.

Another case for comparison is Kramer v. State, 619 So. 2d 274 (Fla. 1993). Again, the circumstances showed a sudden attack by an intoxicated individual on his drinking companion. There were two aggravating circumstances found in Kramer. One was prior violent felony as in the case at bar. However, Kramer had the additional aggravating factor of especially heinous, atrocious or cruel applicable. In holding a death sentence disproportionate, the Kramer court summarized the evidence as:

> nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk. This case hardly lies beyond the norm of the hundreds of capital felonies this Court has reviewed since the 1970s.

619 So. 2d at 278. At bar, we know that the attack was precipitated by Coolen's mistaken belief that the victim might have been pointing a small pistol at him. Even if this fact is given no weight in mitigation, we are still left at bar with the same circumstances as Kramer - "a spontaneous fight . . . between a disturbed alcoholic and a man who was legally drunk".

As a final case for comparison, we should distinguish the case of Duncan v. State, 619 So. 2d 279 (Fla. 1993) where this Court found a death sentence to be proportionate. As in the case

at bar, the only aggravating circumstance proved in Duncan was prior violent felony. However, Duncan had a prior second degree murder conviction while Appellant had not committed a prior homicide. Most significantly, the Duncan court found that there was no evidence in the record that the defendant had been drinking when he stabbed the victim. 619 So. 2d at 283. This Court further found "no evidence to support the statutory mental mitigating factors urged by the defendant". Id.

By contrast, in the case at bar there was conclusive evidence of Appellant's intoxication when he stabbed the victim. There was other evidence (as pointed out in previous issues) that would justify finding the statutory mitigating circumstance of substantially impaired capacity applicable to Coolen. Finally, there appears to have been a substantial amount of preplanning before Duncan stabbed his victim, whereas Appellant suddenly overreacted to a misperceived threat.

This Court has declared that the purpose of proportionality review is "to foster uniformity in death penalty law". Tillman v. State, 591 So. 2d 167 at 169 (Fla. 1991). The totality of the circumstances in the case at bar are much closer to those in Nibert and Kramer than they are to the circumstances in Duncan. Accordingly, this Court should now hold that a sentence of death is disproportionate and cannot be imposed on Coolen.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Appellant, Michael Thomas Coolen, respectfully requests this Court to grant him relief as follows:

As to Issue I - reversal of conviction and remand for a new trial on no higher offense than second degree murder.

As to Issues II-IV - reversal of conviction and remand for a new trial.

As to Issues V-VII - vacation of death sentence and remand for a new penalty trial.

As to Issues VIII and IX - vacation of death sentence and remand for a proper reweighing of all mitigating circumstances.

As to Issue X - vacation of death sentence and remand for imposition of a sentence of life imprisonment.

APPENDIX

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA

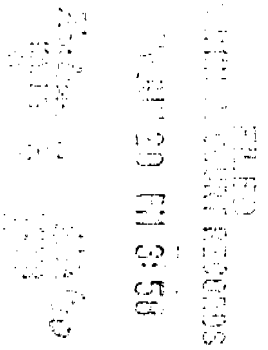
CRIMINAL DIVISION

CRC92-17322CFANO-M

STATE OF FLORIDA

vs.

MICHAEL THOMAS COOLEN



SENTENCING ORDER

The Defendant was tried before this Court on April 12th, 1994 - April 14th, 1994. The jury found the Defendant guilty of Murder in the First Degree. The same jury reconvened for the penalty phase on April 21st, 1994 and evidence in support of aggravating and mitigating circumstances was heard The jury returned a recommendation that the Defendant be sentenced to death by electrocution. The Court then requested sentencing memoranda from counsel, and ordered a Pre-Sentence Investigation. Sentencing was set for this date, June 20th, 1994. On April 21st, 1994 the Court noticed respective counsel for a hearing on May 27th, 1994, for the presentation of the written sentencing memoranda, oral argument on the sentence to be imposed and for the receipt of any additional evidence or testimony regarding aggravating or mitigating circumstances relevant to sentencing. On May 27th, 1994, the said hearing was conducted The Pre-Sentence Investigation was received from the Department of Corrections on June 2nd ,1994. The Defendant scheduled a hearing before this Court on the morning of June 17th, 1994 for the purpose of presenting a statement refuting certain aspects of the State's interpretation of the evidence as it was reflected in its sentencing memorandum. The Defendant presented statements at both the hearing of May 27th and that of June 17th.

This Court, having heard the evidence presented in both the guilt phase and penalty phase, and having had benefit of legal memoranda and argument both in favor and in opposition to the death penalty, and having reviewed the Pre-Sentence Investigation Report finds as follows:

A. **AGGRAVATING CIRCUMSTANCES**

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

The State introduced certified judgements and sentences proving that the Defendant had been convicted of seven (7) prior felonies involving the use or threat of violence. All were from the Defendant's home state of Massachusetts. Several of the convictions involved the same victim, Michael Bylsma, in two incidents that were seven years apart. The first occurred in the fall of 1980, when Mr. Bylsma was twenty years old. The Defendant, who at that time was unknown to Bylsma, was chasing a friend of Bylsma's with a knife. Bylsma went to his friend's aid and in a confrontation with the Defendant was stabbed at least seven times. He was first stabbed twice in the head. The Defendant then got the victim in a headlock and stabbed him twice more in the back. When Bylsma fell to the ground the Defendant stabbed him three more times under the armpit in an apparent attempt to reach the victim's heart. Bylsma survived, but was in a coma for three months and suffered permanent brain damage. At the time of the trial of the 1980 incident the victim was physically incapable of speech. The Defendant was convicted and sentenced to eight (8) years in the Massachusetts prison system.

The second incident involving Mr. Bylsma occurred on Halloween night, 1987. The Defendant appeared with his face painted in a bar in the victim's neighborhood. Although under a court order to stay away from Bylsma, the Defendant had stalked the victim to this location and accosted him with statements like: "Mickey - we got some unfinished business to settle." The bartender and others ejected the Defendant before he could get close to Bylsma. Later that night, after the victim had been driven home, the Defendant was waiting. He again approached Bylsma who bluffed the Defendant into believing that he had a gun. The Defendant ran to his car and tried to run down Bylsma. The victim retreated to his Uncle's house and called the police. The Defendant remained outside shouting that he would kill Bylsma's mother and father. When the police arrested the Defendant he was armed with two knives and an ice pick The state introduced three additional convictions of the Defendant for assault and battery with a deadly weapon upon victims other than Bylsma. One involved the use of a knife, the

others a shod foot, These felonies did involve the use or threat of violence to another person. This aggravating circumstance was proved beyond a reasonable doubt.

At the conclusion of the penalty phase of the trial the state argued that the jury should be instructed regarding the aggravating circumstance that the capital felony was especially heinous, atrocious or cruel. After reviewing the evidence and testimony during both the guilt phase and penalty phase of the trial, the Court concluded that this aggravating circumstance was not established beyond a reasonable doubt. Accordingly, no instruction was given on this circumstance and it was not considered by the jury or the Court. No other aggravating circumstances were sought by the state and the jury was not instructed on any others. None of the other aggravating circumstances enumerated by statute is applicable to this case and none other was considered by this Court.

B. MITIGATING CIRCUMSTANCES

Statutory Mitigating Circumstances

At the conclusion of the penalty phase the Defendant requested and the Court instruct the jury regarding two statutory mitigating circumstances:

1. The victim was a participant in the Defendant's conduct.

2. 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 Defendant's sentencing memorandum likewise suggests that the court consider these

two circumstances. The jury was not instructed on any other statutory mitigating circumstance and the Court finds that the evidence adduced during both the guilt phase and the penalty phase of the trial did not reasonably establish the existence of any such additional statutory circumstances by the greater weight of the evidence. This Court will therefore consider and address only these two statutory mitigating circumstances.

Non-Statutory Mitigating Circumstances

The jury was instructed on, and the Defendant's sentencing memorandum suggests the Court consider eight non-statutory mitigating circumstances:

1. The Defendant's family background;

2. The Defendant's remorse;

3. The Defendant's employment background;

4. The Defendant's participation in self-help programs;

5. The Defendant's alcoholism or drug use and dependency;

6. Defendant's voluntary confession and/or cooperation with law enforcement authorities;

7. The (Defendant's) quality of being a caring relative;

8. Any other aspect of the Defendant's character or record, and any other circumstances of the offense.

At the pre-sentencing hearing held on May 27th, 1994 the Defendant addressed the court

from a prepared statement. Although the State objected to the Defendant's statement, since he chose not to testify during either phase of the trial and was not then subjected to cross-examination, the Court accepted and has considered the Defendant's remarks. The Court finds that in and of themselves they do not suggest the existence of any additional statutory or non-statutory mitigating circumstances that were not already suggested in the Defendant's sentencing memorandum. The Defendant's statements of May 27th and June 17th were considered, along with all of the other evidence produced in both phases of the trial.

At the conclusion of the hearing of May 27th, 1994, the Court requested that counsel for the Defendant submit a brief memorandum, in the form of a list, of any additional non-statutory mitigating circumstances which the Defendant desired that the Court consider. Specifically, the Court requested clarification of the last above listed circumstance, if a more precise description could be articulated. By telephone message some seven clays following the pre-sentencing hearing, counsel advised the Court that there were no other mitigating circumstances, other than those set out in the sentencing memorandum which the Defendant desired that the Court consider. This Court finds that the testimony and evidence adduced during both phases of the trial failed to reasonably establish by the greater weight of the evidence the existence of any such additional circumstances for the Court's consideration.

At the Defendant's request, an additional hearing was held on June 17th, 1994 for the purpose of presenting additional statements by the Defendant to refute arguments made in the State's sentencing memorandum,

This Court will therefore address, in order, each of the statutory and non-statutory mitigating circumstances which the Defendant has requested be considered

Statutory Circumstance 1. The victim was a participant in the Defendant's conduct.

Although Defendant listed this circumstance for consideration in his sentencing memorandum, no evidence was suggested to support its existence. Normally, this circumstance

would be appropriate in an assisted suicide or a case involving the death of a co-defendant in a felony-murder scenario, In this case, absent any argument by the Defendant which might enlighten the Court, it is presumed that this circumstance is suggested to reflect the Defendant's allegation that the death resulted from a fight with the victim. However, the overwhelming weight of the evidence and testimony produced during the trial confirms that the only conduct in which the victim participated with the Defendant was beer drinking. The suggestion by the defendant that the victim's death was the result of mutual combat is completely unsupported by any testimony whatsoever. The Defendant, in his statement to Detective Madden following the incident, asserted that he stabbed the victim six times because he perceived that the victim had suddenly developed a bad attitude. He further suggested that he saw "something" or a "flash" in the victim's hand at one point when the victim was approaching him, and reacted to defend himself. This Same position was taken by the Defendant in his statement to the Court at the pre-sentencing hearing of May 27th and June 17th, 1994. The Defendant's theory is that the victim Was angry at the Defendant because earlier in the evening the Defendant had made a pass at Barbara Caughman, the victim's wife Although Mrs. Caughman confirms that the Defendant had placed his hand inside her shirt and fondled her breast, there is no evidence that the victim witnessed this incident. Likewise, after the Defendant was rebuffed by Mrs. Caughman, there was no evidence that the victim was told of the Defendant's conduct. Indeed, when this advance was made Michael Keller was in his house showing the defendant's girlfriend where the bathroom was. The only evidence of anyone being angry that night was the Defendant's conduct toward the victim's nine-year-old step-son and the killing itself. Both incidents involved the Defendant's use of his newly purchased knife. The jury apparently arrived at the same conclusion by rejecting the self defense theory put forth during the guilt phase and finding the Defendant guilty of premeditated first degree murder. The only testimony produced at trial regarding the stabbing of Michael Keller established that he was attacked suddenly and savagely by the Defendant, without warning or prior evidence of conflict.

The evidence failed to reasonably establish by the greater weight of the evidence the existence of this statutory mitigating circumstance. This Court does not find this statutory mitigating circumstance to exist.

Statutory Mitigating Circumstance **2. 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.**

During the penalty phase of the trial there was testimony presented by several witnesses that the Defendant had a strict mother who would chain or tether him in the back yard when he was young. She would apparently show him very little affection and had a domineering personality. The Defendant's aunt, Kathleen Coolen, who testified to these acts, moved to Florida when the Defendant was about sixteen and only saw him occasionally after that. Her daughter, Judy O'Connor, is six years younger than the Defendant. She confirmed the relationship between the Defendant and his mother. The other witness who testified regarding this issue was the Defendant's girlfriend, Deborah Morabito. She suggested that the Defendant was an alcoholic and that he underwent a personality change when he had been drinking. There was no doubt that the Defendant had been drinking on the evening of the stabbing. This Court recognizes that a mental or emotional condition that does not rise to the level of insanity may be a mitigating circumstance in a death penalty proceeding.

In analyzing the evidence there appears to be a substantial conflict regarding the Defendants ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law. Although the Defendant's aunt testified to abusive treatment of the Defendant by his mother, there was also evidence from other relatives and even the same relatives regarding his close and loving family relationships as an adult. For instance the Defendant's sister, Michelle Garrity, who is ten years younger, described him as a "typical" brother. She said that he was good to her, liked to babysit for her, bought her things and showed kindness toward her. In his adult relationship with her he continued to be kind, generous and considerate toward her children. He lived in her home for a short period and he was described as helpful, kind and very affectionate toward his nieces and nephews. This does not describe a person seriously affected by childhood experiences to the extent that he is unable to conform his conduct to the requirements of the law. It is worthy to note that subsequent to the trial Michelle Garrity was interviewed by Debra Tarbert, an investigator for the Department of Corrections regarding the preparation of a presentence investigation. In that interview she, like Debra Morabito at trial, offered the opinion that the Defendant's actions may have been prompted by alcohol or drug abuse. She also suggested that the Defendant undergoes a personality change when he has been drinking. Those matters were not mentioned during her testimony, which was given through a videotaped deposition taken prior to trial. Other acquaintances who testified likewise failed to describe the Defendant as alcoholic or someone with a serious personality disorder, Bill Najjar, a childhood friend, characterized the

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Defendant as a "good kid". When the Defendant worked for him he was reliable and cshibi ted no violence. It seems unlikely that under the circumstances the witness would not have noticed any suggestion of alcoholism. Another friend, Matthew D'Ambrosio, worked with the Defendant for some time at the Department of Public Works. They became good friends and socialized together away form work also. Mr. D'Ambrosio describes the Defendant as ambitious. He never saw him argue with anyone or exhibit any violence. No signs of social maladjustment were observed at all by this witness, and he did not suggest that the Defendant was alcoholic. No expert testimony was produced at trial to suggest that the Defendant's substance abuse or family background had affected in some way his actions on the night of the murder, The Court will not engage in speculation regarding the existence of such a circumstance, absent consistent and credible evidence. In summary, no pattern of proof emerged from the testimony during the penalty phase to support this statutory mitigating circumstance.

The totality of the evidence and testimony at trial does not reasonably establish the existence of this circumstance by the greater weight of the evidence. The Court finds that this statutory mitigating circumstance does not exist.

Non-Statutow Mitigating Circumstance 1. **The Defendant's family background.**

Most of the facts concerning this circumstance have already been recited in the above section. As previously stated, this Court has considered the evidence produced at trial and through the presentence investigation regarding the Defendant's family background. Although there was some testimony as to matters in the Defendant's childhood that 'were characterized as abuse, it did not reasonably establish that his upbringing created a personality disorder that would explain or mitigate the conduct for which he was convicted in this case. Indeed, the testimony of family members characterized the Defendant as a kind and considerate person. The Defendant was brought up in a large family with two brothers and three sisters. While not wealthy, they apparently were not particularly impoverished, and his other siblings seem to have developed into perfectly well adjusted, law abiding citizens. There simply was no competent evidence to reasonably establish by the greater weight of the evidence that the Defendant's family history should be considered as a non-statutory mitigating circumstance in this case. The Court finds that this circumstance does not exist.

Non-Statutory Mitigating Circumstance 2. **The Defendant's remorse.**

The Defendant has asked that the Court consider his remorse as a mitigating circumstance. The only evidence of remorse by the Defendant produced at trial was inferred from the fact that after his arrest the Defendant sobbed or cried briefly during his interview with Detective Madden when he was told that John Keller had died. It is impossible to determine whether his emotion was prompted by concern for the victim or for himself. Certainly he showed no remorse at the time of the offense. Once Michael Keller was down and dying, the Defendant fled scene with Ms. Morabito and showed absolutely no concern for the welfare of the victim or his family. Although the Defendant had engaged in a completely unprovoked attack on Mr. Keller, he did not give the first thought to helping him obtain aid in his defenseless and helpless condition. After the Defendant was arrested and transported back to the scene of the incident to be identified, he expressed no apparent concern about the act he had committed or the condition of the victim. During the interview with Detective Madden, the Defendant never inquired as to the condition of his victim and his display of emotion upon learning of Keller's death does not establish the existence of sincere remorse. This non-statutory mitigating circumstance was not reasonably established by the greater weight of the evidence. This Court finds that this circumstance does not exist.

Non-Statutory Mitigating Circumstance 3. **The -Defendant's employment background.**

The Defendant was unemployed at the time of the offense. However, there was some testimony produced at trial to the effect that the Defendant, when employed, was a reliable and ambitious worker. As previously noted, both Bill Najjar and Matthew D'Ambrosio testified regarding work related experiences with the Defendant that were positive. According to the presentence investigation, the Defendant completed high school but has no special skills or training. He reported his occupation as a truck driver, but was unable to provide the Department of Corrections investigator with the name of his last employer. His employment history has been affected by the fact that, according to his sister's statement in the presentence investigation, over

the last twenty years he has been in prison more than he has been out. That would certainly have a detrimental effect on achieving any substantial career goals. It does not appear from the evidence and testimony that the Defendant's employment history was stable, nor does it reveal any notable accomplishments that could be considered as significant. This court finds that although the Defendant was at various times employed, this fact, and his performance on the job do not constitute mitigation in this case and the Court does not attribute any weight to this factor.

Non-Statutory Mitigating Circumstance 4. **The Defendant's participation in self-help programs.**

Evidence was introduced during the penalty phase that the Defendant had participated in a narcotics anonymous program while incarcerated in the Pinellas County Jail, awaiting trial. He apparently also completed a self-esteem and reliance course offered in the jail. The fact of participation in these programs was offered as a potential non-statutory mitigating circumstance. It was specifically agreed that this circumstance would not be used to suggest that the Defendant would adjust well to life in prison. The presentence investigation report reflects that the Defendant reported that he was in a rehabilitation center in 1978, but walked out because the "rules were too strict". This casts some doubt on whether the Defendant's participation in counseling would have occurred at all if the Defendant had been free to walk away, as he did in 1978. Although the fact of his participation was reasonably established, this Court finds that it should be given no weight, considering the fact that the Defendant did not want to suggest that his participation reflected an ability to adjust to prison life.

Non-Statutory Mitigating Circumstance 5. **The Defendant's alcoholism or drug use and dependency.**

As previously stated herein, there is no doubt that on the night Michael Keller was murdered, the Defendant had been drinking. This was testified to by his girlfriend Mrs. Morabito and the victim's wife. The question of whether the Defendant was intoxicated or even under the influence to the extent his judgement was substantially impaired is less certain. The evidence does

not suggest that the Defendant was so intoxicated that he was incapable of rational thought and action. The jury, who was given the voluntary intoxication instruction, agreed and found that the Defendant's actions constituted premeditated murder. Immediately following the stabbing, the Defendant had the presence of mind to drive off with his girlfriend in her van. While attempting to escape from the area, he had the forethought to place the knife in his girlfriend's jacket and to remove his bloody shirt. When stopped by a deputy, he gave a false name. Although the deputy felt that the Defendant was impaired to the extent necessary to qualify for a driving under the influence charge, there was no testimony that the Defendant was drunk, or even highly intoxicated. As to the Defendant being an alcoholic, the only proof of that assertion is from his own self-serving statements and those of his girlfriend. No other family members, friends or acquaintances testified to this fact. Likewise, there was no testimony that the Defendant's prior violent acts were in any way connected to alcohol consumption, refuting the assertion of Mrs. Morabito that the Defendant only got violent when he was intoxicated Finally, there was no expert opinion offered as to the Defendant's alcoholism or drug dependency or the effect of alcohol on his actions on the night of the murder. Although the Florida Supreme Court in ***Johnson v. State, 608*** So.2d 4 (Fla. 1992), Cert. denied 124 L. Ed.2d 273 (1994), has recognized that voluntary intoxication may be found to be a mitigator, such a finding is dependent on the facts of the particular case. It is apparent, from the facts recited in the discussion of this circumstance as well as others, that the Defendant engaged in a substantial amount of purposeful conduct on the night of the murder. He knew what he was doing, and he knew it was wrong.

In summary, the testimony failed to reasonably establish by the greater weight of the evidence that the Defendant is an alcoholic or drug addict, Further, the testimony revealed that the Defendant was fully aware of the criminality of his conduct and was not so impaired by alcohol that he was significantly inhibited from conforming his conduct to the requirements of the law. The totality of the evidence fails to reasonably establish this non-statutory mitigating circumstance by the greater weight of the evidence. The Court finds that this mitigator does not exist.

Non-Statutorv Mitigating Circumstance- 6. **Defendant's voluntary confession and/or cooperation with law enforcement authorities.**

The Defendant suggests that his interview with Detective Madden constituted cooperation

with law enforcement and that his admission that he did in fact stab the victim represents a confession. This Court disagrees. There was most certainly not any cooperation with law enforcement. In fact, the Defendant fled the scene after the crime. He hid the murder weapon in his girlfriend's jacket and removed the shirt he was wearing to hide the bloody evidence of his involvement. When stopped by a deputy, he gave a false name. Although he later claimed that this was done because he thought there were "traffic" warrants out for him from Massachusetts, it is more likely he was avoiding arrest for the stabbing or for other violent felony charges that he apparently still has pending in that state.

It is true that the Defendant did voluntary participate in an interview with Detective Madden after he was arrested. This so-called confession was nothing more than a lame effort to avoid responsibility for his actions. The Defendant knew that there were witnesses to the attack, so he couldn't deny his involvement. He knew the victim was not armed, so he couldn't claim he was defending himself. His only refuge was to claim he didn't know what he was doing, i.e. he was intoxicated, or devise a scenario that would allow him to claim that he thought he was being attacked or threatened with attack. It is a testament to the Defendant's presence of mind that he was able to analyze his predicament and devise a position that would incorporate his only two possible defenses. The jury rejected both of them of course, but that does not diminish the fact that they still were the only conceivable defenses to a senseless and inexcusable act.

The Defendant did not confess to Detective Madden, he tried to con him. He did not cooperate with law enforcement officers, he attempted to avoid and deceive them. This non-statutory mitigating circumstance was not reasonably established by the greater weight of the evidence. This Court finds that this circumstance does not exist:

Non-Statutory Mitigating Circumstance 7. **The (Defendant's) quality' of being a caring relative.**

The testimony supporting this circumstance came from the Defendant's sister, his aunt, and a cousin. All said that the Defendant was a caring, considerate relative who loved children. Although these is no reason to believe that their testimony was not sincere, there does not appear to

be any aspect of the Defendant's relationship with these family members that is significantly different than that which any person would normally expect to have. Although this circumstance was reasonably established, this Court accords it only slight or marginal weight.

Non-Statutory Mitigating Circumstance 8. **Any other aspect of the Defendant's character or record, and any other circumstances of the offense.**

As is previously recited in this order, the Court has requested that the Defendant clarify or articulate any additional specific evidence or testimony that the Court should consider which is claimed to be mitigating in nature for the purposes of this requested circumstance. No other facts or arguments have been suggested by the Defendant, and the Court can find none. The Court finds that there is no other aspect of the Defendant's character or record, or any other circumstance of the offense that has been reasonably established by the greater weight of the evidence that should be considered as mitigating in this case. This non-statutory mitigating circumstance does not exist.

This Court has now considered and evaluated each statutory and non-statutory mitigating circumstance which the Defendant has requested. The Court has identified each such mitigating factor that has been reasonably established by the greater weight of the evidence. The Court must now weigh the aggravating circumstance against those that are mitigating. The Court found one aggravating circumstance to exist beyond a reasonable doubt. The Court found that no statutory mitigating circumstances exist in this case. Three non-statutory mitigating circumstances were reasonably established: The Defendant's employment background, the Defendant's participation in self-help programs, and the (Defendant's) quality of being a caring relative, Of these three circumstances, the Court was unable to attribute any weight whatsoever to the first two, and only slight weight to the third, The Court finds that the aggravating circumstance outweighs the mitigating circumstances and that it does so beyond a reasonable doubt. The jury likewise found this to be the case and recommended the imposition of the death penalty by a vote of eight to four. This Court is required to give the jury recommendation great weight in determining the proper penalty to be imposed In reaching its decision, the Court has considered the reasoning contained in such cases as *Songer v. State, 544* So.2d 1010 (Fla. 1989) and *Nibert* v. *State, 574* So.2d 1059 (Fla. 1990), wherein the Florida Supreme Court addressed the proportionality of the death penalty where only one aggravating circumstance was found to exist. In such cases the Court recognizes

that any significant substantial mitigation would require that the jury's recommendation be overridden. In this case however, the amount of mitigation is so slight that it is practically nonexistent. It is therefore

ORDERED AND ADJUDGED THAT THE DEFENDANT, MICHAEL COOLEN BE AND HE IS HEREBY sentenced to death in the electric chair for the murder of MICHAEL KELLER.

MAY GOD HAVE MERCY ON YOUR SOUL.

DONE AND ORDERED IN CLEARWATER, PINELLAS COUNTY, FLORIDA ON this 20th day of June, 1994.

W. DOUGLAS BAIRD, CIRCUIT JUDGE

Copies furnished to:

State Attorney
Brent Armstrong, Esquire
Joseph McDermott, Esquire

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 10th day of July, 1995.

Respectfully submitted,

Douglas S. Connor

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