IN THE SUPREME COURT OF FLORIDA

KEN ELDON LOTT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER: 86,108

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On May 20, 1994, Ken Eldon Lott, hereinafter referred to as appellant, was indicted by a Grand Jury with one count of Murder in the First Degree. (PT190)[1] The trial court found the appellant indigent, and the Office of Public Defender was appointed. (PT198) A motion to withdraw as counsel was filed by the Public Defender, and a Notice of Appearance was filed by Joel A. Spector, Esquire on June 2, 1994. (PT202,203)

On June 29, 1994 appellant filed thirty (30) pretrial motions concerning challenges to the Florida Capital scheme; Motion to Restrict Admissibility of Photographs, and an Offer to Stipulate to cause of death. (PT213-360) After hearing, the Motion for Appointment of Investigator was granted. (PT48) In a

[1] The symbol "PT" refers to the pre-trial record; the symbol "TR" refers to the trial record; and the symbol "PP" refers to the penalty phase record.

subsequent hearing, the Motion for Appointment of Co-Counsel was denied. (PT63)

Prior to opening statement, appellant stipulated not to mention character evidence or prior violent acts of a State witness in the opening statement. (TR283) The State agreed not to show photographs in opening statement. (TR285)

During trial, appellant objected to photographs of the victim on the grounds that the photos were cumulative, gory and inflammatory. (TR412, 416, 417, 418, 432, 435) The objections were overruled. (TR412, 414, 416, 417, 426) The appellant made a standing objection to any picture not depicting cause of death, and to picture # 36. (TR437) The objection was overruled. (TR438) There was an objection to picture #49 on the grounds that was photo was repetitive. (TR448) The objection was overruled. (TR448) The objection to picture #50 is overruled. (TR450)

Appellant objected to the introduction of a shirt taken from the appellant's home in Deltona on the grounds of relevance. (TR468) The shirt was admitted over objection subject to it being tied up later. (TR469) Appellant objected to the introduction of State Exhibit YY (fingerprint cards) on the grounds of relevance. (TR478) The objection was overruled. (TR479) The appellant objected to State XX (photos of fingerprints). (TR482) The trial court admitted the fingerprint cards and photo of fingerprints taken by other deputies into evidence over objection for the limited purpose of showing they do not match state Witness Whitman. (TR489) The appellant made a standing objection

to the fingerprint evidence on the grounds of relevance. (TR490) State moved Exhibit C (composite of 41 slides) into evidence over objection. (TR509)

During the state's case, Assistant State Attorney Culhan advised the Court the Rule Sequestration had been violated. (TR540) During the testimony of the medical examiner, Culhan encountered Sergeant Corriveau, Detective Dana Griffis, and witness Kristen Hayes in the back room. The witnesses were looking through their evidence list and they told Culhan that there had been two sets of pliers discovered at the murder scene, at which time Culhan realized that the Rule of Sequestration had been invoked. (TR540) The trial court conducted a hearing on the possible violation of the court's order concerning the Rule of Sequestration. (TR541-572) Appellant moved for sanctions and requested the court exclude the witnesses. (TR572-73) The trial court denied the motion for sanctions. (TR579)

The appellant objected to additional fingerprint evidence being admitted into evidence (State CC) on grounds of relevancy. (TR622) The objection was overruled. (TR624) Appellant's objection to all fingerprints being admitted into evidence was overruled, and the fingerprints were admitted for the limited purpose of eliminating Whitman as a suspect. (TR624) Appellant objected to introduction of State's Exhibits MMM and ZZ (fingerprint evidence) on relevancy grounds. (TR629) The objection was overruled. (TR630)

A taped phone conversation between appellant and state

witness Whitman was published to the jury over objection. (TR818) Appellant objected to the admission of Appellant's shoes into evidence on relevancy grounds. (TR823)

The appellant made an oral Motion in Limine concerning the testimony of a State expert concerning the shoe track on the grounds that the prejudicial effect would be outweighed by the probative value. (TR852) Appellant objected to state witness Fischer testifying as to where State Exhibits 57 and 58 (palm prints) were gathered in the victim's home based upon hearsay. (TR889) The objection was overruled. (TR890) The appellant objected to State witness Fischer testifying as to what the sneaker manufacturer reported to her concerning the manufacture of the sneakers. (TR901) The objection was overruled. (TR901) Appellant objected to Fischer testifying as to where in the house the footprint evidence was gathered in the victim's house. The objection was overruled because Fischer was reading from a card that was already in evidence. (TR909)

The State rested. (TR932) The appellant moved for a Judgment of Acquittal on three grounds: No proof of premeditation; no evidence that Appellant was at the victim's home at the time of death; and venue of the crime was not established. (TR934) The motion for Judgment of Acquittal was denied. (TR940)

There was a proffer of defense witness James Whitman concerning testimony of his brother, state witness Robert Whitman's reputation. (TR940) The trial court excluded the testimony of James Whitman as to the reputation of Robert

Whitman. (TR977) There was also a proffer of defense witness Hortence E. Coleman on the reputation of Robert Whitman. (TR977) The trial court permitted the testimony of Coleman. (TR987) Appellant proffered testimony of Coleman that Appellant told Coleman that the victim was a landscaping client. (TR1038) The trial court sustained the State's objection. (TR1038)

The trial court denied Appellant's request for a circumstantial evidence instruction. (TR1078) The Appellant renewed the motion for Judgment of Acquittal. (TR1091) The State requested that State Exhibit OOO (photo of ring brought to David Pratt) be admitted into evidence. (TR1098-99) The Appellant objected on the grounds that Pratt could not be sure if the photo was an accurate representation of the jewelry. (TR1099) The Appellant withdrew the request for a circumstantial evidence instruction. (T1097)

The appellant rested his case. (TR1103) The trial court denied the motion for Judgment of Acquittal, and permitted the State to reopen its case to admit State Exhibit OOO into evidence as #63. The State rested its case. (TR1104) During closing argument, the Appellant objected to the State's argument concerning the evidence. (TR1164) The trial court instructed the jury to rely on their memories. (TR1165)

During jury deliberations, the jury requested that Robert Whitman's testimony be read back to them. (TR1213) The transcript of Robert Whitman's testimony was sent back to the jury to be read in the jury room. (TR1214) The appellant was

found guilty as charged.

During the penalty phase, appellant objected to the victim's sister, Anne Tighe, making a prepared victim impact statement to the jury. (PP17) Appellant objected to the admission of Department of Corrections (DOC) records involving letters from DOC officials and a letter from Appellant to DOC officials due to it being beyond the capital sentencing statute and that the letter was hearsay. (PP19-28) The court reserved ruling. (PP28)

Appellant objected to some aggravating factors. (PP33) Appellant objects to the testimony of Ms. Richardson, a victim of a past armed robbery committed by the appellant. (PP46) The trial court overruled the objection. (PP49) The trial court admitted the judgment and sentence and the letters in the DOC file concerning the attempted escape. (PP103) The state objected to witness Pratt testifying that: "I can't believe for a moment he did that." (PP128) The objection was sustained over Appellant's objection. (PP128) The Appellant objected to testimony concerning Appellant being adjudged delinquent. (PP165) The objection was overruled. (PP167) The state further conducted cross-examination designed to reveal Appellant's entire arrest history. (PP167) Appellant made a motion for mistrial based upon the admission of Appellant's arrest history. (PP175) The motion for mistrial was denied. (PP183) Appellant renewed the motion for mistrial which was denied. (PP187, 210) Appellant made an ore tenus motion to limit State's inquiry into prior convictions. (PP224) The trial court ordered that the State limit the cross-

examination of Dr. Dee concerning the details of the past crimes committed by the appellant. (PP274)

The appellant objected to the jury instructions on aggravating factors (felony murder and pecuniary gain). (PP328) The trial court ruled that it will instruct on both factors. (PP336) Appellant further objected to the jury instruction on witness elimination and on the aggravating circumstance of heinous, atrocious and cruel (HAC). (PP344, 346) The trial court permitted a jury instruction on HAC. (PP350) The appellant requested a jury instruction for the jury to consider individually each aggravator and mitigator; the trial court denied the request. (PP366) The appellant renewed the motion for mistrial. (PP369) The trial court gave the CCP instruction. (PP371) The jury returned a recommendation of a death sentence by a vote of 12 to 0. (PP421)

The trial court conducted a Spenser hearing on June 20, 1995. (PR105) The Appellant denied having any involvement in the murder of Rose Connors and testified that he obtained Rose Connors' jewelry and credit card from Robert Whitman. The trial court found that six aggravating factors were proven beyond a reasonable doubt and that five were used in the weighing process; the trial court also found that two statutory mitigating circumstances were proven and given considerable weight and some weight was given to non-statutory mitigating factors. (TR 574-584) The trial court sentenced appellant to death. (TR 177)

STATEMENT OF THE FACTS

On Saturday, March 26, 1994, Ann Ferguson and Rose Connors, the victim, made plans to have lunch together the following Monday. They were to meet at Rose Connors' house and go to the Wekiwa Marina. (TR327) On Monday, March 28th, Ann Ferguson arrived at Rose Connors' home at approximately 11:15 a.m. as planned. Ferguson rang the bell and knocked on the door with no response. She then entered the house and called Rose's name. Ferguson went towards the bedroom and then saw Rose Connors lying on the bed. (TR329) Ferguson ran to the kitchen to telephone police. (TR330) Ferguson remained on the telephone until sheriff deputies arrived. (TR332)

Orange County Deputy Sheriff Timothy Gillespie was dispatched to the Connors' house in Sweetwater West. (TR338) The deputy subsequently entered the house and saw Ferguson on the phone in the kitchen. Ferguson began screaming and pointing to the bedroom area. (TR340-41) The deputy then observed the naked victim lying face down on the bed in a pool of blood. The deputy observed no sign of life from Rose Connors, and found no other victim or suspects in the house. (TR341-44) Paramedics arrived and entered the bedroom, also observed no sign of life and left the crime scene. (TR342) Deputy Gillespie contacted his supervisor, took a statement from Ferguson, and secured the crime scene. (TR343-44) Fingerprints, palm prints and footprints of the victim were taken at the morgue by the Crime Scene Unit. (T353)

Orange County Sheriff Deputy Dana Griffis of the Crime

Scene Unit responded to the crime scene at about noon. (TR355-56) Deputy Griffis fingerprinted Ann Ferguson and collected a pair of shoes from her. (TR360,365) Deputy Griffis then assisted Deputy Corriveau in taking measurements of the house. (TR361) Deputy Griffis also recovered some duct tape from the dumpster outside the residence. (TR362) The following day, Deputy Griffis collected latent fingerprints from the master bedroom and took prints from the vacuum cleaner with black powder. (TR368-69) The deputy also administered a chemical, Ninhydrin, to the walls of the hallway, door and the bathroom furthest from the crime scene, and to the walls around the other bedroom. (TR372-375)

On March 30th, Deputy Griffis returned to the crime scene for further processing. From March 30th through April 11, Deputy Griffis processed numerous areas of the house including: a pack of cigarettes and all the exterior doors and windows except the front door; (TR377-380) The deputy photographed several latent fingerprint areas on the hallway walls; (TR380) The deputy also photographed a footwear impression located in the dirt outside the house; (TR381) swept the master bathroom, shower stall and bathtub, and photographed latent fingerprints; (TR382-83) the deputy also photographed more latent fingerprints taken from the coffee maker and walls; (TR384, 385, 386) the deputy processed the master bedroom bathroom with black powder and a latent fingerprint was found on the sink and on the shower stall; (TR387-89) Deputy Griffis also collected a piece of gray duct

tape and an empty duct tape roll from the closet in the first bedroom; (TR390) the deputy collected all the water and sink traps, and processed the kitchen cabinet doors, drinking glasses and a toaster; (TR392) He also collected a pair of pliers and a plastic bag from underneath the desk in the first bedroom; (TR392-94) the deputy also photographed latent fingerprints processed with physical developer in the hallway and cut off a red stain from the back of the sofa in the living room; the deputy also processed two latent fingerprint areas on the south edge of the north front door and a latent fingerprint area on the exterior glass of the door; (TR396-98) and he processed the interior doors, took a picture of a purse that was found open and put it into evidence. (TR465) On April 21st, Detective Griffis went to appellant's home in Deltona, Florida and took a V-neck shirt into evidence. (TR467) Fibers found during the sweep of the victim's home were consistent with fibers found in a T-shirt found at the appellant's home. (TR504)

Dr. William R. Anderson, Deputy Chief Medical Examiner for Orange and Osceola Counties, testified. (TR507) When the medical examiner arrived at the crime scene he observed the victim lying face down, unclothed with a towel-like item over the bottom of her buttocks area. (TR511) A large quantity of blood was found around the body and a stab wound to the right shoulder. (TR511) The medical examiner also observed no secondary path of blood from the shoulder, meaning there was no body movement after the bleeding started. (TR512) A significant amount of blood

soaked into the mattress and came down the side of the bed. (TR512) The medical examiner then observed areas on the victim's arms where the blood must have come in contact with but was spared getting on the skin because something was there to prevent it from going onto the skin until it dried. This indicated that the arms were actually in a different position and had been moved after the blood dried. (TR513-14) The medical examiner also found some gray, linear, sticky material which looks like the edges of tape. According to the medical examiner, this indicates that duct tape was on the wrists and that the body was moved and duct tape removed after death, giving the blood a period of time to dry. (TR514-15) There were no blood marks on the feet, showing the victim did not walk in the blood. (TR515)

Based upon the collection of blood, the medical examiner concluded the wounds were inflicted while the victim was on the bed. (TR516) Fecal matter was found on the victim's foot, in her underwear and smeared in various areas in the house. According to the medical examiner, it's not unusual for someone who is being assaulted and injured to have some defecation as well as urination. It is usually seen in situations where somebody is being frightened, is under a lot of stress or is in a life fighting type of situation. (TR516) There was sticky tape substance on the victim's cheek indicating that duct tape was put over her mouth. (TR517-18) The victim's larynx was fractured; however, medical examiner did not observe petechial hemorrhages (very small hemorrhage in the skin and membranes of the eyes)

which is often seen in strangulation. The lack of hemorrhaging suggests that there was not sufficient compression around the neck to cut-off the venous flow of blood. (TR518) The victim also had a knife wound on the neck which partially cut the jugular vein, causing significant loss of blood. (TR520) The victim had a fresh bruise and a fairly significant amount of acute hemorrhaging into the soft tissue, which is consistent with being forcibly held or pulled by a pair of hands. (TR521) The victim had scrapes on her elbow and knee area from coming into contact with a rough surface. (TR522) There were areas on the left arm where some type of instrument caused irregular damage.

A pair of pliers, which matched the size of the wounds, was found at the scene. The wound was consistent with the contusion and abrasion caused by pliers being applied to the skin in a pinching type manner. (TR523) The thumb of the right hand was cut. The cut was consistent with the hand possibly trying to grab the weapon or defend against the weapon. This was really the only defensive wound found on the body. (TR524) A fingernail was broken, this could have been the result of a struggle. (TR525) There was significant bruising in the area of the thigh indicating that some pressure or some force had been applied in the medial thigh area, possibly from forcing the legs apart. (TR526-27) The victim had injuries to the temporal area indicating some significant amount of blunt force injury prior to death. (TR527) The blow to the head combined with the pressure to the neck rendered the victim unconscious. Once the bleeding

started there was very little motion of the body. (TR528)

The cause of death was bleeding due to the incision wound to the neck which cut the jugular vein. (TR529) The blow to the head was inflicted minutes (up to a half hour) before the neck was cut. (TR531-32) The time of death was determined to be in the general neighborhood of between 5:00 p.m. on March 27th and 5:00 p.m. on March 28th. (TR533-34) There was no evidence that the victim was beaten (like punishment with fists). (TR535-36) There was no evidence of any disinfectant used at the crime scene. (TR536) There was no evidence of sexual battery found by the medical examiner. (TR537-38)

Sergeant Robert Corriveau, of the Orange County Sheriff's Office, was the initial lead crime scene investigator of this homicide. (TR581) Corriveau photographed and made a diagram of the crime scene. (TR582) Corriveau also did a perimeter check of the outside of the house. He found the front door unlocked, the back door locked, and the windows secure. (TR586) The home's security system did not appear to be tampered with. (TR587) There were no pry marks or other signs of forced entry. (TR588) While processing the crime scene, Corriveau found a wallet on top of the drop ceiling in the kitchen. (TR591) He also found duct tape in a dumpster on Lot 65, adjacent to the crime scene. (TR593) Fecal matter was found on the floor in the foyer. (TR594) Corriveau found a pair of panties underneath a bed that were torn and had fecal matter on them. (TR596)

Kristen Hayes, a forensic analyst for the Orange County Sheriff's Department, responded to the crime scene on March 29, 1994. (TR611) Hayes processed the crime scene for fingerprints and footprints. (TR612-20) Hayes testified that she removed a fingerprint from a doorjamb at the crime scene, and took photographs of a shoe track found in the house. (TR621, 627) Hayes removed a fingerprint from the headboard in the second bedroom and an additional footprint from the foyer. (TR628-29)

Robert Lindsay, a representative of Capital Warrant, presented records from his credit card company of certain credit card transactions from a credit account issued to Rose Connors. (TR647-48) John Levinson, manager of electronic banking for Sun Trust Service Corporation, authenticated business records of ATM transactions that occurred at Sun Trust ATM locations. (TR650-53) Through Levinson, the State also introduced photographs made by the ATM machine at the Douglas Drive ATM that correspond with the transaction at the ATM. (TR654) The first photo taken from the ATM machine was dated March 27, 1995, at 09:23:18. (TR657)

Ann Tighe, the sister of the victim, identified a ring in a photograph as belonging to her sister Rose Connors . Tighe also identified a picture of her sister wearing the ring and a tennis bracelet on her wrist. (TR659-61) Clara Graham was a co-worker of the appellant's wife, Tammy Lott, at Paragon Home Care in March and April, 1994. (TR668-69) Graham witnessed Tammy Lott wearing both a ring and tennis bracelet that looked like the ring and tennis bracelet worn by the victim in a picture. (T669-70)

Connie Hopewell was a co-worker with Tammy Lott, at Paragon Home Care in March and April, 1994. (TR672) Hopewell noticed Lott wearing a ring on her finger that resembled the ring pictured in State Exhibit #38. (TR673)

David Pratt borrowed Lott's truck in April 1994, and Lott offered to sell Pratt a gold ring and a tennis bracelet. (TR674-76) Lott wanted $600.00 for the jewelry. (TR676) The jewelry was taken to a pawn shop where the diamonds on the gold ring were determined to be phony. (TR678) Lott told Pratt that he did something for somebody in Ocala, and they gave him the jewelry in lieu of money. That may have been the reason he did not buy it, because other people might have stolen it. (TR687)

Lieutenant Ben Johnson, with the Volusia County Sheriff's Department, was called by Robert Whitman on May 16 or 21, 1994, to schedule a meeting. (TR691-93) Johnson met and conversed with Whitman later that day at Whitman's residence. (TR694) Johnson then contacted the Orange County Sheriff's Department, and Deputy Cameron Weir called Johnson at home shortly thereafter. (TR695) Johnson made arrangements to meet with Orange County Sheriff deputies and Whitman in his office the following Monday. Whitman produced two rings at that meeting, which he gave to the Orange County deputies. (TR696) Johnson has known Whitman since they were kids, and both their fathers were friends. (TR698)

Robert Whitman had known Appellant since he was ten years old. (TR722) Sometime after Easter 1994, Appellant came to

Whitman's house and stated that he had some jewelry he had to get rid of that had come from a robbery and murder in Jacksonville. (TR723-24) A week later, Appellant returned to Whitman's house and told Whitman that Lott **and** a friend, Ray Fuller, had gone to this lady in Sweetwater to rob her and ended up killing her. (TR725-26) Appellant told Whitman that he used to work for the victim doing landscaping and he knew she was pretty well off. (TR726) Appellant stated he met Fuller at a Firestone tire store. Fuller had a half ounce of Crystal Meth, and they went off to do that. (TR726) Once that ran out they went out and got some cocaine. When that ran out they had no money and no drugs. "I guess they were Jones or something needed more." (TR726) "Jones" is withdrawing cold turkey. (TR727)

Appellant further told Whitman that his **and** Fuller's plan was for Ray to get the lady inside and tie her up and gag her. Somehow the lady got loose and ran out the front door. He said he ran out there and grabbed her and took her back into the house. (TR727) The victim did not have any cash, just gold and jewelry. (TR731) The lady begged Lott not to kill her, saying that she would take him to the bank and get them money and sign her car over to them. Lott said he could not take the chance because she knew him and she would send him to prison. (TR731-32)

Appellant further admitted that he beat the lady because she was frightening him. "He beat her worse than he beat on men before and could not knock her out." Appellant admitted killing the victim with a boning knife and cut her throat with **a**

filet knife, saying he had to kill her because the lady knew him. "Said he had to kill the bitch." (TR727) Whitman said that Appellant wondered why no blood spurted out when he cut her throat. (TR728-29) Appellant also admitted that he returned to the house the same night and poured disinfectant on the victim and cleaned up the scene. (TR730) When Appellant returned to the victim's house to clean up, he took his stepson's bicycle and left his truck about a mile or two away. (TR747)

A couple of weeks after Appellant confessed to Whitman, Whitman contacted Lieutenant Johnson. Whitman was afraid Lott would kill someone else and Whitman would be in trouble for having knowledge of this murder and doing nothing. (TR732) Whitman met with Lieutenant Johnson on a Saturday. Johnson asked that Whitman meet with other law enforcement officers at another date, and requested that he try to get some of the jewelry from Lott. (TR733) The next day Lott showed up and Whitman got three rings from him. (TR733) The following day Whitman gave the three rings to Detective Derrider of the Orange County Sheriff's Office. (TR734-35) Whitman had previously seen the tennis bracelet in Lott's possession, and had seen Lott's wife wearing it. (TR736) Whitman tried to get the tennis bracelet, but Lott's wife would not give it up. (TR736) Whitman stated that the tennis bracelet that Lott showed him sort of looked like the bracelet in State Exhibit #39. (TR737)

The detectives asked Whitman for permission to tape record a telephone conversation with Lott wherein Whitman would

solicit admissions from the appellant(T737) :

WHITMAN: Oh, no. Well, maybe I can help ya on them rings, man.

LOTT: Yeah.

WHITMAN: What, uh, is your lowest - the guy's offering six hundred. That one's zucranium.

LOTT: That square one?

WHITMAN: The big one, yeah, the one ain't like we figured. You know, we figured it was --

LOTT: That's what I told 'em it looked too damn big, you know?

WHITMAN: Yeah, it's not worth much. But the other one they said it may go six hundred.

LOTT: Try six fifty.

WHITMAN: Try what?

LOTT: Try Six fifty.

WHITMAN: Six fifty?

LOTT: Yeah, I give you fifty of it. That all right?

WHITMAN: Okay.

LOTT: You know, I --

WHITMAN: I didn't, weren't really looking for nothin' but I know you're in a bind. (SR 4-5)

The police then made arrangements with Whitman to give money to Lott for the rings. The police bugged Whitman's house where the transaction was to take place. (TR740)

Lott showed up early while the police were still at Whitman's house planting electronic devices. Lott spotted the police van with a Orange County tag. Whitman said it was a TV repairman from Sanford and to come back in two hours and he would

have the money. (TR741) Subsequently, Lott returned to Whitman's house and came in the trailer real spooky. He went back looking around and wouldn't come out to the living room. Whitman invited Lott to talk with him in the living room, where the bug was, but Lott refused and went outside. (TR742) Whitman went to the breakfast nook and from the window said, "well if you won't come here, here's your money and you can leave." Whitman then passed $600.00 to Lott through the window. (TR743) Lott got in his truck and left. Whitman then hollered over the bug that Lott was leaving the back way towards Grand Avenue. (TR744)

Whitman stated that he had been convicted of three or four felonies, the last one was in 1983 or 1984. (TR746) According to Whitman, Lott "snitched" on Whitman and Whitman went to jail for a week and received probation. (TR748) Whitman and Lott had no association with each other for nearly twenty years. (TR749) Then one day he saw Lott and his wife riding horses. They saw each other a couple more times and a relationship developed. (TR751) Whitman had purchased a horse from Appellant. (TR752) Whitman admitted supplying marijuana to Appellant. On the day he came to the trailer to get the $600.00, Lott also discussed purchasing or picking up some marijuana. (TR754) After Whitman stated, "here's your money," then he said, "I'm going to tell you something, I can't hardly stomach this anymore. It's getting to me inside because of what you did," and I said I can't handle this. Lott replied, "What are you doing to me?... Please don't do this to me." (TR758)

After Lott was arrested, Whitman wrote a letter to Lott's wife stating that he would always be there for her. (TR763) Whitman admitted to making some effort to establish an alibi because he felt Lott would try to implicate him in the murder. He contacted people that were with him to show there was no way he could have been involved. (TR772) Whitman told his friends that they may be called as witnesses to testify that he was in a garage putting an engine in a truck. (TR773) Whitman denied ever knowing Appellant's alleged accomplice, Ray Fuller. However, in an April 22nd or 23rd phone call with Lott's wife Whitman stated, "Oh you know him" when Lott's wife denied knowing Ray Fuller. (TR783-86) While Whitman testified, he held a calendar that had information on it pertaining to his alibi. (TR787) Whitman prepared his alibi when law enforcement told him that Lott was implicating him in the murder. (TR789)

Volusia County Deputy Sheriff Laurence Josepa was involved in the surveillance and apprehension of the Appellant. (TR801) After Appellant **was** stopped, there was a request to search Appellant's vehicle and Lott cooperated fully. (TR802) The deputy obtained the shoes that the Appellant wore and gave them to Detective Derridder. (TR803) Volusia County Deputy Phillip Delgado also participated in the arrest of Lott. (TR810) When Deputy Delgado approached Lott's vehicle he observed cash bills underneath the Appellant's vehicle on the driver's side. He turned the bills over to the Orange County law enforcement officers. (TR811-12)

Orange County Sheriff Investigator Stuart Derridder investigated the murder of Connors. (TR813) Derridder met with Lieutenant Johnson and Whitman, and Whitman gave Derridder jewelry. (TR814) Whitman agreed to call Lott and have the conversation recorded. (TR816) After recording the serial numbers from some bills, Derridder gave money to Whitman who was to give it to Lott. Lott was arrested shortly thereafter and the same money was found under Lott's car. (TR819-20) Derridder admitted that he did not have first-hand knowledge of the jewelry ever being in Lott's hands, just the statements of Whitman. (TR832) During the taped phone call, Whitman talked about perhaps he could keep one of the rings for his part. (TR833) Despite the fact that Appellant was arrested in April 1994, the State gathered evidence in December 1994 on Royce Piplin, the victim's boyfriend (fingerprints, shoes, and interviews). (TR842-43)

Debra Fischer, an FDLE analyst testified as an expert in the area of latent print comparison identification. (T863-66) Fischer stated that three latent palm prints found in the house were identified as Appellant's. (TR885) One palm print was found on the left door jamb of the second bedroom. (TR887) Two other palm prints were found on the exterior glass of the front door, and on the front edge of the west sink in the master bedroom. (TR890) Three of the shoe impressions found at the crime scene matched the footwear impression of Appellant's shoes. (TR899) The footwear was the same size (9). Strippling is little markings along the sole of the shoe. In some footwear the mold

is done by computer and some by hand. (TR900) Fischer called the manufacturer, and the strippling in the mold of Lott's shoe was done by hand, making that mold an individual. (TR901) Fischer could not make a positive ID of the shoe because there were individual characteristics missing or cuts left by wear. (TR903) Two footwear impressions were recovered from the peak kitchen tile floor area. (TR909) Whitman could not be eliminated as a suspect from the palm prints found because the palm print provided by law enforcement officers was inadequate. Fischer advised the law enforcement officers of this in her March 13, 1995 report, however, there has been no response from them. (TR917-20)

Juan Briones was painting a house in the neighborhood of the victim's house on Sunday morning, March 27, 1994. (TR1006) Briones heard five or six screams from a woman's voice between 9:30 and 10:30 a.m. Briones identified the victim's house where he heard the screams coming from. (TR1009)

Carolyn Nellis, the Appellant's aunt, attended a BBQ at the Appellant's mother's house the Sunday after Easter 1994. (TR1017-18) The Appellant introduced Robert Whitman to Nellis stating this is the man I got into trouble with when I was sixteen, and Whitman responded, "Yeah and I've been waiting twenty years to get something on him." (TR1022)

Hortence "Libby" Coleman, the Appellant's mother, overheard the Appellant introduce Whitman to Nellis wherein Whitman stated that he had been trying to get even with him

(Lott) for 23 or 24 years. Coleman asked why Whitman stated that, and he just shook his head. (TR1026-28) Coleman stated that Whitman's reputation for truthfulness is not good in the community. She said his reputation was known throughout the neighborhood. (TR1029-30)

The Appellant did landscaping, worked digging pools, and also drove a semi-truck in 1994. (TR1035) Appellant had three landscaping clients in the Sweetwater **area** until February, 1994. (TR1036-37) At the time of the murder, the Appellant was living in Deltona and his mother in Deland, ten miles **away.** (TR1039-40) Coleman called Appellant at home in Deltona at 8:45 a.m. on Sunday, March 27th, before she left for St. Augustine. She called to remind him to mow the yard before the realty people came on Tuesday. Coleman spoke to Appellant's wife directly, and she relayed conversation from Appellant while he was looking after Coleman's puppies. Coleman specifically heard her son's voice. (TR1041-42) Coleman recalls the time because after completing the call, Coleman called her aunt in Lakeland, Florida at 8:55 a.m. The phone bill was entered into evidence. (TR1043-45) Robert Whitman worked with Appellant at times when he did his landscaping work. (TR1047-48)

PENALTY PHASE

The State sought the following aggravating factors: prior violent felony; felony murder; avoid lawful arrest; pecuniary gain; HAC; and CCP. (PP33) The defense counsel sought the following statutory mitigating factors: B) emotional distress;

and F) capacity to appreciate law. (PP34) Defense counsel moved to invoke the rule of sequestration due to the victim's sister being allowed to testify in the courtroom. (PP36) The State introduced three armed robbery judgment and sentences. (PP59) The State admitted a fourth judgment and sentence for attempted escape with a letter from Department of Corrections. (PP115) The State rested. (PP117)

Yul Ashley Clark, of Deland Roofing, testified that he has known the Appellant since junior high school. Clark stated that Lott **was** never violent, never started fights or pushed people around. Clark said that Lott's nature is non-violent and that he is a happy-go-lucky kind of person. (PP119-20) Clark stated that Appellant started stealing his parents car to go joyriding, and that once he and Lott stole a car at a hospital and left it on the beach. (PP122-23)

David Pratt testified that he has known Appellant since high school, and has always known him to be 100% straight up and honest. Pratt has never seen the Appellant upset or mad or start fights and bully people around. (PP125-27) Appellant volunteered his time and tractor for a Jaycee party. Pratt stated, "I can't believe for a moment he did that." (PP127) Appellant had good accounts in his lawn maintenance business and was always busy. He had nice equipment and trucks. (PP132)

Ray Delong testified that he owned DDD Equipment in Deland. He stated that Lott had a business account with him and always paid his bills. Delong would loan Lott equipment and when

Lott's business was slow he would come in to work out payment arrangements with Delong. (PP133-34) Delong said Lott was even tempered and once volunteered to help the company move to a new location. (PP135) Delong never witnessed any behavior that suggested Lott had any brain damage. (PP136)

Lott's uncle, Farris Davis, testified that Lott was always peaceful around him. (PP139) Lott's aunt, Carolyn Ellis, testified that Lott lived with her in Orlando in the 1970's. she said Appellant was truthful and helpful with the kids, She never saw him violently upset. (PP144-46) Larry Ridner, a corrections officer, was best friends with Lott when they were teenagers. Ridner stated that Lott was a non-violent person and that his current conviction is inconsistent with Lott's personality. (PP155-58)

Lloyd Coleman, Appellant's stepfather, stated that Lott never got into fights. (PP160-61) He said Lott was hardworking, never lazy, and had his own business. Coleman testified that Lott also did charity work by donating his landscaping services. (PP162-63) Lott's mother testified that he is a helpful, non-violent, hardworking person. (PP191-92) Lott had a head injury when he was eighteen months old and was hospitalized for two weeks. He suffered additional head injury, rendering him unconscious, at the age of sixteen as a result of a motorcycle accident. (PP193-94) After the motorcycle accident, Lott suffered from very bad headaches. His performance at school dropped, he began getting into trouble at school because he

Wouldn't quit talking. (PP198-99) Lott was married and was a very good stepfather. Lott loved his stepson very much and his stepson felt the same. Lott also stated that he would turn his life around and never go back to prison. (PP195)

Dr. Henry Dee, a clinical psychologist, performed psychological tests on Lott. (PP279-80) Lott used alcohol, cocaine, speed and marijuana. He got addicted to cocaine while incarcerated and used it intravenously up until his arrest. (PP281) Based on Dr. Dee's testimony, Lott showed cerebral damage, with greater damage to the left cerebral function than to the right. (PP284) Further testing of the frontal lobe function showed impairment which would impact Lott's ability to logically plan and carry out, or reasonable behavior inhibits response to provocation to environment and control of impulses. (PP285) Other testing confirmed Lott's drug addiction. (PP286) At the time the crime was committed, Lott suffered from organic person syndrome. (PP288) This type of injury would place the Lott under the influence of extreme mental or emotional disturbance. This injury and impairment would also effect the Lott's capacity to conform his behavior to the requirements of law. (PP289) This syndrome would substantially impair Lott's capacity to appreciate the criminality of his conduct. (PP290) The use of cocaine and cocaine withdrawal would amplify the effects of the syndrome. (PP290) Lott was using cocaine up until the time of his arrest. (PP291) Lott was also physically and psychologically abused by his stepfather. (PP292)

SUMMARY OF THE ARGUMENT

POINT ONE: The Appellant's conviction for first degree murder should be overturned because the evidence is legally insufficient to support the guilty verdict.

POINT TWO: The trial court excluded James Whitman's testimony concerning his brother, Robert Whitman's reputation for truthfulness. Robert Whitman was the State's "star witness" and the erroneous exclusion of this testimony was reversible error.

POINT THREE: The trial court excluded Hortence Coleman's testimony concerning statements made to her by the Appellant. The substance of the statements that were excluded was that the Appellant provided lawn care maintenance and handyman services to the victim before the murder. This evidence would have established a reasonable explanation for the Appellant's palm prints being found in the victim's house.

POINT FOUR: The trial court erred in instructing the jury and finding the aggravating circumstance of an especially heinous, atrocious or cruel murder where the testimony by the medical examiner conclusively established that the initial attack on the victim rendered the victim unconscious.

POINT FIVE: The Appellant's death sentence is disproportionate to other death sentences that have issued in this state when compared against the spectrum of capital cases that this Court has reviewed.

POINT SIX: The trial court erred by permitting the introduction of gruesome photographs of the victim over timely

objection. The probative value of this photographic evidence was substantially outweighed by the danger of unfair prejudice.

POINT SEVEN: The trial court erred in instructing the jury that, in determining what sanction to recommend, it could consider whether the murder was cold, calculated and premeditated, where there **was** not sufficient evidence in the record to support the instruction.

POINT EIGHT: The trial court erred in allowing the state to introduce irrelevant, prejudicial evidence of nonstatutory aggravating factors; to wit: hearsay letters from the Department of Corrections, and the Appellant's arrest history.

POINT NINE: The trial court erred in permitting victim impact evidence that **was** not relevant to the issue of the uniqueness of the victim and went beyond the narrow application of the statutory scheme.

POINT TEN: The trial court erred by not imposing sanctions where the state violated the rule of sequestration.

POINT ELEVEN: Section 921.141, Florida Statutes is unconstitutional.

POINT I

THE CONVICTION FOR FIRST-DEGREE MURDER VIOLATES THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICT.

The trial court denied the appellant's motion for judgment of acquittal. The trial judge erred by not granting an acquittal to the charges because the state's evidence is legally insufficient to support a guilty verdict; the proof fails to exclude the reasonable possibility that someone other than Ken Lott killed Rose Connors. The demonstrative evidence of Lott's guilt is entirely circumstantial; the case entirely rests upon the testimony of Robert Whitman.

Some facts are not in dispute. Rose Connors was last known to be alive on a Saturday morning when she made arrangements to have lunch with Ann Ferguson on the following Monday. When Ferguson arrived at Connors' house Monday morning, she found Connors dead. The Medical Examiner concluded that the cause of death was from a knife wound to the neck and that death occurred between 5 pm Saturday to 5 pm Sunday, March 27, 1994.

Juan Briones testified that on Sunday, March 27, 1994 he was painting a house in the vicinity of Rose Connors' house. On that morning Briones heard five or six screams from a woman's voice between the hours of 9:30 and 10:30 in the morning coming from Rose Connors' house. Hortence Coleman established an alibi for appellant by testifying that she called the appellant at his home on Sunday March 27 in Deltona, Florida at 8:45 am and was on

the phone until 8:55 am. Coleman further testified that appellant had three landscaping clients in the Sweetwater area where the victim lived and that Robert Whitman did accompany the appellant on his landscaping jobs.[2]

After the victim's body was discovered, members of crime scene unit spent nearly two weeks processing the victim's home for evidence. According to the FDLE senior crime analyst, three latent palm prints found in the victim's house belonged to the appellant. One palm print was found at the left doorjamb of bedroom number two; one was found on the exterior glass of the front door; and one was found at the front edge of the west sink in the master bedroom. Robert Whitman could not be eliminated as a suspect from other palm prints found in the appellant's house. The FDLE analyst advised law enforcement that Robert Whitman could not be eliminated as a suspect in writing, but there was response. Fibers found in the appellant's house was consistent with a shirt recovered at the crime scene. Three of the shoe impressions found at the crime scene were the same size of appellant's footwear and consistent with the appellant's footwear. The state further introduced a photograph of a white male with a truck using the victim's ATM card. The white male in the photograph resembled the appellant and the truck in the photograph resembled appellant's truck.

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[2] The trial court excluded testimony by Coleman that Rose Connors had been a landscaping client prior to the murder. The defense wished to introduce this testimony to explain why appellant's fingerprints were found at the victim's home. (T1038)

Robert Whitman testified that appellant confessed the murder to him. Whitman further produced jewelry that belonged to the victim which he claimed he received from the appellant. Others testified that Appellant's wife was wearing jewelry that resembled jewelry belonging to the victim.

Appellant was not permitted to introduce testimony of Robert Whitman's brother concerning his reputation for truthfulness that supported the hypothesis that Robert Whitman was the likely perpetrator of this crime (See Point II). Nevertheless, this evidence is legally insufficient to establish that Ken Lott, and no other person, killed Rose Connors. Accordingly, as a matter of law, Lott is entitled to reversal of the murder conviction and discharge.

" [T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). Lott's conviction violates the Due Process Clause and as a matter of law the judge erred in denying the motion for judgment of acquittal because the circumstantial evidence is legally insufficient to overcome the presumption of innocence, and the alleged confession to Robert Whitman is unreliable.

Under Florida law, where there is no direct evidence of guilt and the state seeks a conviction based wholly upon circumstantial evidence, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the

evidence is inconsistent with any reasonable hypothesis of innocence, The basic proposition of our law is that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt, and it is the responsibility of the state to carry its burden. It would be impermissible to allow the state to meet its burden through a succession of inferences that required a pyramiding of assumptions in order to arrive at the conclusion necessary for conviction. Torres v. State, 520 So.2d 78, 80 (Fla. 3d DCA 1988). See Posnell v. State, 393 So.2d 635, 636 (Fla. 4th DCA 1981) ("Where the state fails to meet its burden of proving each and every necessary element of the offense charged beyond a reasonable doubt the case should not be submitted to the jury and a judgment of acquittal should be granted."); Kickasola v. State, 405 So.2d 200, 201 (Fla. 3d DCA 1981) ("[E]vidence which furnished nothing stronger than a suspicion, even though it tends to justify the suspicion that the defendant committed the crime, is insufficient to sustain a conviction.") (emphasis added) .

It is well established in Florida that a case that rests exclusively on circumstantial evidence must exclude all reasonable hypotheses of innocence.

> It is the responsibility of the State to carry its burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. (citations omitted).
>
> Evidence which furnishes nothing

> stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even thoush the circumstantial evidence is sufficient to suqqest a probability of quilt, it is not therebv adequate to suwwort a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Davis v. State, 90 So.2d 629, 631-32 (Fla. 1956) (emphasis added).

But for the unreliable confession to Robert Whitman, the case against Lott is entirely circumstantial. There is NO direct evidence of his guilt.

The state was required to prove beyond a reasonable doubt that:

1. Rose Connors is dead.
2. The death was caused by the criminal act or agency of Ken Lott.
3. There was a premeditated killing of Rose Connors.

Section 782.04(1)(a), Fla. Stat.; Fla. Std. Jury Ins. in Crim. Cases, p.63. The state proved and it is undisputed that Rose Connors is dead. It is expressly submitted, however, that the state failed as a matter of law to sufficiently prove either that Collins' death was caused by the criminal act or agency of Ken Lott or that the killing was premeditated. Accordingly, as a

matter of law, Lott is entitled to reversal of his conviction and immediate discharge from custody in Florida.

THE STATE FAILED TO PROVE THAT COLLINS' DEATH WAS CAUSED BY THE CRIMINAL ACT OR AGENCY OF KEN LOTT.

What competent evidence exists that Lott, and no other person, killed Connors? The state relied on the inferences to be drawn from four areas of proof:

1. Fingerprint evidence.
2. Fiber and shoe print evidence.
3. Possession of stolen property.
4. Confession to Robert Whitman.

FINGERPRINT EVIDENCE:

The fingerprint evidence established at most that Lott had been in the victim's home. Admittedly, the fingerprint comparison evidence provided a positive means for identification. However, the state is required to show that the palm prints could only have been left in the victim's bedroom during the commission of the crime to **allow** the trier of fact to legally infer that the identity of the murderer was Ken Lott. See Jaramillo v. State, 417 So.2d 257 (Fla. 1982); Cox v. State, 555 So.2d 352 (Fla. 1989). The state did not prove that the palm prints could only have been placed in the victim's house at the time of the murder. There is no way of knowing how long the palm prints were present in the house. This identification evidence, viewed in a light most favorable to the state, shows at most that at some point in time Ken Lott had been in Collins' house.

FIBER AND SHOE PRINT EVIDENCE

The shoe print and fiber evidence established at most that a shoe impression and fiber found in Collins' home are consistent with Lott's clothing. A shoe impression comparison analysis was conducted by an shoe impression analyst, and the results was inconclusive. The testimony of the expert establishes at most that Lott's shoe is consistent with three shoe impressions found in Collins' kitchen. However, the expert could not make a positive identification of the shoe because there were individual characteristics missing left by wear. There was also fibers found during the sweep of the house that were consistent with a shirt found in the appellant's house.

Appellant contends that comparing fibers is not like comparing fingerprints, in that fiber comparison does not provide a positive means of identification. Florida appellate courts have not hesitated to reverse convictions that are founded upon such equivocal identification evidence. For example, in Horstman v. State, 530 So.2d 368 (Fla. 2d DCA 1988), the Second District Court of Appeal reversed a second-degree murder conviction because the circumstantial evidence proving identification (hair and blood comparison testimony) was too equivocal to negate the possibility that someone other than the accused shot the victim.

> The strongest evidence implicating Horstman in Peterson's murder is the hair that was found on her body. Although hair comparison analysis may be persuasive, it is not 100% reliable. Unlike fingerprints, certainty is not possible. Hair comparison analysis, for example, cannot determine the age or sex of the person from whom the hair came. The state emphasizes that its expert, Agent Malone, testified that the chances were

> almost non-existent that the hairs found on the body originated from anyone other than Horstman. We do not share Mr. Malone's conviction in the infallibility of hair comparison evidence. Thus, we cannot uphold a conviction dependent upon such evidence.

Horstman, 530 So.2d at 370. See Jackson v. State, 511 So.2d 1047 (Fla. 2d DCA 1987) (First-degree murder conviction reversed due to the legal insufficiency of identification of murderer based on bite-mark comparison, hair comparison, and statement of accused).

POSSESSION OF STOLEN PROPERTY:

State witness Whitman provided law enforcement jewelry that belonged to the victim which he claimed he received from the appellant. Others testified that Appellant's wife was wearing jewelry that resembled jewelry belonging to the victim. Also, a photo of a person at an ATM machine using the victim's ATM card resembled the appellant. This evidence provides a strong circumstantial inference that the appellant was a participant in Rose Connor's murder absent a reasonable hypothesis of innocence. One reasonable hypothesis of innocence that was provided during the Spenser hearing was that the appellant received the ATM card and jewelry from Robert Whitman.

CONFESSION TO ROBERT WHITMAN:

The investigation and arrest of the appellant was precipitated by Robert Whitman contacting law enforcement and stating that Appellant had confessed to him the murder of the victim. This alleged confession was not reliable.

During the trial, the defense exposed the motive for Whitman to frame the appellant. Years before, the appellant had

implicated Whitman in a crime, and as a result Whitman had gone to jail. At the time of the murder, Whitman made statements that he **was** going to get even with the appellant.

The trial jury rejected the hypothesis that Robert Whitman and not appellant was the murderer because two critical evidentiary matters were improperly excluded from consideration. First, Appellant's mother was not permitted to testify that the appellant did landscaping and general help around the house for the victim which would have given an explanation for the appellant fingerprints being found in the house. Second, the brother of Robert Whitman **was** not permitted to testify that Robert Whitman's reputation for truthfulness was bad.

CONCLUSION

In sum, the state's evidence is more consistent with the premise that Lott did not murder Connors than that he did. The assumption that Lott is the murderer is also inconsistent with the defense theory that Robert Whitman committed the murder. There was testimony that Whitman could not be excluded as a suspect due to the fingerprint evidence found in the victim's house. Whitman's familiarity with the victim's home and the manner of the victim's death also supports the defense theory that Whitman was the murderer.

Pursuant to McArthur v. State, 351 So.2d 972 (Fla. 1977), as a matter of law the state's evidence is insufficient to support the verdict because it fails to exclude the possibility that some person other than Ken Lott killed Rose Connors.

> A review of prior decisions of this Court in similar cases is not helpful to the analysis required here, since the nature and quantity of circumstantial evidence in each case is unique.
>
> * * *
>
> In general, the jury received two categories of circumstantial evidence -- scientific and non-scientific. Our study of both types leads us to conclude that, on balance, neither is inconsistent with innocence.

McArthur, 351 So.2d at 976; see also Fowler v. State, 492 So.2d 1344, 1347 (Fla. 1st DCA 1986) ("Conviction returned by jury could not be sustained by the court unless there was competent and substantial evidence inconsistent with any reasonable hypothesis of innocence.")

All of the state's competent evidence can be believed and still the proof is consistent with Lott's innocence because there is no competent, substantial proof showing that Lott entered Connors home at the time of the murder. As a matter of law, pursuant to McArthur, supra, the evidence is insufficient to support the verdict. The conviction must be reversed, not only because the state failed to prove that Ken E. Lott was the murderer, but also because the state failed to prove a premeditated murder.

INSUFFICIENT EVIDENCE OF PREMEDITATION

For a killing to constitute premeditated murder in the first-degree the state must establish not only that the accused committed the act resulting in the death of another, but also that before committing the act he formed a definite purpose for a sufficient time to be conscious of a well-defined purpose and

intention to kill. Purkhiser v. State, 210 So.2d 448 (Fla. 1968). Premeditation is the one essential element distinguishing first-degree murder from second-degree murder. See Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986) ("Premeditation is more than a mere intent to kill; it is a fully formed conscious purpose to kill."); Owens v. State, 441 So.2d 1111 (Fla. 3d DCA 1983). More than an intent to kill must be shown to sustain a first-degree murder conviction. Tien Wans v. State, 426 So.2d 1004 (Fla. 3d DCA 1983).

The state at trial argued that Connors was beaten and stabbed. Assuming, arguendo, that Lott was the assailant, can it reasonably be said beyond a reasonable doubt that the beating **was** first-degree premeditated murder? If Lott was Connors' assailant, he may well have intended to inflict severe injury upon her for an unknown reason, but as **a** matter of law that provoked reaction does not equate with **a** deliberate, conscious purpose to effect the death of another. Though premeditation can be proved by circumstantial evidence, as a matter of law that evidence must be inconsistent with any premise other than that the person was killed by someone consciously intending to do so before it is sufficient to support a conviction for first-degree premeditated murder.

The evidence in this case is legally inadequate to support the conviction because the evidence fails to establish that Ken Lott was Connors' murderer. There is no direct evidence that is inconsistent with the legal presumption that Lott is

innocent. Therefore, the state failed to adequately prove that the death of the victim was caused by the criminal act or agency of Ken Lott. Assuming that Lott was Connors' assailant, according to Whitman the motive for the murder **was** witness elimination. Based upon the physical evidence, it is equally likely that the blows were struck out of rage and pain, that is, as a totally non-premeditated reaction to resistance by the victim. See Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988) ("A rage is inconsistent with the premeditated intent to kill someone[.]") (emphasis added).

As a matter of law, the evidence in this **case** is simply inadequate. The conviction rests on pure speculation and the unreliable testimony of Robert Whitman. A first-degree murder conviction that rests on such equivocal evidence violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Accordingly, the conviction must be reversed and Lott discharged from Florida custody.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCLUDING THE TESTIMONY OF A DEFENSE WITNESS, THEREBY VIOLATING THE DEFENDANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

The defense proffered the testimony of James Whitman, brother of star state witness Robert Whitman for the purpose of proving that Robert Whitman's reputation for truthfulness in the community was bad. (TR940) The trial court excluded the testimony of James Whitman concerning the reputation of his brother Robert Whitman for truthfulness.

DISCUSSION

Anytime a witness testifies, his ability to be truthful is at issue and subject to impeachment. One way that witnesses may be impeached in Florida is the proof of character using reputation in the community for truthfulness. See Florida Evidence Code Section 609 Therefore, a jury is permitted to infer from testimony that the community believes the witness is not truthful person, that the witness is not truthful when testifying during the trial.

In order to prove reputation, it is first necessary to lay the foundation that the witness is aware of the person's reputation in the community. Reputation in this context is the composite description of what people of a particular community have said or are saying about an individual. This evidence is thought to be reliable because it is a distillation of those views. Therefore, for reputation testimony to be admissible the

trial court must find that the witness is in fact aware of the person's reputation for truthfulness. This is not to say that the witness must have heard others discussing the character trait involved, but rather the witness knows the person's reputation for the trait involved. See Gamble v. State, 492 So. 2d 1132 (Fla. 5th DCA 1986)

In the instant case, James Whitman testified that he had knowledge of his brother's reputation fox truthfulness:

> Q. Do you feel you can honestly say that your familiar with his reputation, even though you may not be able to remember specific people that you talked to.
>
> A. Absolutely.
>
> Q. Is that clear to you?
>
> A. Yes, sir.
>
> Q. And what is his reputation -- in what community is it, first of all?
>
> A. In Deland.
>
> **Q.** How long have you lived there?
>
> A. 42 years.
>
> Q. All right. And that's the community that Robert's essentially been raised in?
>
> A. Yes. We were raised there.
>
> Q. What is Robert Whitman's reputation for truthfulness in his community of Deland?
>
> A. He has a hard time telling the truth, sometimes telling a lie will --
>
> STATE: I have to object.....
>
> (TR942,943)

The trial court further questioned James Whitman during the

proffer:

> Q. How do you know that the community thinks he is a liar?
>
> A. Well, we have -- how do I know the community thinks he's a liar?
>
> Q. Right. What do you base it on?
>
> A. My -- and there again my family, my personal experiences, my experiences that I have spoken to certain individuals in the community.
>
> (TR973,974)

The trial court sustained the state's objection. In ruling James Whitman's testimony inadmissable, the trial court concluded that Whitman could not adequately describe the members of the community that provided the basis of his brother's reputation for being untrustworthy.

The appellant asserts that the trial court erred in excluding the testimony of James Whitman. In Gamble v. State the trial court stated that:

> One learns of another's general reputation in a community over a period of time and through miscellaneous contacts with many people. Inability to recall specific names and times of conversations should not be a sufficient basis for exclusion, although it may affect its weight.

It is respectfully submitted that the appellant was entitled to present the foregoing testimony, and the erroneous exclusion of the testimony bearing directly on the credibility of the state's star witness was reversible error in this case.

POINT III

THE TRIAL COURT ERRED IN EXCLUDING A STATEMENT MADE BY APPELLANT THAT PRIOR TO THE MURDER OF ROSE CONNORS, APPELLANT HAD PROVIDED LAWN MAINTENANCE AND HANDYMAN SERVICES TO CONNORS.

During the direct examination of Appellant's mother, Hortence Coleman, defense counsel questioned Coleman about Appellant's lawn maintenance clients in the area of the victim's home:

> Q All Right. But you know he was operating in the Sweetwater area?
>
> A Yes, sir.
>
> Q For how long?
>
> A From '92, from about the end of '92. I think he started in about June of '92 and he gave it up in February of '94.
>
> Q Okay. And in addition to mowing the acres, he also had individual residential clients?
>
> A Yes, I think he did. He had about three.
>
> MR. SPECTOR [Defense counsel]: Okay. One minute, Your Honor. May we approach, Your Honor?
>
> THE COURT: Sure.

(TR1038) The state then objected to the defense counsel eliciting testimony from Coleman that appellant made statements to her that the victim had been a client. The trial court sustained the objection.

The appellant asserts that the trial court erred in excluding Coleman's testimony. Admissions by a party-opponent

have historically been admissible as substantive evidence as an exception to the hearsay rule. See Fla. Stat. 90.803.18 These out-of-court statements and actions are admissible, not because they were against the interests of the party when they were made, but because the adverse party cannot complain about not being cross-examined. See Swafford v. State, 533 So.2d 270, 271 (Fla. 1988) There is no requirement under section 90.803(18), that the admissions be against a party's interest. See United States v. Barletta, 652 F.2d 218, 219 (1st Cir. 1981) The common name of the exception, e.g., admission, may be misleading since there is no requirement that the adversary admit anything in the statement. A more precise term for the exception is "statement by a party-opponent." See Ehrhardt, Florida Evidence, page 677.

The circumstantial evidence of appellant's palm prints being found in the victim's home without explanation was devastating evidence of appellant's guilt. Therefore, evidence that would have provided a reasonable explanation as to how the appellant's palm prints could have been in the victim's house was essential to the defense. This evidence would have provided an explanation to the jury for the fingerprint evidence that was found at the victim's home, which would bolstered the hypothesis of innocence. See Jaramillo v. State, supra. Based upon the quantum of evidence that was presented by the state in this case, it can not be said that the exclusion of Coleman's testimony can be harmless beyond a reasonable doubt.

POINT IV

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING THE AGGRAVATING CIRCUMSTANCE OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER.

There was no direct evidence presented on how Rose Connors was murdered. The medical testified that Connors had blunt force injury to the temporal area and a broken larynx. The head injury and pressure to the head rendered the victim unconscious. The medical examiner further testified that based upon the collection of blood, the deadly wounds were inflicted while the victim was on the bed, and that once the bleeding started there was little motion of the victim's body. This all supports the inference that the victim was likely unconscious at the time the fatal attack was administered.

The trial court emphasized that the victim suffered unspeakable humiliation, terror and pain on the one hand, and then states that "there is no way of knowing how long this tortuous assault lasted, but common sense dictates it could not have been brief," From this finding, the trial court suggests that one should ignore the medical examiner's testimony and acknowledge beyond a reasonable doubt that the victim was aware of the attack and suffered great fear and pain. This is pure speculation.

Appellant submits that there was no testimony that the victim was aware of her impending death. Furthermore, there was no testimony that the victim suffered any pain as a result of the

blow to the head. It is fair to conclude due to the lack of evidence that Rose Connors lost consciousness immediately upon being attacked. Appellant contends that the HAC aggravating factor was not proven beyond a reasonable doubt.

"A homicide is especially heinous, atrocious or cruel when 'the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Boenoano v. State, 527 So.2d 194 (Fla. 1988), quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). "Acts committed independently from the capital felony for which the offender is being sentenced are not relevant to the question of whether the capital felony itself was especially heinous, atrocious, or cruel. " Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985); See Halliwell v. State, 323 So.2d 557 (Fla. 1975).

A judge may properly instruct on all of the statutory aggravating **circumstances,** notwithstanding evidentiary support. Straight v. Wainwright, 422 So.2d 827, 830 (Fla. 1982); See also Jacobs v. Wainwright, 450 So.2d 200, 202 (Fla. 1984) (reading verbatim all statutory aggravating and mitigating). It is not improper for a judge to refuse to instruct the jury on mitigating circumstances that are not supported by the record. Roman v. State, 475 So.2d 1228, 1234 (Fla. 1985) ("The standard jury instructions instruct the judge to give instruction on only those aggravating and mitigating circumstances for which evidence has

been presented."); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985) ("We find no error. The judge followed the standard instructions and specifically addressed all circumstances and gave instructions of those aggravating and mitigating circumstances for which evidence had been presented.") The note to the judge contained in the Standard Jury Instructions in Criminal Cases, 2d Ed. expressly states, "Give only those aggravating circumstances for which evidence has been presented", p. 80 (emphasis added).

In the instant case, the trial court did not instruct on all the aggravating circumstances. The trial court elected to instruct on only those aggravating circumstances which he believed were supported by the evidence. Therefore, appellant contends that the trial court erred in instructing the jury on the aggravating circumstances of an especially heinous, atrocious or cruel murder where a timely objection was made and where there was no evidentiary support whatsoever for the instruction. It is expressly submitted that giving the unsupported instruction over objection violated the Eighth Amendment, in that the presence of that legally improper instruction was confusing and misleading to the jury concerning their recommendation of the appropriate sanction.

The presence of the instruction was prejudicial and confusing. This was not a situation where the jury was read verbatim all of the statutory aggravating circumstances which, if unobiected to, is apparently not reversible error. See Straisht

v. Wainwright, supra. The jury in this case received instructions on six aggravating circumstances.

This particular aggravating circumstance, due to the subjectivity involved, violates the Eighth Amendment because it fails to adequately channel the discretion of the jury.

> To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge of balance the facts of the case against the standard of activity which can only be developed by involvement with the trials of numerous defendants. Thus, the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

State v. Dixon, 283 So.2d 1, 8 (Fla. 1973) (emphasis added). See Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Godfrey v. Georsia, 446 U.S. 420 (1980).

The instruction also should have not been given because clearly as a matter of law there was not sufficient competent evidence to support the means and method of the victim's death. It was nothing more than speculation that the victim died as the trial court theorized. Moreover, the trial court should not have found this aggravating circumstance. Appellant further submits that the trial court erred in detailing the events that led to the victim's death (as if the trial court was there) where there was no evidence introduced to support this version of events. Again, according to the medical examiner, there was a single blow to the head and pressure to the neck of the victim that rendered her unconscious.

In anticipation of an argument by the State that the

error is harmless, it is submitted that the erroneous presence of this particular instruction led the jurors to conclude, and reasonably so, that they were entitled to consider whether in their opinion this murder **was** especially heinous, or cruel and to base the death recommendation on this erroneous consideration. Furthermore, the trial court relied upon this aggravating factor in determining that death was the appropriate sentence in this case. The jury would not appreciate, in the absence of a separate instruction in that regard, that acts on an unconscious victim could not support the circumstance. See Halliwell supra. A lay person would inevitably conclude that this murder was especially heinous, atrocious or cruel. The State cannot meet its burden of showing beyond a reasonable doubt that the erroneous presence of this particular instruction in the face of a timely objection did not affect the recommendations of death by the jury. See State v. Lee, 531 So.2d 133 (Fla. 1988); Ciccarelli v. State, 531 So.2d 129 (Fla. 1988).

The death sentence must be reversed and the matter remanded for a new penalty phase with a new jury due to violations of the Fifth, Sixth, Eighth and Fourteenth Amendments. These violations were caused by the presence of an improper instruction and finding by the trial court that was wholly unsupported by the evidence. Timely and specific objections by defense counsel were overruled. The presence of that particular instruction under the facts of this case was so susceptible to confusion and **misapplication by the jury that distortion of the**

reasoned sentencing procedure required by the Eighth Amendment as occurred; the recommendation of the jury is unreliable and flawed.

POINT V

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

The trial court found four aggravating circumstances, i.e., felony murder/pecuniary gain, prior violent felony, heinous, atrocious and cruel and witness elimination. The Heinous, Atrocious and Cruel (HAC) aggravating circumstance was improperly found (See Point Four). Therefore, the three aggravating circumstances weighed against the substantial statutory and non-statutory mitigating circumstances, Lott's death sentence is disproportionate considering the spectrum of capital cases that this Court reviews. This case simply does not qualify as one warranting the imposition of the ultimate sanction.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306 (1972), that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d 1, 17 (Fla. 1973); See also Coker v. Georgia, 433 U.S. 584 (1977)[3] This Court reviews "each sentence of death issued in the state,"

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

Fitzpatrick v. State, 427 So.2d 809, 811 (Fla. 1988), to "[g]uarantee that the reasons present in one case will reach similar result to that reached under similar circumstances in another case," Dixon, 283 So.2d at 10, and to determine whether all of the circumstances of the case at hand "warrant the imposition of our harshest penalty." Fitzpatrick, at 812. Ken Lott's case is neither "the most aggravated" nor "unmitigated."

Performing a proportionality review, this Court should strike Ken Lott's death sentence. In Fitzpatrick the trial court found the following aggravating factors:

> 1. Fitzpatrick was previously convicted of another capital felony or a felony involving the use or threat of violence;
>
> 2. Fitzpatrick knowingly created great risk of death to many persons;
>
> 3. The capital felony was committed while Fitzpatrick was engaged in the commission of, or attempted commission of an enumerated felony, namely kidnapping;
>
> 4. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and
>
> 5. The capital felony was committed for pecuniary gain.

The trial judge found the following statutory mitigating circumstances:

> 1. The capital felony was committed while Fitzpatrick was under the influence of extreme mental or emotional disturbance;
>
> 2. The capacity of Fitzpatrick to appreciate the criminality of his conduct to the requirements of law was substantially impaired; and

> 3. The age of Fitzpatrick at the time of the crime.

In vacating the death sentence, this Court emphasized the fact that the trial court did not find the two aggravating circumstances of heinous, atrocious, (HAC) and cruel, and cold, calculated, and premeditated (CCP):

> The trial judge's findings of the mitigating circumstances of extreme emotional or mental disturbance, substantially impaired capacity to conform conduct, and low emotional age were supported by sufficient evidence. In **contrast,** the aggravating circumstances of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent.

Fitzpatrick at 812. In making its proportionality review, this Court has therefore held that some aggravating circumstances are more weighted then others, and where the aggravating circumstances of HAC and CCP are absent the murder is less aggravating.

In the instant case, both HAC and CCP are "conspicuously absent" and substantial statutory and non-statutory mitigating evidence was presented and found by the trial court. Following the holding in Fitzpatrick, this court should overturn Lott's death sentence as disproportionate to other capital cases in Florida.

There was a factually similar case where this court also found that the death penalty was disproportionate to other capital cases in Florida. In Proffitt v. State, 510 So.2d 896 (Fla. 1987) defendant was initially tried and convicted for first-degree murder and originally sentenced to death. The

evidence at trial revealed that Proffitt, while burglarizing a house, killed an occupant with one stab wound to the chest while the victim was lying in bed.

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

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

In overturning Proffitt's death sentence this Court held:

> Here, not only is there no aggravating factor of prior convictions, but the trial judge expressly found that Proffitt's lack of any significant history of prior criminal

> activity or violent behavior were mitigating circumstances. Co-workers described Proffitt as nonviolent and happily married. He was employed at the time of the offense and was described as a good worker and responsible employee. This testimony was unrefuted. The record also reflects that Proffitt had been drinking; he made no statements on the night of the crime regarding any criminal intentions; there is no record that he possessed a weapon when he entered the premises; and the victim was stabbed only once. Additionally, following the crime, Proffitt made no attempt to inflict mortal injuries on the victim's wife, but immediately fled the apartment, returned home, confessed to his wife, and voluntarily surrendered to authorities. To hold, as argued by the state, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty. We hold that our decisions in Rembert and Menendez require this Court to reduce the sentence to life imprisonment without the opportunity for parole for twenty-five years.

Proffitt at 898.

Unlike Proffitt, in the instant case the trial court found far more substantial mitigating circumstances including two statutory mental mitigating circumstances. Appellant argues that the facts surrounding the murder in the instant case are no more aggravated than in the series of cases listed above. Appellant further contends that there is as much mitigation presented and found in the instant case than the series of cases listed above.

Conclusion

To be sure, the instant case is not the most aggravated and least mitigated murder to come before this Court. On the contrary, this case is one of the least aggravated and most

mitigated. The sentence of death in this case is disproportionate when compared with other capital cases where this Court has vacated the death sentence and imposed life imprisonment. When compelling mitigation exists such as that existing in this case, some of which was found by the trial judge, the death penalty is simply inappropriate under the standard previously set by this Court.

POINT VI

THE INTRODUCTION OF PREJUDICIAL AND UNNECESSARY PHOTOGRAPHS OF THE VICTIM DENIED KEN LOTT HIS RIGHT TO A FAIR TRIAL.

Gruesome photographs is one of the most troubling issues in capital cases. Most often, appellate courts are asked to rubber stamp admission of truly revolting pictures, even though "[i]t is unrealistic to believe, even after a limited view, that the horror engendered by these slides could ever be erased from the minds of the jurors..." Commonwealth v. Garrison, 331 A.2d 186, 188 (Pa. 1975); Walker v. City of Miami, 337 So.2d 1002 (Fla. 3d DCA 1976); Young v. State, 234 So.2d 341 (Fla. 1970).

The test for the admissibility of photographic evidence is one of relevance. Straight v. State, 397 So.2d 903 (Fla. 1981) However, even "relevant evidence is inadmissible if it probative value is substantially outweighed by the danger of unfair prejudice." Section 90.403, Fla. Stat.(1993); Hoffert v. State, 559 So.2d 1246 (Fla. 4th DCA 1990). Thus, even though technically relevant, before photographs can be admitted into evidence, "the trial judge in the first instance and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury." Leach v. State, 132 So.2d 329, 332 (Fla. 1961).

In the instant case, the trial court allowed the introduction of numerous photographs of the Appellant's timely

and specific objections. (TR418) Before trial appellant offered to stipulate to the victim's cause of death. Therefore, where the issue of cause of death was not contested by the defense at trial, the admission of the prejudicial evidence constitutes reversible error. See Hoffert, supra

POINT. VII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT, IN DETERMINING WHAT SANCTION TO RECOMMEND, IT COULD CONSIDER WHETHER THE MURDER WAS COLD, CALCULATED AND PREMEDITATED, THEREBY RENDERING THE DEATH SENTENCE UNRELIABLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The **law** is clear that, unless the parties agree that the judge may instruct on all the factors, the jury must be instructed on only those aggravating and mitigating factors that are supported by the evidence. See Roman v. State, 475 So.2d 1228, 1234 (Fla. 1985) ("The standard jury instructions instruct the judge to give instruction on only those aggravating and mitigating circumstances for which evidence has been presented."); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985) ("The judge followed the standard instructions for those aggravating and mitigating circumstances for which evidence had been presented.") See also Standard Jury Instructions in Criminal Cases, 2d Edition, p. 80, ("Give only those aggravating circumstances for which evidence has been presented.")

> The jury's recommended sentence is given great weight under our bifurcated death penalty system. It is the jury's task to weigh the aggravating and mitigating evidence in arriving at a recommended sentence. Where relevant mitigating evidence is excluded from this balancing process, the scale is more likely to tip in favor of a recommended sentence of death; Since the sentencer must comply with a stricter standard when imposing a death sentence over **a** jury recommendation of life, a defendant must be allowed to present all relevant mitigating evidence to the jury in his

> efforts to secure such recommendation. Therefore, unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new recommendation on resentencing.

Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987). Accord, Rilev v. Wainwrisht, 517 So.2d 656, 659 (Fla. 1987) ("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.") (emphasis added).

Thus, this Court recognizes that it is constitutional error for the jury to be prevented from considering non-statutory mitigating factors in determining whether to recommend life imprisonment or the death penalty, because the failure to do so skews the analysis in favor of imposition of the death penalty. A jury instruction on an improper statutory aggravating factor results in the same taint. When more aggravating factors are present, more mitigation will be needed to counterbalance the presence of the aggravating factor. Thus, the presence of an improper factor also necessarily skews the analysis in favor of the death penalty, which renders the death penalty unreliable under the Eighth and Fourteenth Amendments.

In the instant case, the trial court agreed to give the State requested instruction on CCP for the following stated reasons over strenuous objection:

> Based on the fact that it wasn't -- it was something that did require some thought and he didn't just walk in and kill her because she got in the way. It

was more than that.

(PP371) In the State's closing argument that the death penalty was the proper sanction in this case, the state attorney spent the balance of his time arguing that this was a cold, calculated and premeditated murder.

There can be no conclusion other than that the jury applied the CCP factor in recommending imposition of the death penalty. The actions by Appellant would necessarily have been viewed by a lay person as cold, calculated and premeditated. Evidence and argument was presented by the State to that end, and the prosecution devoted much of the penalty phase to convince the jury that this murder was done with planning, calculation and heightened premeditation. Even is these offensive things had not been stressed, in all likelihood the jury still would have attributed weight to this factor when told by the court that it was permissible under the law that they do so.

This court dealt with the improper instruction of the HAC aggravating factor in the case of Omelus v. State, 584 So.2d 563 (Fla. 1991). In Omelus, the state stressed that three aggravating circumstances were clearly established by the evidence, specifically: (1) that the murder was committed for pecuniary gain; (2) that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; (3) that the murder was especially heinous, atrocious, or cruel. The state focused especially upon the last factor, that the murder was especially heinous,

atrocious, or cruel. The jury returned a recommendation of death by an eight-to-four vote.

The trial judge subsequently imposed the death penalty, finding two aggravating circumstances: (1) that the murder was committed for pecuniary gain and (2) that it was committed in a cold, calculated, and premeditated manner. The trial court did not find as an appropriate aggravating circumstance that the murder was especially heinous, atrocious, or cruel.

This Court found that the trial court erred in instructing the jury that it could properly consider as an aggravating factor that this murder was especially heinous, atrocious, or cruel. In ordering a new penalty phase this court stated:

> Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the death sentence in this case because, given the state's emphasis on the heinous, atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an eight-to-four vote, we must conclude that this error is not harmless beyond a reasonable doubt under the standard set forth in DiGuilio.

Clearly, the instant case is analogous to the error found in Omelus. To be sure, the jury would not appreciate, however, that as a matter of law it could not properly weigh the cold, calculated, and premeditated nature of Rose Connors' murder into the equation of whether to recommend life imprisonment or the death penalty for Lott. Indeed, the jury is presumed to have

used this instruction and to have followed the law given it by the trial judge. Grizzell v. Wainwrisht, 692 F.2d 722, 726-27 (11th Cir. 1982), cert. denied, 461 U.S. 948 (1983). The burden is on the State to show beyond a reasonable doubt that the instruction on this inapplicable statutory aggravating factor did not affect the jury recommendation. See Riley, 517 So.2d at 659; Ciccarelli v. State, 531 So.2d 129 (Fla. 1988); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Chapman v. California, 386 U.S. 18 (1967). The State cannot meet that burden. Accordingly, the death penalty must be vacated and the matter remanded for a new penalty phase.

POINT VIII

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE IRRELEVANT, PREJUDICIAL EVIDENCE OF NONSTATUTORY AGGRAVATING FACTORS.

During the penalty phase, the state introduced irrelevant and prejudicial evidence of nonstatutory aggravating factors over objection on three occasions: letters from Department of Corrections officials concerning a prior offense; and state cross-examination designed to reveal the appellant's arrest history.

Appellant objected to the admission of Department of Corrections (DOC) records involving letters from DOC officials and a letter from Appellant to DOC officials due to it being beyond the capital sentencing statute and that the letter was hearsay. (PP19-28)

At the penalty phase, counsel for Appellant called the Appellant's stepfather, Lloyd Coleman, for the purpose of testifying on the Appellant's childhood. During the direct examination of Mr. Coleman, the following testimony transpired:

> **Q:** How would you describe his personality as he was coming up, like just coming into the teenage years for example?
>
> A: More or less a typical teenager. He and I had our ups and downs occasionally. Sometimes he wouldn't do what I thought he should be doing.
>
> **Q:** Was he unusually troublesome?
>
> A: No, sir.

Q: Was he generally honest and always had respect.

A: Yes, sir. Always honest and always had respect.

Q: He got into some trouble during his teenage years, didn't he?

A: Yes, sir.

(PP160, 161)

ARGUMENT

The state entered the Department of Corrections letters and cross-examined Mr. Coleman with the goal of entering inflammatory evidence of appellant's bad acts, specifically threats against a law enforcement officer and desecration of a Baptist Church to serve no valid purpose other than inflame the passions of the jury. In the matter of the cross-examination of Coleman it is obvious that the questioning had no other the purpose:

Q: Okay. Now you've described Mr. Lott's teenage years as being pretty much normal?

A: Yes, sir.

Q: Now it's true, is it not, that at age 14 Kenneth Lott started getting arrested for stuff, isn't that right, as a juvenile, at 14, in 1967; do you remember that, 1967 he and another juvenile broke coke bottles on the grounds of a church and destroyed some church signs?

A: No, **sir.**

Q: Do you remember that you had the glass removed and replaced the signs?

A: No, sir.

Q: You don't remember that?

A: No, sir.

Q: How about in April of 1967, do you remember the defendant and another juvenile entering the Stetson Baptist Church and throwing varnish on the inside walls of a church wall of the --

A: No.

Q: You remember in 1957 Mr. Lott being adjudged to be a delinquent and being suspended from school?

MR. SPECTOR: I object to what Mr. Ashton is asking --

(PP165)

The trial court overruled the objection, (PP167) The state continued to make inquiries calculated to further taint the jury with questions calculated to inflame the passions of the jury. The counsel for appellant, after further strenuous objections, subsequently made a Motion for Mistrial. (PP175)

Concerning capital sentencing, this Court has held that the specific statutory aggravating circumstance codified in Florida Statute 921.141, is the sole consideration for the jury and judge in deciding the propriety of the death sentence. In Miller v. State, 373 So.2d 882 (Fla. 1979), the trial court considered the defendant's incurable and dangerous mental illness as an aggravating factor in imposing the death penalty. This Court rejected this approach and held that:

> The aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose. Purdy v. State, 343 So.2d 4 (Fla. 1977). This court, in Elledge v. State, 346

So.2d 998, 1003 (Fla. 1977) stated:

> We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

Miller, at 885. See also McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Bassett v. State, 449 So.2d 803, 809 (Fla. 1984) (dissenting opinion, Overton, J.).

To be sure, during the direct **examination of** appellant's step-father, the step-father may have downplayed the extent that appellant had legal troubles when he was a teenager. However, when asked the question whether appellant got into trouble as a teenager, Coleman stated yes. Having admitted that the appellant got in trouble as a teenager, what purpose could the state's cross-examination into the area of desecrating a Baptist Church serve other than to inflame the passion of the jury. Likewise, with the DOC letters, any probative value they may have had was surely outweighed by there prejudicial effect. It can not be said that these error were harmless where religion and law enforcement are involved and where there was not the most aggravated and least mitigated murder. Therefore, the death sentence should be vacated and a new penalty phase ordered. See Geralds v. State, 601 So.2d 1157 (Fla. 1992)

POINT IX

THE TRIAL COURT ERRED IN PERMITTING VICTIM IMPACT EVIDENCE THAT WAS NOT RELEVANT TO THE ISSUE OF THE UNIQUENESS OF THE VICTIM AND WENT BEYOND THE NARROW APPLICATION OF THE STATUTORY SCHEME.

The Appellant objected to the victim's sister, Anne Tighe, making a prepared victim impact statement to the jury. The trial permitted the statement made to the jury over objection. The "victim impact" evidence should have been excluded by the trial court. The introduction of the improper evidence unfairly and unconstitutionally tainted the jury's recommendation. Section 921.141(7), Florida Statutes (1992) provides:

> ...the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be presented as a part of victim impact evidence.

Florida has consistently excluded evidence designed to create sympathy for the deceased. Jones v. State, 569 So.2d 1234 (Fla. 1990). See also Lewis v. State, 377 So.2d 640 (Fla. 1979) and Rowe v. State, 120 Fla. 649, 163 So. 22 (1935). This rule of law provides even more protection to a capital defendant at a penalty phase.

> Florida's death penalty statute, section 921.141, limits the aggravating

> circumstances on which a sentence of death may be imposed to the circumstances listed in the statute. § 921.141(5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence. Blair v. State, 406 So.2d 1103 (Fla. 1981); Miller v. State, 373 So.2d 882 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978).

Grossman v. State, 525 So.2d 833, 842 (Fla. 1988).

In the case of Pavne v. Tennessee, 111 S.Ct. 2597 (1991) the United States Supreme Court held that there is no Eighth Amendment bar to victim impact evidence during the penalty phase of a capital trial. Id. at 2601. Neither Payne, nor any other United States Supreme Court case, deals with the question of whether such evidence is permissible under state law.

Since the issuance of the Payne opinion, this Court has addressed the introduction of victim impact evidence only a few times. In those cases, this Court has rejected an Eighth Amendment challenge, pointing out that Pavne receded from Booth v. Marvland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989). See, e.g., Jones v. State, 612 So.2d 1370 (Fla. 1992); Burns v. State, 609 So.2d 600 (Fla. 1992); and Hodges v. State, 595 So.2d 929 (Fla. 1992). When dealing with the broader contention that victim impact evidence was improperly admitted, this Court focused on the relatively minor effect that the evidence had in each particular case. See, e.g., Sims v. State, 602 So.2d 1253 (Fla. 1992) and Burns v. State, 609 So.2d

600 (Fla. 1992). In Windom v. State, 656 So. 2d 432 (Fla. 1995) this Court found that victim impact evidence is separate from the weighing of the aggravating and mitigating factors, and must be relevant to the issue of the uniqueness of the victim.

So even after Payne and Windom, to be admissible, evidence must be relevant to a material fact in issue. The challenged testimony in this case was not. [4] A number of disinterested eyewitnesses observed Burns shoot the officer in cold blood. During the victim impact statement, the victim's sister stated:

> {Mother} was always trying to persuade her to come back home. Even though she came back regularly to see us she stayed with us a couple of weeks before she died. (PP78,79)

Appellant submits that the above does not speak about the unique characteristics of the victim and instead inflames the passions of the jury and taints there sentencing recommendation, The error is not harmless in his case. In Burns, the evidence was admitted during the guilt phase. Since numerous eyewitnesses testified about the shooting, the error was harmless. The objectionable evidence was admitted at Appellant's penalty phase. "Substantially different issues arise at the penalty phase of a capital trial that require analysis qualitatively different than

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[4] See Bryan v. State, 533 So.2d 744, 746-47 (Fla. 1988); §§ 90.401, 90.402, Fla. Stat. (1991). This Court's opinion in Burns v. State, 609 So.2d 600 (Fla. 1992) is dispositive of the issue at hand. The Burns trial court allowed evidence of the police officer/victim's professional training, education and conduct to "rebut" statements made by defense counsel during opening statement of the guilt phase. This Court held that the admission of evidence was error, although harmless in that particular case.

that applicable to the guilt phase." Castro v. State, 547 So.2d 111, 115 (Fla. 1989). The jury used the objectionable evidence to determine that Ken Lott should die, not to determine that he was guilty of the crimes charged.

All the jury should have been considering was the evidence in aggravation and the evidence in mitigation. They also heard victim impact evidence, but were never told how to treat this evidence. Surely the result of the above testimony was to inflame the passions of the jury and impair the sentencing recommendation. As a result, the jury voted that Ken Lott should die in Florida's electric chair.

POINT X

THE TRIAL COURT ERRED BY NOT ORDERING SANCTIONS WHERE THE STATE VIOLATED THE RULE OF SEQUESTRATION.

During the state case, Assistant State Attorney Culhan advised the Court the Rule Sequestration had been violated. (TR540) During the testimony of the medical examiner, Culhan encountered Sergeant Corriveau, Detective Dana Griffis, and witness Kristen Hayes in the back room. The witnesses were looking through their evidence list and they told Culhan that there had been two sets of pliers discovered at the murder scene, wherein Culhan realized that the Rule of Sequestration had been invoked. (TR540) The trial court conducted a hearing on the possible violation of the court's order concerning the Rule of Sequestration. (TR541-572) Appellant moved for sanctions and requested the court exclude the witnesses. (TR572-73) The trial court denied the motion for sanctions. (TR579)

During the violation hearing, state witness Hayes questioned state witness Griffis about who processed latent fingerprints. (TR.545) Also, witness Griffis and Corriveau discussed who had found duct tape at the scene. (TR554) Although there was contradictory testimony among the three witnesses as to what was talked about, it is not clear whether testimony was changed by the violation. However, it is certain that the discussion refreshed memories thereby bolstering witness credibility.

This Court has frequently pointed out that the rule of

sequestration is intended to prevent a witness's testimony from being influenced by the testimony of other witnesses in the proceeding. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Odom v. State, 403 So.2d 936 (Fla.1981), cert. denied, 456 U.S. 925, 102 S.Ct. 1970, 72 L.Ed.2d 440 (1982); Dumas v. State, 350 So.2d 464 (Fla.1977); Spencer v. State, 133 So.2d 729 (Fla.1961), cert. denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962). Before a trial court excludes testimony on the ground that the sequestration rule was violated, the trial court must determine that the witness's testimony was affected by other witnesses' testimony to the extent that it substantially differed from what it would have been had the witness not heard the testimony. In the instant case, the trial judge found that if there was a violation, there would be no substantial change in the witnesses testimony to support excluding the witness. (TR578) The trial court did not address the issue of the gathering of the fingerprint evidence. This evidence was critical to the state's case, and having the witnesses comparing notes on this evidence is extremely dangerous to the notion of confidence and propriety of the proceeding. In the trial judge erred in failing to exercise her discretion to determine whether exclusion of testimony in the area of fingerprint collection and processing was warranted under the circumstances. The failure to address was clearly error.

POINT XI

CONSTITUTIONALITY OF SECTION 921.141, FLORIDA STATUTES.

1. The Jury

a. Standard Jury Instructions

The Appellant submits that the jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

i. Heinous, Atrocious, or Cruel

The instruction does not limit and define the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application in violation of the dictates of Mavnard v. Cartwrisht, 486 U.S. 356 (1988); Shell v. Mississippi, 498 U.S. 1 (1990); and Espinosa v. Florida, 112 S.Ct. 2926 (1992). The "new" instruction in the present case (T 882) violates the Eighth Amendment and Due Process. The HAC circumstance is constitutional where limited to only the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Espinosa, supra. Instructions defining "heinous," "atrocious," or "cruel" in terms of the instruction given in this case are unconstitutionally vague. Shellp r a . While the instruction given in this case states that the "conscienceless or pitiless crime which is unnecessarily torturous" is "intended to be included," it does not limit the circumstance only to such

crimes. Thus, there is the likelihood that juries, given little discretion by the instruction, will apply this factor arbitrarily and freakishly.

The instruction also violates Due Process. The instruction relieves the state of its burden of proving the elements of the circumstances as developed in the case law.[5]

ii. Cold, Calculated, and Premeditated

The same applies to the "cold, calculated, and premeditated" circumstance. The standard instruction simply tracks the statute.[6] Since the statutory language is subject to a variety of constructions, the absence of any clear standard instruction ensures arbitrary application. See Rogers v. State, 511 So.2d 526 (Fla. 1987) (condemning prior construction as too broad). Jurors are prone to similar errors. See Hodses v. Florida, 113 S.Ct. 33 (1992) (applying Espinosa to CCP and acknowledging flaws in CCP instruction). Since CCP is vague on its face, the instruction based on it also is too vague to provide the constitutionally required guidance. Any holding that jury instructions in Florida capital sentencing proceedings need not be definite, would directly conflict with the Cruel and Unusual Punishment Clauses of the state and federal

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[5] For example, the instruction fails to inform the jury that torturous intent is required. See McKinney v. State, 579 So.2d 80, 84 (Fla. 1991) ("The evidence in the record does not show that the defendant intended to torture the victim").

[6] The instruction is: "The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification."

constitutions. These clauses require accurate jury instructions during the sentencing phase of a capital case. Espinosa v. Florida, 112 S.Ct. 2926 (1992). The instruction also unconstitutionally relieves the state of its burden of proving the elements of the circumstance as defined by case law construing the "coldness," "calculated," "heightened premeditation," and "pretense" elements.

iii. Felony Murder

This circumstance fails to narrow the discretion of the sentencer and therefore violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions.

b. Majority Verdicts

The Florida sentencing scheme is also infirm because it places great weight on margins for death as slim as a bare majority. A verdict by a bare majority violates the Due Process and the Cruel and Unusual Punishment Clauses. A guilty verdict by less than a "substantial majority" of a 12-member jury is so unreliable as to violate Due Process. See Johnson v. Louisiana, 406 U.S. 356 (1972), and Burch v. Louisiana, 441 U.S. 130 (1979). It stands to reason that the same principle applies to capital sentencing. Our statute is unconstitutional, because it authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the

various states in determining whether the statute was constitutional, indicating that an anomalous practice violates Due Process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. Only Florida allows a death penalty verdict by a bare majority.

c. Florida Allows an Element of the Crime to be Found by a Majority of the Jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. See State v. Dixon, 283 So.2d 1 (Fla. 1973). The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 490 U.S. 638 (1989).

d. Advisory Role

The standard instructions do not inform the jury of the great importance of its penalty verdict. The jury is told that their recommendation is given "great weight." But in violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320 (1985) the jury is told that its "recommendation" is just "advisory."

2. Counsel

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the defendant has no say in the matter. The defendant becomes the

victim of the ever-defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through the present. See, e.g., Elledge v. State, 346 So.2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance).

Failure of the courts to supply adequate counsel in capital cases, and use of judge-created inadequacy of counsel as a procedural bar to review the merits of capital claims, cause freakish and uneven application of the death penalty.

Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases. The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution. In the instant case, appellant obtained private counsel through the help of his family after appellant had disagreements with his court-appointed counsel. Private counsel argued that he required an additional attorney appointed to help prepare for a penalty phase because he lacked experience in capital cases. The trial court denied the request.

3. The Trial Judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975). On the other, it has at times been considered the ultimate sentencer so that constitutional errors in reaching

the penalty verdict can be ignored. This ambiguity and like problems prevent evenhanded application of the death penalty.

4. Appellate review

a. Proffitt

In Proffitt v. Florida, 428 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259.

Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating Circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwrisht, 108 S.Ct. 1853, 1857-58 (1988) (Eighth Amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the substantive gambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death-eligible persons, or channel discretion as required by Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Herring).

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts).[7]

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So.2d 270 (Fla. 1988).

Although the original purpose of the "hinder government

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[7] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L.Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Elisible Cases Without Making it Smaller, 13 Stetson L.Rev. 523 (1984).

function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,' it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. Appellate Reweighing

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So.2d 1200 (Fla. 1986).

d. Procedural Technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[9] See, Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of Eighth

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[8] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L.Rev. 907, 926 (1989).

[9] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Appellant contends that a retreat from the special scope of review violates the Eighth Amendment under Proffitt.

Amendment); and Smalley v. State, 546 So.2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated Eighth Amendment). Capricious use of retroactivity principles works similar mischief. In this regard, compare Gilliam v. State, 582 So.2d 610 (Fla. 1991) (Campbell not retroactive) with Nibert v. State, 574 So.2d 1059 (Fla. 1990) (applying Campbell retroactively), Maxwell v. State, 603 So.2d 490 (1992) (applying Campbell principles retroactively to post-conviction case, and Dailev v. State, 594 So.2d 254 (Fla. 1991) (requirement of considering all the mitigation in the record arises from much earlier decisions of the U.S. Supreme Court).

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder" cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

5. Other Problems With the Statute

a. Victim Impact

The statute is unconstitutional for a variety of reasons. First, the legislature had no authority to pass this statute as it violates Article V, Section 2(a) of the Florida

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[10] Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

Constitution which states, in part, "The Supreme Court shall adopt rules for the practice and procedure in all courts." The Florida Supreme Court has consistently held that this provision is exclusive in that any statute which invades this prerogative is invalid. Haven Federal Savings and Loan Association v. Kirian, 579 So.2d 730 (Fla. 1991). The matters at issue in Section 921.141(7) are clearly procedural. Id. at 730. The statute at issue is an attempt to regulate "practice and procedure." It deals with "the method of conducting litigation", just as surely as the regulation of voir dire, waiver of jury trial, or severance. Id. at 732. This Court has recognized that rules of evidence "may be procedural" and thus the sole responsibility of the Florida Supreme Court. In re Evidence Code, 372 So.2d 1369 (Fla. 1979) .

The Florida Constitution also requires that this type of evidence be prohibited, as it provides broader protection than the United States Constitution for the rights of a capital defendant. Tillman v. State, 591 So.2d 167 (Fla. 1991). The Tillman court explicitly held that a punishment, in a given case, is unconstitutional under the Florida Constitution if it is "unusual" due to the procedures involved. The allowance of this sort of victim sympathy evidence violates Article I, Section 17. The existence of this evidence is totally random; depending upon the extent of the deceased's family and friends, and their willingness to testify. The strength of this evidence would also depend on the articulateness of the friends and family (or other

representatives of the community in this case).

The admission of this evidence also violates the Due Process Clause of Article I, Section 9 of the Florida Constitution. This Court's opinion in Tillman, supra, is a clear indication that this type of evidence violates Article I, Sections 9 and 17 in a capital case, even if it is permitted in other cases. [Death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than lesser penalties].

The admission of this evidence violates Article I, Sections 9 and 17 in other ways. First, such evidence intrudes into the penalty decision considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, this proof is highly emotional and inflammatory, subverting the reasoned and objective inquiry which the courts have required to guide and regularize the choice between death and lesser punishments. Third, victim impact evidence cannot conceivably be received without opening the door to proof of a similar nature in rebuttal or in mitigation, further upsetting the delicate balance the courts have painstakenly achieved in this area. Fourth, the evidence invites the jury to impose a death sentence on the basis of race, class, and other clearly impermissible grounds. Allowing this type of evidence inevitably makes the entire system freakish and arbitrary and thus unconstitutionally infirm.

It must also be noted that Section 921.142(7) is extremely broad and vague. The language concerning the "victim's

uniqueness as a human being and the resultant loss to the community" puts absolutely no limits as to who can testify or what they can testify to. The phrase "loss to the community" contains no definition of community or limits on its membership. This could lead to anyone testifying or even to death sentencing by petition or public opinion pole.

It is clear that a statute, especially a penal statute, must be definite to be valid. Locklin v. Pridseon, 30 So.2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977). Thus, definiteness is essential to the constitutionality of a statute.

The statute at issue here clearly fails under any standard of definiteness under the United States and Florida Constitutions. The term "community" contains a wide variety of meanings. It can be geographic community or it can mean people with perceived common interests. See Black's Law Dictionary (containing several different definitions of the term). Even within the concept of a geographic community, it can mean anything from a neighborhood up to the "community of nations." The term "community" when applied to a community of interests can mean virtually anything; including common hobbies, jobs, sports teams, political beliefs, religion, race, or ethnicity. One of the most common ways in which the term "community" is used, is in the racial or ethnic sense. The phrases "Black Community," "Hispanic Community," etc. are widely used in the media.

Testimony of the lost members of a racial or ethnic community would clearly be forbidden under the Florida and United States Constitutions. The statute's terms are simply too vague and overbroad; capable of a wide variety of clearly impermissible uses. The statute also fails to give the defendant any notice of the type of evidence he is to defend against.

Nor is the jury given any guidance on how to use this evidence. As noted previously, the evidence does not constitute an aggravating circumstance. The jury in this case was specifically told by the trial court and the prosecutor that they were not to treat the "victim impact" evidence as an aggravating circumstance. (R88-89,102) The jury was left with no guidance as to how to weigh this evidence.

The admission of this evidence without any guidance is unconstitutional pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution. The failure to sufficiently guide discretion, with the possibility of arbitrary and discriminatory results, was a theme running throughout the opinions in Furman v. Georsia, 408 U.S. 238 (1972). The guiding of the judge and jury's discretion was a critical factor in upholding the facial constitutionality of the Florida statute. Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973). Several cases has recently been reversed based on jury instructions which fail to sufficiently define an aggravating circumstance. See, e.g.,

Espinosa v. Florida, 112 S.Ct 2926 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988). The statute clearly fails to pass constitutional muster and this Court should make that pronouncement for all to hear.

b. Lack of Special Verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found, because the law does not provide for special verdicts. Worse yet, it does not know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F.2d 285, 306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the Eighth Amendment.

In effect, our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 109 S.Ct. 2055 (1989) (rejecting a

similar Sixth Amendment argument).

c. No Power to Mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because Rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavor mitigation in violation of Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It also violates Equal Protection of the laws as an irrational distinction trenching on the fundamental right to live.

d. Florida Creates a Presumption of Death

Florida law creates a presumption of death where, but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case) . [11] In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first-degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more

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

mitigating circumstances sufficient to outweigh the presumption.[12] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the United States Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to Due Process and the heightened Due Process requirements in a death-sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

e. Florida Unconstitutionally Instructs Juries Not To Consider Sympathy.

In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), reversed on procedural srounds sub nom. Saffle v. Parks, 494 U.S. 484 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violate the Lockett principle. The Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987) (upholding constitutional instruction prohibiting consideration of mere sympathy), writing that sympathy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Parks, 860 F.2d at 1553. The instruction given in this case also states that sympathy should play no role in the process. A jury would have believed in

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

reasonable likelihood that much of the weight of the early life experiences of Appellant should be ignored. This instruction violated the Lockett principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

f. Electrocution is Cruel and Unusual.

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

This unnecessary pain and anguish shows that electrocution violates the Eighth Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v, Georgia, 433 U.S. 584, 592-96 (1977).

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, Appellant respectfully requests this Court to reverse Appellant's conviction and discharge him from Florida custody as to Points I, II and III; order a new penalty phase as to Points IV, VII, VIII, IX and XI; order a new trial as to Points V, VI and X.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal, and mailed to Mr. Ken Eldon Lott, #026985 (R2S6), Florida State Prison, P.O. Box 747, Starke, FL 32091-0747, this 1st day of April, 1996.

George D.E. Burden

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