IN THE SUPREME COURT OF FLORIDA

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MICHAEL SHELLITO,

Appellant,

V.

CASE NO. 86,931

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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SECOND JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

MICHAEL SHELLITO, :

Appellant,

v. CASE NO. 86,931

STATE OF FLORIDA, :

Appellee. :

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On February 9, 1995, the Duval County Grand Jury indicted appellant, MICHAEL SHELLITO, for premeditated first-degree murder in the death of Sean Hathorne on August 31, 1994. R 1-3.[1]

Appellant was tried by jury before Judge R. Hudson Olliff on July 17-21, 1995. The jury found him guilty as charged. R 308, T 1210.

The penalty phase was held August 21, 1994. Following deliberations, the jury returned with an advisory verdict recommending the death sentence by a vote of 11 to 1. R 359, T 1511.

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[1]References to the seven-volume record on appeal (Volumes I-VII) are designated by "R" and the page number. References to the twenty-six volume pretrial and trial transcript (Volumes VIII-XXXIII) are designated by "T" and the page number.

On September 8, 1995, the court denied appellant's motions for a new trial and heard argument as to the sentence for this offense and several unrelated offenses. T **1524.**

On October 20, 1995, the trial judge imposed the death sentence. T **1566.** In the sentencing order, the judge found three aggravators: prior violent felony, pecuniary gain, and committed during a robbery. R 393-394. The judge found appellant's age was a mitigating factor of slight weight and his background and character "may" be a mitigating factor of slight weight. R 395-398.

Notice of appeal was timely filed November 20, 1995 R 407, **407a.**

STATEMENT OF FACTS

Sean Hathorne, 18, was fatally shot in the chest around 4:30 a.m. on Wednesday, August 31, 1994, as he walked home from his girlfriend's house. That evening, around midnight, police arrested appellant, 18, and others during a raid on Stephen Gill's Colonial Forest apartment. Appellant was indicted for the Hathorne murder on February 9, 1995. Appellant's defense was that Steve Gill, the uncharged co-participant, shot Hathorne.

Guilt Phase

State's Case-in-Chief

Kevin Keyes testified his .380 semiautomatic pistol, also known as a .9 millimeter short, was stolen between 10 p.m., Tuesday, August 30, 1994, and 7 a.m. the next morning. The pistol was in his pickup truck parked outside his home. T 381, 384-385. The words ".9 millimeter" were inscribed on the pistol. T 387. Keyes stated he believed the pistol was taken between 1 and 2 a.m. because a vehicle crashed into a neighbor's mailbox around that time. Keyes lived six miles from the Colonial Forest Apartments. T 388-392.

Amy Luke, age 14, testified she was living on Resa Terrace Road in August 1994. Sean Hathorne came by when he got off work around 1 a.m. and headed home on foot around 4 a.m. He lived a few blocks away. T 394-397, 401.

Ricky Bays testified he was in jail for armed robbery. He had been in jail since the September 1 raid on Steve Gill's apartment. T 415. He had a prior felony conviction. T 419. Bays and Mike Shellito had been friends for three years. Steve Gill was Bays's cousin. Bays had introduced Mike to Steve six months before the shooting. T 416-417. In August 1994, Ricky Bays, Steve Gill, Jason Gill (Steve's stepbrother), Judy Gill (Steve's mother), Julie Gill (Judy's 3-year-old daughter), and Theresa Ritzer (Jason's girlfriend) were all living in the same

apartment at the Colonial Forest Apartments. T 437. Mike lived a few blocks away and stayed there sometimes. Heather Raffa, Bays's girlfriend, and another girl, Peggy, also stayed there sometimes. T 418-419.

They were all at Steve's the night Hathorne was shot. When Bays and Mike arrived at 7 p.m., Steve was there. Steve's girlfriend, Sunshine Turner, arrived around 10 p.m. Bays drank a quart of beer around 11 p.m. Sunshine did not drink and did not appear intoxicated. T 420-421. Bays, Sunshine, and Heather walked to the nearby Majik Market and were back in 10 minutes. Steve was in his room when they left and when they returned. Mike left around midnight, give or take a half hour. He was gone about an hour. T 421-422, 444. No one else left while Mike was gone. Bays and Heather were in Bays's room; Steve and Sunshine were in Steve's room. T 423.

Bays said Mike returned with a black gun engraved with the words ".9 millimeter." T 424-425. He said Mike told him he had gotten the gun from a van that night. Bays had seen Mike drive up in a black van. T 452-453, 456-457. Bays identified State's Exhibit A as the gun Mike had that night. T 425. On cross-examination, Bays conceded he had told Detective McHail on September 1 the gun was chrome with a black handle. T 452.

Bays said Steve and Mike took Sunshine home around 4 a.m. Mike took the gun, tucked in his waist. They drove Judy Gill's white Ford pickup. T 426-427. They got back around 5:30 a.m. and came into Bays's room. Mike had the gun in his waist. Bays said Mike said he had shot someone after they dropped off Sunshine. He saw a guy walking down the street. He shook the guy down, but he did not have any money, so he shot him. The guy crawled up to a fence and died. The guy had some papers in his pocket that looked like legal papers. Mike said the guy looked like Bays, so Bays figured he was Puerto Rican. T 429-431. Mike did not say whether Steve was involved. Steve, who was present, said nothing but acted "real paranoid or like real scared" and was looking out the windows. T 432, 449. Bays said Heather and Peggy also heard Mike talking about the shooting. T 454.

Bays said he and Mike were at Steve's apartment later that night at 11 p.m. Mike had the same gun. Steve was not there. Bays was not present when Mike was arrested because he was being arrested himself. Bays was taken to the Police Memorial Building, where he gave a statement telling police what Mike had said about the shooting. Bays said he had not entered a plea on the armed robbery charge and had not been promised anything. T 433-434.

On cross-examination, Bays said Horace Cook and Jesse Furlow had been his cellmates. T 439-440. He read about the homicide in the newspaper while in jail. T 445. He kept information about his case under his mattress. T 440. Bays identified the statement he had given on September 1, and said he had been charged with the pending armed robbery when he gave the statement. When he gave the statement, he was concerned about the robbery charge and what might happen to him. T 450-451. On redirect, Bays said he had not read any details of the Hathorne shooting in the paper and had not seen any police reports about it before he gave his September 1 statement. T 455.

Over defense objection, Detective Hinson was permitted to testify to what Bays said in the interview. Hinson testified he interviewed Ricky Bays at the police station around 4 a.m. on September 1. Bays did not have access to any police reports at that time. T 622. Bays told Hinson appellant and Steve Gill had returned to Steve's apartment around 5:30 a.m. that morning. They had left around 4 a.m. to take Sunshine home in Steve Gill's mother's pickup truck. After they dropped off Sunshine, they saw someone walking down the road. Appellant got out and confronted the person to rob him. He was a Puerto Rican male. He did not have a wallet, just some papers. Appellant told Bays he shot him

after he did not have any money. He said he crawled up by a fence. T 623-624.

On cross-examination, Hinson said Bays was under arrest when he gave his statement. Theresa Ritzer and Jason Gill were at the police station also. T 630. Hinson was not sure if he knew Bays had given a written statement to Detective McHail earlier but said he probably was aware Bays had been interviewed already. T 633. Hinson interviewed Bays at 6:25 a.m. T 634.

Sunshine Turner testified she was dating Steve Gill when the shooting took place. She had known Mike two days. T 475-476. The night of the shooting, Ricky Bays and Heather Raffa picked her up and took her to Steve's apartment. She arrived around midnight. She did not drink or do drugs that night. She stayed in Steve's room most of the night. T 478-479. Mostly the guys were drinking. She saw seven to ten quarts of beer. Steve was "pretty intoxicated." T 511. Sunshine and Heather went to the Majic Market for 10 minutes. T 480. Neither Steve nor Ricky left the apartment. Mike left around 1 or 1:30 a.m. He was gone an hour. T 480-481. Steve drove her home around 4 a.m. in his mother's truck. Mike rode with them. T 482. Sunshine lived on Resa Terrace, a 15-minute drive from Steve's apartment. T 483. On the way home, Steve and Mike talked about needing to 'make

money" and 'do some work." Sunshine told them to take her home first. A block from her house, Mike said he needed to talk to someone and got out. He seemed anxious. She told him "please don't do anything this close to my house." T 484-486. She did not see a gun. T 516. Steve drove her to the end of Resa Terrace. They talked for five minutes and he dropped her off and left. It was 4:20 a.m. T 487. Steve called her the next day. T 518. At Steve's house, police threatened to charge her with the murder if she did not cooperate. T 529. She stopped dating Steve a week later and had not spoken to him in 11 months. T 490.

Michael Green lived at 5386 107th Street and witnessed the shooting. T 460. Green testified he was awakened by arguing in front of his house around 4 a.m. He looked out the window and saw a white pickup truck in the road. A guy stood by the truck. He heard a "pop" and saw the guy spin around, run, and fall over by his gate. The guy was not crawling. Green could not tell where the gunshot came from. T 461-463. The truck looked just like Judy Gill's truck. T 470-471. The truck drove towards Catoma. Green called 911. T 463.

Police found Sean Hathorne 30 feet from the street, by Green's chain link fence. T 646-655. Some papers related to

Hathorne's job were in his front pants pocket, partially exposed. T 601, 604. No wallet was found. T 603. A shell casing was found in the grass, 5 1/2 feet from the street and 15 feet from the body. T 655, 678. If a vehicle were in front of the house, facing Catoma, the shell casing would be to the vehicle's left. T 679. The shell casing came from the pistol recovered from the shootout at Steve Gill's apartment on August 31. T 813.

The medical examiner testified the cause of death was a gunshot wound to the chest. T 557. The bullet entered the back of the arm pit on the right side and exited on the left side. T 547. The wound was consistent with being inflicted by a .380 caliber bullet. T 557. A bruise on the head was consistent with the head hitting the ground. T 548. The entry wound was clean, meaning the shooter was at least two feet away. T 555,

Lateria Copeland, age 16, testified he and three friends went to the Colonial Forest Apartments around midnight the night of the police raid. T 703. Mike was outside with a black and gray gun. Mike said he got the gun from a truck. T 708. It was the gun he had dreamed of. T 705. They all went inside. T 706, Mike said he had gone up to a guy and asked for money. The guy said he did not have any money, and Mike "told the dude he was out of gas" and shot him. He demonstrated how he held his arm

straight out and said he shot him in the heart. T 708, 711. As Copeland tried to leave around midnight, the police came into the apartment. T 709.

On cross-examination, Copeland admitted he was on community control for five years in a juvenile case. If he violated, he would get sent off. T 734, 744. He said he was friends with Hank Baker, whose brother had beat up Mike brother. T 734. He did not know whose apartment they were in that night. He had been forced to stay and smoke marijuana. They smoked a 30 sack in one blount, meaning 3 dimes, a lot of marijuana, but the marijuana did not affect him at all. T 737-739. They were all smoking marijuana in a back bedroom when Mike was talking about the shooting. Mike did not say the guy died. He never said who he was with or where and never described the guy he shot. The guy just dropped down, he was not running or crawling. T 743-744. Copeland was taken to the police station that night, and as soon as he told them about Mike, they let him go. T 740.

On redirect, Copeland said he did not know the person who beat up Mike's brother. T 745. When asked what Mike said about smoking, he said when they came in the front door, Mike told them they were going to smoke. T 748.

Theresa Ritzer, 18, testified she lived in Ohio with her

parents. She was staying at Steve Gill's apartment the last week of August 1994. She met Mike through Steve three days before the police raid. T 752-754. That night, she and Jason Gill were at the apartment when Ricky Bays and Mike arrived sometime after dark. T 757, 775. Judy Gill and her daughter came later, as did three or four other guys she did not know. T 755, 757. Steve Gill was not there. T 759. At some point, Mike borrowed Jason's **car,** and Mike and Ricky went to get more beer. When they got back, Ricky left. T 775-776.

Mike had a black gun. He said it was a .9 millimeter short. T 755. He said he and Steve Gill were driving down the road and saw someone walking down the street. Mike told Stephen to pull over. Mike got out and told the guy to give him all his money. The guy said he did not have any money but he would go home and get some. Mike said "you're out of gas" and shot him. He watched his light blue shirt turn dark blue. Mike talked about the shooting like he was proud. Mike, Theresa, and the other guys were in Steve Gill's bedroom when Mike told about the shooting. T 759-760.

When the other guys left the apartment, the police entered, identifying themselves as police. Mike jumped out the bedroom window. Theresa and Jason went into the hallway, where the

police ordered them to lie down. T 760-761. Theresa went back to her parents' home in Ohio several weeks later. T 762.

On cross-examination, Theresa said she was taken to the police station after the police raid. She gave Officer Carney a written statement in the early morning hours but did not tell him what she had just testified about. She told Carney she had not seen or heard anything suspicious. T 764. Later, around 9 a.m., she gave a sworn statement. Everything in that statement was true. She said Mike had the gun when he came to the apartment the second time that night. T 765.

On redirect, Theresa testified over objection that before she gave her statement to Officer Carney, she asked if Michael was dead. T 789. She wanted to know because he had held a gun to her head and said he would kill her if she talked and had killed before, She said she did not tell Carney what she knew because she was scared. T 791. A couple of hours later, she decided to tell because she was going back to Ohio. T 791.

Deputy Hurst testified he was stationed in the courtyard behind the Colonial Forest Apartments the evening of August 31, 1994. Around 12:15 a.m., he heard officers shouting, "police." Hurst saw Mike jump out a bedroom window and run. Hurst yelled to him to stop, then released his dog. Hurst ran around the

corner and found the dog biting Mike, and Mike pointing a gun at the dog's head, Mike pointed the gun at Hurst's torso, and Hurst shot him. When Mike stood up and tried to run, Hurst shot him a couple more times, and he went down. Hurst found out later another officer also was shooting. T 560-568, 573-578.

Officer Clark testified he was 30 to 40 yards away when he heard Hurst tell the suspect to stop. T 584-585. Clark moved around the corner of the building and saw the suspect on the ground entangled with the dog. T 586. A shot was fired and the dog got up and left. Hurst then fired, and the suspect turned in Clark's direction, and Clark fired. T 588. Clark did not see the suspect's gun until he went down. T 590. Clark fired at the suspect three times. T 594. Prior to this incident, Clark was familiar with Ricky Bays and Steve Gill. T 596. Police secured the gun, a semiautomatic, silver with dark handles. T 605. The magazine was empty but a live round was in the chamber. T 663.

Defense Case

John Bennett was living at 5389 107th Street the night Hathorne was shot and witnessed the shooting. Bennett testified he heard tires screeching around 4 in the morning, as if a vehicle had stopped suddenly. He looked out the window and saw "like a shadow of a silhouette" of a person moving around the

back of a truck. The person appeared to be coming from the driver's side of the truck. T 826-830.

On cross-examination, Bennet said the truck was about 110 feet away and heading towards Catoma Street, He was looking at the back tailgate and passenger side of the truck. T 830-831. The shadow was not the person who got shot. He was "fairly certain" the shadow came from the driver's side because of the person's conversation. T 833. When asked about his deposition statement that it was 'possible" the shadow came from the passenger side, Bennett said he believed the boy was walking towards him, which meant he had to have come from the driver's side of the truck. T 834-835. Bennett was not wearing his glasses but did not need them to see a shape. T 836.

Theresa Ritzer said she smoked some marijuana the night of the police raid but not enough to feel anything. They all went in the bedroom when Mike told them they were going to smoke. She was not in the apartment most of the evening the night before the raid. T 838-842.

Officer Hinson testified he interviewed Stephen Gill the morning of September 2. Gill had given Detective McHail a written statement the night before. T 845. When asked if he had information that led him to believe Gill had lied in that

statement, Hinson said he was "concerned" about Gill and "that's why we advised him of his rights." T 846. On cross-examination, Hinson said he was concerned about Gill because he felt Gill had lied to McHail about whether he was present when Hathorne was shot. T 855, 857.

Jabreel Street testified he was serving a 90-day sentence for possession. He had seven or eight bad check charges and five felonies (three cocaine charges, one possession of a firearm by a convicted felon, and one felony bad check charge). T 863.

Jabreel said he, Ricky Bays, Horace Cook, and Jesse Furlow were in the same cell block. T 863-864, Ricky Bays made an offer to Jabreel about "jumping" appellant's's case. "Jumping" a case meant trading information about a case for a more lenient sentence. Bays showed Jabreel papers and photocopies about appellant's case. One looked like a police report. Bays got the papers from his mother. She had an inside connection to the sheriff's office. Horace Cook gave Jabreel the details about the case, including the gun used, the victim, where the body was lying, the neighborhood, the time of night. Jabreel did not "jump" on the case because his own case was so petty. Bays offered the information in exchange for cigarettes. 866-868.

On cross-examination, Jabreel said Horace Cook and Jesse

Furlow had jumped him in jail. It lasted about a minute. When they took Jabreel out of the cell, Ricky Bays plundered his mattress. 872-873. The details he recalled about appellant's case were that appellant and friends were in a van when the victim and others rode up on bicycles. Appellant and his friends jumped out and robbed the victim. A fight ensued. Michael shot the victim in the head. The gun he used shot two kinds of bullets, .380 and .9 millimeter. 876-877.

Heather Raffa testified she was not drinking at Stephen Gill's apartment the evening of August 30, 1994. T 907. She did not see a gun that night. When asked if she had seen a gun at the apartment before that night, she said yes. T 907. She did not hear anyone talking about what happened while Steve and Michael took Sunshine home. T 908. On cross-examination, she said the gun she saw in the apartment before that night **was** a gun Michael had.[2] T 914.

Migdalia Shellito,[3] appellant's mother, said the family was

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[2]Defense counsel made the following objection to this testimony: "Judge, I think he needs to lay a predicate to see if I don't want him to impeach her improperly. She may very well indicate that, I don't know if that's improper impeachment, she hasn't contradicted anything she said in the deposition." The objection was overruled. T 909-910.

[3]Mrs. Shellito was permitted to testify after Steven Gill, through counsel, exercised his Fifth Amendment privilege not to testify. T 952.

lived two blocks from Steve Gill's apartment. Michael lived with them but sometimes stayed at Stephen's. T 960-961. Michael was working for a roofing contractor in August of 1994, but they let him go after he split a finger and had stitches. T 962. Just after Michael was indicted, Stephen Gill came to her house. He introduced himself, and she asked him to sit down. He mentioned the news and asked, "What the hell is going on?" She told him Michael had been charged with murder. He said he was very sorry about that. Mrs. Shellito told Steve it was a matter of time before they picked him up because they had towed his truck. He said, "I don't give a damn, I'm not going to jail." He stated he had told his lawyer he did it and said again, "I'm sorry for what happened to Michael but I'm not going to jail. I leave the state first." She asked him what he meant, and he said, "I killed the son of Bitch but I'm not going to jail." Her husband was in the dining room, but Steve could not see him. T 963-964.

On cross-examination, Mrs. Shellito said she had met Steve Gill once before this conversation and had talked to him on the phone. T 966-967. When asked about her statement in her deposition that Steve practically said he shot the guy, Mrs. Shellito explained: "[Y]eah, you see because that's like you talk criminal law, the kids today talk I guess slang, wasted for

me, I don't understand what that mean. Smoke is smoking. **Okay.** And I said what do you mean? He said then he said I shot the son of a Bitch." T 990-992.

Mrs. Shellito said she told Michael's former **lawyer, Mr.** Ellis, what Steve Gill had said. T 972. She left two messages for Detective Goff. He called once when she **was** not home. He did not return the other call. T 973-975. She told the newspaper. T 977. She told Mr. Plotkin,[4] but he told her to talk to Michael's lawyers. T 979. She did not write the judge but may have told his secretary what Steve had said. T 982.

On redirect, Mrs. Shellito recalled Mr. Plotkin saying to her at her deposition he did not want her version of what she thought Steve meant, but wanted the words that came out of his mouth. After this, she told him exactly what Steve had said:

> "He knocked on my door and when I opened my door he say -- I tell him come on in. And he said Miss Shellito, what the hell is going on? And then I say, you know what you saw on the TV, And he said I **saw the** TV **and** Michael been charged and I'm sorry but I'm not going to jail. I'm sorry that Michael got charged with it but I'm not going to jail. And then I said Steve, what do you mean? And then he say I did it, I shot him and I told my lawyer but I'm not going to jail. I leave the state first,"

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[4]Mr. Plotkin was the prosecutor in this case.

T 987-988.

Joseph Shellito, appellant's father, a retired Navy man, said he overheard the conversation between his wife and Steve Gill. T 997. He was sitting at the kitchen table. He could not see Gill. T 998. He heard his wife answer the door. He heard **Steve's name,** heard him say, "Mrs. Shellito" and mention Michael had been charged with the murder, He kept saying how sorry he was that Michael got charged with it. Mr. Shellito heard only parts of the conversation. Steve said more than once he **was** drinking the night it happened. He said he had told his attorney he had killed the guy but said they "can't do nothing to me because he can't testify." He said if he had to testify, he would say he had been drinking and did not remember anything. He said a number of times about being sorry about Michael. T 998.

Mr. Shellito had never met Steve Gill. He had seen him drive by the house. Mr. Shellito did not tell law enforcement about the conversation. T 1004. The conversation took place shortly after Michael was indicted. T 1005.

Sta e's Rebuttal Case

Debbie Dlugosz, **a** clerk for Duval County, testified she talked to Mrs. Shellito in May 1995 outside the courtroom. Mrs. Shellito was distraught about Michael's situation. She did not

mention that someone else had confessed to the murder. T 1017.

Detective Goff testified he spoke to Mr. and Mrs. Shellito once, an hour after Michael was shot. T 1021. Goff said he got a message from Mrs. Shellito on December 16. He went to her house a few days later. No one answered the door. He called later that day but no one answered. T 1022.

Penalty Phase

State's Case

Ricky Bays testified he was appellant's codefendant in two armed robberies committed around 11:OO p.m. on August 31, 1994. T 1311. He had pled not guilty and hoped to get a "real good deal" from the prosecutor. T 1231. Bays was driving when they picked up a hitchhiker. 1312. They pulled over, and appellant pulled the guy out of the car, put a pistol to him, and told him to give him everything he had. When asked if appellant ever told him what he wanted to do, Bays said appellant wanted to shoot the guy. He told appellant lights were coming, and they left. They went to David Wolf's house, Wolf was the neighborhood drug dealer. T 1316-1317. Appellant got out to buy marijuana. When Wolf pulled it out, appellant put a pistol to his head and said, "Give it to me." T 1318. Bays took appellant back to Steve Gill's apartment. T 1319. Bays denied getting information from

his mother about the homicide or the robberies. T 1321.

Kenneth Wolfenburger testified he was hitchhiking to work when Bays picked him up. T 1324. Bays pulled over, and appellant jumped out and told him to get out. Appellant had a gun. He asked for money. When Wolfenburger told him where it was, appellant had him get down on his knees with his hands behind head. Appellant went through his bag, then took the bag, which contained $10. Bays yelled "lights," and appellant got in car and they left. T 1326-1328.

The state introduced into evidence judgments and convictions for (1) the August 31, 1994, armed robberies and the September 1, 1994, aggravated assault on a law enforcement officer, and (2) a March 1994 aggravated assault without a gun, to which appellant had pled. T 1331-1332, 1337.

Sandra Hathorne, the victim's mother read a statement. She told the jury Sean's "second mom" cried every time they talked about Sean. She said she and Sean's friends could not do things they once loved because it brought back painful memories. T 1340-1341. The defense moved for mistrial after a lady in the courtroom burst into tears during Mrs. Hathorne's testimony. Defense counsel pointed out two jurors had observed this and Mrs. Hathorne herself had cried while reading parts of her statement.

The trial judge stated Mrs. Hathorne's voice quivered and broke but she did not cry and denied the motion. T 1342-1343.

Defense Case

A. Testimony.

Joe Shellito, appellant's brother, said Mike was the youngest of three children. Rebecca was 23, Joe was 22. T 1348. Joe and Michael went to different schools because Mike went to a special education school. Mike was born in Roosevelt Roads, Puerto Rico. They lived there for a little while, then moved to Key West. Mike looked up to Joe. They did everything together until Joe was in eigth or ninth grade. T 1349-1350. Mike was really close to his mother. Their father was out to sea a lot, so their mother raised Mike. Mike slept with his mother until a late age, napped with her until he was 15 or 16. Their relationship with their father was very distant. There was a bad communication problem between Mike and his father. T 1351. Their father was an alcoholic. He drank Rum and coke. He drank all day long, half a gallon every two or three days. T 1352.

HRS took protective custody of the children when their father went out to sea and did not start his allotments in time. They got evicted from their trailer and lived in the car for a few days. Their mother went to a priest for help and ended up in

jail. The children were placed in shelters. T 1353-1354.

Mike stuttered badly as a child, so did not talk much. When he stuttered, he would hit himself in the head. T 1354. He always had younger friends. Joe joined the Navy 11 months before he finished high school, then went on active duty. Mike had started having trouble with friends a little before that, in around seventh or eighth grade. T 1354-1355.

They did not have a lot of money, but he and Mike used to do all kinds of jobs to earn money. They mowed lawns, raked leaves, caught and sold shrimp, washed cars. Mike was good with mechanical things, and they worked on bikes together. They both played Pop Warner baseball, T 1356-1357.

Joe said Mike was very loving, very caring. He was the first person in the family to hold his son when he was born. Joe said he loved his brother very much. He, his wife, and children would visit him in prison.

Joe said his and his sister's relationship with their father was different from Mike's because "I could grasp things a little bit better than my brother could." When asked if either parent was physically abusive, he said, "I'd probably say my father was physical, my mother probably not." T 1359-1360.

Rebecca Shellito testified that Mike and their father did

not get along. Their father would get drunk and hit on Mike. He put Mike through a wall. He punched him in the mouth once and busted his tongue. They got into a lot of fights. T 1368-1369. He started hitting on Mike when he was 8 or 9. He had a short temper when he got drunk. He drank from the time he woke up until he went to bed at night. He hit Rebecca once. He backhanded and slapped their mother once. T 1370-1371. Mike was about 3 when HRS took them into custody. Their father had forgotten to post his allotment, and their mother **was** put in jail for neglect. When their father got back, he went to his parents' house and left them in the shelter until their mother got out of jail. T 1372.

After they moved to Orange Park, when Mike was about 12, her father's drinking increased **a** lot. T 1373. Rebecca moved out when she was 19. Mike helped her and lived with her for a time. He helped her any way he could. He was not in any trouble then. He was working with a roofing company. T 1374. Rebecca said she loved her brother and would visit him in prison if he were sentenced to life in prison. T 1375.

They were in Orange Park when their father put Mike through the wall. The HRS guy came out. Joe, Jr. was not there. Joe **was** not living with them when Mike got punched in the mouth. T

1377. Rebecca graduated from high school. She had worked at Southern Bell for three years. T 1377-1378.

Joseph Shellito, appellant's father, said he and wife divorced for three or four months shortly before Mike was born. T 1381. He had an alcohol problem until the last three or four years. He drank "couple three fifths a day, a week." T 1383. He was discharged from the Navy in 1982. He was now a security guard. T 1384. He was at sea when his wife got evicted. She was arrested. They had her in jail for less than a month. They airlifted him back and he got her and the kids. T 1385. He was away for most of Mike's infancy and early childhood. He was not involved in raising him. When asked about the time he busted Mike's lip, he said Mike was in altercation with his mother and he stepped in when he thought Mike was going to strike her. T 1386. His wife took Mike to the hospital. They were having marital problems at the end of 1987, and the first part of 1988, when he pushed Mike through wall. Just after that, they separated. T 1387.

Mr. Shellito said Mike was easy to get along with most of the time. He had lots of pets as a youngster. He liked to take bikes apart and put them back together. T 1388. Mr. Shellito said he had visited Mike every chance he could since he had been

arrested and would continue to visit him in prison. He loved his son very much. T 1389.

Mike was placed in an emotionally handicapped class in kindergarten. He had reading problems and stuttered. T 1398. He had jobs but could not keep them for one reason or another. T 1393. Mr. Shellito felt Mike started getting into trouble when he began hanging around with the wrong people. T 1395.

Migdalia Shellito testified that she finished high school but never graduated because her father was sexually abusing her. T 1400. She divorced Joseph in 1975. She left him because he hit her. When they got back together, Michael was born. T 1401-1402. When Mike was 5 days old, he started choked on some milk and turned purple. He stopped breathing. They went to the emergency room. They said he had "clogged the back, the breathing to his brain." T 1403.

The marriage was not good when Michael was young. Joseph was gone a lot. When he was home, he drank--"half a gallon about one or two a day." "He worked, came home, sat, and drank." Migdalia, in turn, had an affair. T 1404.

Michael wanted a close father/son relationship but his father did not have time. T 1405. She was evicted in November of 1977. She was put in jail and her kids in protective custody.

T 1407. In 1988, they were having marital problems again. She was at work when Joseph put Mike through the wall. HRS came out and told her find another place to go. She did. In 1990, Joseph injured Mike's tongue. Mike said something smart, and Joseph hit him. T 1408.

Mike was placed in special education in kindergarten. They told her he was lacking in communication. He stuttered and did not like to talk because of that. He had reading problems, too. He did not start reading until 6th grade. T 1409-1412. Mrs. Shellito first suspected he had psychological problems when he was 2. He would sit on the couch and watch TV and would not get up unless she moved him. In 5th or 6th grade, he would hit himself in the head, When she asked him why, he said, "Something is walking in there," T 1423. She took him to Grant Central Hospital, where they said he had a learning disability and something undeveloped in his brain. He was there 47 days, then was referred to Dr. Mullen, who confirmed the diagnosis of organic brain disorder. T 1414-1417. Dr. Mullen had seen Mike three times when he tried to kill himself. He was on Tegratol and overdosed. Before taking the pills, he told his mother, "I just don't want to keep going through this any more." She took him to the emergency room. T 1417-1418. He threatened to kill

himself another time but did not do anthing. T 1435.

Mike helped her around the house. Once, he persuaded her to take in a guy whose parents did not want him. The guy stayed until his parents let him come home. Another time, Mike begged her to keep an old man, who was blind. She told him she had enough to handle with her father-in-law. He said, "we can have another grandfather." They kept him 5 years. What Mike really wanted was a man who would be a father to him. She loved her son with all her heart. T 1419-1422.

On cross-examination, Mrs. Shellito said Mike pushed her once. T 1425. He was a follower, he did what other people did. His problems began when he started hanging out with "that person that was in your office." T 1431-1432. That guy, Stiffel, was very smart and his mother left him home alone with money and a computer, so that is where they went. T 1433. She sometimes gave Mike money to stay in a hotel. T 1436. When asked if Mike had ever spent time with an older woman, she said he had. T 1437. He was still having temper tantrums in the 6th grade. T 1439.

B. School, Medical, and Psychiatric Records.

Mike was identified as having 'severe emotional problems'" in kindergarden. See Defendant's Exhibit 1. A psychologist's

report dated June 1981 states Mike was referred to a pediatrician because he "appears to be extremely hungry, sneaks extra milk and even eats glue. , . has also been known to fall asleep in class or at dinner table and then it is very difficult to awake him." Dr. Aymer wrote the school that Mike's physical exam was normal, but his behavior level was that of a two-year-old child. Dr. Aymer recommended a program for emotionally handicapped children and psychological counseling. The psychologist's report notes Mrs. Shellito took Mike to the Community Mental Health Clinic twice. Defendant's Exhibit 1.

The report describes Mike's year as follows:

> "Michael's behavior vacillated widely from severe withdrawal, clinging to pillars, hiding behind chairs, and crawling under desks to very violent outbursts of holding scissors to childrens' necks and choking them. At times he's constantly moving, searching, touching and at other times he falls asleep on the floor. . . . He is extremely distractable and moving constantly in the classroom. He . . . has run off several times. Even with one to one help which he gets almost daily, Michael usually does not complete his work and has made very little academic progress. Michael's vocal habits vary from speaking so softly that he cannot be understood to shouting in incomplete phrases angrily. He frequently uses obscene language and laughs inappropriately. Michael eats all sorts of objects, drinks glue from the bottle and always has something in his mouth. He

> demands food and will steal if he is not watched. . . . He has been seen wandering the streets until 10 p.m. and smoking cigarettes. The parents have not followed through on their agreement to take Michael to therapy and have not been consistent in their interactions at school."

Defendant's Exhibit 1.

The report states Mike exhibited an "extreme fear of adult contact." When approached by the psychologist and guidance counselor, he "hid behind [al pole, slithering down it and started furiously digging a hole in the ground with his hands. At the same time, the child attempted to hide his head in the hole." Id. In the classroom, he wandered aimlessly, eyes darting from place to place. Attempts to engage him in an activity were unsuccessful. Id. The psychologist recommended **an** emotionally handicapped classroom and family therapy, as "this family appears to be in a state of crisis." Id.

Michael was evaluated again at age 7. He was in first grade in an emotionally handicapped class in Jacksonville. There had been little change: The report stated Michael was "aggressive and violent towards his peers and withdrawn with adults." His academic level was kindergarden. He was so severely shy with adults, the teacher spoke to him through another student. Intelligence tests showed low to borderline functioning. Other

tests revealed "feelings of inferiority, ineffectiveness, inadequacy, insecurity, and excessive defensiveness." He was placed in a program for Emotionally Handicapped and Specific Learning Disabilities. Id.

A report from Michael's fifth grade teacher states he **was** functioning two grade levels below placement and reading on a first-grade level, with assistance. Id.

Another psychological evaluation was conducted June 15, 1989, when Michael **was** 13 and in seventh grade. He moved from Orange Park to Jacksonville in March of 1989, and was placed in an Emotionally Handicapped program. The report states his IQ was 78, borderline **or** slow learner range. Verbally, he was 9 years old. He had the short-term memory of a 6-year-old. In visual-perceptual motor ability, he was 12 years old. He was defensive and evasive. Family strains were apparent, especially anger and hostility towards his father. The family was in the process of divorce. Id.

A Child Study Team Conduct Review, dated March 23, 1990, describes Michael as having severe learning disabilities and academic deficits, and severe behavioral problems at school and home. He was referred to Charter Hospital. Id.

A report from Jacksonville Naval Hospital dated August 17,

1990, shows Michael, age 14, was seen for a tongue laceration sustained in a fight with his father. Defendant's Exhibit 2.

A report from Grant Center Hospital, Citra, Florida, shows Michael was hospitalized for a month in October 1991. He was 16. The psychiatrist's report states Michael had a history of "homicidal and suicidal threats." He was diagnosed with Organic Mental Disorder, Conduct Disorder, Developmental Language Disorder, and Developmental Reading Disorder. Tegretol was prescribed. Id.

Dr. Mullen saw Michael November 11, 1991. Her report states Michael spoke only to answer questions but appeared well-oriented. He denied feelings of depression, anxiety, and thoughts of suicide or homicide. The diagnosis was organic mental disorder, conduct disorder undifferentiated, and developmental language disorder. The report states Michael was hospitalized at Charter Hospital in 1989 because of "family problems." Dr. Mullen's notes state Michael missed his November 25 session because his mother was "too busy" to take him. Her notes from a December 5 session indicate Michael was seeing less of the Orange Park friends he had gotten into trouble with. Dr. Mullen's January 6 notes state Mrs. Shellito called to say Michael had been hospitalized after trying to kill himself. He

was caught stealing a guinea pig from a pet store and got angry when his mother tried to talk to him. Mrs. Shellito put his pills on the table and went to a party. When she returned, she found the bottle empty. She took Mike to the hospital, where his stomach was pumped. Dr. Mullen never heard from the Shellitos again, Defendant's Exhibit 3. A January 5, 1991, report from the Naval Hospital indicates Mike attempted suicide by overdosing on his medication. Defendant's Exhibit 2.

ARGUMENT

Point I

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF APPELLANT'S ATTEMPT TO FLEE DURING THE POLICE RAID ON STEVE GILL'S APARTMENT WHERE IT WAS EQUALLY LIKELY APPELLANT FLED BECAUSE OF THE ROBBERIES HE COMMITTED AN HOUR BEFORE THE RAID OR BECAUSE OF THE ILLEGAL DRUG USE TAKING PLACE IN THE APARTMENT.

At trial, the prosecutor was allowed to present evidence of appellant's arrest during a police raid of Steve Gill's apartment, including evidence he jumped out a window and pointed a gun at Deputy Hurst.[5] The trial judge erred in admitting this evidence. Although flight evidence generally is admissible to show consciousness of guilt, here, it is impossible to say

[5] The defense filed a pretrial motion in limine to exclude the flight evidence, which was denied, T 335-349, and renewed the objection before its admission at trial. T 570.

whether appellant's flight resulted from illegal activities taking place inside Gill's apartment, from the robberies appellant committed immediately before the raid, or from the homicide, which had taken place twenty hours earlier. Additionally, because the objected-to evidence included evidence of a collateral crime, any marginal relevance it may have had was far outweighed by the danger of prejudice, This error requires reversal for a new trial.

In Florida, as in most jurisdictions, flight from justice has long been regarded as relevant and admissible to show consciousness of guilt, and thus guilt itself. E. Cleary, McCormick on the Law of Evidence s. 271, at 655 (2d ed. 1972). Nonetheless, courts also have "widely acknowledged that evidence of flight or related conduct is 'only marginally probative as to the ultimate issue of guilt or innocence."' United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977).

The probative value of flight evidence depends on the degree of confidence with which four inferences can be drawn:

> (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; and (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

Bundy v. State, 471 so. 2d 9, 20 (Fla. 1985), cert. denied, 471 U.S. 894, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986) (adopting analysis applied in Myers).

Moreover,

> Because of the inherent unreliability of evidence of flight, and the danger of prejudice its use may entail . . . a flight instruction is improper unless the evidence is sufficient to furnish reasonable support for all four elements of the necessary inferences.

Myers, 550 F.2d at 1050.

In Myers, for example, the Fifth Circuit held evidence the defendant fled from federal agents was inadmissible where the facts showed the defendant may have fled because of a different and unrelated crime he had committed. Myers, who was on trial for robbing a bank in Florida, had robbed a bank in Pennsylvania two weeks after the Florida bank robbery. He had been apprehended by federal agents in California and convicted of the Pennsylvania bank robbery before being brought to trial on the Florida charge. In analyzing whether Myers's flight was relevant to the Florida robbery, the Fifth Circuit pointed out that 'the theory under which evidence of flight is admitted presumes that consciousness of guilt concerning the Pennsylvania robbery could be a sufficient cause of [Myers's] flight." 550 F.2d at 1050.

The court therefore held the flight evidence was inadmissible in the Florida trial because doubt existed as to which robbery caused the flight:

> Without knowing whether Myers committed the Florida robbery it is impossible to say whether the California flight resulted from feelings of guilt attributable to the Florida and Pennsylvania robberies or from consciousness of guilt about the Pennsylvania robbery alone. Therefore, . . . no inference that [Myers] is guilty of the Florida robbery is possible. . . .

Id.; see also Merritt v. State, 523 So. 2d 573 (Fla. 1988) (Merritt's attempt to escape while being brought to Florida to stand trial on unrelated charges inadmissible to show consciousness of guilt for murder, even though Merritt aware he was suspect in murder); cf. Bundy, 471 So. 2d at 20 (defendant's flight from jurisdiction several days after victim's disappearance indicated flight was to avoid prosecution for that murder, as opposed to earlier crimes with which he also was charged).

The present case is analogous to Myers. The Hathorne murder took place in the early morning hours of August 31, 1994. Some twenty hours later, appellant committed two armed robberies. An hour after the robberies, appellant jumped out a window and tried to flee when police raided Steve Gill's apartment. There is no evidence appellant was aware he was a suspect in the homicide

investigation when he fled. See State v. Borders, 693 F.2d 1318, 1325 (11th Cir. 1982) (probative value of flight evidence substantially weakened if suspect unaware at time of flight he was subject of criminal investigation for particular crime charged), cert. denied, 461 U.S. 905, 103 S.Ct. 1875, 76 L.Ed.2d 897 (1983). In fact, appellant was arrested for the robberies, not the homicide. Appellant also was using illegal drugs when the police entered Gill's apartment. Here, as in Myers, there is doubt as to which crime caused the flight, and without presuming appellant guilty of the homicide, it is impossible to say whether the flight resulted from guilt attributable to the drugs, robberies, and homicide, or guilt about the drugs or armed robberies alone.

This Court's decision in Freeman v. State, 547 So. 2d 125 (Fla. 1989), is distinguishable. Freeman had been charged with second-degree murder in the death of Epps and first-degree murder in the death of Collier when he tried to escape by climbing through the roof of his holding cell in the county courthouse.[6] This Court rejected Freeman's argument that the flight must have been due to primarily to the Collier murder charge, which carried

[6]Freeman never made it out of the courthouse.

a potential death penalty, because "Freeman was incarcerated for both offenses . . . and he attempted to elude prosecution for both." This case is factually distinguishable, therefore, because Feeman had been charged and incarcerated for both crimes when he tried to escape, whereas appellant was not even a suspect in the homicide. Furthermore, the more recent robbery had been committed on someone who could identify him.[7]

Additionally, unlike Freeman, the flight evidence introduced in the present case included highly prejudicial evidence of an unrelated crime, the aggravated assault on Deputy Hurst. Such evidence, if irrelevant, is presumed harmful because of the danger a jury will take the propensity to crime thus demonstrated as evidence of guilt of the crime charged. Straight v. State, 397 So. 2d 903, 908 (Fla. 1981), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981). Even when relevant, it is possible for such evidence to have an improper prejudicial impact that outweighs its probative value. Id. at 909. Here, the marginal probative value of the flight evidence was far outweiged by the danger of prejudice its use entailed.

This error requires reversal for a new trial.

‘David Wolf, the local drug dealer.

Point II

THE TRIAL COURT ERRED IN ALLOWING DETECTIVE HINSON TO TESTIFY ABOUT RICKY BAYS' PRIOR CONSISTENT STATEMENT, WHICH IMPROPERLY AND PREJUDICIALLY BOLSTERED BAYS' CREDIBILITY.

During direct examination, Ricky Bays testified that after appellant and Steve Gill returned to Gill's apartment after taking Sunshine home on August 31, appellant told Bays he had shot someone. Bays also testified he was arrested 20 hours later for armed robbery, which carried a potential life sentence, and after his arrest, he told police in a sworn statement what appellant had said about shooting someone. T 433-434.

On cross examination, Bays said when he gave the statement to police, he was concerned about the robbery and what might happen to him. He knew he faced a possible life sentence and a fifteen-year mandatory minimum. T 452, 453. Defense counsel also questioned Bays about his activities in jail after his arrrest. Bays said he kept evidence in his own case under his mattress, a place inmates commonly keep evidence about their case. He read about the Hathorne homicide in the newspaper while in jail, but the paper had no details.[8]

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[8]Defense counsel impeached this testimony with Bays's deposition testimony in which he said the newspapers carried a lot of information about the homicide. T 446-447.

On redirect, Bays said he had not read anything about the Hathorne homicide, nor seen any police reports about it, when he gave his September 1 statement.

Later, the prosecutor sought to elicit from Detective Hinson the details of Bays's post-arrest statement. T 606, The state argued defense counsel's questions about the penalty Bays faced for the armed robbery, the newspaper articles he read in jail, and where inmates keep information about their case, intimated Bays had recently fabricated his testimony. The defense objected to Hinson's testimony as cumulative, improper bolstering of Bays's testimony, and hearsay not falling within the recent fabrication exception. The trial court overruled the objection, and Hinson was allowed to testify to Bays's prior consistent statement. T 617.

A witness's prior consistent statements generally are inadmissible to corroborate the witness's testimony. Jackson v. State, 498 So. 2d 906, 909-10 (Fla. 1986). While an exception allows a prior consistent statement to be used, "to rebut an express or implied charge against [the witness] of improper influence, motive, or recent fabrication," see s. 90.801(2)(b), Fla. Stat. (1995), the exception does not apply where the motive to fabricate arose before the prior consistent statement was

made. Jackson, 498 So. 2d at 910. In Jackson, a prisoner tried to curry favor with the state by telling a detective he heard the defendant inculpate himself in an armed robbery/murder. After the prisoner testified, the detective testified as to what the prisoner had told him the defendant said. This Court reversed because the prior consistent statement was made after the prisoner's motive to falsify arose. See also Anderson v. State, 574 so. 2d 87, 93-94 (Fla.) (error to permit investigator to testify as to what witness said after plea agreement because that was when defense suggested motive to fabricate arose), cert. denied, 502 U.S. 834, 112 S.Ct. 114, 116 L.Ed.2d 83 (1991); Parks v. State, 644 So. 2d 106 (Fla. 4th DCA 1994) (where co-defendant was cross-examined about his post-arrest statement and subsequent plea agreement, error to allow state to introduce statement because statement was made after alleged improper motive arose); see also United States v. Miller, 874 F.2d 1255, 1274 (9th Cir. 1989) (powerful motive to fabricate existed when declarants made statements to agents or attorneys while under criminal investigation or indictment).

Here, Bays was under arrest for armed robbery when he gave his statement to Detective Hinson. Any bias, interest, or motive to falsify existed at that moment. If defense counsel's cross-

examination suggested Bays had fabricated his testimony, any motive to do so would have arisen upon his arrest for armed robbery and before he gave his statement. Detective Hinson's testimony as to Bays's statement was inadmissible.

Bays was the only witness who placed the gun in appellant's hands around the time of the shooting. The state relied on Bays's credibility throughout closing argument. Bays's credibility was pivotal, yet the trial court allowed the state to improperly bolster his credibility in the jury's eyes. This error violated appellant's rights to due process, a fair trial, and confrontation under the state and federal constitutions. Appellant is entitled to a new trial.

Point III

THE PROSECUTOR'S CLOSING ARGUMENT DURING THE GUILT PHASE, IN WHICH HE SAID HE THOUGHT A CRITICAL DEFENSE WITNESS WAS A "BLATANT LIAR," DEPRIVED APPELLANT OF A FAIR TRIAL.

It is patently improper for a prosecutor to express his or her personal belief in the veracity of a witness.[9] Pacific0 v. State, 642 So. 2d 1178, 1183-1184 (Fla. 1st DCA 1994); Jones v.

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[9]Such remarks also violate the Florida Code of Professional Responsibility DR7-106(C)(4)("a lawyer shall not . . . [a]ssert his personal opinion . . . as to the credibility of a witness"). See Wilson v. State, 371 So. 2d 126, 128 (Fla. 1978); Dukes v. State, 356 So. 2d 873, 876 (Fla. 1978).

State, 449 So. 2d 313, 314 (Fla. 5th DCA), review denied, 456 So. 2d 1182 (Fla. 1984). Accordingly, a prosecutor may not refer to a witness as a "liar," unless the evidence supports such a conclusion. See Craig, 510 So. 2d 857, 865 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988); Pacifico; Redish v. State, 525 So. 2d 928, 930 (Fla. 1st DCA 1988).

The evidence supports a conclusion that a witness has lied where the jury is given different versions of the same event by that witness. Redish. In Redish, the prosecution introduced a taped conversation in which Redish told Dunson he owed him $1500 interest on a 90-day $6,000 debt and could lose his life if he did not pay. In his testimony, Redish denied the usurious interest rate and said he only wanted to scare Dunson into repaying the loan. The court upheld the prosecutor's argument that the defendant had lied during his testimony because the jury was faced "with two versions of the events." Id. at 928.

In the present case, Migdalia Shellito testified at trial that Steve Gill came to her house after appellant was indicted and said he was the one who shot the victim. Joseph Shellito testified he overheard Gill's confession, unbeknown to Gill. No other evidence was presented as to this event.

During closing argument, the prosecutor remarked:

> "Mrs. Shellito is either an extremely distraught concerned mother or she's a blatant liar. I think she's probably a little bit of both."

T 1100-1101.

This remark was improper. Unlike the defendant in Redish, Mrs. Shellito gave only one version of events. Her testimony was not impeached. She testified she told appellant's original lawyer, told the prosecutor, and told the paper what Steve Gill said. She said she tried to contact Detective Goff, but he did not return her calls. The only chink in her story was Goff's testimony that he received a message from her in December rather than February. The prosecutor failed in his attempt to impeach Mrs. Shellito, so resorted to the improper, unfair tactic of telling the jury he thought she was lying.

Appellant concedes there was no objection to the improper comment. The failure to object to improper prosecutorial comments will not preclude reversal, however, where the comments are so prejudicial to the defendant that neither rebuke nor retraction would destroy their influence. Wilson v. State, 294 so. 2d 327, 328-29 (Fla. 1974).

Mrs. Shellito's credibility was critical to appellant's

defense. Ultimate deductions from the evidence **are** for the jury to draw. Redish, 52.5 So. 2d at 928. Here, the prosecutor drew the ultimate deduction as to appellant's defense, i.e., that it was a lie. This destroyed his defense and denied him a fair trial. Reversal is required.

PENALTY PHASE

Each of the arguments below is based upon the Eighth and Fourteenth Amendments of the United States Constitution, and Article I, Section 17, of the Florida Constitution.

Point IV

THE PROSECUTOR'S CLOSING ARGUMENT DURING THE PENALTY PHASE WAS PERVADED BY IMPROPER AND PREJUDICIAL REMARKS, WHICH DEPRIVED APPELLANT OF A FAIR SENTENCING PROCEEDING AND UNDERMINED THE RELIABILITY OF THE JURY'S RECOMMENDATION.

A. Lack of Remorse Argument.

During closing argument, the prosecutor argued:

> What happened between the time that [Shellito] was bragging about the murder when he came back about 5:00, 5:30 in the morning and about 19 hours later when he was arrested and shot after assaulting a police officer with that nine millimeter, in between what **was** the defendant doing? Was he remorseful, was he horrified over having killed Sean Hathorne?

T 1453 (emphasis added). The trial judge overruled appellant's

objection to this argument.[10] T 1454-1455.

This Court repeatedly has held "[i]t is error to consider lack of remorse for any wurpose in capital sentencing." Trawick v. State, 473 So. 2d 1235 (Fla. 1985), cert. denied, 476 U.S. 1143, 106 S.Ct. 2254, 90 L.Ed.2d 699 (1986). Specifically,

> [L]ack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed as an aggravating factor nor as an enhancement of an aggravating factor.

Powe v. State, 441 So. 2d 1073, 1078 (Fla. 1983).

Here, the prosecutor not only explicitly argued lack of remorse, he improperly argued that appellant had "bragged," about the murder, T 1451, 1453, and "was proud of his accomplishment." T 1468. See Sireci v. State, 587 So. 2d 450, 454 (Fla. 1991) (state witness's testimony that after Sireci read about murder in newspaper, "he seemed rather proud of it," constitutes impermissible testimony on lack of remorse), cert. denied, 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). The trial court erred in overruling appellant's objection to this patently improper argument.

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[10]The trial judge previously had denied appellant's motion in limine to preclude the state from arguing lack of remorse. R 324, T 1223.

B. **"Prosecutorial Expertise" Argument.**

It is wrong for the prosecutor to undermine the jury's discretion in determining the proper punishment by implying that he, or another high authority, has already made the careful decision required. Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985) (en banc), reversed on other grounds, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986); see also Tucker v. Kemp, 762 F.2d 1480, 1484 (11th Cir. 1985) ("While facts of the crime can be stressed to show the seriousness of the case, the prosecutor's careful decision that this case is special is irrelevant and potentially prejudicial"), cert. denied, 478 U.S. 1020, 106 S.Ct. 3333, 92 L.Ed.2d 738 (1986).

In the present case, the prosecutor violated this proscription when he told the jury,

> " [T]he ultimate punishment is not appropriate for all murderers. We don't always seek the death penalty in every murder, we don't always even seek the death penalty in every first-degree murder."

T 1446. This remark plainly was calculated to suggest to the jury those with experience and authority, i.e., the prosecution, already had determined death was the appropriate penalty. This argument is just as improper as telling jurors during the guilt phase of a trial, "we only prosecute the guilty."

C. **Improper Doubling Argument.**

During closing argument, the prosecutor told the jury:

> The first aggravator the Judge will instruct you is what is commonly referred to as felony murder. This is an extremely significant aggravator that cannot be minimized. The legislature is saying that the crime of robbery or attempted robbery is so dangerous that when a murder occurs during the commission of that crime it is automatically an aggravating circumstance.
>
> . . . . .
>
> . . . Let us look at the second aggravating factor in this case. . . . Why did the defendant kill? He killed out of greed. . . .
>
> . . . . ,
>
> . . . You will hear an instruction about the aggravating circumstance of financial gain and felony murder that the crime was committed during a robbery or an attempted robbery. What the law says merges into one aggravating circumstance and that's the law, that is true and appropriate. But keep in mind that each of these factors reveals something. the law separates them in the someutes for a purpose, because each has content, it reflects on the defendant's character.
>
> . . . Even if you look at the fact that he did this during a robbery and the fact that he did it because of money, for greed, that's as one circumstance, there are two concerns involved, and that tells you that is is a particularly weighty, heavy circumstance that calls out for the death penalty.

T 1450-1453.[11]

This argument **was** clearly improper as the robbery and pecuniary gain aggravators in this case were based on a single aspect of the crime, the attempted robbery. See Straight v. State, 397 so. 2d 903, 910 (Fla.) (reversible error to give "inflated consideration" to two aggravators based on single aspect of crime), cert. denied, 454 U.S. 1022, 102 S.Ct 556, 70 L.Ed.2d 418 (1981).

D. Attacks on the Mitigating Evidence.

The prosecutor improperly denigrated the mitigating evidence and attacked the legitimacy of mental and emotional defects as mitigating circumstances. See Garron v. State, 528 So. 2d 353, 357 (Fla. 1988) (reversible error to place issue of validity of legitimate and lawful defense before jury in form of repeated criticism of defense in general); Riley v. State, 560 So. 2d 279, 280 (Fla. 3d DCA 1990) (prosecutor "may not ridicule a defendant or his theory of defense"); Rosso v. State, 505 So. 2d 611, 613 (Fla. 3d DCA 1987) (same).

Although the prosecution submitted no evidence regarding

"The prosecutor made a similar argument at the judge-only sentencing hearing when he urged the court to consider the felony murder/robbery and pecuniary gain aggravators as a "'super aggravator" or as "'one-and-a-half' aggravators. T 1545, 1548, 1549.

emotional handicap, organic brain disorder, or learning disabilities, the prosecutor asserted:

> "You'll hear some evidence of what doctors said and you'll hear or have the records . , . Doctors often have fancy names for insignificant problems. At the very least fancy **names** for problems that are not sufficient to warrant mercy, not sufficient to excuse murder and, that is what you have to keep in mind."
>
> "He knew what he was doing. And anything else that you hear about is an excuse."
>
> "The defendant was deprived, therefore he is depraved. That is **an** excuse."

T 1465-1466. The prosecutor therefore conveyed to the jury appellant's legitimate mitigating circumstances were insignificant, and in any event legally irrelevant because they cannot "excuse" a murder. The combined effect of these remarks was to invite the jury to improperly ignore valid mitigating circumstances established by competent, uncontroverted evidence.

E. **Asking Jury to Show Defendant Same Mercy Shown Victim.**

The prosecutor's final salvo was to ask the jury to show appellant the same mercy he showed the victim:

> "[Mike Shellito] doesn't care, except for money. He has no mercy. What does he want? Mercy. What did he show Sean Hathorne? Nothing. This is a man who was proud of his accomplishments, . . .
>
> I ask you to show that murderer the same

amount of mercy that he showed the victim 18 year old Sean Hathorne."

T 1468 (emphasis added).

This Court has condemned this type of argument as an improper appeal to juror sympathy. Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989); Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). Indeed, the remark made here is virtually identical to the comment condemned in Rhodes ("show Rhodes the same mercy shown to the victim on the day of her death").

F. Harmless Error Analysis.

Applying the harmless error rule enunciated in State v. DeGuilio, 491 so. 2d 1129 (Fla. 1986), the state must demonstrate beyond a reasonable doubt "there is no reasonable possibility" these errors might have contributed to the result of the proceeding. The state's burden to show harmlessness is particularly severe when applied to an improper closing argument in a capital case:

> Due to the subjective nature of the life/death decision and the fact that no matter how "aggravated" the crime may be, the jury always has the option of returning a sentence of life imprisonment, a reviewing court can seldom say that there is no possibility that an unfair closing argument influenced the death penalty that was imposed.

Brooks v. Kemp, 762 F.2d at 1438 (Clark, J., concurring in part and dissenting in part).

The state cannot meet that burden here, where only two valid aggravators were to be weighed against extensive mitigating evidence. Indeed, the improper comment on lack of remorse, standing alone, requires reversal. See Hill v. State, 549 So. 2d 179, 183-184 (Fla. 1989) (exchange that left jury with belief it could consider lack of remorse in determining existence of CCP aggravator not harmless where there were two valid aggravators and one mitigator). Even if the improper comment on lack of remorse were deemed harmless by itself, it cannot be viewed as harmless in combination with the other improper comments.

Point V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THE AGGRAVATING FACTOR OF PECUNIARY GAIN.

The defense objected to both the pecuniary gain aggravator circumstance and the felony murder/robbery aggravator,[12] arguing there was no evidence of financial gain since nothing was taken. T 1273-1274. The objection was overruled, T 1274, and the judge instructed the jury on both aggravators. The defense also filed

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[12]Appellant is not challenging the felony murder/robbery aggravator.

a motion in limine to prohibit argument that would allow improper doubling of these aggravators. R 324. The court denied the motion, ruling the merger instruction[13] would cure any problem the state's argument might create. T 1304.

The trial court found both the felony murder aggravator and the pecuniary gain factor based upon the following fact:

> Shellito stopped the victim, Shawn Hathorne, at gunpoint and demanded money. When Hathorne said he had no money but could go home and get some, Shellito shot him, watched him crawl to a fence and bleed to death.

R 394. The court considered these as one aggravating circumstance of "great weight." R 394.

The trial court erred in finding the pecuniary gain aggravator. In order for this aggravator to apply, the state must prove a pecuniary motivation for the murder itself--not the entire criminal episode. Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982); see also Clark v. State, 609 So. 2d 513, 515 (Fla. 1993); Hill v. State, 549 So. 2d 179, 183 (Fla. 1989). The state

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[13] The judge gave the following merger instruction:

> If you find that the killing of the victim was done for financial gain and was done during a Robbery or Attempted Robbery, you shall consider that as only one aggravating circumstance rather than two. Those circumstances are considered to be merged.

R 366, T 1506.

must show the murder was "an integral step in obtaining some sought-after specific gain." Peterka v. State, 640 So. 2d 59, 71 (Fla. 1994), cert. denied, 115 S.Ct. 940, 130 L.Ed.2d 884 (1995).

Here, the only evidence of motive was appellant's statement that 'he didn't have any money, so I shot him." This conclusively demonstrates the taking of money or property was not the motive for the murder. Michael Green and John Bennett's testimony also show the robbery attempt was over when the victim was shot. The homicide was not committed "as a means of improving [the perpetrator's] financial worth." See Scull v. State, 533 so. 2d 1137, 1142 (Fla. 1988).

This case is the converse of Clark. In Clark, the evidence showed the defendant killed the victim to get his job, then went through his pockets. The Court upheld the pecuniary gain aggravator based on the motive for the killing but rejected the felony murder/robbery aggravator because the theft was not the motive for the murder but was merely an afterthought. Just as the theft was committed as an afterthought in Clark, the murder was committed as an afterthought here. Accordingly, the trial judge should not 'have instructed the jury on the pecuniary gain aggravator nor found it himself.

This error requires reversal. This Court has held it is

reversible error for a trial judge to give "inflated consideration" to two aggravators based on a single aspect of the crime, "unless the absence of mitigating circumstances makes clear any added weight did not tip the balance in favor of a sentence of death rather than life." Straight v. State, 397 So. 2d 903, 910 (Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct 556, 70 L.Ed.2d 418 (1981). Here, while there is no indication the judge gave improper double consideration to the pecuniary gain and felony murder/robbery aggravators, the same cannot be said for the jury. As discussed in Point V, supra, at p. --, the prosecutor improperly argued to the jury that although the pecuniary gain and felony murder/robbery aggravators merge as one,

> "[E]ach of these factors reveals something, the law separates them in the statutes for a purpose . . . there are two concerns involved, and that tells you that this is a particularly weighty, heavy circumstance that calls out for the death penalty."

T 1450-1453. Because the merger instruction merely told the jurors to regard the two aggravators as one, the merger instruction did not cure the prosecutor's improper plea for "inflated consideration" of these aggravating factors.

Absent the pecuniary gain aggravator, there were only two

valid aggravators, felony murder/robbery and prior violent felony. In light of the substantial mitigation presented, this Court cannot say there is no possibility the instructional error, combined with the prosecutor's improper argument, did not affect the jury's recommendation of death. Straight; see also Hill, 549 So. 2d at 183 ('cannot tell with certainty result of weighing process would be same" where striking of invalid aggravator left 2 aggravating factors and 1 mitigating factor). A new penalty proceeding is required.

Point VI

THE TRIAL COURT'S REFUSAL TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS ON MITIGATING CIRCUMSTANCES PRECLUDED THE JURY FROM GIVING EFFECT TO MITIGATING EVIDENCE AND UNDERMINED THE RELIABILITY OF THE JURY'S RECOMMENDATION.

Appellant requested a number of special jury instructions on mitigating evidence to remedy defects in the standard instructions that restrict the jury's ability to give effect to mitigating evidence. The trial court's refusal to give appellant's special requested instructions was reversible error.

A. The Trial Court Improperly Refused to Give Appellant's Requested Instruction Defining Mitigating Evidence and Clarifying that Consideration of Mitigating Circumstances is Mandatory Rather than Permissive.

Appellant objected that the standard jury instructions did

not adequately inform the jury of the meaning of mitigating circumstances, thereby precluding the jury from its task of weighing these factors. T 1256-1258. Appellant therefore requested a special instruction defining "mitigating circumstances" as

> anything about MIKE SHELLITO or the crime which, in fairness and mercy, should be taken into account in deciding the punishment. Even where there is no excuse or justification for the crime, our law requires consideration of more than iust the bare facts of the crime; therefore, a mitigating circumstance **may** stem from any of the diverse frailties of human kind.
>
> Mitigating circumstances are anv facts relating to MIKE SHELLITO's age, character, environment, mentalitv, life and background or any aspect of the crime itself which mav be considered extenuating or reducing his moral culpability or making him less deserving of the extreme punishment of death. You may consider as a mitigating circumstance any circumstance which tends to justify the penalty of life imprisonment.
>
> You must consider all evidence in mitigation. The weight which you give to **a** particular mitigating circumstance is a matter for your moral, factual, and legal judgment. However, you may not refuse to consider any evidence of mitigation and thereby give it no weight.

R 338.[14]

The requested instructions are accurate statements of the

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[14]Defense counsel submitted three other alternative special instructions defining mitigating circumstances. R 337, 339, 340.

law, Cheshire v. State, 568 So. 2d 908, 911 (Fla. 1990); Maxwell, 603 So. 2d 490, 491 n.2 (Fla. 1992), and have been approved by both this Court and the Eleventh Circuit Court of Appeals. Peek v. Kemp, 784 F.2d 1479, 1490 n.12 (11th Cir.) (en banc) (instruction defining mitigating circumstances is "manifestly desirable," though not required in all cases), cert. denied, 479 U.S. 939, 107 S.Ct. 421, 93 L.Ed.2d 371 (1986); Jones v. State, 652 So. 2d 346, 351 (Fla.)(jury not improperly restricted in its consideration of non-statutory mitigating circumstances where jury given both "catch-all" instruction and instruction defining mitigation), cert. denied, 116 S.Ct. 202, 133 L.Ed.2d 136 (1995).

In the present case, the prosecutor repeatedly told the jury the mitigating evidence of appellant's mental and emotional problems, learning disabilities, and deprived childhood was "an excuse." T 1448, 1449, 1465, 1466; see Point V, supra, at p. --. This argument suggested the jurors should disregard the mitigating evidence because it did not rise to the level of a legal justification or excuse, a patently erroneous and misleading statement of law. Morgan v. State, 639 So. 2d 6, 13 (Fla. 1994); Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993); Campbell v. State, 571 So. 2d 415, 418-419 (Fla. 1990); Huckaby v. State, 343 So. 2d 29, 33 (Fla.), cert. denied, 434 U.S. 920,

98 S.Ct. 393, 54 L.Ed.2d 276 (1977); State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). These arguments furthermore improperly suggested to the jurors they could disregard appellant's disabilities as not of a mitigating nature, also a patently erroneous and misleading statement of law.[15] Accordingly, there is a "reasonable likelihood" that, without the special instruction defining mitigation, the jury in this case applied the standard instructions 'in a way that prevent[ed] the consideration of constitutionally relevant evidence." Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990).

Defense counsel's special instruction defining mitigation also was necessary to inform the jury it "must" consider all evidence of mitigation, thereby curing the defect in the standard instruction which improperly states the jury "may" consider mitigating circumstances. See Camnbell, 571 So. 2d at 419 (sentencer "may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from . . . consideration"). The

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[15]Each of these is a legitimate mitigating circumstance. See Point III, infra.

mandatory language in the requested special instruction is **legally** correct; the permissive language in the standard instruction is legally incorrect and misleading. The requested special instruction would have ensured the jurors understood their obligation to consider mitigating circumstances. The trial court's refusal to give the defendant's requested instruction was reversible error. See California v. Brown, 479 U.S. 538, 546, 107 S.Ct. 837, 842, 93 L.Ed.2d 934 (1987) (O'Conner, J., concurring) (jurors must be clearly informed "they are to consider any relevant mitigating evidence").

B. The Trial Court Erred in Refusing to Give Appellant's Requested Instruction on the Weighing Process.

The defense also requested the following special instruction regarding the weighing process:

> It must be emphasized that the procedure to be followed by the jury is not a mere counting process of the number of aggravating circumstances and the number of mitigating circumstances, but rather **a** reasoned judgment as to what factual situations require the imposition of death by electrocution and which can be satisfied by life imprisonment in light of the totality of the circumstances.

R 342.

The requested instruction is consistent with this Court's seminal holding that "the procedure to be followed by the trial

judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances." Dixon, 283 So. 2d at 10. The instruction is necessary to ensure jurors understand their inquiry is a qualitative rather than a quantitative one. This instruction is particularly critical where, **as** here, the jury is not instructed on specific non-statutory mitigating circumstances and therefore may erroneously conclude death is appropriate because the enumerated aggravating circumstances outnumber or equal the enumerated mitigating circumstances. Such a mechanical judgment would be patently inconsistent with Dixon and would improperly prevent the jury from giving effect to relevant mitigating evidence in violation of the Eighth Amendment and Article I, Section 17, of the Florida Constitution.

C. **The Trial Court Erred in Refusing to Instruct the Jury on Specific Non-Statutory Mitigating Circumstances, Including Emotional Handicap, Mental Defects, Low Intelligence, Learning Disabilities, Deprived Childhood, Lack of Education, and that the Homicide Was Committed with Little or No Reflection.**

Under the United States Constitution and under Florida law, the jury must consider and give effect to all relevant mitigating evidence offered by the defendant. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Lockett v. Ohio, 438

U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); **Robinson V. State**, 487 So. 2d 1040, 1042-43 (Fla. 1986); Riley v. Wainwright, 517 so. 2d 656 (Fla. 1987). In order to give effect to such evidence,

> the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett, but which also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . ."

Ssivev v. Zant, 661 F.2d 464 (5th Cir. 1981), cert. denied, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982); see **also** Chenault v. Stvnchcombe, 581 F.2d 444, 447 (5th Cir. 1978)(requirement that sentencer must be allowed to consider mitigating circumstances "would have no importance, of course, if the sentencing jury is unaware of what it **may** consider in reaching its decision"). As this Court has said:

> [Ilimproper, incomplete, or confusing instructions relative to the consideration of both statutory and nonstatutory mitiuating evidence does violence to the sentencing scheme and to the jury's fundamental role in that scheme.

Riley, 517 so. 2d at 658.

In the present **case,** the defense requested several special instructions on non-statutory mitigating factors established by

the testimony of Joseph, Migdalia, Joe, and Rebecca Shellito, and by medical, psychiatric, and school records. These included (1) deprived childhood, (2) mental defects, (3) lack of education, (4) learning disabilities, (5) emotional handicap, (6) low intelligence, (7) the treatment of other participants in the offense, and (8) that the homicide was committed with little or no planning. R 336-337, 346, 349, 350, T 1255-1255, 1261-1262, 1263-1264. The trial judge denied each special instruction in favor of the standard 'catchall" instruction.[16] T 1255-1255, 1261-1264.

The trial court erred in refusing to give appellant's requested special jury instructions on specific non-statutory mitigating factors. Each has been recognized as a valid mitigating circumstance by this Court.[17] Neither the "catchall" instruction nor the instructions as a whole were sufficient to

[16] The jury was instructed: "Among the mitigating circumstances you may consider, if established by the evidence, are: 1. The age of the defendant at the time of the crime. 2. Any other aspect of the defendant's character or record, and any other circumstances of the offense."

[17] See Nibert, 574 So. 2d 1059 (Fla. 1990)(disadvantaged family background); Cochrane v. State, 547 So. 2d 928 (Fla. 1989)(emotional handicap and severe learning disability); Morris v. State, 557 So. 2d 27 (Fla. 1990)(borderline intelligence); Duboise v. State, 520 So. 2d 260 (Fla. 1988)(I.Q. of 79); Wilson v. State, 493 So. 2d 1019 (Fla. 1986)(little or no premeditation); Sireci v. State, 502 So. 2d 1221 (Fla. 1987)(organic brain damage); Hall v. State, 541 So. 2d 1125 (Fla. 1989) (organic brain damage, severe'learning disabilites); Maxwell v. State, 603 So, 2d 490 (Fla. 1992)(treatment of co-participant); see also Point III, infra.

guide the jury in its consideration of these factors. This defect deprived appellant of a fair and reliable jury recommendation, in violation of the Eighth Amendment.[18]

Under Florida law, the jury is a co-sentencer, and its recommendation is an integral part of the sentencing process. Therefore, when an instructional error distorts the jury's weighing process and taints its recommendation, the resulting death sentence cannot stand. Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2026, 120 L.Ed.2d 854, 859 (1992); Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990); Maynard v. Cartwriaht, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

In deciding whether a jury has been sufficiently instructed on an aggravating factor, the United States Supreme Court has looked at whether the instructions given were "so vague as to leave the sentencer without sufficient guidance for determining its presence or absence." Espinosa, 120 L.Ed.2d at 858. In Essinosa, Shell, and Maynard, the Court held the instruction and

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[18] Appellant recognizes this Court repeatedly has declined to require such instructions. See, e.g., Jones, 612 So. 2d 1370, 1375-76 (Fla. 1992), cert. denied, 114 S.Ct. 112, 126 L.Ed.2d 78 (1993). Appellant is unaware of a case addressing the legal argument submitted here, however, and respectfully asks the Court to revisit the issue in light of this argument. Appellant further submits that even if a special instruction on specific non-statutory mitigating factors is not required in every case, such instruction was required in this case.

limiting definitions given on the "heinous, atrocious, and cruel" (HAC) aggravator failed this test because the definitions were not specific enough: "[O]rdinary jurors could reasonably construe the definitions as applicable to every first-degree murder." See Shell, 498 U.S. at 5 (Marshall, J., concurring); Maynard, 486 U.S. at 364.

In Jackson v. State, 648 So. 2d 85, 88 (Fla. 1994), this Court applied this test to Florida's standard jury instruction on the "cold, calculated, and premeditated" (CCP) aggravating factor, which told the jury it could consider, if established by the evidence, that "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." The Court began its analysis by examining its own caselaw construing the CCP aggravator:

> [T]his Court has found it necessary to explain that the CCP aggravator applies to "murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder," Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991), and where the killing involves "calm and cool reflection." Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). The Court has adopted the phrase "heightened premeditation" to distinguish this

> aggravating circumstance from the premeditation element of first-degree murder. Id.; Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The Court has also explained that "calculation" constitutes a careful plan or a prearranged design. Rogers, 511 So. 2d at 533.

648 So. 2d at 88-89.

The Court then reasoned that because the jury was unaware of the limiting construction placed on the aggravator by caselaw, "the average juror may automatically characterize all premeditated murders as CCP." Id. at 89. The CCP instruction suffered the same defect as the HAC instructions found lacking in Shell, Maynard, and Espinosa: The definition of the aggravator left the jury without sufficient guidance for determining its presence or absence. The Court concluded the definitions established by its own caselaw

> call for more expansive instructions to give content to the CCP statutory factor. Otherwise, the jury is likely to apply CCP in an arbitrary manner, which is the defect cited by the United States Supreme Court in striking down the HAC instructions.

Id. at 89-90. The Court proposed a new instruction incorporating the requirements established by caselaw. Id. at 89 n.8.

A jury is just as likely to apply the "catchall" instruction in an arbitrary manner as to apply the CCP instruction

invalidated in Jackson in an arbitary manner, The "catchall" insruction informs the jury only that it "may" consider "any other aspect of the defendant's character or record or any other circumstances of the offense." The instruction provides no explanation of the nature of mitigating circumstances. Nor does it explain what categories of conduct the law recognizes as mitigating. See Campbell, 571 So. 2d at 419 (listing examples of categories of conduct viewed in the law as mitigating) . While the invalid CCP instruction defined the CCP aggravator in a way that allowed the jury to include every first-degree murder within its ambit, the 'catchall" instruction defines--or fails to define--mitigation in such a way that allows the jury to exclude every valid nonstatutory mitigating circumstance from its ambit. Just as this Court required a limiting instruction incorporating caselaw to give content to the CCP aggravator, this Court should require a supplemental instruction incorporating caselaw on non-statutory mitigating factors to give content to the "catchall" instruction. A supplemental instruction should be required for each non-statutory mitigating factor expressly recognized by this Court for which the defendant has produced evidence. Cf. Bryant v. State, 601 So. 2d 529, 533 (Fla. 1992)(instruction on statutory mental mitigators required whenever defendant has

produced any evidence to support instruction).

Even if a supplemental instruction on specific non-statutory aggravators is not constitutionally required in every case, such an instruction was required here. It is well-established that a single jury instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Boyde, 494 U.S. at 378 (quoting Cupp v. Naushten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)). In the present case, the only statutory mitigating circumstance upon which the jury was instructed was age. There were no instructions, therefore, that informed the jury a defendant's emotional and mental defects, educational inadequacies, and childhood deprivations are legitimately mitigating. Furthermore, unlike the "catchall" instruction approved in Boyde, which informed the jury "you shall consider . . . [a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," 494 U.S. at 373-74 (emphasis added), the instructions in the present case did not explain the nature of mitigating circumstances and improperly told the jury that it "may" consider mitigating evidence, not that it 'must" do so. The "catchall" instruction also could have led jurors to consider all the non-statutory mitigating evidence as a single mitigating

factor, thereby distorting the weighing process.[19]

The trial court erred in refusing appellant's special instructions on specific non-statutory mitigating circumstances. The "catchall" instruction was wholly insufficient to guide and focus the jury in its consideration of these factors. This error was compounded by the prosecutor's closing argument, designed to persuade the jurors the evidence presented on appellant's behalf did not show legitimate mitigating circumstances but was merely "an excuse." See Point V, supra at p.--. In the context of the entire charge, there is a 'reasonable likelihood" the jury in this case applied the instructions in a way that prevented its consideration of constitutionally relevant evidence. See Boyde. The jury's death recommendation, and the death sentence imposed pursuant to that recommendation, are unreliable and cannot stand.

Point VII

THE TRIAL COURT ERRED IN REFUSING TO MODIFY THE STANDARD INSTRUCTIONS TO MAKE CLEAR THE PROSECUTION BEARS THE BURDEN OF PROVING DEATH IS THE APPROPRIATE PENALTY.

Defense counsel requested two special instructions to make clear the prosecution has the burden of proving both the

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[19] Indeed, this is precisely what the trial judge did here. The trial judge evaluated all the mitigating evidence presented on appellant's behalf under the "catchall" and concluded "this" may be a mitigating circumstance. R 396-398; see also Point VIII, infra.

existence of sufficient aggravating circumstances and that those aggravating circumstances outweigh the mitigating circumstances. R 335, 343, T 1254-1255, 1259-1260.[20] The trial judge refused the special instructions, and, charged the jury three times that should it find sufficient aggravating circumstances to justify the death penalty, it must then determine "whether mitigating circumstances exist that outweigh the aggravating circumstances." T 1307, 1504, 1506. The trial judge's refusal to give the requested instructions improperly placed the burden of proof on the defense to establish that death was not the appropriate penalty.

In Aranso v. State, 411 So. 2d 172, 174 (Fla.), cert denied, 457 U.S. 1140, 102 S.Ct. 2973, 73 L.Ed.2d 1360 (1982), this Court addressed the propriety of a "burden shifting" instruction similar to the instructions objected to below. The Court held a "burden shifting" instruction, if given alone, might violate the due process principles enunciated in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d SO8 (1975), and

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[20]The special instructions requested by the defense on burden of proof were: (1) "Should you find that an aggravating circumstance does exist, it will then be your duty to determine whether, beyond every reasonable doubt, it outweighs any mitigating circumstance that you fmd to exist," (R 335) and (2) The defendant does not have the burden to prove that a recommendation of life imprisonment is appropriate. Rather, the State has the burden of proving that recommendation of death is appropriate." (R 343).

State v. Dixon. In Arango, however, the jurors also were told the death penalty could be given only 'if the state showed the aggravating circumstances outweighed the mitigating circumstances." The Court concluded the instructions as a whole properly allocated the prescribed burden of proof.

Unlike the instructions in Arango, the standard instructions given here placed the ultimate burden of proof squarely on the defense, thus making death the presumptively appropriate sentence if aggravating and mitigating circumstances are in equipoise. The instructions given here therefore precluded the jury from giving effect to the mitigating evidence, in violation of the Eighth Amendment. Cf. Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir.) (presumption that death is appropriate where statutory aggravating factors exist that are not overcome by a mitigating factor vitiates individualized sentencing determination required by Eighth Amendment), cert. denied, 486 U.S. 1026, 108 S.Ct. 2005, 100 L.Ed.2d 236 (1988).

This error was compounded by the prosecutor's improper argument to the jury that the state "has no more burder of proof" once it has proved the aggravating factors. The prosecutor initially told the jury:

> Now, the task that you have is twofold:

> Number one, you must determine if aggravators exist, then you must see if anv mitigation exists which outweighs that aggravation. If there are sufficient aggravators proven beyond a reasonable doubt you must recommend the death senaltv unless the mitigation outweighs those aggravators.

T 1148-1149. After discussing the possible aggravating factors, the prosecutor then told the jury:

> Once the assravators have been proven beyond a reasonable doubt, ladies and gentlmen, which I submit to you they are clearly, it's important for vou to realize that there is no more burden of proof. We have spoken throughout about the State's burden of proof, the state has a burden to prove the assravators hevond a reasonable doubt but once we do that- there **is** no burden of. Your question then is do the aggravators outweigh the mitigators. Not do they outweigh them and beyond a reasonable doubt. Do the aggravators outweigh the mitigators?

T 1460-1461.

The improper "burden-shifting" instructions, combined with the prosector's improper and misleading 'burden-shifting" argument, deprived appellant of due process and **a** fair sentencing proceeding.

Point VIII

THE TRIAL COURT'S EVALUATION OF APPELLANT'S PROPOSED MITIGATING CIRCUMSTANCES, INCLUDING AGE (18), DEPRIVED CHILDHOOD, EMOTIONAL HANDICAP, LEARNING DISABILITY, LOW INTELLIGENCE, ORGANIC BRAIN DISORDER, AND **THAT THE MURDER WAS COMMITTED WITH LITTLE OR** NO REFLECTION WAS ARBITRARY AND LEGALLY AND FACTUALLY ERRONEOUS, AND THEREFORE DEPRIVED APPELLANT OF A FAIR SENTENCING HEARING.

The trial judge evaluated the proposed mitigating circumstances as follows:[21]

1. **DEFENDANT'S AGE AT THE TIME OF THE OFFENSE**

FACT

At the time of the murder, the defendant was 6'4" tall; weighed 176 pounds and was 19 years of age. He is now 20 years old. He was and is a physically mature adult male. The murder victim, Sean Hathorne, was 18 years of age.

The defendant's criminal record started at age 13 in Juvenile Court. He was arrested 14 times as a juvenile and adjudged guilty of 4 felonies and committed to HRS. At age 18, he was certified from Juvenile Court to adult Felony Court for prosecution.
The defendant's total criminal record as a juvenile and as an adult shows that he has been arrested 22 times, has been charged with 30 separate crimes and has now been convicted of 8 felonies as an adult. He also has 4 felony convictions as a juvenile.
The defendant was on probation for 2 violent felonies at the time he committed this murder.

[21] The trial judge's sentencing order is Appendix A.

The PSI and testimony show that the defendant has been using alcohol and drugs since an early **age.**

The PSI shows that the defendant had not been employed in a lawful occupation for 24 months before he committed the murder.
The defendant stated in the PSI that he was primarily supported by "different ladies in the community."

CONCLUSION

Although young in years, the defendant is old in the ways of the world and vastly experienced in crime. Outlawry, his chosen vocation, and the largess of favored females has been his livlihood [sic],
The defendant's age is a marginal mitigating circumstance and I assign it slight weight.

2. ANY OTHER ASPECT OF THE DEFENDANT'S CHARACTER OR RECORD OR CIRCUMSTANCES OF THE OFFENSE.

FACT

The defendant was raised in a stable, lower middle class home with his mother, older sister and brother. His father was an alcoholic, a career Navy man and was away from home on duty about half the time during which the children were growing up. However, the father did take the defendant fishing, go-carting and to the movies on occassion.

The father and mother have gone to Court with the defendant after each criminal episode and have counseled with him about the consequence of his behavior.

The father treated and disciplined all of the children the same. On three occassions, he struck or pushed the defendant but on one of those occassions, the defendant was screaming

at the mother and the father stepped in to protect her.

The defendant did not do well when he started school and was put in a special education class.

His sister and brother excelled in school, both graduated from High School (the brother with honors) and both have become successful, lawabiding citizens. The brother is an E-4 in the Navy and the sister works at AT&T.

Much of the defendant's school problems were behavioral until he was finally dismissed from Jr. High School in the 8th grade and sent to a disciplinary camp after which he refused to return to High School. Since that time, he lived at home and could not or would not hold a job and set his own life style.

The defendant had a loving relationship with his mother, brother and sister. All children had the same advantages in the home and all were taught morality and the importance of the work ethic,

The defendant would frequently argue with his mother and have temper tantrums and threaten when he could not have his way.

Although he lived at home, he seldom worked and frequently was away, staying with friends and often got money from his mother so he could stay at motels with his girlfriends. He spent much time in the company of older women.

The defendant has, for short periods of time, been in several treatment and diagnostic facilities but without any specific diagnosis of mental illness or other disabling conditions.

> This may be a marginal mitigating circumstance and I assign it slight weight.

R 396-398.

The trial judge concluded the two aggravating factors, felony murder and prior violent felony, outweighed the "two marginal" or "two questionable" mitigating circumstances." R 399.

The trial judge's evaluation of the mitigating evidence in this case is contrary to the evidence and the law. The court's factual findings are arbitrary, inaccurate, and incomplete. Indeed, the judge's evaluation of the mitigating evidence is so skewed, it indicates a fundamental misunderstanding of the nature and function of mitigating circumstances, as defined both by this Court and the United States Supreme Court. The trial judge's inability to view any of the evidence presented on appellant's behalf as mitigating indicates a deep-seated bias in favor of the death penalty in this case that cannot be overcome. This Court should remand this case for a new penalty proceeding before a different judge.

The law in this area is well-established. A trial judge must, in writing, expressly evaluate every statutory and nonstatutory mitigating factor proposed by the defendant.

Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995); Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). Mitigating factors must be found if "reasonably established by the greater weight of the evidence." Ferrell, 653 So. 2d at 371. While the relative weight to be given a mitigating factor is within a trial judge's discretion, that discretion must be exercised in a reasonable manner, i.e., there must be legal and logical justification for the result. See Cannakiris v. Cannakiris, 382 So. 2d 1197, 1203 (Fla. 1990); see also Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990) (Court not bound to accept trial court's findings in mitigation if findings based on misconstruction of undisputed facts or misapprehension of law).

In the present case, the trial judge rejected[22] or diminished appellant's proposed statutory and non-statutory mitigating factors for reasons that were arbitrary, illogical, and legally erroneous.

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[22]The sentencing order states age is a "marginal mitigating circumstance and I assign it slight weight," R 396, but later characterizes both proposed mitigators as "questionable." R 399. Referring to the nonstatutory mitigating evidence, the order states "[t]his may be a marginal mitigating circumstance and I assign it slight weight." R 398. Did the trial judge find or not find non-statutory mitigating circumstances? If so, to what non-statutory mitigating circumstance does "this" refer? This ambiguity is itself a violation of this Court's clarity requirement, requiring reversal for resentencing. See Mann v. Statel, 420 So. 2d 578, 581 (Fla. 1982) (sentencing judge's findings should be of "unmistakable clarity").

A. The Trial Judge's Evaluation of Appellant's Age as a Mitigating Factor Was Factually and Legally Erroneous.

For defendants below the age of 18, chronological age 'is itself a mitigating factor of great weight." Eddinss v. Oklahoma, 455 U.S. 104, 116, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). For defendants 18 and older, chronological age is mitigating to the extent it reflects the defendant's "mental and emotional maturity." Scull v. State, 533 so. 2d 1137, 1143 (Fla. 1988), cert. denied, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989); Amazon v. State, 487 So. 2d 8 (Fla.), cert. denied, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986); Echols v. State, 484 So. 2d 568 (Fla. 1985), cert. denied, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988); Haves v. State, 581 So. 2d 121 (Fla.), cert. denied, 502 U.S. 972, 112 S.Ct. 450, 116 L.Ed.2d 468 (1991). A defendant's age must be given substantial weight, therefore, if the evidence establishes the defendant is unusually immature, mentally or emotionally. See Amazon, 487 So. 2d at 13 (age could mitigate crime committed by 19-year-old with emotional maturity of 13-year-old).

In the present case, the trial judge's evaluation of this mitigator was factually erroneous as appellant was 18, not 19,

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when the crime was committed.

The trial judge's evaluaton also was legally erroneous. The trial judge improperly discounted appellant's youth as a mitigating factor based upon his physical maturity, his drug and alcohol use since a young age, his lack of employment,[23] and his prior record. The judge's reliance on these factors is illogical. Physical maturity obviously is irrelevant to an individual's mental and emotional maturity. Drug and alcohol use since a young age, if relevant at all, surely indicates immaturity, not maturity.[24] Likewise, a defendant's lack of employment, or reliance on others for support, if relevant, evinces immaturity. Finally, it is difficult to discern how appellant's involvement in the criminal justice system since he was 13 demonstrates maturity. The trial judge's conclusion that appellant is "old in the ways of the world" makes no sense. Appellant's criminal history, as well as the circumstances of the instant offense, demonstrates not maturity, but the inability to

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[23]The trial court relied on the PSI in finding appellant had not been employed for two years despite testimony by his sister and mother that appellant was working for a roofing contractor until several weeks before the homicide, when he was laid off due to an injury. Appellant's father also testified he had had various jobs but had been unable to hold them.

[24]A history of alcohol and drug abuse is itself a mitigating factor. Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993); Kraemer v. State, 619 So. 2d 274, 277-78 (Fla. 1993); Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992).

control one's behavior and impulsivity that is characteristic of preschool children.

The trial judge also erred in ignoring the evidence presented that demonstrated appellant's emotional and mental immaturity, i.e., that appellant is emotionally handicapped, has low or borderline intelligence, has severe learning disabilities, has only an eighth-grade education, and has organic brain damage. These emotional and mental disabilities were clearly established by both testimony and school, psychiatric, and medical records. The sentencing order does not even mention these factors.

The trial judge's rejection, or diminution, of age as a mitigating circumstance for the reasons given was error.

B. The Trial Judge Abused His Discretion in Failing to Expressly Evaluate, Find, and Weigh Appellant's Proposed Nonstatutory Mitigating Factors, Including Low Intelligence, Emotional Handicap, Learning Disabilities, Deprived Childhood, and that the Homicide Was Committed With Little or No Premeditation.

At age 5, appellant was found to be "seriously emotionally disturbed" by a psychologist. He was diagnosed as emotionally handicapped and attended schools for emotionally handicapped children until he dropped out of school after eighth grade. He has severe learning disabilities. His I.Q. is between 78 and 84,

in the borderline range between low and mentally retarded.[25] He was diagnosed as having organic brain disorder. He twice was hospitalized for psychiatric problems. He tried to kill himself when he was 16. Despite these mental and emotional handicaps, appellant was described by his mother, brother, sister, and father as loving, caring, and protective of his family.

This evidence established a number of well-recognized mitigating circumstance. Morris v. State, 557 So. 2d 27 (Fla. 1990) (borderline intelligence); Cochrane v. State, 547 So. 2d 928 (Fla. 1989) (emotional handicap and severe learning disability); Brown v. State, 526 So. 2d 903, 908 (Fla.) (lack of education), cert. denied, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988); Hall v. State, 541 So, 2d 1125 (Fla. 1989) (organic brain damage, severe learning disabilites); Sireci v. State, 502 So. 2d 1221 (Fla. 1987) (organic brain damage); Duboise v. State, 520 So. 2d 260 (Fla. 1988) (I.Q. of 79)

The trial judge erred in failing to expressly evaluate, find, or weigh these factors. The only mention in the sentencing

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[25] According to the DSM-TV, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, American Psychiatric Association, Fourth Edition, a score of 85 is low normal. A score below 70 is considered mentally retarded. The range of scores between 70 and 84 used to be called "'borderline mental retardation." Blume and Bruck, Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis, 41 Ark. L. Rev. 725, 73 1 (1988).

order of appellant's emotional and mental defects were the judge's observation that appellant "did not do well in school and was put in a special education class," that "much of his school problems were behavioral," and that he had "been in several treatment and diagnostic facilities but without any specific diagnosis of mental illness or other disabling conditions." These findings are both inaccurate and incomplete. Appellant was diagnosed with emotional handicap, severe learning disabilities, and organic brain disorder. Appellant's intelligence is in the borderline range. It was error not to consider these facts as mitigating.

The trial judge's findings with regard to appellant's background also are incomplete and inaccurate. Appellant was the son of an alcoholic, who was either absent or drunk. When home, his relationship with his son consisted largely of argument and hitting. Appellant's mother was jailed for neglect and the children placed in protective custody when appellant was 2. HRS was called to intervene on two other occasions. When appellant was 5, school officials reported the children were "unkempt, hungry, and roaming the streets." Appellant was hungry, stole milk, ate glue and other objects, and fell asleep in class. A psychologist concluded the family "appears to be in crisis."

Although school officials and mental health professionals repeatedly urged appellant's mother to obtain psychological help, she failed to follow-through with therapy. Appellant's parents divorced and remarried before appellant was born, the marriage was not good when he was a young child, and his parents separated again when he was 12. This family was not stable.

Moreover, that appellant's sister and brother did well in school and currently have good jobs is totally irrelevant to whether the neglect and deprivation appellant experienced is mitigating. There is no reason to expect siblings to turn out the same, particularly where, as here, one child is mentally and emotionally handicapped. Fortunately, some individuals are able to overcome neglectful or abusive childhoods. This does not mean a deprived childhood is not a mitigating factor for those individuals without the resources to do so. It is totally inappropriate for the sentencer to consider the conduct or character of others in determining the appropriate sentence.

Appellant was described by his father, mother, brother, and sister as loving, helpful, and loyal. He persuaded his mother to take in an old, blind man who had no place to go. He persuaded his mother to take in for three months a friend whose parents had rejected him. The trial judge erred in failing to consider,

find, and weight this evidence. See Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987) (Contributions to family, community, or society are evidence of positive character traits to be weighed in mitigation), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

The trial judge also erred in failing to consider the fact that this murder was committed with little or no premeditation. This Court has recognized that if the "killing, although premeditated, was most likely upon reflection of a short duration," this aspect of the offense is mitigating. Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986) (reducing death sentence to life). It was undisputed that the instant killing involved little or no premeditation, yet the trial judge failed to weigh this factor.

Finally, the trial judge properly found but failed to consider as mitigating that appellant had used drugs and alcohol since a young age. See, e.g., Farr v. State, 621 So. 2d 1368 (Fla. 1993).

The Eighth Amendment requires reliability in capital sentencing. Caldwell v. Mississippi, 472 U.S. 320, 329-30, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Many of the limits

the Court has placed on the imposition of capital punishment "are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." Caldwell, 472 U.S. at 329. In this case, the trial judge abused his discretion in rejecting or minimizing the mitigating circumstances based on factual findings that were arbitary, inaccurate, and incomplete and reasons that were illogical and improper. The trial judge's sentencing order in this case does not meet the Eighth Amendment's standard of reliability.

Point IX

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988).

> Death is a unique punishment in its finality and its total rejection of the possibility of rehabilitation. It is proper, therefore, 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, 7 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

Here, death is clearly disproportionate. This offense is a

standard felony murder committed with little or no premeditation by an 18-year-old with a history of emotional and mental problems.

Analyzing the aggravating and mitigating factors in light of this Court's caselaw mandates a reduction to life imprisonment. The underlying felony aggravator is the weakest aggravating circumstance of all, as it is inherent in every felony murder prosecution. This Court has implicitly recognized this in Rembert v. State, 445 So. 2d 337, 340-41 (Fla. 1984), in which the Court reduced a death sentence to life where the underlying felony was the only aggravator, even though there were no mitigating circumstances and the jury recommended death. The Court also consistently has reduced to life cases where the underlying felony is the only aggravating circumstance even though the jury recommended death. Proffit v. State, 510 So. 2d 896 (Fla. 1987); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Menendez v. State, 419 So. 2d 312 (Fla. 1982).

In addition to the relatively weak felony murder aggravator, the trial court properly found the prior violent felony aggravator. The purpose of this aggravator is to allow the sentencer to assess the defendant's propensity for violence. Hardwick v. State, 461 So. 2d 79 (Fla. 1984), cert. denied, 471

U.S. 1120, 105 S.Ct. 2369, 86 L.Ed.2d 267 (1985). Here, three of the felony convictions were for offenses that took place within 20 hours of the homicide. The remaining offense was an aggravated assault to which appellant pled as a 17-year-old. The facts underlying that offense were that appellant pointed a BB gun out the car window at two people in another car. See PSI. The 20-hour episode consisting of the murder and the other violent felonies was an aberration in appellant's life and does not demonstrate an unalterable propensity for violence.

This is balanced against appellant's age of 18 and the non-statutory mitigating factors of unstable family with an alcoholic father; severe emotional handicap; severe learning disabilities; organic brain damage; low intelligence; positive character traits; and a family that loves him.

This Court's decisions in Livingston v. State, 565 So. 2d 1288 (Fla. 1988), and Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986), support a life sentence. In Livingston, this Court reduced the death sentence to life imprisonment despite two statutory aggravating circumstances and a death recommendation from the jury. Indeed, Livingston involved the same two aggravating circumstances, armed robbery and prior violent felony, and a similar panoply of mitigating circumstances: age

(17), immaturity, marginal intelligence, abuse and neglect, drugs and alcohol. Id. at 1292.

In Wilson, this Court struck one aggravator, which left the HAC aggravator and prior violent felony aggravator and no mitigating circumstances. The Court reduced the sentence to life imprisonment relying on the fact "that the killig, although premeditated, was most likely upon reflection of a short duration." Id. at 1023. The Court took this action even though the offense involved a first-degree murder, a second-degree murder, and an attempted first-degree murder, and the defendant had a history of violent criminal behavior. Id. at 1024. (Ehrlich, J., dissenting). The present case is less aggravated and more mitigated than Wilson. Both have the prior violent felony aggravator, although Wilson involves stronger facts for that aggravator. And, like Wilson, this case involves limited, if any, reflection.

This Court's decisions in Brown v. State, 526 So. 2d 903 (Fla. 1988), and Cochrane v. State, 547 So. 2d 928 (Fla. 1989), involving jury overrides, also support a life sentence. Both defendants were emotionally immature, mentally defective teenagers (Brown was 19, Cochrane was 18). In Cochrane, this Court reduced the sentence to life despite three valid

aggravating circumstances (prior violent felony, pecuniary gain, kidnapping), including another first-dearee murder committed four days earlier. See also Kramer v. State, 619 So. 2d 274 (Fla. 1993) (reduced sentence to life where there were 2 aggravators and no statutory mitigators even though defendant had previously killed a man for which he **was** convicted of attempted murder before the man died); Fead v. State, 512 So. 2d 176 (Fla. 1987) (reducing sentence to life despite prior murder). The Court also reduced the sentence to life in Brown despite three **aggravators,** prior violent felony, robbery, and avoid arrest.

In Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991), this Court explained that the purpose of proportionality review is to prevent the imposition of 'unusual" punishments. The death penalty is rendered unusual in a constitutional sense if it is imposed for a murder "similar to those . . . cases in which death previously was deemed improper." Kramer. 619 So. 2d 277 n.3. Both Brown and Cochrane are much more aggravated than the instant case. The nature and quality of the mitigating evidence was very similar to that presented here. Appellant's death sentence is clearly disproportionate when compared to these cases. To allow the death sentence to stand in the present case would indeed be "unusual." Appellant is aware that the jury's advisory verdict

is a factor that must be considered. In this case, however, the jury's recommendation, as argued above, is wholly unreliable. Furthermore, this Court has the ultimate responsiblity for ensuring that death sentences imposed in Florida are proportional. While the sentencing recommendation of the jury, like the sentence imposed by the judge, is relevant, this should not be the deciding factor in determining who lives and who dies.

This case is not one of the most aggravated and least mitigated of capital murders. Accordingly, this Court should reduce appellant's sentence to life imprisonment.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Issues I, II, and III, reverse appellant's conviction for a new trial; Issues IV, V, VI, VII, VIII, reverse appellant's sentence for a new penalty proceeding; Issue IX, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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SECOND JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard B. Martell, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, MICHAEL WAYNE SHELLITO, #302491, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 14th day of August, 1996.

Nada M. Carey

IN THE SUPREME COURT OF FLORIDA

MICHAEL SHELLITO,

Appellant,

v. CASE NO. 86,931

STATE OF FLORIDA,

Appellee.

APPENDIX

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