IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

PRESSLEY ALSTON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO.: 87,275
LOWER CASE NO.: 95-5326-CF

On appeal from the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida

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INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

PRESSLEY BERNARD ALSTON was arrested on May 25, 1995, and booked into the pre-trial detention facility in Duval County on charges of murder, armed robbery and kidnapping. (R-1). At first appearance court on May 27, 1995, Alston executed a "defendant's claim of rights form," and an affidavit of insolvency. (R-3; R-4). The claim of rights form asserted Alston's right to refrain from making statements unless his attorney was present, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution. (R-5). Alston was adjudicated insolvent, and the public defender was appointed to represent him. (R-4).

An indictment charging first-degree murder, armed robbery and armed kidnapping was returned on June 8, 1995. (R-14). The first-degree murder count alleged a premeditated design to kill. (R-14). On July 19, 1995, Circuit Court Judge, Aaron K. Bowden entered an order appointing Dr. Harry Krop as an expert to examine appellant and to report to appellant's attorney. (R-17). The evaluation of appellant was set for Wednesday, August 2, 1995. (R-19). A neuro-psychologist with Dr. Krop, Sherry Risch, evaluated Alston on Wednesday, September 13, 1995. (R-27).

Trial counsel filed a suggestion of mental incompetence to proceed on September 22, 1995, (R-29). Appellant was ordered to be evaluated by Dr. Ernest Miller, M.D., and by Beth Shadden, in order to determine competence. (R-32).

Alston's upbringing and family life was evaluated by Roger B. Szuch, a licensed clinical social worker, in preparation for the

penalty phase, as an expert family therapist. (R-35).

Appellant filed a motion to suppress statements, admissions, and confessions obtained by Detectives Baxter, Roberts and Hinson on May 25 and 26, 1995. (R-51). That motion was heard on November 17 and 22, 1995, and was denied. (T-62).

Appellant also filed motions attacking the validity of the death penalty statute and requesting expert witnesses to testify about its application, including:

(a) motions to declare section 921.141 and 922.10, Florida Statutes, unconstitutional because electrocution is cruel and unusual punishment (R-61);

(b) motion for evidentiary hearing and for payment of fees and costs of expert witnesses on the constitutionality of death qualifications (R-96);

(c) motion to preclude death qualifications of jurors in the innocence or guilt phase of the trial and to utilize a bifurcated jury if a penalty phase is necessary (R-102);

(d) motion to prohibit instruction on aggravating factors 5(h) and 5(i) (R-130);

(e) motion to declare sections 782.04 and 921.141, Florida Statutes, unconstitutional because of treatment of mitigating circumstances (R-134);

(f) motion to dismiss and to declare section 782.04 and 921.1241, Florida Statutes, unconstitutional for a variety of reasons (R-140);

(g) motion to declare section 921.141(5)(i), Florida Statutes, unconstitutional (R-157);

(h) motion to declare section 921.141(5)(h), Florida Statutes, unconstitutional (R-186);

(i) motion to declare section 921.141(5)(d), Florida Statutes, unconstitutional (R-204);

(j) motion to declare section 921.141, Florida Statutes, unconstitutional as applied because of arbitrariness in jury overrides and sentencing (R-215);

(k) motion for evidentiary hearing for payment of fees and expenses of expert witnesses concerning arbitrary application of the death penalty (R-242);

(l) motion to prohibit misleading referenced to advisory role of the jury at sentencing (R-77);

(m) motion for statement of aggravating circumstances (R-81);

(n) motion to prohibit impeachment of defendant by prior criminal convictions, or, in the alternative, to impanel a new penalty phase jury (R-86).

These motions were denied. (T-244-48; T-260-62).

Trial counsel also filed a motion in limine concerning a videotape of a "walk-over" from the Police Memorial Building to the pre-trial detention facility. (R-306). The videotape contained footage depicting Alston's questions to TV reporters, reporters' questions to Alston, reporters' comments and Alston's, and physical gestures. (T-962-64). The trial court determined that the evidence presented by the videotape was "compelling and highly probative," and denied the motion. (T-212-23).

Appellant filed another motion in limine concerning testimony of the mother of the victim and concerning testimony relating to an

incident with one Gwennetta McIntyre (R-311). Trial counsel filed a third motion in limine concerning the victim's clothing, objecting to its introduction into evidence and observation by the jury, because of the deteriorating condition of the clothing. (R-318). The state stipulated to this motion. (T-206-07). Appellant also filed a motion to suppress physical evidence, alleging that the physical remains of the victim, clothing and three bullets which were seized from the scene of the crime were fruits of the poisonous tree of an illegally obtained confession made by appellant. (R-320).

Appellant also filed a written request for a special jury instruction concerning victim impact evidence, specifically:

> You are about to hear evidence concerning the victim in this case, James Coon. I instruct you that, although you are entitled to hear this evidence, you are not to consider it as an aggravating circumstance or weigh it as an aggravating circumstance when you determine whether to recommend a life sentence or a death sentence.

(R-323). Portions of this requested jury instruction were given; but the trial court gave a different instruction. (T-1432-34). Trial counsel also filed a motion requesting that the jury be instructed that the appellant was being administered psychotropic medication and was under medical supervision for a mental and/or emotional condition during the trial. (R-324). The motion alleged that appellant was being administered the following medications:

(a) Tegretol, .200 mg three times per day;

(b) Desipramine, .25 mg three times per day; and

(c) Thorazine, 100 mg at 1:00 o'clock p.m. and 200 mg at 11:00 o'clock p.m.

(R-324). The trial court took the motion under advisement, pending Alston's behavior at trial. (T-227). This motion was renewed during trial, and was denied. (T-913-14).

The state filed its notice of other crimes, wrongs or acts evidence pursuant to section 90.402 and 90.404(2), Florida Statutes, seeking to introduce evidence that on January 23, 1995, appellant drove James Coon's vehicle to a parking lot where he was in an altercation with Gwennetta McIntyre. (R-327).

Appellant filed his notice of intent to present expert testimony of mental mitigation during the penalty phase. (R-328).

Alston also requested the court utilize a special verdict because of the ambiguity arising from a general verdict of guilt as to first-degree murder. (R-91). This request was denied. (T-250-52).

Jury selection began on Monday, November 27, 1995. Fifty out of fifty-six venire persons indicated some degree of knowledge of the facts of the case, appellant, or of the deceased, James Coon. (T-365; T-525). During voir dire, appellant moved for a change of venue, asserting that the degree of media saturation in this case made it difficult to select a jury. (T-524-25). That motion was denied. (T-525).

Trial began on November 28, 1995, and continued until November 30, 1995.

At the close of the state's case, trial counsel moved for a mistrial based on the state's failure to authenticate the pawn shop

receipt. (T-1258). Trial counsel also requested a curative instruction. (T-1259). Both requests were denied. (T-1259). Trial counsel also moved for a judgment of acquittal on all three counts; that motion was also denied. (T-1259-60).

The defense presented testimony of one witness, then indicated to the court that Alston was unable to decide whether to testify, and that defense counsel suspected that Alston was incompetent to make that decision. (T-1266-67). The court required the defense to announce his decision; the defense rested without calling Alston as a witness. (T-1268).

A charge conference was then held. (T-1273). Trial counsel renewed the pre-trial motion relating to two theories of first-degree murder. (T-1274). Trial counsel also objected to Paragraph Five of the guilt-phase instruction entitled "Rules for Deliberation:"

> "It is the judge's job to determine what a proper sentence would be if the defendant is guilty."

(T-1284). The court disagreed and gave the instruction. (T-1285; T-1369). The defense also requested the independent act instruction, which was denied. (T-1285).

The jury returned a verdict on December 1, 1995, finding appellant guilty of murder in the first degree, robbery with a firearm, and kidnapping while in the possession of a firearm. (R-340; R-341; R-342). Appellant filed his motion for a new trial on December 4, 1995. (R-403).

On December 11, 1995, appellant appeared before the trial

court. (T-1403). Argument was held regarding scheduling of depositions of penalty phase witnesses, and on appellant's request to delay the proceedings because of the inability to call the co-defendant as a witness. (T-1403; T-1410).

Trial counsel filed a motion to delay the penalty phase until after the disposition of the co-defendant Dilanjan Ellison's case, or, in the alternative, to grant Dilanjan Ellison use immunity. (R-468). Appellant asserted that it was necessary to delay the penalty phase proceeding in his case because the co-defendant Dilanjan Ellison could provide testimony to rebut aggravating circumstances argued by the state. (R-468). Counsel had previously attempted to depose Dilanjan Ellison, but Dilanjan Ellison asserted his Fifth Amendment right to remain silent. (T-1440; R-468). The motion to delay the penalty phase proceeding was denied. (T-1414).

Appellant's amended motion for a new trial was also heard on that same date, and denied. (T-1417; T-1421). Trial counsel also renewed the motion to exclude victim impact evidence. (R-249; T-1422). Appellant had also requested a specially-drafted jury instruction as to victim impact evidence, and had filed the same with the court. (T-1425; R-323). The state objected to any jury instruction as to victim impact evidence. (T-1426). The trial court agreed with defense counsel that a cautionary instruction as to victim impact evidence was necessary prior to the jury hearing such evidence, and that the instruction would be given again in the court's final instructions. (T-1428-29).

Trial counsel also filed written defense requested penalty phase jury instructions. (R-417-38). The trial court granted certain of the defense' written additions and/or deletions to the standard penalty phase jury instructions, but denied others. (T-1433-34).

Over objection from defense counsel, the state was permitted to display an eleven-by-fifteen inch full-color graduation photograph of the victim. (T-1442). Prior to the penalty phase testimony, counsel for the state prepared a written statement for the mother of the victim to read to the jury. (T-1439). The penalty phase was held on December 13, 1995. (T-1448). The state presented testimony of Sharon Coon, the mother of James Coon. (T-1452). During Mrs. Coon's testimony, the prosecution displayed the graduation photograph of James Coon on an easel in front of the jury. (T-1456). Trial counsel objected to the display of the photograph. (T-1456). Mrs. Coon read the statement she had prepared with the assistance of the prosecutor; the state introduced evidence of appellant's two previous convictions in aggravation. (T-1450-51).

The defense then presented its evidence in mitigation, calling several lay and expert witnesses on behalf of Alston. (T-1460). On December 14, 1995, the jury returned its advisory verdict recommending the death penalty by a vote of nine to three. (T-1760).

Trial counsel filed a motion for a new penalty phase; (T-485); the motion was denied on December 20, 1995. (T-1768). The case

was passed for a sentencing hearing; the state called additional witnesses to testify about the victim. (T-1769). Trial counsel objected to the additional victim impact testimony of the state's witnesses. (T-1770). The trial court overruled the objections. (T-1773).

The case was passed to January 12, 1996, for sentencing. (T-1799). Prior to the actual sentencing hearing, trial counsel filed a motion to prohibit the imposition of the death penalty because of the mental age of the defendant. (R-498). That motion was denied without argument. (T-1799).

Appellant was sentenced on January 12, 1996, to death for count one (first-degree murder); to life on count two (armed robbery); and to life on count three (armed kidnapping). (R-504-10). The sentences in counts two and three were imposed to run consecutively with each other and with count one. (R-508-09). The trial court entered its sentencing order, finding the following aggravating factors had been proved beyond a reasonable doubt:

(a) previously convicted of a crime of violence;

(b) instant capital felony committed while the defendant was engaged in or was an accomplice in the commission of robbery and kidnapping;

(c) the capital felony was committed for the purposes of avoiding a lawful arrest;

(d) the capital felony was committed for pecuniary gain;

(e) the capital felony was especially heinous,

atrocious, or cruel; and

(f) the murder was committed in a cold, calculated and premeditated manner with out any pretense or moral or legal justification.

(R-511-20). Because the trial court determined two of the aggravating circumstances to have merged, the court determined that only five statutory aggravating circumstances had been proved beyond a reasonable doubt. (R-515).

The trial court determined that appellant suffered a deprived childhood, but determined that was not a mitigating factor sufficient to outweigh the aggravating factors. (R-516-17). The trial court rejected as mitigation the fact that appellant had admitted his involvement in the offense, and also rejected the fact that appellant had an intellectual and mental age far below his chronological age. (R-517). Although the trial court determined that appellant suffered from a bi-polar disorder, the trial court found that particular mitigating circumstance to have little weight. (R-517-18). The trial court also rejected as mitigation appellant's claim that he had the ability to work for a living. (R-518). The trial court rejected appellant's proposed mitigating circumstance that he had the ability to get along with people and to treat people with respect. (R-518). The trial court stated in its sentencing order:

> As required by law the court has found and weighed the statutory aggravating circumstances and finds that six (6) circumstances, five (5) after merger, have been established beyond a reasonable doubt. The aggravating circumstances are compelling

> and persuasive evidence which must be weighed in conjunction with any statutory and non-statutory mitigating circumstances found to exist. No statutory mitigating circumstances exist, but some few non-statutory mitigating circumstances exist which individually and collectively are wholly insufficient to militate against the strong aggravating circumstances which cry out for the imposition of the death penalty. This defendant has demonstrated his lack of respect for the integrity of other people's person and property. He refuses to conform his conduct to the requirements of law. Death is the only appropriate punishment under the facts and circumstances of this case. Indeed any one aggravating factor in this case, standing alone, would outweigh any mitigating factor or factors.

(R-518-19).

Appellant timely filed his notice of appeal to this court. (R-583).

STATEMENT OF THE FACTS

On January 23, 1995, while on patrol Jacksonville Sheriff's Officer McCauley located an abandoned car in the Arlington area of Jacksonville while on patrol. (T-830-31). The car had damage to the driver's side. (T-833). It was determined that the car had belonged to one James Coon; the police inventoried the car and placed it in storage. (T-838-39). Coon had previously been reported as a missing person. (T-95-97).

Lonnie Cothern testified that on January 22, 1995, he had seen a grey Monte Carlo "ram into a building" and then back into another car. (T-819). Cothern gave a description of the driver of the other car, and said he was wearing a red jacket and green pants. (T-819-20). Cothern said he saw the driver of the Honda drive the car to the back of the building, come back to the front of the building and get into the Monte Carlo. (T-820). Cothern then called the police; the Monte Carlo went north on Cesery Boulevard. (T-820; T-824).

State witness John Curran testified that he saw the car being abandoned, and a man running away. (T-826). According to Curran, the man was 6 feet tall with a medium build; Curran also testified the man wore a red jacket. (T-827).

On May 24, 1995, Gwennetta McIntyre, Pressley Alston's on-again, off-again girlfriend, went to the Jacksonville Sheriff's Office after consulting with her minister; there she contacted Homicide Detectives Boyd and Baxter. (T-882). McIntyre also met with detectives on the following day at the Jacksonville Sheriff's

Office, speaking again with Detective Boyd and Detective Baxter. (T-882). On May 25, McIntyre gave the Sheriff's Office statements regarding Pressley Alston and the red Honda, and told the police where Alston could be located. (T-882-83). McIntyre also gave the officers consent to search her house. (T-883).

After learning this information, the detectives searched McIntyre's home, where she showed them jackets and a gun. (T-885). McIntyre testified that she had a .32 calibre firearm, which she had gotten out of her car and placed back on the boxspring of the bed prior to the search of her house. (T-886). The police took that firearm into custody; it was introduced into evidence as State's Exhibit 17. (T-886-87).

McIntyre also testified that she had gone with Pressley Alston to pawn a Guess wristwatch, and, over objection from the defense, she was permitted to authenticate Pressley Alston's signature on the purported pawn shop ticket. (T-889-90). McIntyre also testified that in February, Alston had given her a yellow-gold chain with an "S" pendant on it. (T-892). McIntyre testified that Alston had asked her to have the broken chain repaired, and that she had done so. (T-893).

After the testimony of Gwennetta McIntyre, trial counsel renewed the previously-made motion regarding an instruction to the jury that Pressley Alston was taking psychotropic medication. (T-913). Trial counsel pointed out:

> After the court adjourned, I'm not sure if the Court observed it, but I know Ms. Corey did because she spoke to us about it, there was an incident where Mr. Alston swore and showed a lot of emotion.

> And I want to bring it to the Court's attention and renew our motion.

(T-913). The motion was denied. (T-914).

Detective Quinn Baxter testified that he had arrested Pressley Alston on May 25, 199, between 8:30 and 9:00 p.m. (T-932). Baxter testified that Alston was interviewed in an interview room in the homicide office, where he was advised of his rights. (T-932-33). Baxter claimed that Alston understood his constitutional rights, and signed a form waiving those rights. (T-936). Baxter testified that neither he nor Detective Roberts, who was also present, ever offered or promised Alston anything in order to obtain a statement from him, and that Alston had not been threatened. (T-938-39). According to Baxter, Alston began by stating that he wanted to tell the detectives what had happened but that he did not want the detectives to take notes. (T-940).

Baxter testified that he had told Alston that he [Baxter] knew about the incident involving the Monte Carlo and the red Honda, and about the pistol involved in the crime. (T-940). Baxter also informed Alston that his half-brother, Dee Ellison was in custody. (T-940).

Baxter testified as follows:

> I asked Alston if I had lied to him at any time up to this point, and he told me no, that I had not lied. And I again reminded him about the Monte Carlo, we knew about the Monte Carlo incident and in fact we got to the point where I told him, I said, 'it really doesn't matter at this point whether you confess to us,' basically our concern, you know, trying to locate the body of James Coon. And at that point basically he asked me if he led us to the body of Mr. Coon would he get the death

> penalty, and I told Mr. Alston at that time that I could not discuss the death penalty because that was basically against the law and we couldn't talk about it.

(T-940-41). The State Attorney then asked Baxter:

> By against the law, you mean it's against the law for you to use the death penalty to try to obtain a statement from him?

(T-941). Baxter replied:

> That's correct. He brought it up, and I told him that I couldn't do it, that I couldn't talk about the death penalty.

(T-941). Subsequent to that time, Alston began making statements about the crime. (T-941).

After making these statements, Alston agreed to take the detectives to the scene where Coon's body could be found. (T-950). Detectives transported Alston to a rural, densely-wooded area on the north side of Jacksonville where a search was conducted for the body. (T-955). After Alston and the detectives had looked unsuccessfully for the body, detectives took Alston by his mother's home on the return trip to the jail. At that time, Alston's mother asked why he was in custody, and the detective explained to him that it was for the murder of James Coon. (T-1062). Alston purportedly responded to the question from his mother, "Did you kill somebody?", by saying "Yes, Momma". (T-1062).

Alston was then returned to the Police Memorial Building, where he was prepared to be transported to the Duval County Jail to be booked. Alston was taken out of the front entrance to the Police Memorial Building, and transported across a public plaza area to the pre-trial detention facility. (T-958).

Prior to the time of Alston's being transported to the detention facility, the Sheriff's office had alerted the media. (T-958). Television cameras were present, and filmed the event. (T-958). The filmed version of Alston's "walk-over" from the Police Memorial Building to the Duval County Jail was introduced at the trial, over objection of trial counsel. (The film was introduced as State's Exhibit 21).

Alston was taken from the Duval County Jail the following morning to again search for the body. (T-965). With Alston's help the remains of the body were ultimately located in a densely-wooded rural area and Alston was transported back to the jail. (T-966-67).

Peter Lardizabal, a toolmark and firearm identification analyst for Florida Department of Law Enforcement, (T-1082), testified that he evaluated the three projectiles which had been introduced into evidence by the state. He was not able to determine that they had been fired from the .32 caliber revolver recovered from Gwennetta McIntyre's bedroom. (T-1103).

The State also called Dr. Floro, Deputy Chief Medical Examiner for the Fourth Judicial Circuit. (T-1119). The state attempted to qualify Dr. Floro as an expert in the area of "forensic pathology, including forensic odontology." (T-1121). Dr. Floro admitted on cross-examination by defense counsel that he was ***not*** a forensic odontologist, and that he has never been a dentist. (T-1122). The trial court qualified Dr. Floro as an expert in the area of forensic pathology, but ***not*** in the area of forensic odontology.

(T-1122).

Dr. Floro testified that on Friday, May 26, 1995, he was called to a crime scene on Cedar Point Road in Jacksonville. (T-1123). Dr. Floro testified that he was briefed by the detectives at the scene, and that he viewed human remains and clothing at the scene. (T-1123-24).

Dr. Floro testified that identification of skeletal remains of a human is made by dental examination. (T-1127). Dr. Floro testified that he obtained dental x-rays from a Dr. Chester Aikens which purportedly belonged to James Coon. (T-1127-28). Over defense objection, Dr. Floro was permitted to testify that he compared a chart purportedly made by Dr. Aikins to a postmortem dental chart of James Coon. (T-1129). Dr. Floro testified that based on his evaluation of the x-rays and the charts and his own visual examination of the remaining teeth, he could identify the skull remains as belonging to James Lee Coon. (T-1131). Dr. Floro testified, over objection of defense counsel, that he could make a positive identification of the remains. (T-1132).

Dr. Floro testified that there were two gunshot entrance wounds to the skull of James Coon, and one exit wound. (T-1138-39). Dr. Floro referred to the entrance gunshot wounds as wounds one and two, but was unable to tell in what order they were fired. (T-1139; T-1144). Dr. Floro testified that the wounds identified as gunshot wounds numbers one and two would have caused immediate unconsciousness to the victim and would have been fatal. (T-1141-42). Dr. Floro testified that the victim's head would have been in

contact with the ground when the shots were fired. (T-1144).

The state recalled Detective Baxter to the stand. (T-1149). Baxter testified that on June 1, 1995, he returned to the Duval County Jail, removed Pressley Alston from custody, and brought him to the Police Memorial Building. (T-1150). Baxter testified that he had "figured by then [Alston] had gone to court and had gotten a lawyer." (T-1150). Baxter testified that it is not the practice of the Jacksonville Sheriff's Office to interview prisoners who have already been appointed attorneys; according to Baxter, "we only go over there if they call us or request to speak to us." (T-1150-51).

Baxter testified that on June 1, 1995, he again advised Alston of his constitutional rights, using the same type of form previously used. (T-1151). According to Baxter, Alston reviewed the form, said that he had no questions, and signed the form. (T-1152). Baxter testified that he added a paragraph to the standard form stating, "I have requested to talk to homicide detectives." (T-1152). (State's Exhibit 53).

During that interview, Alston initially told the detectives that the firearm had belonged to Gwen, and that Dee [Dilanjan Ellison] had been in the woods with James Coon. (T-1154). Alston, according to Baxter, stated that the .32 caliber firearm was not the gun used during the incident. Alston implicated his half-brother Dee, and a person named Kirk. Alston told the detectives that Coon was in the truck tied up and kept saying "Oh Jesus. Oh Jesus." Alston then gave another version of the events leading up

to the shooting of James Coon, implicating his half-brother and Kirk. (T-1155-57). In this version of the events, Alston blamed the shooting on Dee. (T-1159-60). Subsequent to Alston's making this oral statement, the detectives reduced it to writing, and offered it to Alston for his review. Alston corrected several mistakes, then signed the document. (T-1161-62). This statement was admitted as 54. (T-1162). The detectives ultimately located the person known as Kirk, and interviewed him. (T-1169-70). Kirk was not arrested. (T-1170).

The state also introduced into evidence a "Guess" watch that was picked up at the Cash America Pawn Shop in Jacksonville and, as well, offered into evidence a pawn receipt purportedly from that same shop. (T-1170-71). Trial counsel for appellant had previously objected to the introduction of the pawn shop receipt on the ground that it was hearsay and had not been authenticated. (T-1172). At that time, the trial court sustained the objection to the introduction of the pawn shop receipt into evidence because of the State's failure to authenticate the same. (T-1172).

Upon cross-examination, Detective Baxter admitted that he had never specifically told Pressley Alston for what crime he was being arrested when he was first taken into custody, (T-1179), and also that he never tape recorded, video recorded or court reported any of Alston's oral statements. (T-1180).

Detective Baxter also admitted that on May 25, he told Pressley Alston that he did not really care if Alston confessed, because his main concern was finding Mr. Coon's body. (T-1184).

Detective Baxter testified that he told Alston he wanted closure for the victim's mother and his family, to give them peace of mind. (T-1184). Detective Baxter also explained to Alston the situation was as if someone had kidnapped Alston's own daughter and Alston never knew what had happened to her. (T-1185). Detective Baxter would not admit that he was attempting to play on Alston's conscience or trying to get Alston to sympathize with the Coon family, but claimed he was just trying to get Alston to "see reality." (T-1185). Detective Baxter stated:

> That's reality, there is no closure for Ms. Coon if we don't find that body, and that's reality, and that's what I was trying to get him to see this reality.

(T-1185). Baxter admitted that he told Alston that if Alston took the detectives to the body that he would tell the judge and the state attorney that he had done that. (T-1185). Baxter also admitted that he told Alston that Alston should not be surprised if Mrs. Coon spoke to him about finding the body. (T-1185-86).

MOTION TO SUPPRESS

On November 17, 1995, the trial court heard the motion to suppress Alston's oral and written statements made on May 25, and 26, and the motion to suppress physical evidence. (T-62-63). At that hearing, the state presented testimony of Detective Harold Bennett, Jacksonville Sheriff's Office, and of Sergeant Roy Henderson, Jacksonville Sheriff's Office. (T-62-80). Detective Bennett testified that he and his partner Detective Henderson had

volunteered to take Pressley Alston into custody for the murder of James Coon. (T-65-66). Bennett testified that he and Henderson had travelled to Alston's place of employment, the Nissan dealership on Cassat Avenue in Jacksonville. (T-66). Bennett testified that he and Henderson had been given information by the lead detective in the case, Detective Baxter, and that they knew that Alston was working at the Nissan dealership as a car washer. (T-66). Henderson and Bennett came into contact with Alston simultaneously; Bennett identified himself as a police officer and ordered Alston to, "Get down". (T-67). Bennett testified he told Alston, "You are under arrest." (T-67).

Bennett testified that both he and Henderson had drawn their weapons because they considered Alston to be a dangerous suspect. (T-68). It took Henderson and Bennett less than one minute to take Alston into custody. (T-68). Detective Bennett testified that he did not at any time advise Alston on his rights. (T-68-69).

Neither Bennett nor Henderson ever told Alston the reason for his arrest. (T-69; T-79-80). Detective Bennett testified that he did not tell Alston the exact charges for which he was being placed under arrest because of officer safety reasons. (T-69). Bennett stated:

> Since he was a murder suspect, I felt like it would probably be to our benefit not to advise him of his rights, and rather than advising him--I'm sorry, advising him of what the charges were, and rather than advise him of what the charges were and asking a bunch of questions I probably couldn't accurately answer, I thought it best to just tell him that we would have him downtown shortly and all of the questions you have will be answered

down there.

(T-69).

Bennett testified that he was aware of Florida Statute section 901.17, regarding the effectuation of an arrest without a warrant. (T-70-71). Bennett testified that "it would depend on the circumstances" whether he told a suspect who was under arrest for murder what they were being arrested for. (T-71-72). Bennett admitted that Alston did not resist the arrest and that he was handcuffed immediately upon being placed in custody. (T-72).

When asked whether he thought the arrest would have been imperiled had he read Alston his rights, Detective Bennett responded:

> Well, a lot of things could have happened. I could have told him he was under arrest for murder, and then he would have maybe asked me some questions about specific times and dates or circumstances when the murder happened, which if I told him anything, then it might be in error, which would cause him maybe to answer differently questions later.
>
> If I had the full knowledge and facts and it was my case, then maybe I would have told him that. But rather than maybe give some misinformation, I just told him, "Listen, all of your questions, we'll answer as soon as we get you down to the station, we'll get you down there as soon as we can."

(T-73). The officer who transported Alston from his place of employment to the Police Memorial Building did not advise him of the reason for his arrest. (T-92).

Sergeant Roy Henderson of the Jacksonville Sheriff's Office accompanied Bennett to the Nissan dealership on May 25, 1995. (T-76). Henderson testified that he had been told by Detectives

Baxter and Roberts that probable cause existed to arrest Pressley Alston on a charge of murder. (T-76). Henderson testified that he was the first person to advise Alston that he was under arrest, and that he ordered Alston to "Get on the ground." (T-78). Henderson testified that after Alston was informed that he was under arrest that he [Alston] was handcuffed and taken to a patrol car. (T-78-79). Henderson did not tell Alston exactly why he was under arrest, and used only the words, "You are under arrest." (T-79).

Henderson testified that he did not tell Alston that he was under arrest for the offense of murder because:

> At that time I didn't know the line of questioning that Detective Baxter and Roberts would be using, I didn't want to jeopardize their case, and we were going to take him directly to the Homicide Office, and I didn't feel it was necessary.

(T-79). Nor did Henderson advise Alston of Miranda warnings. (T-79-80).

After arriving at the Police Memorial Building, Alston was taken to the Homicide Office, where he was placed in an interview room. (T-104-05). Detective Baxter and Detective Roberts met with Alston in the interview room, and read his constitutional rights off of a sheriff's office form. (T-107-08). Detective Baxter, upon beginning to question Alston, failed to advise Alston that he was under arrest for murder. (T-155). Baxter began the interrogation by talking about an old case he had worked on with Alston a couple of years prior. (T-155).

Baxter explained to Alston that Alston was going to jail whether he confessed or not. (T-157). Baxter drew a diagram of

the courtroom for Alston and showed him where participants in the trial would sit and where Angela Corey would be in the courtroom. (T-157).[1] Baxter testified that he told Alston:

> As a matter of fact, I told him, I said, "Look, you are going to jail whether you confess or not, ***our main concern right now is to find the body of James Coon.***"

(T-157). (Emphasis supplied). Baxter testified that the detectives tried to get Alston to talk to them to try to locate the body of James Coon. (T-157-58).

Alston was very careful in choosing his words, and up until the point in time that Baxter drew the courtroom diagram, was reluctant to tell the detectives anything. (T-158). Baxter stated, "I think he was still watching his words. I don't think he was convinced totally that we had Dee and his statement, and we eventually showed him the signature of the statement by Dee." (T-158).

Detective Baxter told Alston that if Alston told the truth, he would tell the State's Attorney and the Public Defender's Office, and his lawyer, and the judge. (T-158-59). Detective Baxter also informed Alston that his girlfriend Gwennetta was at the police station at the very moment, and that she would be questioned. (T-162).

Baxter had a discussion with Alston regarding the victim's mother and her inability to find the body of her son:

> I related to Pressley Alston that Ms. Coon

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[1]The prosecutor was outside the interview room during the time Alston was being investigated. (T-160).

> obviously needed closure in this case. Again, my view point or perspective at that time was trying to get him to show us where the body was, and this was after I told him I didn't really care whether he confessed, just take me to the body. I felt Mrs. Coon needed closure because her son was still missing, and I expressed the things about his daughter. I said, "You have a daughter. The fact if somebody has taken your daughter and you don't see her again, you don't get any closure, so I think it's important from Mrs. Coon's aspect if you can take us to his body, that would give her some closure in her son's death.

(T-160).

At some point during the detective's questioning, Alston said he would talk, but that he did not want Detective Roberts to take notes. (T-162). Roberts ceased his note taking. (T-164). Baxter thought Alston might be assuming that if the detectives didn't take notes that his statements couldn't be used against him. (T-165). This occurred after the detectives had shown Alston his half-brother's signature on the sheriff's office statement form. (T-162-63). Detective Baxter testified that Alston began "giving [him] a little bit as we're going along, but that Alston did not specifically say that he went out there and shot and killed the victim." (T-163). According to Baxter, Alston said that he would take detectives to the body, but prefaced this statement with the query, "If I take you to the body, will I get the death penalty?" (T-163).[2]

Alston made a statement incriminating himself and his half-brother, but not stating who had actually shot Coon. (T-948-50).

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[2]Baxter had opened the interrogation by mentioning the name of a Duval County man on death row. (T-164).

PENALTY PHASE

Pressley Alston's mother, forty-five-year-old Janice Alston, testified at the penalty phase hearing. (T-1465). She had never been married to Pressley's father, Nathaniel Ellison, Jr., whom she met when she was nineteen. (T-1465-69). Pressley Alston was the third of her five children (T-1468). Although Mrs. Alston had resided with Nathaniel Ellison for a brief period of time, the relationship was not good, and Ellison never gave her any money to help support Pressley. (T-1469-70). Moreover, Nathaniel had beaten Janice in front of Pressley on several occasions. (T-1460).

Janice Alston testified that on one occasion Nathaniel Ellison jumped on her and "knocked me out at the fireplace," causing her children to think that she was dead. (T-1470). Mrs. Alston testified that Nathaniel Ellison drank every day, and that she had to call the police on a number of occasions to save herself from his physical abuse. (T-1471).

On another occasion, Mr. Ellison threw a mayonnaise jar at Janice Alston, cutting her side and requiring her to go to the hospital for stitches. (T-1473). On yet another occasion, Nathaniel Ellison attempted to throw Janice Alston out of a two-story window, but she was saved by his mother. (T-1474). Nathaniel Ellison flooded Mrs. Alston's house, assaulted her with a firearm, and kidnapped the children. (T-1477-80). Ellison was also arrested for not paying child support. (T-1480). Mrs. Alston testified that Ellison told her he had been in prison in New York. (T-1484).

Mrs. Alston not only endured a long, abusive relationship with Pressley Alston's father, but during Alston's childhood, she lived with at least two other abusive males. (T-1485; T-1488). Trial counsel introduced into evidence Jacksonville Sheriff's Office records showing the arrest of Samuel Bernard Walker and Freddie Lee Marshall for domestic violence upon Mrs. Alston. (T-1489).

When Pressley Alston was eleven years old, Mrs. Alston filed the following police report against her then ex-boyfriend, Samuel Walker:

> The complainant approached the officer and advised that the subject, the ex-boyfriend, attempted to assault her. The subject walked up then and began striking the complainant about his face. The subject had to be pulled off the complainant and placed under arrest. The subject then attempted to strike the complainant again, and these officers had to physically restrain the subject with handcuffs. The subject was highly intoxicated and very belligerent. Officer McDuff removed a large hunting knife from the suspect's front right pants pocket. The subject stated numerous times that he was going to kill the complainant. The complainant received abrasions to her face, and neither officer received any injury.

(T-1492). Mrs. Alston's ex-boyfriend, Samuel Walker, received a jail sentence of twenty-days for that offense. Mrs. Alston also testified that when Pressley was in elementary school, he attended school regularly and did very well. (T-1498-99).

Mrs. Alston testified that when Pressley became older, he moved in with his grandmother in St. Augustine, but that she was a drinker, and didn't provide the best environment for Pressley. (T-1500).

The defense also called Mary Louise Bryant. (T-1504). Ms. Bryant testified that she had resided in Jacksonville all of her life, and had five children. (T-1505). Ms. Bryant met Pressley Alston when he was a child, and was friends with her children. (T-1505). Pressley would come to Ms. Bryant's home in the afternoon after school. (T-1505). Pressley was about eight years old when she first met him. (T-1506).

Ms. Bryant said that Pressley began staying at her house almost every night and did not want to return to his own home. (T-1506-07). Ms. Bryant testified that Pressley's mother wasn't "an honest mother," and Pressley was "more like he was lost." (T-1508). Ms. Bryant said:

> It was just like he was really lost, you know, he just wanted to be loved. And that's the bottom line with us, you know.

(T-1508). Ms. Bryant testified that she and her husband had considered getting custody of Pressley, and that Pressley's mother said, "He's your boy." (T-1509). Ms. Bryant indicated that Pressley's mother "pretty regularly" had a beer in her hand, and that she often fought with her boyfriends. (T-1510-11). Ms. Bryant indicated that when Pressley was at her house he got along fine with her, her husband and their children, and that he was never disrespectful to her or her husband. (T-1512). Ms. Bryant testified that as a child, Pressley did his assigned chores. (T-1512). Ms. Bryant testified that after her husband died, she lost touch with Pressley Alston. (T-1513).

Tony Sermons also testified during the penalty phase. (T-

1514). Tony Sermons was twenty-five years old, married with two children, and employed at ITT Rayonier. (T-1514-15). Sermons testified that he had known Pressley Alston since they were seven or eight years old, and that they had grown up in the same neighborhood. (T-1516). Tony Sermons was a grade ahead of Pressley Alston, but they were close friends during school. (T-1516). Sermons testified that Pressley's mother drank and had done her share of partying while Pressley was a child. (T-1517). Tony Sermons testified that the Alston household wasn't very nice, and that Janice treated Pressley differently than her other four children. (T-1517). According to Tony Sermons, Janice Alston would always tell Pressley to go see his father for things like school clothes. (T-1518).

Tony Sermons recalled occasions when the police were called to Janice Alston's home, and recounted the time she had cut her boyfriend Sam with a knife in self-defense. (T-1518-19). Sermons testified that after Pressley began staying at the Sermons family's home that his own mother hardly came to visit him. (T-1520). Sermons testified that he had not really had any contact with Pressley Alston since Pressley had been about fourteen years old. (T-1522).

Tiki Jones, Pressley Alston's twenty-four-year-old cousin, testified she had known Pressley Alston her whole life, and has spent time with him while growing up. (T-1525). When asked "Can you tell the jury what it was like at Pressley's house when you-all were growing up together?," Tiki Jones replied, "Hell." (T-1515).

Tiki Jones testified that Pressley's mother and father always fought, and that the children did not know what to do. (T-1525). She testified that both parents drank a lot, and stayed drunk. (T-1525). Tiki Jones testified that Janice had been injured on several occasions, and that there were holes in the wall where Pressley's father used to throw her into the wall. (T-1526).

According to Tiki, Pressley always took the blame for whatever happened, and that Janice would punish him by beating him with sticks, extension cords, anything she could get her hands on. (T-1528). Tiki Jones actually witnessed these beatings. (T-1528). According to Tiki, Janice Alston would beat Pressley until she got tired and he would be bruised. (T-1528). Tiki never saw Janice treat Pressley in a nice or affectionate way. (T-1528).

Tonda Reed also testified that she had met Pressley Alston when she was about seven years old. (T-1531). Tonda Reed testified that her mother, Catherine Marie Reed, was a friend of Janice Alston. (T-1531). Ms. Red said that although Janice Alston was nice, she used to drink a lot and that she always got into a lot of fights with her boyfriends. (T-1532). Tonda Red testified that she remembered calling the police when Janice would fight. (T-1533). Tonda Red indicated that she had never seen Janice Alston show affection toward Pressley, or show him love, or tell him she loved him and cared for him. (T-1535). Tonda Red remembered one occasion where Janice's boyfriend Samuel Walker was beating her with a pipe. (T-1535-36). Tonda Red testified that

Janice would always fall back in with these men. (T-1538). She also testified that Pressley Alston was treated like the worst child that Janice Alston had, and that she treated all the rest of her children better than him. (T-1538).

Samuel Walker, who dated Janice Alston from 1982 to 1989, also testified at the penalty phase hearing. (T-1541-42). According to Samuel Walker, Janice Alston drank a lot, and all of their fights started when she was drinking. (T-1542). Samuel Walker displayed the scars from being cut with both a razor and a butcher knife by Janice Alston. (T-1543-44). Walker recalled that often Pressley and his youngest brother would be present when the fights occurred, and that sometimes Pressley would try to help his mother. (T-1546). When asked how Janice acted toward Pressley when Samuel Walker lived with her, he stated:

> Well, it was no love there, you know, to the point where most mothers grab their sons and their daughters and kiss them and tell them, "I love you," and sitting down and watching TV, you know, we might be laughing, and the mother, she be -- nothing funny, you know, it would be something to laugh at and she never would laugh, you know.

(T-1547). Walker testified that Janice Alston treated Pressley differently from the other children. (T-1547).

The defense also presented the testimony of Melody Spruell, a guidance counselor for the Duval County School Board. (T-1552). Melody Spruell testified that she reviewed Alston's school records for both St. Johns and Duval Counties. (T-1553). According to Spruell, Alston was a typical student up until the fifth grade, but in the fifth grade his attendance (and performance) "started to

take a noticeable dive." (T-1553-54). Spruell indicated that beginning with the sixth grade there were major differences in Pressley Alston's records. (T-1553). Pressley Alston repeated the sixth grade three times before he was promoted, receiving low markings in areas of motivation, dependability, initiative, study habits, and emotional maturity. (T-1553-54). Melody Spruell indicated that Alston spent two years in the seventh grade but was never promoted. (T-1554).

Melody Spruell indicated that during Pressley's first year in the sixth grade, he missed nineteen days of school; he missed twenty-one days in the second year and thirteen days in the third year. (T-1554). Spruell testified that after Alston could not earn enough credits to graduate from the seventh grade, he was placed into the "Competency Development Program." (T-1555). This was a public school drop-out prevention program, designed for students who were over-age, who had problems with attendance, who had failed at least a couple of years, and who had low test scores and problems of motivation. (T-1555). This program was designed to give the students functional skills in reading and math, and provide them with vocational skills. (T-1555). Ultimately, after attempting the tenth grade in St. Augustine, Pressley dropped out of school without completing the ninth grade. (T-1557-58).

Lillian Lewis of St. Augustine, testified that she had known Pressley Alston all his life, and that he lived with her from the time he was fifteen until eighteen. (T-1560-62). Lillian Lewis testified that Janice Alston was really a good mother but that she

was "sort of a confused woman . . . with problems of her own." (T-1562). Ms. Lewis indicated that Janice Alston was also a heavy drinker. (T-1563).

Ms. Lewis recounted that Pressley's grandmother had thrown him out of her house because she wanted him to quit school and to work, and Pressley disagreed with this. (T-1565). Ms. Lewis recounted Pressley's grandmother had beating him with a broom, leaving welts on his back, and that he left her home for the Lewis household. (T-1565). According to Ms. Lewis, the next day there was another altercation between Pressley and his grandmother, and Pressley tried to cut his wrist with a glass bottle. (T-1566).

Ms. Lewis indicated that her family took Pressley in, and that Pressley became an integral party of their household. (T-1567). Pressley was "the sweetest thing you ever wanted to see," and got along well with Mr. Lewis, and the Lewis children. (T-1567). Ms. Lewis said that Pressley helped her more than her own children did. (T-1568). During the time that Pressley lived with the Lewis family in St. Augustine, his natural mother never came to visit. (T-1568). Ms. Lewis indicated that Pressley worked, and gave her money to assist in his support. (T-1570). Ms. Lewis also testified that her family were members of the Jehovah's Witness religion, and that Pressley attended the Kingdom Hall with them in St. Augustine. (T-1570-71).

Nicki Oxendine, Pressley's girlfriend from St. Augustine, also testified. (T-1574). Ms. Oxendine testified that she met Pressley Alston in high school and they began going together. (T-1576).

Pressley and Nicki Oxendine had a child, Precious, who was six years old at the time of the penalty phase hearing. (T-1576). Ms. Oxendine indicated that Pressley had acknowledged fatherhood of their daughter, and had always treated her with respect when he lived in St. Augustine. Oxendine testified that Pressley had worked at Luhrs' Corporation, at McDonald's and at The Chimes Restaurant. (T-1578-79). Ms. Oxendine indicated that she would stay in touch with Pressley if he were incarcerated. (T-1579).

Robert Szuch, a marriage and family therapist, testified on behalf of Pressley Alston. (T-1581). Szuch's resume is attached to the motion requesting authorization to incur the expense of retaining him. (R-36-49). Szuch assessed and evaluated Pressley Alston's family dynamics in order to determine what had led up to his involvement in this case. (R-1587).

Szuch testified that he had received summaries of investigative reports of many family members and persons who had had contact with Pressley Alston. (T-1587). Szuch personally interviewed Janice Alston as well as Nathaniel Ellison and one of Pressley's brothers. (T-1588). Szuch testified that he also reviewed court records relating to paternity actions and criminal prosecutions. (T-1588).

Szuch testified that the family of Pressley Alston appeared to be very dysfunctional, and explained the various interrelationships between family members and persons close to Pressley. (T-1588-92). Szuch concluded that the relationships within Pressley Alston's family were generally violent, leading to disfunction. (T-1598-

99). Szuch testified that there was no arena of safety, security, love or nurturing in the Alston family. (T-1599). Szuch felt that the family at all levels had been heavily and constantly exposed to trauma, fighting, explosiveness, alcoholism, cocaine addiction, guns, knives, beatings, physical abuse and emotional abuse. (T-1600). Szuch did not get the sense that there was a lot of love, nurturance and affirmation happening in the Alston family system. (T-1601).

Szuch also opined that the family lacked communication skill, and communicated primarily through violence and avoidance. (T-1601). Szuch observed that the father, when present in Pressley's life, was very violent, and felt that none of the other men in the mother's life provided any sense of role modeling, direction, support, or nurturance. (T-1602). Szuch testified that the Alston family ranked as one of the worst that he had ever seen in terms of health and ability to function and problem solve in productive ways. (T-1604).

The defense also presented Dr. Sherry Risch, a clinical psychologist. (T-1608). Dr. Risch testified that she held a Ph.D. in clinical psychology, and that she met with Pressley Alston on two different occasions to conduct a battery of cognitive tests. (T-1611). Dr. Risch testified that she had administered a battery of standardized tests to Pressley Alston in a manner accepted through the psychological and psychiatric community. (T-1612). Dr. Risch testified that she tested Pressley Alston to determine his intellectual ability, his ability to learn over time, and his

problem solving abilities (or cognitive flexibility). (T-1614). Dr. Risch testified that she determined Pressley Alston's verbal IQ to be 75, and his performance IQ to be 81. (T-1615). Dr. Risch concluded that Pressley Alston had a mental age between 13 and 15 years. (T-1520).

Dr. Eric S. Waugh, M.D. also testified at the penalty phase. (T-1626). Dr. Waugh, a board-certified psychiatrist, practices in Putnam County, Florida, and treats inmates at the Duval County Jail. (T-1626-28). Dr. Waugh testified that he first evaluated Pressley Alston during a previous incarceration at the Duval County Jail and has been treating him there in his instant incarceration. (T-1629).

Dr. Waugh testified that his initial diagnosis of Pressley Alston was mood disorder, and he has most recently re-diagnosed Alston as suffering from bipolar disorder mixed with psychotic features. (T-1629-30). Dr. Waugh testified that because Alston's initial level of depression was significant, he had prescribed an antidepressant medication called desipramine, 25 milligrams three times a day, and thorazine, 100 milligrams three times a day. (T-1632). Dr. Waugh ultimately added a mood stabilizer called tegretol, 200 milligrams three times a day. (T-1632). Dr. Waugh testified that Pressley Alston was taking these medications during his trial. (T-1633).

Robert Paul Appelman, Jr., a licensed family advocacy social worker, testified at the penalty phase hearing. (T-1646). Appelman testified that Pressley Alston had been a client of his

when he had been in private practice in early 1995. (T-1647). Appelman treated Alston because of a court order for counseling regarding anger control. (T-1648).

Appelman and Dr. Maria Hanger saw Alston beginning in October, 1994, through January, 1995. (T-1648-49). Appelman testified that he last saw Pressley Alston on April 21, 1995. (T-1469). Appelman indicated that Alston had cooperated with him, and was "engaged" with him in his treatment. (T-1649). Appelman stated that Alston had been attentive and respectful in his dealings with him, and that Alston seemed to want assistance in dealing with his depression and other problems. (T-1649).

Ronald Benson and Rocko Turino both testified that they had been supervisors when Pressley Alston had been employed in their respective companies. (T-1651-52; T-1658). Both Benson and Turino indicated that Alston had been a good worker; in fact, Benson testified that Alston had been one of their top workers at VAK-PAK and could keep up with the work of about one and one-half people. (T-1656). VAK-PAK involved fiberglass work. (T-1656). Turino was the service manager at First Coast Nissan, where Alston had worker as an automobile detailer. (T-1658-59). Turino testified that Alston worked very well, and never had a problem getting along with supervisors and other employees, and that he was punctual and reliable. (T-1660).

The Children's Program manager at the shelter for battered women in Jacksonville, Hubbard House, testified. (T-1661). Marianne Wilcher testified that she ran the HARK Program at Hubbard

House--a program designed to help children who have witnesses domestic violence. (T-1662). Wilcher set forth some of the effects of home violence on children in their developmental years:

> Yes, when children--when children are school age children, a lot of times they have very poor grades, a lot of time they have very difficult--they have a lot of difficulty concentrating in school, a lot of times they are placed in the emotionally handicapped classes, or they are labelled with Attention Deficit Disorder. There are many different things that happen to children who are school age. Sometime these children, when they grow up to the teenage years, sometimes they can be suicidal, they run away, they get involved in violent crimes, and the list goes on and on, because of the violence that they have seen in their home.

(T-1665). Wilcher testified that the purpose of the HARK Program was to teach children that there are choices and to teach them that violence is not the only way to solve problems. (T-1664-65). The brochure of the program was admitted into evidence as defense exhibit number three. (T-1667).

SUMMARY OF ARGUMENT

Appellant first argues that because his in-custody confession was made involuntarily and as a result of circumstances calculated to delude him as to his true position, it was error for the trial court to deny the motion to suppress. Appellant cites Williams v.State, 441 So.2d. 653 (Fla. 1983), for the proposition that "if attending circumstances at the time of the giving of the purported confession are calculated to delude the prisoner as to his true position, or if the attendant circumstances are calculated to exert improper and undue influence over the defendant's mind" the confession should be suppressed. Because the detectives arrested Alston without a warrant, refused to advise him of his rights, deluded him as to his true position regarding the note-taking of the detectives, employed a blatantly coercive "Christian burial speech" and intimated they would soon begin questioning Alston's girlfriend, the attendant circumstances in this case establish that Alston's confession was not freely and voluntarily given.

Appellant next raises the issue of the denial of the motion in limine as to the videotape "walk-over." Over defense objection, the state admitted into evidence a videotape of a "walk-over" from the Police Memorial Building to the Duval County Jail, depicting Alston's behavior after he had been booked. This videotape depicts Alston questioning reporters, reporters questioning Alston, Alston gesturing reporters, smirking, jeering, and engaging in otherwise inappropriate behavior. Because this videotape contained no relevant evidence, and was highly inflammatory and prejudicial to

Alston, the trial court erred in permitting it to be shown to the jury.

Alston requested the court instruct the jury that he was taking prescription psychotropic medication, and set forth the medications and dosages in his motion. The trial court denied the request to instruct the jury that Alston was taking psychotropic medication; because it is mandatory pursuant to Rosales v. State, 547 So.2d. 221 (Fla. 3d DCA 1989), that the jury be so instructed, the trial count committed reversible error in failing to so do.

The trial court permitted the medical examiner to testify as to the identification of the victim's remains through methods of forensic odontology, despite the fact that the medical examiner was specifically not qualified as an expert in that field. Appellant relies on Terry v. State, 658 So.2d. 954 (Fla. 1996), to support this contention that the medical examiner was not adequately qualified to express an opinion on the identity based on dental charts. Moreover, appellant asserts that the hearsay antemortem dental records of the victim should not have been testified to by the medical examiner.

Appellant also asserts that the trial court erred in denying the motion for judgment of acquittal as to the armed robbery count because of insufficient evidence to sustain the conviction, and cites Harris v. State, 589 So.2d. 1006 (Fla. 4th DCA 1991). Appellant additionally asserts that the trial court erred in denying the defense request to delay the penalty phase proceeding until the co-defendant could be tried and sentenced.

Alston argues that the trial court's instructions to the jury as to the advisory role of the jury in the sentencing phase violated his rights under Caldwell v. Mississippi, 105 S.Ct. 2633, 472 U.S. 320, 86 L.Ed.2d 231 (1985). Appellant asserts that the trial court erred in permitting victim impact evidence to be presented to the jury and argues that the testimony in this case far exceeded the scope authorized by Payne v. Tennessee, 501 U.S. 808, 115 L.Ed. 2d 720, 111 S.Ct. 2597 (1991). Appellant also asserts that the trial court erred in its jury instructions as to victim impact evidence, and asserts that because the trial court said that victim impact evidence "may be considered" by the jury in making its decision, that the instruction was erroneous.

Finally, appellant asserts that the state has failed to prove the aggravating factors "HAC," "CCP," and "elimination of a witness;" that the mitigators outweigh the aggravators and that the death penalty is disproportionate in this case.

ARGUMENT

ISSUE I:

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS ALSTON'S CONFESSION

Pressley Alston was arrested without a warrant, was never advised of the charges for which he was being arrested, promised by the detectives they would speak to the judge and the state attorney about his cooperation, and was given a "Christian burial speech" to spur him to help locate the body of the victim. Despite these facts, the trial court denied Alston's motion to suppress his subsequently-made oral and written statements:

> The Court finds that the statements of Pressley Bernard Alston were freely and voluntarily made, that he waived his rights knowingly and intelligently and, furthermore, that he understood his rights. There was no deceit, trickery and chicanery practiced by the Jacksonville Sheriff's Office in connection with his interrogation, there were no promises, unlawful promises, threats, intimidation or coercion. The defendant repeatedly sought to talk to the police officers, and knew full well the consequences of his doing so.
>
> The motion to suppress the statements is denied, as is the motion to suppress the physical evidence.

(T-286-87). After an analysis of the circumstances surrounding Alston's arrest and subsequent confession, it is clear that the trial court erred in failing to grant the motion to suppress given the facts of this case.

The facts show that although Alston was arrested at gunpoint without a warrant, neither of the arresting homicide sergeants advised him of the reason for which he had been arrested. (T-68-

69). Detective Harold R. Bennett, a homicide ***sergeant*** with the Jacksonville Sheriff's Office, testified that he did not tell Alston the exact charge for which he was being placed under arrest because of concerns for officer safety. (T-69). Bennett testified:

> Since he was a murder suspect, I felt like it would probably be to our benefit not to advise him of his rights, and rather than advising him--I'm sorry, advising him of what the charges were, and rather than advise him of what the charges were and asking a bunch of questions I probably couldn't accurately answer, I thought it best to just tell him that we would have him downtown shortly and all of the questions you have will be answered down there.

(T-69). Sergeant Bennett could give no real reason for failing to read Alston his rights, but speculated that:

> Well, a lot of things could have happened. I could have told him he was under arrest for murder, and then he would have maybe asked me some questions about specific times and dates or circumstances when the murder happened, which if I told him anything, then it might be in error, which would cause him maybe to answer differently questions later.
>
> If I had the full knowledge and facts and it was my case, then maybe I would have told him that. But rather than maybe give some misinformation, I just told him, "Listen, all of your questions, we'll answer as soon as we get you down to the station, we'll get you down there as soon as we can."

(T-73).

The second sergeant who accompanied Sergeant Bennett to the scene of the arrest testified that he did not tell Alston that he was under arrest for a murder charge because:

> At that time I didn't know the line of

> questioning that Detective Baxter and Roberts would be using, I didn't want to jeopardize their case, and we were going to take him directly to the Homicide Office, and I didn't feel it was necessary.

(T-79). Moreover, the patrol officer who transported Alston from the scene of his arrest to the Police Memorial Building (a fifteen to twenty minute ride) responded to Alston's question in route, "Am I being arrested?" by stating that she didn't know. (T-92).

After arriving at the Police Memorial Building, Alston was taken to the Homicide Office, where he was placed in an interview room. (T-104-05). Detective Baxter and Detective Roberts met with Alston in the interview room, and read his constitutional rights off of a sheriff's office form. (T-107-08). Detective Baxter, upon beginning to question Alston, failed to advise Alston that he was under arrest for murder. (T-155). Baxter began the interrogation by talking about an old case he had worked on with Alston a couple of years prior. (T-155).

Baxter explained to Alston that Alston was going to jail whether he confessed or not. (T-157). Baxter drew a diagram of the courtroom for Alston and showed him where participants in the trial would sit and where Assistant State Attorney Angela Corey would be in the courtroom. (T-157).[3] Baxter testified that he told Alston:

> As a matter of fact, I told him, I said, "Look, you are going to jail whether you confess or not, ***our main concern right now is to find the body of James Coon.***"

---

[3]Assistant State Attorney Angela Corey was outside the interview room during the investigation. (T-160).

(T-157). (Emphasis supplied). Baxter testified that the detectives tried to get Alston to talk to them to try to locate the body of James Coon. (T-157-58).

Alston was very careful in choosing his words, and up until the point in time that Baxter drew the courtroom diagram, was reluctant to tell the detectives anything. (T-158). Baxter stated, "I think he was still watching his words. I don't think he was convinced totally that we had Dee and his statement, and we eventually showed him the signature of the statement by Dee." (T-158).

Detective Baxter told Alston that if Alston told the truth, he would tell the State's Attorney and the Public Defender's Office, and his lawyer, and the judge. (T-158-59). Detective Baxter also informed Alston that his girlfriend Gwennetta was at the police station at the very moment, and that she would also be questioned. (T-162).

Baxter implored Alston to help the victim's mother:

> I related to Pressley Alston that Ms. Coon obviously needed closure in this case. Again, my view point or perspective at that time was trying to get him to show us where the body was, and this was after I told him I didn't really care whether he confessed, just take me to the body. I felt Mrs. Coon needed closure because her son was still missing, and I expressed the things about his daughter. I said, "You have a daughter. The fact if somebody has taken your daughter and you don't see her again, you don't get any closure, so I think it's important from Mrs. Coon's aspect if you can take us to his body, that would give her some closure in her son's death.

(T-160).

At some point during the detective's questioning, Alston said he would talk, but that he did not want Detective Roberts to take notes. (T-162). Roberts ceased his note taking. (T-164). Baxter thought Alston might be assuming that if the detectives didn't take notes that his statements couldn't be used against him. (T-165). This occurred after the detectives had shown Alston his half-brother's signature on the sheriff's office statement form. (T-162-63). Detective Baxter testified that Alston began "giving [him] a little bit as we're going along, but that Alston did not specifically say that he went out there and shot and killed the victim." (T-163). According to Baxter, Alston said that he would take detectives to the body, but prefaced this statement with the query, "If I take you to the body, will I get the death penalty?" (T-163).[4]

In Williams v. State, 441 So.2d. 653 (Fla. 3d DCA 1983), the Third District Court of Appeal held that a defendant's purported confession should be suppressed if attending circumstances at the time of the giving of the purported confession are calculated to delude the prisoner as to his true position, or if the attendant circumstances are calculated to exert improper and undue influence over the defendant's mind. 441 So.2d. at 655. The court explicitly prohibited purported confessions which are extracted by any sort of implied promise or reward are explicitly prohibited. Citing Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed.

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[4]Baxter had opened the interrogation by mentioning the name of a Duval County man--whom Alston knew--on death row. (T-164).

568 (1897), the Third District Court of Appeal held that the standard for reviewing the voluntariness of the confession is:

> "Must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . A confession can never be received into evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon it effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been inserted."

441 So.2d at 656 (Citations omitted).

In Williams, the record revealed a course of conduct and statements which, taken individually, might not have vitiated a confession; however, the Third District Court of Appeal noted that when "two or more of the suspect statements or courses of conduct are employed against a defendant, the confession is involuntary. 441 So.2d. at 656, citing Brewer v. State, 386 So.2d. 232 (Fla. 1980). Moreover, the state must prove by a preponderance of the evidence that the rights of the prisoner were not violated. 441 So.2d. at 656. Stating that the law cannot measure the force of influence used or decide upon its effect upon the mind of the prisoner, this court held that the declaration should be excluded if ***any*** influence has been exerted. 441 So.2d. at 656.

This court has held the "Christian burial speech" interrogation technique a "blatantly coercive and deceptive ploy." Roman v. State, 475 So.2d. 1228 (Fla. 1985), cert. denied, 475 U.S. 1090 (1986).

The totality of circumstances must be reviewed to determine

whether influence was exerted. Brewer v. State, 386 So.2d. 232 (Fla. 1980). When two or more courses of police conduct are employed against an in-custody defendant, the courts have found the confession to be involuntary and inadmissible. Id. In the instant case, several factors worked to exert undue influence upon in-custody Pressley Alston:

(a) Pressley Alston was not advised for what reason he was being taken into custody at the time of his arrest;

(b) Pressley Alston was not advised for what reason he was under arrest once he reached the Police Memorial Building;

(c) the interrogating detectives made specific promises to Pressley Alston, including their agreement to tell the judge about his cooperation;

(d) the interrogating detectives intentionally misled Pressley Alston because they stated they would not take notes, thereby leading the defendant to believe that what he said could not be used against him;

(e) the interrogating detective employed a blatantly coercive and deceptive ploy in giving the "Christian burial speech" to Pressley Alston, stating that they only wanted to help find the body;

(f) the interrogating detective employed a ruse that "the Coon family need closure"; and

(g) the detectives intimated they would soon begin questioning Alston's girlfriend.

Alston's confessions were made only after all of the seven factors listed above had occurred. It is clear that the confessions were not voluntarily given. The purported confessions must be suppressed because the surrounding circumstances were calculated to delude or exert improper influence over the defendant. See, State v. Chavon, 482 So.2d. 392 (Fla. 1985). Because the statements of Pressley Alston were improperly admitted,

his convictions must be reversed and this cause remanded for a new trial.

ISSUE II:

THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION IN LIMINE CONCERNING THE VIDEOTAPE OF THE "WALK-OVER"

The trial court permitted the state to introduce into evidence a videotape of a "walk-over." (T-960). The videotape, taken by local television camera persons, showed Alston in the custody of Detective Quinn Baxter walking from the Police Memorial Building to the back door of the pre-trial detention center. (State's Exhibit No. 21). The videotape was taken after Alston had been booked for the murder of James Coon. (T-960). The videotape depicted Pressley Alston in his work clothes, handcuffed and in the custody of the detective. (State's Exhibit No. 21). The audio portion of the tape reveals the media questioning Alston and jeering at him. (State's Exhibit No. 21). The videotape also shows Alston engaging in inappropriate behavior, and offering responses to the reporter's questions. (State's Exhibit No. 21). The audio portion of the tape is set forth below:

ALSTON: "I hope that, I hope that, I hope, uh, you don't f___ me in the morning."

OFFICER: "Oh, they won't take a picture of it. Don't take a picture of his company."

REPORTER: "Did you do it? Did you know who he was?"

ALSTON: "Huh?"

REPORTER: "Did you know who Mr. Coon was?"

ALSTON: "No, I didn't know who he was.:

REPORTER: "They got the wrong guy?"

ALSTON: "They got the right one."

REPORTER: "So you did it? Did you admit to it?"

ALSTON: "Naw, I ain't admit to it, but under the circumstances -- "

REPORTER: "What -- what kind of circumstances, pal? Why'd you do it?"

ALSTON: "He was just a victim of circumstances."

REPORTER: "Just somebody you came across?"

ALSTON: "Just a victim of circumstances."

REPORTER: "And that's it, huh?"

ALSTON: "That's it."

REPORTER: "Got any remorse, any regrets?"

ALSTON: "I got a whole lot."

REPORTER: "Got a whole lot of what?"

ALSTON: "Regrets, remorse."

REPORTER: "Doesn't help him out now, does it?"

ALSTON: "Naw. It ain't gonna help me either. It ain't gonna help me either when I get to death row."

REPORTER: "What'd you like to say to his mother, his family?"

ALSTON: "I can't say that I'm sorry. I can't say that. Um, I really can't say nothing, 'cause I don't know what they would accept."

REPORTER: "You can't what?"

ALSTON: "I really can't say anything, 'cause I don't know what they would accept. They probably wouldn't wanta hear a man -- anything from a man like me."

"Want me to smile?"

REPORTER: "You think it's funny?"

ALSTON: "Naw. Naw, I don't think it's funny."

POLICE: "Identify."

ROBERTS: "Detective Roberts with a prisoner."

JAIL: "Can't hear ya, speak up (inaudible)."

ROBERTS: "Ya'll be quiet for a second. Detective Roberts with a prisoner."

REPORTER: "You kinda smiling there, pal."

ALSTON: "Huh?"

REPORTER: "You kinda smiling?"

ALSTON: "The lights and stuff like that, man. I'll be gone for a long time, man. Death Row.

"Cameras rolling now?"

REPORTER: "They're rolling.

Any last words? Anything else you wanta say?"

ALSTON: "Bye."

REPORTER: "Don't be hitting him too hard now."

REPORTER: (Inaudible).

REPORTER: (Inaudible)."

(End of videotape).

(T-962-64). The defense objected to the admission of this exhibit on grounds of relevance, and because any probative value would have been outweighed by the prejudice. The state argued:

> . . . Judge, . . . there is no due process violation, that the press in this city and in this country has a First Amendment right to

> report the news as they see fit, that this defendant was protected to the extent that he requested, that his place of work not be shown, and the he freely answered the questions of the reporters, as is shown right on the tape.
>
> And that, in fact, Judge, what isn't shown on the tape is that he looked like he enjoyed the entire thing, he laughed and smiled the entire time he was being walked from the police building over to the jail. And I would submit to the Court that that is evidence in and of itself of the voluntariness of his statements. He never once ducked his head or tried to duck behind either officer. He asked questions of the reporters. He even asked if the cameras were still on.

(T-208-09).

The trial court erred in permitting the videotape to be introduced to the jury because it was irrelevant and because its relevance, if any, was heavily outweighed by substantial prejudice to defendant. This court has previously noted that because of the forceful impression made upon jurors by videotaped evidence, it should be received with caution. Cave v. State, 660 So.2d. 705 (Fla. 1995). The admissibility of a videotape must be decided according to the particular circumstances in each case. Aetna v. Cooper, 485 So.2d. 1364 (Fla. 1986).

This court has rejected the admissibility of videotape which contains depictions of highly prejudicial statements, actions, and displays of emotion, this court has held such to be inadmissible as prejudicial and confusing. Id. at 1366. Where the probative value is outweighed by the prejudicial effect, the tape should not be admitted into evidence. As the Florida evidence code states:

> Relevant evidence is inadmissible if its

> probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury or needless presentation of cumulative evidence.

Section 90.40, Florida Statutes (1995). Unsworn emotional statements on the videotape can confuse and mislead a jury, and should not be presented. Id.

Clearly, the tape in this case contained emotionally charged statements and actions of defendant calculated solely to inflame the passions of the jury. Even the trial court noted that the tape showed Alston's "attitude." (T-210). The tape offered no additional evidence which could not have been presented at the trial by other means, and was introduced solely to inflame the passions of the jurors.

In Scott v. State, 559 So.2d. 169 (Fla. 4th DCA 1990), the Fourth District Court of Appeal held inadmissible a videotape made by a national television crew in which sheriff's deputies comment concerning the defendant. The Fourth District held that the jury should not have heard the audio portions of the tape. In this case, the reporter's questions are irrelevant and highly prejudicial to defendant. Even if this tape were relevant, it is clearly outweighed by the prejudice as outlined in Scott.

In Pausch v. State, 596 So.2d. 1216 (Fla. 2d DCA 1992), the Second District Court of Appeal held that a videotape of an officer accusing a defendant of the facts of the case undermine the fairness of the defendant's trial on a charge of murder. In Pausch, the Second District Court of Appeal stated that the tape recorded interview "condemned" the defendant and was misleading,

confusing, prejudicial, and fundamentally undermined the fairness of her trial on the charge of murder. 596 So.2d. at 1218-1219.

Moreover, when the contents of a tape are inflammatory, and substantial other reliable evidence can prove the same fact, it is error to admit a videotape. Potteng v. State, 589 So.2d. 390 (Fla. 1st DCA 1991). In Potteng, the First District Court held that the showing of the videotape to the jury constituted error of such magnitude that reversal and remand for a new trial were required. 589 So.2d. at 391. In the instant case, this court should find the offending video to be irrelevant, or to be so highly prejudicial and inflammatory as to outweigh any possible relevance and reverse this cause for a new trial.

ISSUE III:

THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST TO INFORM THE JURY THAT APPELLANT WAS BEING ADMINISTERED PSYCHOTROPIC MEDICATION

Prior to the trial, appellant filed a motion to have the court instruct the jury at the beginning of the trial that Alston was being administered psychotropic medication under medical supervision for a mental or emotional condition. (R-324). That motion alleged that Alston was being administered psychotropic medication by the jail medical staff as follows:

(a) Tegretol, .200 mg three times per day;

(b) Desipramine, .25 mg three times per day; and

(c) Thorazine, 100 mg at 1:00 o'clock p.m. and 200 mg at 11:00 o'clock p.m.

(R-324).

The trial court withheld ruling on the motion prior to trial, and took the motion under advisement pending Alston's behavior at trial. (T-223-29). At trial, defense counsel renewed the motion and noted Alston's behavior for the record. (T-913). Despite trial counsel's recounting of the incident, the trial court stated:

> THE COURT: The conversation is concluded. I have kept an eye on Mr. Alston throughout the proceedings, I have not seen any bizarre or inappropriate behavior. I'm looking for it, as I indicated earlier, and he's just showing the normal range of reactions of a person accused of a crime, and your request is denied.

(T-914).

The trial court's failure to instruct the jury that the defendant was being psychotropic medication constituted reversible,

fundamental error and requires a re-trial of this cause. Rosales v. State, 547 So.2d. 221 (Fla. 3rd DCA 1989). In Rosales, the Third District Court of Appeal held:

> With respect to appellant's first point, we find that the trial court erred in denying the appellant's motion to instruct the jury that the appellant was on psychotropic medication at the time of the trial. The defense argued that rule 3.215(c)(2), Florida Rules of Criminal Procedure, requires the giving of an explanatory instruction when a defendant's attendance at trial is aided by medication for a mental condition. The trial court denied the motion. The rule, however, is quite specific:
>
> If the defendant proceeds to trial with the aid of medication for a mental or emotional condition, upon the motion of defense counsel, the jury *shall*, at the beginning of the trial and in the charge to the jury, be given explanatory instructions regarding such medications. (Emphasis added).
>
> Fla.R.Crim.P. 3.215(c)(2)(formerly Fla.R.Crim.P. 3.214(c)(2). The trial court's failure to instruct the jury requires reversal.

547 So.2d. at 223 (emphasis supplied).

The failure of the trial court to give the requested instruction violated the requirements of Florida Rule of Criminal Procedure 3.215(c)(2), and seriously impaired Alston's ability to present an effective defense both at the guilt and penalty phase hearings. The jury was called on to address questions of the voluntariness of Alston's waiver of constitutional rights and of the voluntariness of Alston's statements, and as well was called upon to determine whether certain aggravating factors which were based on Alston's mental state had been proven beyond a reasonable

doubt. The jury may well have thought Alston always behaved in conformity with his medicated state at trial. In fact, the jury may have been disinclined to accept Alston's mitigation evidence based on his behavior at trial. Alston, in fact, presented evidence that he suffered from a bipolar disorder. (T-1629-30).

It cannot be said that the failure to give this instruction was not harmful to Alston's ability to present an effective defense. Because the trial court erred in refusing the instruction, this cause should be reversed and remanded for a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN PERMITTING THE MEDICAL EXAMINER TO TESTIFY AS TO THE IDENTIFICATION OF THE VICTIM BASED UPON METHODS OF FORENSIC ODONTOLOGY AND UPON HEARSAY RECORDS OF THE VICTIM'S DENTAL HISTORY

Dr. Floro, the deputy medical examiner for the Fourth Judicial Circuit, testified that on Friday, May 26, 1995, he was called to a crime scene on Cedar Point Road in Jacksonville. (T-1123). Dr. Floro testified that he was briefed by the detectives at the scene, and that he viewed human remains and clothing at the scene. (T-1123-24).

Dr. Floro testified that identification of skeletal remains of a human is made by dental examination. (T-1127). Dr. Floro testified that he obtained dental x-rays from a Dr. Chester Aikins which purportedly belonged to James Coon. (T-1127-28). Over defense objection, Dr. Floro was permitted to testify that he compared a chart purportedly made by Dr. Aikins to a postmortem dental chart of James Coon. (T-1129). Dr. Floro testified that based on his evaluation of the x-rays and the charts and his own visual examination of the remaining teeth, that he could identify the skull remains as belonging to James Lee Coon. (T-1131). Dr. Floro testified, over objection of defense counsel, that he could make a positive identification of the remains. (T-1132).

The trial court erred in permitting Dr. Floro to testify as to the identification of the remains located in the rural area. Because Dr. Floro was not qualified as a forensic odontologist, it was error for the trial court to permit him to testify that the

antemortem dental records of James Lee Coon led to a positive identification of the skeletal remains; moreover, it was error to permit Dr. Floro to testify regarding a comparison with hearsay antemortem dental records of James Lee Coon.

The trial court refused to qualify Dr. Floro as an expert in forensic odontology. (T-1121-22). The trial court specifically stated that Dr. Floro would not be permitted to give opinion in the area of forensic odontology. (T-1122). Despite this ruling, the trial court permitted Dr. Floro to testify that he compared a chart reportedly made of James Lee Coon's dental work by a Dr. Chester Aikens to a post-mortem dental chart of James Lee Coon. (T-1129). Dr. Floro testified that based on his evaluation of those charts and X-rays, and his on visual examination of the remaining teeth, that he could positively identify the skull remains as belonging to James Lee Coon. (T-1131).

Clearly, the trial court abused its discretion in permitting Dr. Floro to identify the remains of the victim. As this court said in Terry v. State, 668 So.2d. 954 (Fla. 1996):

> The determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge whose decision will not be reversed absent a clear showing of error. Ramirez v. State, 542 So.2d. 352 (Fla. 1989). An expert is permitted to express an opinion on matters in which the witness has expertise when the opinion is in response to facts disclosed to the expert at or before the trial. §90.704, Fla. Stat. (1993). §90.702 requires that before an expert may testify in the form of an opinion, two preliminary factual determinations must be made by the court under §90.105. First, the court must determine whether the subject matter is proper for

> expert testimony, i.e., that it will assist the trier of fact in understanding the evidence or in determining a fact in issue. Second, the court must determine whether the witness is adequately qualified to express an opinion on the matter. Charles W. Ehrhardt, Florida Evidence, § 702.1 (1994 L.Ed.).

668 So.2d. at ____.

It is clear in this case that Dr. Floro was ***not*** adequately qualified to express an opinion on the matter of the identify of the remains based on the method of forensic odontology. The record is abundantly clear that Dr. Floro was not and never had been a dentist, was not an odontologist, and was definitely not qualified to perform testing and evaluation in that field. The trial court clearly abused its discretion in permitting the testimony of the identification based on the methods of forensic odontology.

Second, the trial court erred in permitting Dr. Floro to testify that he had evaluated the hearsay records of a Dr. Chester Aikens. Dr. Floro testified that records purporting to be those of James Lee Coon were furnished to him but no predicate was ever laid to establish the records as (1) the authentic records of Dr. Aikens; or (2) as the actual records of the same James Lee Coon involved in this case.

The trial court has therefore committed compound error in permitting this testimony from Dr. Floro; because the testimony was inadmissible, and should not have been permitted, the convictions in this case must be reversed and this cause remanded for a new trial.

ISSUE V:

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE ARMED ROBBERY COUNT BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE CONVICTION

Alston was convicted of the armed robbery of James Coon; the indictment alleged the taking of:

> a vehicle and contents, United States currently, wallet and contents, clothing and jewelry: which had belonged to James Coon. (R-14).

Appellant was convicted as charged of this count. (R-341).

The crime of robbery requires proof beyond a reasonable doubt of the following elements:

1. A taking

2. Of money or other property which may be the subject of larceny

3. From the person or custody of another

4. By force, violence, assault or putting in fear

Section 812.13(1), Florida Statutes; Butler v. State, 602 So.2d 1303 (Fla. 1st DCA 1992); see also, Schram v. State, 614 So.2d 646 (Fla. 2d DCA 1993). In order to convict a defendant of the charge of robbery, each of those elements must be proved beyond a reasonable doubt. Moreover, because the state alleged armed robbery with a deadly weapon, that element must also be proved beyond a reasonable doubt.

In the instant case, there was no proof of any of the requisite four elements of the offense of robbery, and the trial court erred in failing to grant the motion for judgment of

acquittal as to that count. At best, the evidence established that appellant had been in a red Honda Civic subsequent to the time Coon had been reported missing and had been in possession of jewelry which had been taken from James Coon. The evidence presented by the state only at best established a speculation that cash may have been taken. There is absolutely no evidence to establish beyond a reasonable doubt, first that the automobile, cash or jewelry was taken; or, second that it was taken by force, violence, or putting Coon in fear; or, third, that Alston was involved.

To distinguish the offense of robbery from the offense of theft, force or threat must be used in an effort to obtain or retain the victim's property. Harris v. State, 589 So.2d 1006 (Fla. 4th DCA 1991), on appeal after remand, 619 So.2d 1043 (Fla. 4th DCA 1993), Here, where there is only speculation that property was missing and no evidence whatsoever that force or threat was used to obtain or retain the said property, the judgment of acquittal must be granted. Similarly, in the case of Butts v. State, 620 So.2d 1071 (Fla. 2nd DCA 1993), where the defendant at some point in time after a robbery has cash in his pockets, but no other evidence exists to connect him to the robbery, the court held a judgment of acquittal should have been granted.

The facts relied upon to prove robbery become wholly and totally circumstantial; where circumstantial evidence is relied upon to prove a crime, in order to overcome a defendant's motion for judgment of acquittal, the burden is on the state to introduce evidence which excludes every reasonable hypothesis except guilt.

Atwater v. State, 626 So.2d 1325 (Fla. 1993); State v. Powell, 636 So.2d. 138 (Fla. 1st DCA 1994).

In Atwater, there was significantly more evidence against the defendant to sustain a conviction of robbery. There was evidence that the victim had cash in his ***trousers*** shortly before the killing, and when the victim's body was found, his pockets were turned out and the only money found in the room was a few pennies on the floor. 626 So.2d at 1328. Unlike Atwater, the evidence in the instant case was extremely weak, and established no ***taking***. This case should be remanded with instructions to discharge Alston from the armed robbery count.

ISSUE VI:

THE TRIAL COURT ERRED IN FAILING TO GIVE THE INDEPENDENT ACT INSTRUCTION DURING THE GUILT PHASE OF THE TRIAL

Trial counsel requested and filed a written jury instruction on "independent act." (R-339). That requested jury instructing was denied. (T-1285).

The trial court erred in denying the defense requested jury instruction on independent act. It is clear from the record that conflicting evidence (through Pressley Alston's own statements) existed as to whether co-defendant Dilanjan Ellison was actually the primary mover behind this crime. (T-941-43). Because the theory existed that Ellison was the primary planner and perpetrator of the offense, as well as being the shooter, the trial court should have given the requested instruction on independent act. Because the trial court failed to give this instruction, this cause must be reversed and remanded for a new trial.

ISSUE VII:

THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST TO DELAY THE PENALTY PHASE PROCEEDINGS UNTIL THE CO-DEFENDANT COULD BE TRIED AND SENTENCED

The record in this case reflects a palpable abuse of discretion on the part of the trial court because of the denial of the defense motion for continuance of the penalty phase. Trial counsel moved for a continuance of the penalty phase proceeding until the co-defendant could be tried; trial counsel asserted that the co-defendant had valuable information which would assist defendant in his penalty phase defense. (T-1410-68). Because the co-defendant's case was already set for trial, justice would not have been delayed by a continuance of the penalty phase proceeding to enable defendant to investigate that avenue.

The co-defendant, Delanjin Ellison, was appellant's half-brother; he had given statements to detectives prior to appellant's arrest and gave the detectives information regarding the shooting in this case. Defense counsel attempted to depose Ellison, but Ellison took the Fifth Amendment in response to all deposition questions. (T-1411).

Ellison could have provided information regarding each and every aggravating factor argued by the state; Ellison could have provided information about the victim's demeanor and behavior prior to the shooting, about any cold, calculate, and premeditated plan, about any heinous, atrocious and cruel nature of the crime, about whether the crime was committed for the elimination of a witness, and possibly, about mitigation.

Because the trial court abused its discretion in denying the motion to continue, this court should remand this cause for a new trial.

ISSUE VIII:

THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST TO DELETE THE PORTION OF THE JURY INSTRUCTION "RULES FOR DELIBERATION" REGARDING THE "JUDGE'S JOB" AND ERRED IN FAILING TO GIVE THE DEFENSE REQUESTED JURY INSTRUCTION

The standard jury instruction as to the advisory role of the jury in Florida's capital sentencing scheme was read to the jury as follows:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge, however, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(T-1749). During voir dire, the trial judge instructed the jury pool as to the procedure regarding the advisory sentence:

> After you heard the aggravating and mitigating circumstances and the arguments of the lawyers, you would then render to the Court and advisory sentence, and in that advisory sentence you would say to the Court whether you believe the defendant should be sentenced to life imprisonment without the possibility of parole or death.
>
> The advisory sentence that is rendered to the Court on the matter of the sentence, again assuming the finding of guilty of murder in the first degree, can be by majority vote of the jury. After that advisory sentence is rendered, it is up to the Judge to sentence the defendant to either life imprisonment without the possibility of parole or death. But the Court, that is the Judge, is not required to follow the advisory sentence of the jury, but the advisory sentence of the

jury will be given great weight by the Court.

(T-529-30).

At the close of the guilt phase, the trial court instructed the jury from the standard criminal jury instructions:

> Your duty is to determine if the defendant is guilty or not guilt in accordance with the law. It is the Judge's job to determine what a proper sentence would be if the defendant is guilty.

(T-1369).

Trial counsel objected to this instruction before trial and again prior to the giving of the guilt phase instructions. (R-417-38; T-1284). Trial counsel had previously submitted written requested penalty phase instructions, noting the same problem. Trial counsel's written requested instruction read as follows:

> The punishment for this crime is either death or life imprisonment without the possibility of parole. Final decision as to what punishment shall be imposed rests {solely} with the judge of this court; however, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon PRESSLEY ALSTON, and the law requires the court to give great weight to your recommendation. I may reject your recommendation only if the facts are so clear and convincing that virtually no reasonable person could differ.

(R-417-38).

The instructions given by the trial judge constitute an impermissible denigration of the role of the jury in violation of Caldwell v. Mississippi, 105 S.Ct. 2633, 472 U.S. 320, 86 L.Ed.2d 231 (1985), and in violation of Florida caselaw which follows Caldwell. In Caldwell, the United Sates Supreme Court held:

> [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been lead to believe that responsibility for determining the appropriateness of defendant's death rests elsewhere.

105 S.Ct. at 2639. The instruction given to the jury in the guilt phase de-emphasized the role of the jury in the capital sentencing scheme. Appellant's conviction for first-degree murder must be reversed and this cause remanded for a new trial.

ISSUE IX:

THE TRIAL COURT ERRED IN PERMITTING VICTIM IMPACT EVIDENCE TO BE PRESENTED TO THE JURY

At the penalty phase, the trial court permitted the state to present the "victim impact" testimony of Sharon Coon, the mother of James Coon. (T-1451). Coon testified that her son was "just an ordinary person who did ordinary things." (T-1457). Coon described her son as "a Christian and a gentleman who loved his mother, family, church, education and community." (T-1457). Coon described her son's interests, and his love of family. (T-1457). Coon also explained that her son assisted her with an after-school program focusing on development of inter-city at-risk children, and was involved in a high school "brain brawl." (T-1458).

Coon recounted her son's statements to her:

> Momma, I love you. I thank God for giving me a good momma. Momma, I work with kids who don't have anyone to go home to, they are just on their own. At least I have a good momma. One day I'm going to finish college. I'm going to make it in life. I'm going to be famous. And, Mom, you will never have to work any more. I'm going to take care of you. Don't worry about John and Joneshia, because I will make sure they go to college.

(T-1459). Coon testified that she said to her son that he did not owe her anything for being a good mom. (T-1459). Coon testified that her nephew now volunteered to perform chores her son had performed while living, and that her son had previously over-extended his credit cards by buying for students, family and friends who were in need. (T-1459).

In closing, Sharon Coon said:

> My son often said, "One word that should not be allowed in the mind when it comes to fulfilling a dream is 'can't.' The word can't can sometimes limit the brain power. When the brain power is limited, you can't make progress. Slaves have limited minds due to the lack of education. Can't was not in their vocabulary so they tried to create the type of world they wanted to live in." My son said, "Today I'm here through the blood of a people who did not know the words can't, stop, give up, or quit. I am living their dreams."
>
> James was my baby and the ending of my motherhood. He was my only son. Therefore, he was the only one left in my family to keep the family name going on.

(T-1459-60). Trial counsel had objected to the admissibility of all of this testimony. (T-1422).

Sharon Coon's testimony far exceeded the scope authorized by Payne v. Tennessee, 501 U.S. 808, 115 L.Ed. 2d 720, 111 S.Ct. 2597 (1991). Moreover, this testimony far exceeds the scope of Florida Statutes which permit victim impact evidence to be heard by the jury.

Florida Statute 921.141(7), authorizes the prosecutor to introduce, and subsequently argue, victim impact evidence. The statute defines victim impact evidence:

> Such evidence shall be designed to demonstrates the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.

Clearly, the information elicited from Sharon Coon was designed to stir the passions of the jury, and to create sympathy for both James Lee Coon and Sharon Coon. The evidence testified to by Mrs. Coon far exceeded that necessary to establish James Lee Coon as an

individual human being; moreover, the testimony revolved around the loss to Mrs. Coon, rather than to members of the community. Sharon Coon's testimony regarding her son's statements about her being a "good momma", was not permissible under the statute, and was designed to evoke emotions on the part of the jurors. In Windom v. State, 656 So.2d. 432 (Fla. 1995), this court held "[v]ictim impact evidence must be limited to that which is relevant as specified in Section 921.141(7)." 656 So.2d. at 434. This court held that testimony outside these parameters had been erroneously admitted. Id.

Because the trial court erred in permitting this victim impact testimony to be presented to the jury, this court should remand this cause for a new penalty phase proceeding.

ISSUE X:

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AS TO VICTIM IMPACT EVIDENCE

Trial counsel requested and filed a written request for a special jury instruction concerning victim impact evidence:

> You are about to hear evidence concerning the victim in this case, James Coon. I instruct you that, although you are entitled to hear this evidence, you are not to consider it as an aggravating circumstance or weigh it as an aggravating circumstance when you determine whether to recommend a life sentence or a death sentence.

(R-323).

The state attorney requested the following instruction as to victim impact evidence:

> You are now instructed that the victim impact evidence offered by Sharon Coon during the penalty phase shall not be considered as an aggravating circumstance but may be considered in making your decision.

(T-1446-47). Trial counsel objected on the basis that the statute does not permit the victim impact evidence to be considered by the jury. (T-1447). The trial court gave the instruction requested by the state. (T-1447-48; T-1451-52).

The trial court's instruction as to victim impact evidence was erroneous, and did not accurately state the law. The trial court should have given the defense requested instruction, which comports with the requirements of Payne, supra, and Windom, supra.

ISSUE XI:

THE TRIAL COURT ERRED IN PERMITTING THE FULL-COLOR GRADUATION PHOTOGRAPH OF JAMES COON TO BE EXHIBITED TO THE JURY DURING CLOSING ARGUMENT

During the state's penalty phase closing argument, the state exhibited to the jury a full-color 11" by 15" high school graduation photograph of James Coon. (T-1442). The photograph was in a gold frame and depicted Coon in a tuxedo. (T-1442). The state had intended to introduce this photograph during the testimony of Coon's mother, but because she did not testify, they were unable to do so. (T-1441). Trial counsel objected to the display of the photograph, and asserted that it was an improper use of victim impact evidence. (T-1442). That objection was overruled. (T-1442).

The trial court erred in permitting the graduation photograph of James Lee Coon to be displayed to the jury. This court held in Cave v. State, 660 So.2d. 705 (Fla. 1995), that the admissibility of photographic evidence is determined by relevancy rather than necessity. The test for admissibility of photographs is whether the photograph is relevant to any issue to be proved in a given case. Kingery v. State, 523 So.2d. 1199 (Fla. 1st DCA 1988). Clearly, the photograph of the victim in the instant case had no relevance at the penalty phase other than to inflame the passions of the jury, to create sympathy for the victim, and to prejudice the defendant. Such use was impermissible, and the trial court should not have been permitted the photograph to be displayed to the jury. Coon's identity had already been proven by other

methods; the photograph was presented at the penalty phase, not the guilt phase, and cannot be said to have been for any relevant purpose. Because the trial court erred in permitting the highly inflammatory[5] photograph to be displayed to the jury during the closing argument in penalty phase, this cause should be reversed and remanded for a new penalty phase hearing.

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[5]The ***graduation*** photograph was especially inflammatory in light of the claimed statements of the victim, "Jesus, Jesus, Jesus, Don't let anything happen, I just want to finish college." (T-1164).

ISSUE XII:

THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING A LAWFUL ARREST

The trial court found that the murder of James Coon had been committed for the purpose of avoiding a lawful arrest, and set forth in its sentencing judgment:

> The aggravating circumstance specified in Florida Statute Section 921.141(5)(e) was established beyond a reasonable doubt in that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. The defendant and his accomplice took James Coon from a hospital where he had been visiting an ill relative, drove him to a remote part of town after taking personal property from him, and thereafter executed him because the defendant realized that James Coon could identify him and his accomplice. The purpose of the killing was to eliminate a witness to the kidnapping and robbery. This statutory aggravating circumstance was established beyond any reasonable doubt.

(R-512-13).

In Thompson v. State, 647 So.2d. 824 (Fla. 1994), this court held that the aggravating factor "elimination of a witness" was not supported by the testimony of a witness who said she "watched defendant converse with the victim in a shop, turned away, heard a pop, looked up, and saw defendant standing over victim." 647 So.2d. at 826. This court held that because of the absence of evidence as to what happened during the brief time that the witness looked away, there was insufficient proof of this aggravating factor. *See also* Bates v. State, 465 So.2d. 490 (Fla. 1985).

Similarly, in the instant case, the ***only*** testimony about what happened at the time of the shooting was from the defendant's own

statements[6]. This case is more akin to Hansbrough v. State, 509 So.2d. 1081 (Fla. 1987), wherein this court held that the fact that a murder victim ***might*** have been able to identify the assailant was not sufficient to support the finding that the defendant had killed the victim solely to eliminate a witness, and rejected this aggravating factor. In Hansbrough, this court stated that this aggravating factor is reserved primarily for execution or contract murders, or witness-elimination killings, and goes to the state of mind, intent, and motivation of the perpetrator. 509 So.2d. at 1086.

In order to prove this particular aggravator, it must be "clearly shown that the dominant or only motive for the murder was the elimination of the witness." Oats v. State, 446 So.2d. 90 (Fla. 1984). Clearly, the state is unable to so do in the instant case; it was error the for trial court to so find. Because this aggravating factor was not proved beyond a reasonable doubt, the jury should never have been so instructed, and this cause must be remanded for a new penalty phase hearing.

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[6]Appellant gave several conflicting statements regarding the details of the crime; no other evidence regarding the actual events was introduced by the state.

ISSUE XIII:

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL

In its sentencing judgment, the trial court determined that the capital felony was especially heinous, atrocious, or cruel, and stated:

> The aggravating circumstance specified by Florida Statute Section 921.14(5)(h) was established beyond a reasonable doubt in that the capital felony was especially heinous, atrocious, or cruel. This was not a "routine" robbery wherein the decedent was killed simultaneously with the robbery. James Coon was forced into his own vehicle, spent more than thirty (30) minutes inside the vehicle with his two (2) assailants, repeatedly begged for his life, was taken out of the vehicle in a remote location in Jacksonville, and vividly contemplated his death for a minimum of thirty (30) minutes. The words of James Coon are haunting, "Jesus, Jesus, please let me live so I can finish college." The defendant's accomplice shot the decedent once, and it appears that this shot was not fatal. After the accomplice came back to the defendant who did not go out into the woods initially with the accomplice and the decedent, the defendant inquired as to whether James Coon was dead. The accomplice responded that he assumed that he was as he had shot him once.
>
> Not content with this assurance from the accomplice, the defendant took the firearm from the accomplice and went to the victim who was alive, moaning, and James Coon held up his hand as if to fend off further attacks. The defendant then shot James Coon at least two (2) times, and there is no question that James Coon was then rendered dead. It is difficult for the court to imagine a more heinous, atrocious, or cruel manner of inflicting death upon an innocent citizen who just happened to be in the path of this defendant who was then a predator looking for money or other things of value.

(R-513-14).

Appellant asserts that the evidence presented regarding the homicide of James Coon fails to prove beyond a reasonable doubt that the murder was especially heinous, atrocious, or cruel. In support of this contention, appellant cites Dixon v. State, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974). In Dixon, this court interpreted the meaning of "especially heinous, atrocious, or cruel:"

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the consciousless or pitiless crime which is unnecessarily torturous to the victim.

283 So.2d at 9. See also Robertson v. State, 611 So.2d 1228 (Fla. 1993), and Watts v. State, 593 So.2d 198 (Fla. 1992).

This court recently reiterated this rule in Hartley v. State, ___ So.2d. ___ (Fla. 1996), 21 F.L.W. S 391:

> In order for the HAC aggravating circumstance to apply, the murder must be conscienceless or pitiless and unnecessarily torturous to the victim. Richardson v. State, 604 So.2d. 1107 (Fla. 1992). Execution-style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim.

See also Ferrell v. State, ___ So.2d. ___ (Fla. 1996), 21 F.L.W. S 388. The facts of this case are not dissimilar from the facts in

Ferrell and Hartley; the victim was kidnapped and driven to a remote location where he was shot. In Ferrell and Hartley, like the instant case, there was no torture, and no evidence of extreme and outrageous depravity.

Generally speaking, in order to be classified as "heinous, atrocious, or cruel," homicides must have some fact about them that is extremely distinguishable from the "norm." For example, in Campbell v. State, 571 So.2d 415 (Fla. 1990), "HAC" was sustained where the victim was stabbed twenty-three times over the course of several minutes and had defensive wounds.

Moreover, the facts of the crime must be vile and shocking, such as the facts in Thompson v. State, 619 So.2d 261 (Fla. 1993) (victim was repeatedly and continuously tortured, beaten, sexually assaulted and mutilated over a long period of time for apparent enjoyment).

As this court stated in Robertson v. State, 611 So.2d 1228 (Fla. 1993), "[t]he circumstance of heinous, atrocious, or cruel is appropriately found 'only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another'." 611 So.2d at 1233 (citations omitted).

Nothing sets this case apart from the "norm" of capital felonies, thus making the "HAC" finding improper. See, Lawrence v. State, 614 So.2d 1092 (Fla. 1993). There are no facts in this case which lead to the inexorable conclusion that the homicide was

outrageously wicked and vile. The fact that there were multiple gunshot wounds administered within minutes or that the victim begged for his life does not establish "heinous, atrocious, and cruel." Bonifay v. State, 626 So.2d. 1310 (Fla. 1993); Stein v. State, 632 So.2d. 1361 (Fla. 1994), cert. denied 115 S.Ct. 111 130 L.Ed. 2d 58. The state failed to establish beyond a reasonable doubt that the HAC aggravator existed and the trial court's finding of the aggravating factor "heinous, atrocious, or cruel" constitutes error. The imposition of the death penalty based on such a finding must be reversed, and a life sentence imposed.

ISSUE XIV:

THE TRIAL COURT ERRED IN GIVING INSUFFICIENT WEIGHT TO THE DEFENDANT'S MITIGATING FACTORS

The defendant presented two days of testimony in the penalty phase to establish the existence of non-statutory mitigating factors. (T-1460). The defendant established through credible, competent, unimpeached, and unrebutted testimony that he was the victim of a dysfunctional and extremely abusive childhood, that he had very little love and guidance from his parents while growing up and that his family life as a child was "hell." Alston also presented the testimony of professional mental health experts who testified regarding his bipolar disorder, and his mental age of thirteen. Dr. Sherry Risch and Dr. Eric Waugh testified that Alston suffered from the manic-depressive disorder which affected his mood and thinking abilities; Dr. Risch testified that Alston's borderline IQ presented him with a mental age of thirteen.

The state presented no testimony in the penalty phase other than the two certified copies of Alston's prior convictions and the victim impact testimony. The state relied entirely on the testimony it presented at trial to establish the remaining aggravating factors. Clearly, the testimony presented by the defense in the penalty phase far outweighed that presented in aggravation--especially in light of the almost non-existent evidence about the actual events leading up to and during the shooting.

Because the trial court erred in applying insufficient weight to Alston's mitigating factors, this court should determine that

because the mitigation in this case is substantial, compared to the insubstantial aggravation, a life sentence is appropriate, and should vacate and set aside the sentence of death and impose a life penalty. See, Geralds v. State, ___ So.2d. ___, 21 F.L.W. S 85 (Fla. 1996).

ISSUE XV:

THE TRIAL COURT ERRED IN FINDING THAT THE STATE HAD PROVED BEYOND A REASONABLE DOUBT THE STATUTORY AGGRAVATING FACTOR OF "COLD, CALCULATED AND PREMEDITATED MANNER"

The facts of this case show at best a robbery gone awry, not a carefully planned and calculated murder. The facts upon which the state relied to convince the jurors that the "cold, calculated, and premeditated" statutory aggravator existed are equally consistent with facts leading up to a robbery of the victim, rather than a homicide.

The trial court's written sentencing order set forth the facts which it determined to exist in connection with the "cold, calculated and premeditated" aggravator:

> The aggravating circumstance specified by Florida Statute Section 921.141(5)(i) has been established in that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The essential facts justifying the conclusion that this statutory factor has been established have been outlined in part. This was a crime of heightened calculation and premeditation. The defendant could have stopped at kidnapping and robbery. He could have taken the defendant's motor vehicle and other valuables and left James Coon to pursue his life as an exemplary citizen of this community. Instead the defendant confined James Coon in his own motor vehicle and forced James Coon to contemplate his death while the defendant decided what to do with him. Certainly the defendant had more than ample time to reflect upon his actions, and there was absolutely no suggestion that he was under the influence of any intoxicants or the domination or pressure of another. Indeed it appears that the defendant was with his brother, his accomplice, and they were celebrating the defendant's brother's

> sixteenth (16th) birthday. This was an outrageous crime without even a scintilla of evidence suggesting moral or legal justification. This statutory aggravating circumstance was established beyond a reasonable doubt.

(R-514-15).

In Gamble v. State, 20 F.L.W. S 242 (Fla. May 25, 1995), this court, citing Jackson v. State, 648 So.2d 85 (Fla. 1994), noted that this aggravating factor is properly found when

> The killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), *and* that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), *and* that the defendant exhibited heightened premeditation (premeditated), *and* that the defendant had no pretense of moral or legal justification.

(20 F.L.W. S at 242). In Gamble, the evidence established days of advance planning and an elaborate scheme. This court has also recently stated that the heightened premeditation which is the element of this aggravator is "cool and calm reflection." Windom v. State, 20 F.L.W. S. 200 (Fla. April 27, 1995).

The rule of this court is that in order to prove the existence of the aggravator of "cold, calculated, and premeditated," the state must show a ***heightened*** level of premeditation establishing that the defendant had a careful plan or prearranged design to kill. Sweet v. State, 624 So.2d 1138 (Fla. 1933). Moreover, where the evidence regarding premeditation is "susceptible to . . . divergent interpretations," the state fails to meet the burden of establishing beyond a reasonable doubt the statutory aggravator of

"cold, calculated, and premeditated." Geralds v. State, 601 So.2d 1157 (Fla. 1992). In Geralds, the facts, as in the instant case, were equally susceptible of the planning of a burglary, rather than a homicide.

This court has stated that the "heightened" premeditation required to prove this statutory aggravator does not apply when a perpetrator intends to commit an armed robbery . . . but ends up killing the store clerk in the process. Porter v. State, 564 So.2d 1060 (Fla. 1990). The facts in this case fail to rise to the level of heightened premeditation, and appellant does not fall within the narrow class of persons eligible for the death penalty by reason of this statutory aggravator. The trial court's finding of this aggravator flies directly in the face of Zant v. Stevens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed. 2d (1983). In order to pass constitutional muster, the interpretation of this statutory aggravator must apply only to murders "more cold-blooded, more ruthless, and more plotting than the ordinary reprehensible crime of premeditated first-degree murder." Porter, supra, at 1064. Additionally, the mere fact that Coon may have been murdered "execution-style" cannot by itself support the cold, calculated and premeditated aggravator. Wyatt v. State, 641 So.2d 355 (Fla. 1994).

Where, as here, the record is void[7] of the kind of evidence indicative of the heightened premeditation necessary for

[7]This court must consider the fact that the only evidence regarding the details of the events leading up to the shooting came from appellant's conflicting statements.

application of this aggravating circumstance, this court cannot sustain the trial court's findings. For example in Jackson v. State, 498 So.2d 906 (Fla. 1986), where the appellant had planned the robbery and shot the victim, this court held that an intent to rob is not indicative of heightened premeditation. In the instant case, the facts presented by the state are equally susceptible of the conclusion that Alston intended only to participate in a robbery of James Coon, and did not intend to participate in a murder. Moreover, the premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. See Harry v. State, 522 So.2d 817 (Fla. 1988); Hardwick v. State, 461 So.2d 69 (Fla. 1984), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2369, 86 L.Ed. 2d 267 (1985). Finally, where there is no basis in the record for a finding that the homicide was committed in a cold, calculated manner with a heightened sense of premeditation, the finding cannot be sustained. In Hamilton v. State, 547 So.2d 630 (Fla. 1989), this court took the extra step of discussing the application of statutory aggravators in a case which was reversed for error during the guilt phase. It is clear from this court's ruling that facts supporting the statutory aggravators must be proved beyond a reasonable doubt, and cannot be based on speculation. *See also* Schafer v. State, 537 So.2d 988 (Fla. 1989), and cases cited therein.

Because the trial court erred in determining that the statutory aggravator "cold, calculated and premeditated" had been

proved beyond a reasonable doubt, this court should reverse the sentence of death and impose a life sentence, or should remand this cause for a new penalty phase proceeding.

ISSUE XVI:

THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION TO PROHIBIT THE IMPOSITION OF THE DEATH PENALTY BECAUSE OF THE MENTAL AGE OF THE DEFENDANT

Trial counsel filed a motion to prohibit the imposition of the death penalty because of the mental age of the defendant. (R-498). At the penalty phase, defense established through the testimony of Dr. Sherry Risch, a clinical psychologist, that although Pressley Alston was twenty-four years old, that his mental age, because of his borderline IQ, fell somewhere between thirteen and fifteen years. (T-1520). The state presented no evidence to rebut this testimony.

This court has held in Allen v. State, 636 So.2d. 494 (Fla. 1994), that the death penalty constitutes cruel or unusual punishment if it is imposed upon a defendant who was under the age of sixteen at the time the crime was committed. The Allen court held that a sentence of death is therefor prohibited by Article I, Section Seventeen, of the Florida Constitution. Although Pressley Alston was not a juvenile in terms of chronological age, his ***mental*** age was significantly lower than that of Jerome Allen, who was fifteen years old at the time of the murder. This court stated:

> We cannot countenance a rule that would result in some young juveniles being executed while the vast majority of others are not, even where the crimes are similar.

636 So.2d. at ____. The United States Supreme Court had previously addressed this issue in Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 222687, 101 L.Ed. 2d 702 (1988). The Thompson court noted

"punishment should be directly related to the personal culpability of the criminal defendant". 108 S.Ct. at 2698. In Thompson, the United States Supreme Court noted that "those under sixteen lack the experience, perspective, and judgment expected of adults." 108 S.Ct. at 2608. The Thompson court noted that "[t]hose individuals are more vulnerable, more impulsive, and less self-disciplined." The court pointed out that children have less capability to control their conduct and to think in long-range terms. In addressing the issue, the Thompson court stated "[t]heir crimes are not exclusively their fault; their crimes represent a failure of family, school, and the social system, which share responsibility for the development of our youth." 108 S.Ct. at 2698.

The Thompson court held "[i]t is 'to obvious to require extended explanation' that less culpability should be attached to a crime committed by a person under the age of sixteen, than to a comparable crime committed by an adult." 108 S.Ct. at 2688. "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." 108 S.Ct. at 2689.

Similarly, this court should not countenance a rule that would permit defendants with a mental age under the age of sixteen at the time the crime was committed to be executed. Because the imposition of the death penalty in Pressley Alston's case constitutes cruel and unusual punishment, this court should reverse

the imposition of the death penalty, and remand this cause for an imposition of a life sentence without parole.

ISSUE XVII:

THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE

In order to determine whether the death penalty is proportionate in a given case, this court must consider the totality of circumstances in that case, and compare it with other capital cases. Terry v. State, 668 So.2d. 954 (Fla. 1996), citing Porter v. State, 564 So.2d. 1060 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed. 2d 1106 (1991). This court must recognize that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation." Terry v. State, supra, citing State v. Dixon, 283 So.2d. 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 195 (1974). The death penalty must be reserved only for those cases where the most aggravating circumstances and the least mitigating circumstances exist. Terry v. State, supra, citing Kramer v. State, 169 So.2d. 274 (Fla. 1993). In Dixon, this court laid down the test "to extract the penalty of death for only the most aggravated, the most indefensible of crimes." 283 So.2d. at 8 (Fla. 1973).

In Terry, just as in the instant case, the record did not conclusively establish what actually transpired immediately prior to the victim being shot. In this case, no credible testimony was ever presented by the state to establish the chain of events occurring before the shooting. Alston made several conflicting--and some implausible--statements about what actually transpired; the state presented no other evidence on the question. There was

simply no proof beyond a reasonable doubt of any of the aggravating factors based on the nature of the crime.

Because three of the six aggravating factors found by the trial court in this case were not actually proved beyond a reasonable doubt, and because one of the three remaining aggravating factors merged with another, the only actual aggravating factors left are "previously convicted of a crime of violence." and "committed during the course of a felony." One of the prior crimes of violence relied upon by the state was an aggravated assault upon defendant's girlfriend, Gwennetta McIntyre. (T-1645). The other prior was also an aggravated assault--both were third-degree felonies. (T-1450-51).

Moreover, the mitigating factors proven by Alston far outweigh the two remaining aggravating factors. Alston established that he was raised by a very dysfunctional family, surrounded by acts of physical violence upon his mother and other family members, that his relationship with his natural father was not good, that he received no child support from his natural father, that his mother engaged in relationships with other physically abusive adult males, and that the police were often called to their residence. Alston established that he had mental disabilities and that he had difficulty in school, and had not gone been able to complete the ninth grade. Alston showed that he had good relationships with the mothers of his children and with his three children.

When the totality of the underlying circumstances in discretely analyzed, it is clear that the death penalty is

disproportionate in this case. Based on Terry v. State, supra, Sinclair v. State, 657 So.2d. 1138 (Fla. 1995), and Thompson v. State, 647 So.2d. 824 (Fla. 1994), this court should determine that the sentence of death is disproportionate in this case, and should remand this case for imposition of a life sentence without parole as to the charge of first-degree murder.

CONCLUSION

Because the trial court erred in denying the defense motion to suppress Alston's in-custody statements and erred in permitting the videotape of the "walk-over" to be shown to the jury, this cause must be reversed and remanded for a new trial. Additionally, errors in jury instruction during both the penalty and guilt phases warrant a new trial in both phases. The trial court erred in failing to instruct the jury that Alston was taking prescription psychotropic medication, further warranting a new trial.

The trial court erred in denying the defense request for a judgment of acquittal as to the armed robbery count. The count should be remanded with instructions to discharge Alston from this court. Moreover, the trial court erred in permitting Dr. Floro to testify as to matters of forensic odontology, and to testify about un-authenticated records. the trial court erred in permitting the state to present the victim impact testimony of Sharon Coon, erred in permitting the state to display James Coon's graduation photograph to the jury during penalty phase close. Additionally, the trial court's instructions to the jury as to victim impact testimony warrant a new penalty phase trial.

The state failed to prove the aggravating factors of "HAC," "CCP," and "elimination of a witness;" and the mitigation presented by appellant far outweighs any aggravation established by the state. The trial court erred in determining that these aggravating factors had been established and that death was the appropriate penalty. In addition, because a sentence of death is

disproportionate in this case, the sentence must be vacated and set aside, and a life sentence imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert A. Butterworth, Attorney General, the Capitol, Tallahassee, Florida 32301; and to Harry Shorstein, State Attorney, Fourth Judicial Circuit, Duval County Courthouse, 330 East Bay Street, Jacksonville, Florida, 32202, by regular United States Mail this 10th day of October, 1996.

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