IN THE SUPREME COURT OF FLORIDA

LORAN COLE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 87,337

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

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CONTENTS (Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

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PRELIMINARY STATEMENT

In referring to the record on appeal, the following symbols will be used:

(R) Consisting of Volumes I through VI; Pages 1-960 consisting of various pleadings and pretrial hearings.

(T) Consisting of Volumes VII through XVII; Pages 1-1597 consisting of Appellant's jury trial and penalty phase.

(SR) Consisting of the one volume supplemental record on appeal; Pages 1-43; consisting of three hearings and some pleadings.

STATEMENT OF THE CASE

On March 10, 1994, the State of Florida indicted Loran Cole, Appellant, and William "Chris" Paul, for the first-degree murder of John Edwards. The State also charged both Cole and Paul with two counts of armed kidnaping, two counts of armed sexual battery, and two counts of robbery with a deadly weapon. (R104-107) The trial court appointed the Office of the Public Defender to represent the indigent Loran Cole. (R111)

On April 13, 1994, the Office of the Public Defender filed a motion to withdraw as counsel citing an irreconcilable conflict of interest. (R159-60) On April 18, 1994, following a hearing (R1-13), the trial court granted the motion and appointed private counsel to represent Loran Cole. (R163-64,169)

On December 13, 1994, Loran Cole filed a *pro se* motion to dismiss counsel. (R208) At a December 29, 1994, hearing, Appellant subsequently withdrew his *pro se* motion to discharge counsel. (R220-32)

The trial court eventually granted Appellant's motion to sever his case from his codefendant, William Paul. (R18,276-77) On April 19, 1995, the State filed notice of their intent to seek habitual felony offender status in Appellant's case. (R313) On February 24, 1995, the trial court held a hearing on Appellant's motion to sever and his motion for continuance. (R327-56) The Appellant was not present at this hearing and the State expressed some concern. (R329) The trial court granted the motion for continuance. (R347) The trial court heard brief argument on the motion to sever and accepted case law submitted by counsel. (R348-56) The trial court delayed further argument until the Appellant could be present. On

March 1, 1995, the hearing on Appellant's motion to sever continued. (R357-381) The trial court took the motion under advisement and ultimately granted the motion on May 7, 1995. (R15,376)

On June 5, 1995, Appellant moved to continue the trial. (R416-19) On June 19, 1995, Appellant moved for closure of all pretrial proceedings. (R432-33) Appellant also moved for transcripts of the grand jury proceedings. (R434-41) Appellant also moved to compel the State to disclose evidence of mitigating circumstances. (R450-53) Appellant moved for a pretrial hearing to determine the admissibility of photographs. (R454-55,460-61)

Appellant also filed numerous pretrial motions dealing with the capital sentencing procedure. These included a motion to prohibit any reference to the advisory role of the jury (R456-57); a motion to elect and justify aggravating circumstances (R458-59); a motion to compel the State to furnish a penalty phase witness list (R468-69); a motion for statement of particulars regarding aggravating circumstances, theory of prosecution, and reasons that the State sought the death penalty (R470-75); several motions to declare certain provisions of Section 921.141, Florida Statutes, unconstitutional as applied (R605-10) {921.141(5)(a)}, {921.141(5)(f) (R611-15)}; {921.141(5)(c) (R616-20)}, {921.141(5)(b) (R621-26)}; {921.141(5)(h) (R629-42)}; {921.141(5)(g) (R643-47)}; {921.141(5)(i) (R648-61)}; {921.141(5)(d) (R664-69)}; {921.141(5)(e) (R676-84)}. Appellant also attacked the constitutionality of the statute based on the fact that a bare majority of the jury is sufficient to recommend death (R627-28); the failure to provide the jury with adequate guidance at the penalty phase (R662-63); the burden of proof or persuasion regarding mitigating circumstances (R670-75); and the restricted consideration of mitigating evidence (R685-88).

Appellant also filed a motion for change of venue accompanied by an memorandum of law. (R692-706) The trial court deferred ruling until a jury was selected, then denied the motion. (T7-10,409)

The trial court denied Appellant's motion to sever the murder charge from the other six counts. (R717-23;T21-25) The court also denied Cole's motion to sever the two counts of sexual battery. (T25-26)

Appellant moved to suppress evidence which was the result of a warrantless seizure following his arrest. (R724-25) Following a hearing, the trial court denied the motion. (T437-94) The State introduced the evidence at trial over Appellant's renewed objections. (T123-24,937,957-61,972-76)

A jury was selected, and the trial court denied Appellant's renewed motion for change of venue. (T409) During the trial, the court conducted several bench conferences outside the courtroom, in the hallway, without Appellant's presence. See, e.g., (T870-74,889-92,968-72, 1063-66) During the testimony of Mary Gamble, Appellant moved for mistrial which the court denied. (T889-92) Appellant unsuccessfully objected to the introduction of certain photographs at trial as well as a walking stick. (T723-39,752-56,1201-5) At the close of all of the evidence, the trial court denied Appellant's motion for judgment of acquittal. (T1194-96) The trial court denied two specially requested instructions. (T1214-23) Following deliberations, the jury returned with verdicts of guilty as charged on all seven counts. (R763-69)

The trial court overruled Appellant's objection and allowed the State to present victim impact evidence. (T1325-27,1333-38) Appellant presented several witnesses at the penalty

phase. The trial court denied many of Appellant's special requested jury instructions. (T1512-43;SR30-41)

During deliberations at the penalty phase, the jury asked several questions. (R789-92) Over Appellant's objection, the trial court re-read a portion of the victim's testimony at the jury's request. (T1574-92) Ultimately, the jury recommended death. (R793) On October 9, 1995, Appellant filed a motion for new trial. (R800-1) Appellant's memorandum in support of life. (R870-76) State's memo in support of death. (R881-88) PSI. (R889-912)

In sentencing Loran Cole to death, the trial court filed written findings of fact on December 20, 1995. (R913-22) The trial court concluded that the State proved four aggravating circumstances: (1) that Appellant had previously been convicted of another capital felony;[1] (2) that the murder was committed during the commission of a kidnaping;[2] (3) that the murder was committed for pecuniary gain;[3] and (4) that the murder was especially heinous, atrocious and cruel.[4] (R913-17) The trial court concluded that none of the statutory mitigating circumstances applied. (R917-18) The trial court discussed three categories of nonstatutory mitigation. (R918-21) The court rejected Appellant's contention that the codefendant received disparate treatment. (R918-19) The trial court did find that Appellant suffered from organic brain damage and mental illness. (R919-20) However, the trial court concluded that Appellant's evidence failed to establish that his judgment was impaired in any significant

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[1] §921.141(5)(b), Fla. Stat.

[2] §921.141(5)(d), Fla. Stat.

[3] §921.141(5)(f), Fla. Stat.

[4] §921.141(5)(h), Fla. Stat.

manner. Therefore, the trial court attached only slight to moderate weight to this mitigating factor. (R919-20) The trial court also found that Loran Cole was raised in a difficult and disruptive household. The court gave this mitigating factor only slight weight due to the absence of evidence that Appellant was physically or sexually abused as a child or that his deprived childhood substantially affected his adult behavior. (R920-21) The trial court ultimately concluded that the aggravating factors outweighed the mitigating circumstances and sentenced Loran Cole to die in Florida's electric chair. (R921-22,928-32) The trial court sentenced Cole to six life sentences on each of the noncapital convictions. (R933-38) The trial court justified the departure sentences based on the unscored capital conviction. (R926-27) The written sentences reflect the imposition of the twenty-five year minimum mandatory to each of the six sentences. The court ordered the six concurrent life sentences to run consecutive to the death sentence. (R940) The trial court ordered Appellant to pay cost of restitution which included funeral expenses, counseling expenses, car repair, and transportation for the victim's parents from Japan. (R923-25)

On January 19, 1996, Appellant filed a notice of appeal. (R941-42) This Court has jurisdiction.[5]

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[5] Art. V, §3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

Guilt/Innocence Phase

In February of 1994, Pam Edwards, an Eckerd College student, arranged to meet her brother, John Edwards, a Florida State University student, for a camping trip in the Ocala National Forest. On Friday, February 18, Pam drove up from St. Petersburg and John drove down from Tallahassee to meet in Ocala. Both then drove into the forest to Hopkins Prairie, picked a campsite, and began making camp. (T1092-1102) As they were attempting to pitch their tent, the Appellant, Loran Cole,[6] walked by their campsite carrying a camera with a large lens. Cole indicated that he was on his way to take some photographs and the three chatted. (T1102) Cole left to take photographs, but subsequently returned to the Edwards' campsite and helped them put up the tent. Cole then went to his own campsite and returned with a hatchet and demonstrated how to cut firewood. (T1102-3)

The Edwards made a fire, cooked, and ate dinner. (T1104-6) As they were finishing dinner, Cole and another man walked by the Edwards' campsite saying they were going to look at an alligator pond. (T1106) Cole later returned to the Edwards' campsite and introduced his friend William "Chris" Paul, as "Kurt." (T1107) Paul carried a large walking stick and wore a camouflaged jacket and hat with jeans. (T1107-8) Cole wore a black and blue checkered flannel shirt with a camouflaged jacket and hat with black pants. (T1108) The

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[6] The Edwards knew Appellant, Loran Cole, as both "K.C." and "Kevin." They knew the codefendant, William "Chris" Paul, as "Kurt" and later as "Chris." To avoid confusion, counsel will try to refer to Cole and Paul by their legal names.

four of them talked while sitting around the campfire.[7] Cole said that he had been camping in the area for quite some time. (T1108-11) He revealed that they were planning to stay through the weekend. (T1111-12) The Edwards explained that they were there to do some hiking. Cole claimed that he knew the trails in the area very well and they planned to hike together the next day. (T1112)

That evening the four of them decided to go to take some night pictures of the gators. Cole went to get his camera and John Edwards got his own out of the car. (T1112-13) Cole carried a large flashlight, Pam carried a small Maglite, and John carried a small rubberized flashlight. Pam could not recall whether Paul carried a flashlight or not. (T1114-15) As the four of them walked down the dark trail, Pam became concerned when Cole sometimes called "Kurt" (Paul) by the name of "Chris." She also found it peculiar that Paul lit up a cigarette.[8] (T1115-17) Pam also thought it odd that Paul started carrying his walking stick up on his shoulder. (T1119)

The group never found the crocodile pond. Pam and John Edwards disagreed with the two men about the proper return route to the campsite. (T1119-21) As Pam and John turned back toward the right trail, Cole jumped on Pam, wrapped his arm around her neck, and pulled her to the ground. Pam screamed for her brother, as Cole remained on top of her holding her down. She looked up and saw her brother wielding Paul's walking stick. John was apparently striking Paul. (T1121-22)

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[7] Pam noticed that Paul used a large knife to roast marshmallows. (T1188)

[8] Previously, both Cole and Paul claimed to be environmental and health conscious and decried smoking. (T1117-18)

Pam extracted herself from Cole's grasp and began running down the dark trail. Suddenly, something hit Pam in the back of the head. Cole then handcuffed her from behind and threw her on the ground. (T1122-24) He warned Pam, "if you move, you'll get shot." (T1124) Cole eventually went back down the trail and subdued John while Paul stayed with Pam. Paul had injured his hand during the physical confrontation with John. (T1124-26) Pam and John eventually ended up on their stomachs side by side on the ground. Cole and Paul told the pair that they wanted their cars so they could get out of state.

Cole took Pam's $20.00 from her pocket. The men also took much of the Edwards' jewelry. John and Pam were able to converse briefly before Cole took Pam up the trail while Paul remained behind with John. Paul complained to Pam that his head and hand hurt. Cole and Paul had both expressed anger that John had injured Paul. However, Paul reassured Pam that they would be okay if they cooperated. (T1125-29,1189-90)

Although Pam could not see her brother and Cole, she heard John grunt a few times before Cole rejoined Paul and Pam. (T1129) Cole announced that they were going to remain until John passed out. He called out to John a few times and Pam heard John moaning. After John became quiet, Cole went back to check on John. Cole announced that he was going to move John off the trail and tie him up.[9] Pam heard gagging sounds and Cole implied that John was vomiting. (T1129-30)

The men then took Pam Edwards back to her campsite. They got lost in the woods for

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[9] Before returning to tie up John, Cole escorted Pam out of sight, off the trail to use the bathroom. Paul remained on the trail in John's vicinity. When Pam returned a few minutes later, Paul was in the same spot and posture as when they left. (T1190-93)

a short while and, in the process, walked by John a couple of times. Pam could see that his feet were tied behind him and that he was not moving. (T1131-32) On the return trip to the campsite, the trio avoided a group of boy scouts as well as a van driving on the road. The men warned Pam to remain quiet when people were nearby. (T1132-33) Pam did not remember Paul carrying his walking stick back to the campsite. (T1148)

After returning to the Edwards' campsite, Pam thought about crying out to other campers who were nearby. She refrained because Cole had warned her that they would do further damage to her brother. Cole explained that they had done something to John's neck so that he would be paralyzed for a couple of hours but otherwise would be fine. Cole had also informed Pam that she would have to sleep naked so that she would not escape from the tent. (T1134-36) Cole moved Pam's handcuffs to the front so that she could drink some water. Cole got Pam's purple backpack out of her car and the trio walked five minutes to the men's nearby campsite. Cole tended to the cut on the back of Paul's head. The trio then got into the men's tent. The men made Pam take off her clothes but provided her a blanket. Cole then coerced Pam into an act of sexual intercourse. (T1136-41) Pam decided not to resist. (T1141) Paul and Cole then fell asleep until morning. Pam stayed awake all night and considered various plans for escape. (T1141-44) She remained cautious based on her fear for John's safety as well as her own. She had seen Cole with a knife, and the men also claimed to have guns. (T1143-44)

The next morning, the trio ate breakfast, before Cole left the campsite at approximately 8:30 a.m. He asserted that he was going to check on John. (T1144-46) Cole returned an hour or so later claiming that John had tried to wander away. Pam expressed concern, but

Cole reassured her. (T1146-47) Later that morning, Cole left the campsite again and returned in the afternoon with some toiletries and a bag of marijuana.[10] (T1147-49) Cole removed Pam's handcuffs and left them off the remainder of the weekend. (T1170) Pam and the two men smoked the marijuana.[11] (T1186-87) Pam, who had smoked pot before, over-indulged, became confused, and began hallucinating. (T1149-50,1187) Cole put on a condom and had sexual intercourse with Pam. He explained that he wanted to use a condom so there would be no evidence. (T1150-52) After the sexual act, Pam Edwards lost consciousness. (T1152) Later in the day, Cole left the tent and made dinner. (T1154-55) Pam heard other campers nearby but Cole warned her to be quiet. (T1155)

After eating dinner, the trio broke camp and walked with backpacks across the prairie. They eventually reached Pam's car parked by the road. (T1155-57) The men then took Pam into the woods and tied her to two trees. Using a bandana, they fashioned a loose gag in her mouth. (T1158-59) Saying that they would return, the men left the area. (T1159) Pam slept for the next several hours. She also managed to gnaw through most of her bindings, and by midnight she was free. Still concerned about John's well-being, she remained at that spot until daylight. (T1160-61) At first light on Sunday morning, Pam walked down the road until she was able to find the campground. She looked for her brother but was unable to locate him. (T1161-63) She eventually returned to the road where she flagged down a motorist and

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[10] Pam noticed many empty beer cans at the men's campsite. (T1186)

[11] Paul asked Pam to roll the joint, but she said she lacked that skill. (T1187)

explained her plight. He took her to a convenience store where she called the authorities. [12] (T555-67,1163-64)

The authorities took Pam Edwards back to the crime scene where she described what happened and they gathered evidence. (T583-635,653-58,673-98) They eventually located John Edwards' body. (T658-72) Dr. Janet Pillow, the medical examiner established the cause of death as blunt head trauma and a cut throat. (T748) There were at least three separate blows to the victim's head. (T744-45) Dr. Pillow concluded that Edwards remained alive less than thirty seconds after his throat was cut. (T747-48,757-58) Dr. Pillow had no way to determine whether Edwards was conscious at the infliction of any of the wounds. (T757)

The State also presented several witnesses who became acquaintances of both Cole and Paul in the months before the murder. The group met while all were living at the Salvation Army in Ocala. They included John Thomson, Danielle Zimmerman, and Mary Gamble. Zimmerman, Gamble, and Thomson lived with several children in a mobile home they rented in January, 1994, in the Ocala National Forest. (T801-8) After the murder, Cole and Paul turned up Saturday night at their friends' trailer. (T815-16) Paul explained his injuries by claiming that four men jumped them in the forest. (T815-16) During their weekend stay at the trailer, Cole and Paul drove a Nissan Sentra (Pam Edwards' car) until they wrecked it. They returned a few hours later driving a blue Geo (John Edwards' car). (T818-25) Cole and Paul left some of the Edwards' property at the trailer when they left the next day. The

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[12] The motorist and a female Lake County deputy were the first people that Pam came into contact with after her ordeal. Although there was some confusion about the matter, initial reports were that both Cole and Paul had raped her. (T567-83) At trial, the evidence indicated that Cole was the only one who had any sexual contact with Pam. (T1170-71)

property included a Coleman cooler, a bicycle rack, a flashlight, and other camping gear. (T819-22,854-55,860-61) The pair also had a pouch with several items of jewelry. During the weekend, all the adults drank much beer and smoked some marijuana. (T863-65) Their friends also confirmed that the pair carried knives and Cole occasionally carried handcuffs. (T813,877-79) Cole and Paul left the trailer on Sunday afternoon and never returned. Their friends saw on the news the next day that the pair had been arrested. (T895) After their arrest, Mary Gamble (Cole's jilted girlfriend) visited him in the jail several times. During one of those visits, Cole responded to Gamble's question and admitted that he raped Pam Edwards. She also asked him who had actually killed John Edwards. "He said he didn't know actually which one had actually done it, but he was the one that slit the throat." (T896-900) Gamble claimed that Cole told her that he did not kill Pam Edwards because he had "more sympathy for women."[13] (T900)

Penalty Phase[14]

Ann Cole, Appellant's mother refused to appear at the proceeding that would ultimately determine whether her own son lived or died. (T1357-59) The trial judge offered to have Ms. Cole arrested, but Loran Cole declined the offer. Appellant's father, Don Cole, described the household into which Loran was born as "miserable." (T1390-91) When Loran was born, he joined three half-sisters in the Cole household. (T1392) All four children were the product of

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[13] Gamble admitted that she and Cole once had a romantic entanglement that Cole chose to end. She was extremely bitter toward Cole and had expressed her hatred of him. (T903-4)

[14] The State presented no evidence of aggravating circumstances at the penalty phase. The State did present some devastating "victim impact" evidence. (T1333-46)

four different fathers. (T1366) One sister had no idea who her father was. (T1380) Don Cole described how Ann Cole would "grab something and start beating on [the children]." (T1394) Ann once used a broomstick to beat her daughter Cheryl "half dead."[15] (T1394)

Ann Cole had a serious drinking problem and was probably an alcoholic. (T1391-92) She drank throughout her pregnancy. (T1393) Don Cole testified:

> She was off, you know, all the time. Didn't know what she wanted to do. I don't know whether she was in drugs or alcohol or anything else. She would just fly off the handle in the middle of nothing.

(T1391) Don reported that he was an alcoholic at the time also. He and Ann would get drunk together which frequently led to physical altercations.[16] (T1380,1392)

The oldest daughter described Don Cole as a "mean drunk." (T1379) Once when the couple were separated, Mr. Cole broke into the house and beat his wife. (T1368) When Loran was approximately three years old, his father left the household. He tried to maintain contact with Loran but Ms. Cole prevented that. (T1393) Loran's father had seen him only twice since leaving the household. (T1397-1400)

Loran's mother was constantly in trouble with the law.[17] This resulted in several periods of incarceration for Ms. Cole. As a result, the children were shuttled off to various foster homes. The children were frequently split up among different foster homes spread out

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[15] Andrea, another daughter, naively described the children's discipline as "normal spankings." (T1374)

[16] The fights were described as "knock-down drag-out" fights. (T1380)

[17] Describing her rapid mood swings, Don Cole believed that Ann suffered from some type of mental problems. (T1396)

over several states. (T1368-71,1377-79,1382,1388,1394) The family splintered further when Loran was eight. When they moved from Iowa to Memphis, Loran's oldest sister stayed in Iowa to finish her senior year of high school. (T1366-67) The sister had not spoken to her mother in the sixteen years prior to Loran's trial. (T1381) She found that, "I deal better if I don't have to talk to her." (T1383) She believed it was a "great benefit" when she cut all ties with her mother. (T1387)

When Loran Cole was approximately sixteen years old, the Ohio Juvenile Court System placed him in a residential treatment home headed by Beverly Jean Halm. (T1401-3) Ms. Halm acted as a foster parent after Loran left a juvenile halfway house. (T1403) Ms. Halm described Loran as a "good kid." For the most part, Loran followed the house rules. Every now and then he got into trouble, like every teenager. (T1403-4) A couple of incidents involved marijuana and beer. (T1405-6)

Loran ultimately came to think of Ms. Halm as his surrogate mother. (T1407) Loran also acted like a big brother to Ms. Halm's sixteen-year-old daughter, Sheila. (T1412-13) He was very protective of her. He was frustrated that he was a little behind in his school work. Ms. Halm helped Loran catch up and he was doing fairly well. But the children at school found out he was living in a foster home/juvenile facility which caused problems. He was forced to withdraw from school. (T1403-5) Unfortunately, Loran was too young to qualify for the G.E.D. program. (T1405)

After a four month stay with Ms. Halm, Loran joined his mother, who was on probation in Florida. (T1405-6) Ms. Cole pressured her son to leave the home and get a job even though he was only fifteen or sixteen at the time. (T1409) Six months to one year later,

Loran returned to Ms. Halm's for a month long visit. (T1407) For the next ten years Loran kept in touch by telephone three or four times a year. (T1407,1410)

Dr. Robert M. Berland, one of only 139 board certified forensic psychologists in the country, evaluated Loran Cole. (T1415-23) In February of 1994, Dr. Berland administered the MMPI[18] to Loran Cole on two separate occasions. (T1450,1453) Berland concluded that Cole suffered from delusional paranoid thinking. (T1455) Cole also showed signs of "genuine mental illness" and psychotic mood disturbance. (T1456) These were the result of a biological defect in brain functioning over which Cole had no control. (T1456)

Dr. Berland reviewed an MMPI completed by another mental health professional in 1988. (T1461) That test reflected one of the highest "L" scores that Dr. Berland had ever seen.[19] (T1462) That score reflects a significant pattern of delusional paranoid thinking associated with some type of biological defect in brain functioning. (T1462) The 1988 test showed evidence of mental illness although Cole attempted to minimize his problems. (T1463-64)

Dr. Berland also conducted two clinical interviews of Loran Cole, one on February 28, 1994, and another on September 9, 1995. (T1458) The main purpose of this type of interview is to determine whether valid symptoms of mental illness exist and whether there is evidence of malingering or faking. (T1458) Dr. Berland also administered a WAIS[20] test.

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[18] Minnesota Multiphasic Personality Inventory. (T1427)

[19] Dr. Berland explained that an "L" score measures those little foibles that everyone has, but does not want to admit. (T1462)

[20] Wessler Adult Intelligence Scale. (T1477)

(T1466) The test revealed evidence of brain damage. (T1466-72) Dr. Berland concluded that at least some of Cole's mental illness may be the result of a head injury or genetics. (T1472-73)

Dr. Berland summarized his assessment of Loran Cole. Cole suffers from some type of mental illness in the class of psychosis. (T1473-74)

> ...The delusions and hallucinations are markers that tell us this disease is there.
>
> The disease has a panoramic effect, covering all of his thinking, his perceptions and his judgment. It will cloud them. It will alter his overall world perspective... when he is driving in traffic and someone cuts in front of him, he is going to put a different interpretation on that then most of the rest of us....And it's going to affect not only his perceptions of what's happening to him, but his judgments of how he needs to go about managing his life to be safe and to get what he needs in life.

(T1473-74) Due to incomplete data, Dr. Berland had no way to identify whether Cole's illness is a schizophrenic disorder or a schizo-affective disorder or a bi-polar disorder or organic delusional syndrome. (T1474) All have the same symptoms. (T1474-75) There was no evidence that Loran Cole had ever received medication for his mental illness. (T1500)

Dr. Berland explained the effect of alcohol and drugs on the psychological functioning of an individual already suffering from mental illness. (T1475-76) Psycho-active substances (including alcohol, marijuana, cocaine, LSD, as well as certain prescription drugs) cause an inflaming of the existing psychotic symptoms. (T1475) Even when the effects of intoxication wear off, the effect on the psychosis persists. (T1499)

SUMMARY OF THE ARGUMENTS

Point I: At both phases of Cole's trial, the jury attempted to determine who the real "bad actor" was. This was an even more important consideration at the penalty phase. During deliberations at the penalty phase, the jury asked the trial court to re-read a portion of Pam Edwards' testimony. Over defense objection, the court reporter re-read a critical portion of Edwards' direct examination without reading the pertinent cross-examination. Reading only this portion caused the jury to give undue emphasis to that particular excerpt. Minutes after hearing that portion of the testimony again, the jury returned with the unanimous recommendation to execute Loran Cole.

Point II: Several pretrial hearings and portions of the trial were conducted outside Loran Cole's presence. At several of these hearings/conferences, Appellant's absence resulted in a denial of his constitutional right to a fair trial. These involuntary absences violate this Court's holdings in Francis v. State, 413 So.2d 1175 (Fla. 1982) and Coney v. State, 653 So.2d 1009 (Fla. 1995).

Point III: At the penalty phase, the jury heard what a wonderful person John Edwards was before Loran Cole killed him. The inflammatory testimony aptly demonstrates why victim impact evidence should not be admitted in capital trials. The decision-making process was inappropriately skewed. This Court should recede from Windom v. State, 656 So.2d 432 (Fla. 1995). Additionally, the testimony even exceeded the proper scope of relevant victim impact evidence as set forth by this Court.

Point IV: The State failed to prove beyond a reasonable doubt that the murder was

especially heinous, atrocious and cruel. The evidence is just as consistent that the victim was unconscious after the first blow and did not suffer the requisite amount. Additionally, Appellant lacked the necessary torturous intent. The weight to be given the aggravating circumstance dealing with prior violent felony convictions is lessened by the fact that the convictions were contemporaneous to the murder. Appellant had no prior violent history whatsoever. The trial court also erred in finding the pecuniary gain factor and felony murder factor. Furthermore, the trial court erred in its treatment of the mitigating evidence. A proper weighing of the aggravators and mitigators should result in a life sentence.

Point V: Mary Gamble, a woman Cole had met at the Salvation Army, testified that she was snooping around the car that Cole and Paul drove, because she knew "some history on [Cole]." The testimony clearly revealed to the jury that Loran Cole had a prior criminal record that Gamble knew about. The evidence constituted character assassination. The timely motion for mistrial should have been granted.

Point VI: Due to the pervasive pretrial publicity, the jury pool was clearly tainted. Despite the fact that a jury was picked with relative ease, all of the potential jurors had heard about the case. Several admitted that they could not be fair and were excused. The other jurors' conclusory assurances that they could be fair is not determinative of the matter. The trial court should have granted the motion for change of venue.

Point VII: The introduction of gruesome photographs over Appellant's objections constitutes reversible error in this case. The photographs in question were in color and were extremely gory. One photograph (State's 55) was an autopsy photograph that depicted the under surface of the right side of the scalp pealed back over the cranium. The medical

examiner admitted that the objectional photographs were not necessary for her testimony, but would be helpful. Any slight probative value was outweighed by the substantial prejudice. The prejudice was compounded at the penalty phase when the prosecutor used several of the objectionable photographs during summation. The jury requested three of the objectionable photographs during their deliberations at the penalty phase.

Point VIII: Appellant contends that evidence seized from his person at the time of his arrest should be suppressed. The police had a detailed description of the two men. However, the police arrested the men before they even saw the defendants' faces. From behind, the police could see only a few aspects of a very general description. Their observations did not give the police probable cause. The fruits of the illegal arrest should be suppressed.

Point IX: When the State failed to connect a four foot long oak stick to the crime, defense counsel objected to its admission. The State failed to establish any relevance. The evidence should have been excluded. Any slight probative value was outweighed by the substantial prejudice.

Point X: Appellant contends that the trial court should have instructed the jury using the special requested jury instructions at the guilt and the penalty phase. The requested instructions at the guilt phase dealt with independent act and a taking of property after the murder was complete. The jury could have concluded that the evidence supported both theories of defense. Furthermore, the requested penalty phase instructions were correct statements of the law that were not covered by the standard instructions. The requested instructions were necessary to guide the discretion of the jury.

Point XI: Over objection, the State refused to choose between premeditated and felony

murder as a theory of prosecution. The trial court instructed the jury on both theories. The evidence supports felony murder, but not premeditated murder. Since the jury's verdict is ambiguous as to theory, it must be set aside.

Point XII: The trial court incorrectly ordered restitution amounts. The prosecutor conceded Cole's inability to pay. Cole received no notice of the restitution hearing. Furthermore, the State presented no evidence as to the proper amount of restitution. Finally, the trial court erred in ordering the Appellant to pay the travel expenses for the victim's parents to travel from Japan to Florida for the trial. This type of expense is not proper restitution.

Point XIII: The trial court illegally imposed a mandatory minimum of twenty-five years imprisonment without possibility of parole on the six noncapital offenses. The statute does not permit such a sentence for these offenses. Additionally, the oral pronouncement of sentence omitted this particular provision and must control.

Point XIV: Cole makes numerous attacks on the constitutionality of Florida's death penalty statute.

ARGUMENTS

Loran Cole discusses below the reasons which, he respectfully submits, compel the reversal of his convictions and death sentence. Each issue is predicated on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, and 22 of the Florida Constitution, and such other authority as is set forth.

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING A PORTION OF THE TESTIMONY OF THE KEY STATE WITNESS TO BE READ BACK TO THE JURY WITHOUT ALSO READING THE PERTINENT CROSS-EXAMINATION.

After hearing evidence and argument during the penalty phase, the jury retired to decide whether Loran Cole would be sentenced to life imprisonment or die in Florida's electric chair. During deliberations, the jury submitted a written question asking, "Can we see... [Pam's] testimony regarding John & having difficulty with dinner?" (R789;T1574-75) Defense counsel objected contending that focusing on such a small fragment of testimony would result in undue emphasis. (T1575) Defense counsel pointed out that the requested testimony was a minuscule portion of five solid days of testimony and evidence. (T1575) Pam Edwards had testified during the guilt phase, not during the penalty phase where the question occurred. Appellant asked the court to instruct the jury to rely on their own recollection. (T1575) The trial court ignored Appellant's objection. The judge called the

jury back in and explained one logistical problem[21] in granting their request, but let the jury decide if they wanted the testimony read. The jury persisted in their request. (T1578)

Appellant renewed his objection to the testimony being re-read and "especially to just re-reading a short excerpt dealing with just what they asked." (T1580) Defense counsel explained:

> Because it's apparent from the question, or it may be the situation that they are trying to fix in their minds a time sequence as to when what happened. And I think it would be misleading...my concern is that to do this would place undue emphasis, unless the whole scenario of the trail incident is re-read, including direct and cross and redirect.
>
> THE COURT: If there is any direct -- I mean cross as related to this, I want her to read that. But I understand there was none.
>
> MR. GLEASON [defense counsel]: Well, there was cross as to what happened when on the trail.
>
> THE COURT: Okay.
>
> MR. GLEASON: There was some of that.
>
> THE COURT: We'll make inquiry first, if that's the purpose of their inquiry, to find out the sequence of events. Or if they want to know if they heard some sounds. Or something like that.

(T1580-81) The court reporter located the requested testimony (or at least what was believed to be the requested testimony). The trial court then announced that he would allow the court reporter to read that portion to the jury over the objection of defense counsel. (T1583) The

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[21] The court reporter who reported that portion of the testimony had gone home for the evening, but she could return within the hour. (T1575-78)

jury returned with a clarification of their request:

> Please read after John's last statement of apology, starting
> -- then saying "I'm sorry, Pam, I got you in this position"
> -- something like that.

(T1584) The court reporter ultimately read back six pages of testimony by Pam Edwards, the surviving victim.[22] (T1586-92)

The portion of the testimony dealt with the period of time after Cole and Paul had jumped Pam and John Edwards. Specifically, after both were subdued, Cole took some money and jewelry from both of them. Pam then described how she was moved up the trail a short way and, while Paul stayed with her, Cole apparently went back down the trail where John was. Although Pam could not see, she heard Cole asking John why he had hurt Paul. She heard John grunt a few times before Cole returned and announced that they would remain until John passed out. (T1589-91) Cole called back to John a few times, but John just moaned. (T1591) After John became quiet, Cole announced he would move John off the trail and tie him up. After Cole returned again, Pam heard a gagging sound from John. Cole implied that John was vomiting. (T1591-2) Within minutes of hearing the testimony read back, the jury returned with a unanimous recommendation that Loran Cole be executed rather than spend the rest of his life in prison. (T1592)

Florida Rule of Criminal Procedure 3.410 provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they should be conducted into the

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[22] The trial court reneged on his promise to make inquiry into the jury's concerns, i.e., the sequence of events or the sounds Pam heard.

> courtroom by the officer who has them in charge and the court may give them such additional instructions or it may order such testimony read to them. Such instruction shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

It is within the trial court's discretion to have the court reporter read back testimony of a witness upon the jury's request; but the judge's discretion must be properly exercised. DeCastro v. State, 360 So.2d 474 (Fla. 3d DCA 1978) and Rodriguez v. State, 559 So.2d 678 (Fla. 3d DCA 1990). Generally, the better course of action is to allow reading of testimony where requested. United States v. Holmes, 863 F.2d 4 (2d Cir. 1988). The trial court's discretion in whether to grant a jury request to review testimony is based upon two limited considerations: (1) that requests to read testimony may slow the trial where the requested testimony is lengthy; and (2) that reading only a portion of the testimony may cause a jury to give that portion undue emphasis. United States v. Rabb, 453 F.2d 1012 at 1013-14 (3d Cir. 1971).

In this case, the first consideration was, for the most part, inapplicable. The jury had one more decision to make, that being whether Loran Cole should be executed. Although it took a minimum of thirty minutes for the court reporter to return to the courthouse, the jury persisted in their request even when the delay was explained.

The second consideration is clearly present. The jury was apparently very interested, as they should have been, in who actually wielded the knife that cut John Edwards' throat. The question to be resolved at the penalty phase was whether Loran Cole should be punished more harshly than Chris Paul, his codefendant who received life rather than death. At the time of their arrest Monday morning, it was Chris Paul, not Loran Cole, who possessed a

knife stained with blood consistent with John Edwards' blood. (T965-67,1080-82,1247-8) Pam Edwards admitted she did not see who cut her brother's throat. (T1191) There was much focus on which codefendant had possession of various knives while camping. E.g. (T1188) The key issue at the penalty phase was who the "bad actor" actually was.

The jury returned with a unanimous recommendation for the imposition of the death penalty within minutes of hearing the court reporter read back Pam Edwards' description of what happened on the trail Friday night. The pertinent portion of Pam Edwards' cross-examination that should have also been read back to the jury reveals that Pam was stunned and dizzy from the blow to the back of the head (T1188-89); that Chris Paul was apparently cursing John Edwards for injuring him (T1189-90); that Loran Cole took Pam Edwards to the bathroom just off the trail while Chris Paul stayed in the area where John was (T1190); and that Pam Edwards did not actually see who cut her brother's throat. (T1191) It would have taken very little time to read these few pages of pertinent cross-examination. Without reading it, the likelihood increases that the jury gave undue emphasis to just those points that the State had elected to elicit on direct examination. "The first to present his case seems right, till another comes forward and questions him." Proverbs 18:17.

It was unreasonable and unfair to re-read only the portion of the direct testimony of the main witness against Appellant. Denying defense counsel's request to read the pertinent cross-examination resulted in an unfair determination that Loran Cole must die. Appellant's constitutional right to a fair trial was abridged. Art. I, §16, Fla. Const.; Amends. VI and XIV, U.S. Const.

POINT II

THE TRIAL COURT ERRED IN CONDUCTING PORTIONS OF THE TRIAL WHERE THE APPELLANT WAS INVOLUNTARILY EXCLUDED RESULTING IN A DENIAL OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

Florida Rule of Criminal Procedure 3.180 states that "the defendant shall be present... at any pretrial conference, unless waived by the defendant in writing. A defendant's absence with no express waiver is error." See Garcia v. State, 492 So.2d 360 (Fla. 1986). This Court has held that a defendant's involuntary absence may be harmless error where his presence would not have assisted the defense in any way. Id.

> [The defendant] has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence.

Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982) [citations omitted]. In Coney v. State, 653 So.2d 1009 (Fla. 1995), this Court extended Francis and held that a defendant has a right to be physically present at the immediate site (in that case, at sidebar) where pretrial juror challenges are exercised.

Loran Cole was involuntarily absent from several pretrial hearings as well as during portions of his capital trial. On February 24, 1995, Appellant was involuntarily absent from the hearing on his motion to sever and motion for continuance. (R327-56) The State expressed some concern about Cole's absence. (R329) The trial court granted Appellant's

motion for continuance. (R347) The court heard brief argument on the motion to sever and accepted case law submitted by counsel. (R348-56) The court delayed further argument until Loran Cole could be personally present at a future date. On March 1, 1995, the hearing on Appellant's motion to sever continued. (R357-81) The record does not reflect Appellant's presence at that hearing either. The trial court took the motion under advisement. (R376) The trial court ultimately granted the motion on May 17, 1995. (R18)

Appellant was also excluded from a hearing within a hearing on May 17, 1995. (R14-37) Cole was present for much of the status conference. However, the court granted the motion to sever Cole's case from Paul's case. (R18) Shortly thereafter, Paul's lawyer asked for a hearing outside of Cole's presence regarding certain threats that Cole allegedly made against his codefendant, Paul. (R30-37) Although Cole was excluded from this portion of the hearing, the trial court made a point of inviting Mr. Gleason, Cole's lawyer. (R30) Cole was not present and thus was not able to refute the allegations. Additionally, there was further discussion of Cole's previously filed *pro se* motion to disqualify his defense counsel.[23] (R33-34)

At the June 9, 1995, hearing on Appellant's motion to continue, the record does not reflect Loran Cole's presence. (R49-76) Appellant was also apparently not present at the numerous status conferences held in his case. In his *pro se* motion to dismiss counsel, Cole cited, *inter alia*, defense counsel's failure to arrange his presence at the status conference

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[23] Appellant concedes that the discussion was not of great import or significance. In fact, Paul's lawyer simply wanted to clear up a joking reference made at the prior hearing concerning defense counsel's membership in subversive vigilante groups.

hearings. (R208) Clearly, Loran Cole wanted to be present at every stage of his prosecution.

Perhaps most egregious were the numerous conferences held in the hallway outside the courtroom without Loran Cole's presence. The acoustics in the courtroom were not the best. As a result, the parties frequently stepped out in the hallway for bench conferences and discussions outside Cole's presence. See, e.g., (T870-74) [motion in limine conference where Mary Gamble instructed not to mention contents of Cole's letters to her]; (T889-92) [Appellant's motion for mistrial after Gamble mentions Cole's "history" (Point V) denied and curative instruction declined]; (T968-72) [conference concerning how to answer juror's question regarding which codefendant possessed certain evidence at the time of his arrest]; and (T1302-10) [discussion of trial court's mistake in reading the jury instructions].

But the most egregious involuntary absence occurred at a lengthy "bench conference" near the close of all of the evidence. In the guilt/innocence portion of the trial, defense counsel called one witness whose entire testimony consists of less than three pages.[24] (T1012-15) The witness was taken out of order to accommodate his traveling schedule and the State's budget. The State called two more witnesses (a latent fingerprint examiner and a FDLE microanalyst). (T1017-60) The prosecutor evidently became concerned that future review of this transcript would indicate that defense counsel gave up final summation to call one brief witness. (T1063) The prosecutor stated that he deliberately elicited testimony concerning codefendant Paul's fibers during the testimony of the FDLE microanalyst, since Appellant had already called one witness out of order. If defense counsel had not done so, the prosecutor

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[24] Appellant called John Thomson who testified that Mary Gamble never mentioned that Cole had admitted to her that he cut John Edwards' throat.

stated that he would have refrained from questioning about the fibers which would have forced Appellant to call the witness during his case-in-chief. The court understood but asked, "Let's go in the hall." (T1063) Again outside the presence of Loran Cole, the trial court questioned defense counsel about his tactics in calling only one witness, and a brief one at that.

> THE COURT: Any reason why you didn't ask that question if the witness was there, even if outside the scope of that question?
>
> The question you asked of that one witness about did he ever report the slitting of the throat to that one particular witness.
>
> * * *
>
> MR. GLEASON [defense counsel]: Why didn't I ask it before? I couldn't have, properly.
>
> * * *
>
> THE COURT: I may have let you though.
>
> MR. KING [the prosecutor]: If you would, if you would have let him done that, I would have stayed completely away from the fiber of Mr. Paul and he would have had to introduce the close and called a witness to introduce the close.[25]
>
> THE COURT: I want to make sure for the record.
>
> * * *
>
> THE COURT: I want it to be on the record because -- can you agree -- I mean, would you say that that was not a tactical error?

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[25] The FDLE microanalyst found one black cotton fiber in Pamela Edwards' pubic combings that was consistent with the fibers from Paul's shirt. (T1051-56)

MR. KING: That was a tactical decision he had to make.

THE COURT: And it is something that prudent minds would have made in this case.

MR. KING: Yes.

* * *

THE COURT: I hate these 3.850 motions that come up ten years from now and they bug everyone of us and I don't want any question on these things and I know they're going to come up. If you do that, they're going to come up. So we'll get that on the record, just in case.

MR. KING: And I recognize that it is tactics....

(T1064-65) Loran Cole missed this "conference."

A defendant has an absolute right to be present at all stages of his capital trial. A defendant's involuntary absence may be harmless error where his presence would not have assisted the defense in any way. Garcia v. State, 492 So.2d 360 (Fla. 1986). The trial court and the prosecutor seemed very concerned about defense counsel's tactics. The prosecutor especially appeared anxious to explain why defense counsel would have been forced to call at least one witness during his case-in-chief. It appears to undersigned counsel that, considering the wide scope of permissible cross-examination, both areas of questioning could have been asked on cross-examination of both witnesses (John Thomson and the FDLE microanalyst). But the prosecutor and the trial court seemed very eager to "get the story straight" on the record outside Loran Cole's presence. Ten years from now, when the trial court is presiding over one of those (Loran Cole's) 3.850 motions that he hates so much, the prosecutor will be able to point to the record to explain defense counsel's "tactical decision." The prosecutor,

the defense counsel, and the judge will all have their memories refreshed concerning the "bench conference" that was held in the hallway outside Cole's presence. Loran Cole will have no such opportunity. He will not be able to remember the strategy discussion from which he was excluded.

This Court should reverse Appellant's convictions and sentences and remand for a new trial. Cole was involuntarily excluded from portions of his capital trial. The practice smacks of unfairness. At the very least, this Court should instruct Florida trial judges to cease and desist this practice. Defendants have a desire and a right to be present at all stages of their capital trials.

POINT III

THE JURY'S RECOMMENDATION AT THE PENALTY PHASE WAS TAINTED BY HIGHLY INFLAMMATORY AND IMPROPER VICTIM IMPACT EVIDENCE.

The parties discussed the admissibility of "victim impact evidence" prior to the commencement of the penalty phase. (T1325-28) The State cited the statute, this Court's recent rulings, and the United States Supreme Court holding in Payne v. Tennessee[26] when the trial court asked:

> Has that been enunciated in the case?
>
> * * *
>
> The worth of the victim to the community is proper consideration?
>
> MR. KING (Prosecutor): Yes, sir.
>
> THE COURT: Over Defense objection, I'll overrule.

(T1326-27)

The State's first witness at the penalty phase was Brock T. Fallon, the victim's former teacher at Kadena High School in Okinawa, Japan. (T1333-38) Loran Cole's victim, John Edwards, was one of his favorite students. He really liked him. John was obviously very smart. In Mr. Fallon's advanced placement physics class, John was his best student. Edwards got the highest grade in oceanography. He was a basketball star and was extremely intelligent. (T1333-38) Edwards made 730 (out of 800) on his math SAT. His girlfriend was also very

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[26] Payne v. Tennessee, 501 U.S. 808 (1991).

popular and bright. At the time of trial, she was a student at Texas A&M where she had a 3.8 grade point average her freshman year. (T1338) Mr. Fallon explained to the jury that if John Edwards had not been murdered, he would have graduated college with an engineering degree and then been awarded a Ph.D. following graduate school in engineering. (T1338)

Mr. Fallon explained that John Edwards was more than just a bright and popular student. Although he was one of the "in crowd," Edwards went out of his way to befriend and help the stupid, non-athletic, unpopular students, i.e., the outcasts. (T1338) Edwards was very interested in metaphysics and philosophy. He often wondered what happens when you die. He wondered about moral right and wrong. He enjoyed reading C. S. Lewis as well as news about foreign affairs. (T1341-43)

Edwards' murder hit Mr. Fallon hard. He had looked forward to John returning to see him at Christmas for many years to come. (T1344-45) Mr. Fallon described how a female student collapsed in his arms when she heard the tragic news. The high school held a memorial service at a large local chapel. The school's chapel was too small to accommodate all who wanted to attend. John's basketball jersey number was retired at the service. (T1343-45)

Mr. Fallon concluded his testimony with a summary of what "our community, our society," had lost when John Edwards was killed.

> ...I grew up loving the Stars and Stripes. I know that we have problems racially and other areas, but we can solve them, or we're trying to solve them. And I feel like the Stars and Stripes lost something.
>
> You know, I speak of him in superlatives...But he really was like that.

(T1345) As a teacher, Mr. Fallon completed enumerable college transcripts for students. He explained that colleges asked the high school teachers to rate the students in various categories such as character, tenacity, and ability to excel in college. (T1345) The choices in each category are (1) fair, (2) good, (3) superior, and (4) "one of the best few that I have ever had." (T1346) Mr. Fallon explained that when a teacher checked the last category (one of the best) they had to write an explanation. He told the jury, "That's what I checked for John. I really did. I really did." (T1346) Defense counsel declined cross-examination. (T1346)

Loran Cole's jury heard the above testimony and unanimously urged Cole's execution. It is not surprising considering the highly emotional and inflammatory testimony that the jury heard from Mr. Fallon. The introduction of Fallon's testimony, over defense objection, unconstitutionally tainted the jury's verdict at the penalty phase. This is exactly the type of evidence that prosecutors are presenting to juries throughout this state after this Court's holding in Windom v. State, 656 So.2d 432 (Fla. 1995) and the enactment of Section 921.141(7), Florida Statutes (1995). In Windom, this Court concluded:

> ...We do not believe that the procedure for addressing victim impact evidence, as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators...or otherwise interferes with the constitutional rights of the defendant. Therefore, we reject the argument which classifies victim impact evidence as a nonstatutory aggravator in an attempt to exclude it during the sentencing phase of a capital case....The evidence is not admitted as an aggravator but, instead,...allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death."

Windom, 656 So.2d at 438. Prior to Payne v. Tennessee, 501 U.S. 808 (1991), the Eighth

Amendment to the United States Constitution prohibited the introduction of victim impact evidence at the sentencing phase of a capital murder trial. Booth v. Maryland, 482 U.S. 496 (1987). Booth correctly pointed out that the admission of such evidence creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner. The focus is not on the defendant, but on the character and reputation of the victim and the effect on his family, factors which may be wholly unrelated to the blameworthiness of a particular defendant. Booth pointed out that the presentation of this type of information can serve no other purpose then to inflame the jury and to divert it from deciding the case on relevant evidence concerning the crime and the defendant. Of course, Payne overruled Booth. This Court settled the question in this state by its holding in Windom. Appellant respectfully submits that this Court's holding in Windom was erroneous and urges this Court to recede from Windom. Additionally, Appellant contends that the evidence in this case exceeded the proper bounds of victim impact evidence.

Initially, Appellant points out that it is very difficult to accurately assess the testimony from the cold, black and white pages contained in this record on appeal. Appellant wishes that this Court could view a videotape of the testimony in judging its impact on the jury. There is no doubt that John Edwards was a wonderful human being. He probably never did anything immoral in his lifetime. Mr. Fallon told the jury that Edwards would have eventually earned his engineering Ph.D. There is no telling how valuable John Edwards would have proven to society in general. Instead, his young life was snuffed out by two derelicts whose last address was the Salvation Army in Ocala. This is the type of weighing of human life that inflames the sentencing jury and infects the entire process. Rather than making a reasoned judgment from

the pertinent evidence and applicable law, the jury, to a man, wanted to kill Loran Cole. Who could blame them?

The evidence shows the contrast between the victim's life and Appellant's life. John Edwards had a caring family who loved him. He was intelligent and was pursuing his higher education. Loran Cole had a brain that did not work right. His dysfunctional family abused and abandoned him. Loran Cole never had a chance. John Edwards' chance at life was cut short. These considerations should not be the factors that determine whether Loran Cole lives or dies. The State's introduction of the extremely inflammatory testimony crushed any chance that Loran Cole would get a fair determination of a proper punishment. Any slight probative value was outweighed by the substantial prejudice. §90.403, Fla. Stat. (1995). Appellant urges this Court to recede from Windom.

Furthermore, the testimony exceeded the parameters of proper victim impact evidence in Florida. In Windom, this Court held that victim impact evidence must be limited to that which is relevant as specified in the statute. This Court held that the State properly presented evidence that Windom's victim's two sons were deeply affected by the murder. However, the evidence that the other children in the community were afraid following the shootings was improperly admitted. Such evidence was not limited to the victim's uniqueness and the loss to the community's members by the victim's death. Similarly, at Loran Cole's penalty phase, Mr. Fallon invoked the "Stars and Stripes" enlarging the community to the entire United States. Mr. Fallon implied that, if he had lived, John Edwards might of had a hand in solving this nation's racial problems. (T1345) "I know that we have problems racially in other areas, but we can solve them, or we're trying to solve them. And I feel like the Stars and Stripes

lost something." The objectionable, inflammatory evidence skewed the decision-making process. The State's case placed a thumb on the scales of justice. Loran Cole never had a chance.

POINT IV

THE IMPOSITION OF THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE WHERE THE TRIAL COURT RELIED UPON INAPPROPRIATE AGGRAVATING CIRCUMSTANCES, FAILED TO FIND VALID MITIGATING CIRCUMSTANCES, AND ERRED IN WEIGHING BOTH.

A. The trial court erred in instructing the jury and also in concluding that the murder was especially heinous, atrocious, or cruel.

Appellant objected to any instruction at all on this particular aggravating circumstance contending that the evidence did not support it. (T1523-24) The trial court overruled that objection and ultimately concluded that the murder was especially heinous, atrocious, or cruel. (R915-17) One aspect that the trial court considered was the victim's "concern and understanding of the developing events...Although faced with personal danger and physical harm, John's only comment was 'I'm sorry, Pam.'" (R915) The trial court obviously accepted the State's contention that, "John understood the implications of the situation that had developed as he expressed to his sister his regret of getting them into the situation." (R885) Appellant submits that the court's finding of this particular aggravating circumstance misinterprets the evidence. The State failed to meet their burden of proving this aggravator beyond a reasonable doubt.

1. The State failed to prove that the victim was conscious.

The State failed to meet their burden of proving beyond a reasonable doubt that John Edwards endured the requisite suffering required for the finding of this particular aggravating factor. Edwards died as a result of blunt head trauma and a cut throat. (T748) In all

likelihood, the blows to the head occurred prior to (perhaps just prior, almost contemporaneous) the cutting of his throat. (T748) Dr. Pillow conceded that there was absolutely no way to determine if Edwards was conscious during the infliction of any of his wounds. (T757) Edwards could have been rendered unconscious after the very first blow to the head. (T747) Even if he were conscious at the time his throat was cut, he would have remained so for thirty seconds, at the most. (T757-58) He would be dead within a few minutes of losing consciousness. (T747-48,757-58)

This type of argument admittedly sounds grotesque. However, this Court must look at the cold, hard facts and controlling caselaw while considering whether the State proved **beyond a reasonable doubt** that the victim "suffered enough" (and that the defendant deliberately intended to inflict a high degree of pain) for the application of this aggravating circumstance. Richardson v. State, 604 So.2d 1107 (Fla. 1992) [crime must be **both** conscienceless or pitiless **and** unnecessarily torturous to the victim].

In Elam v. State, 636 So.2d 1312 (Fla. 1994), this Court rejected this aggravator where the victim was beaten to death but was rendered unconscious in a very short period of time. In Rhodes v. State, 547 So.2d 1201 (Fla. 1989), the trial court improperly found the circumstance for the strangulation murder of a semi-conscious victim. See also, Scott v. State, 494 So.2d 1134 (Fla. 1986) [victim pinned under car and suffocated but no evidence the victim was conscious].

2. The victim was unaware that he was about to die.

John Edwards clearly knew that he had made a mistake in convincing his sister to accompany Cole and Paul on the night hike. The situation had deteriorated and John Edwards

knew that they were in trouble. However, John Edwards had no clue that the assailants were going to hurt him. In fact, the pair reassured Pam that the brother and sister would be okay if they cooperated. (T1125-29) Such reassurances are sufficient to militate against a finding of this circumstance. See, e.g., Robinson v. State, 574 So.2d 108, 112 (Fla. 1991) [no evidence that the victim labored under the apprehension that she was to be murdered where codefendant assured her on several occasions that they did not intend to kill her and planned to release her.]

3. Appellant did not intend for Edwards to suffer.

Cole was angry at Edwards for hurting Paul during their fight. This also militates against finding this circumstance. In Porter v. State, 564 So.2d 1060 (Fla. 1990), this Court rejected a finding of the circumstance since the murders were crimes of passion rather than designed to be painful. In Buford v. State, 403 So.2d 943 (Fla. 1981), this Court held that killings committed in an "emotional rage" were not heinous, atrocious, or cruel. Cole's mental and emotional defects militate against the application as well as the weight, if found, to be given this aggravating circumstance. See, Michael v. State, 437 So.2d 138 (Fla. 1983); Jones v. State, 332 So.2d 615 (Fla. 1976); and Huckaby v. State, 343 So.2d 29 (Fla. 1979). Additionally, Cole's ingestion of alcohol militates against a finding of this circumstances. See, e.g., Holsworth v. State, 522 So.2d 348 (Fla. 1988).

The trial court focused inappropriately on the fact that John Edwards was alive at the time his wounds were inflicted. While this is true, it is completely irrelevant if Edwards were unconscious, which the medical examiner could not rule out. The trial court incorrectly states that, "Dr. Pillow testified that John lived for several minutes while suffering from air hunger

or the inability to breath." (R916) The testimony reveals that Dr. Pillow admitted that Edwards would not have suffered the sensation of "air hunger" if he were unconscious at the time. (T749) Dr. Pillow conceded that she had no way of determining if Edwards was in fact conscious or unconscious. (T747,757) Therefore, it is abundantly clear from the record that the trial court was absolutely wrong in writing, "John was conscious for several minutes while he gasped from [sic] air from a severed windpipe slowly filling with blood." (R916)

The trial court's reliance on Pam hearing her brother make "gagging sounds" is also misplaced. Any pathologist worth his salt knows that a person can no longer "cough" in the traditional sense once your trachea (airway) is cut.[27] That is precisely what happened to John Edwards. (T739-43) Any "gagging" sounds heard by Pam Edwards would have been the lungs blowing blood as it drained into his trachea. This sound would be created if the victim were still breathing at the time. However, a victim can breath and still be unconscious. Hence, the trial court's reliance on these "gagging sounds" is misplaced.

B. The weight of the "prior violent felony conviction" aggravator is slight. Additionally, the "felony murder" and the "pecuniary gain" circumstance should not have been found.

In Terry v. State, 668 So.2d 954, 965 (Fla. 1996), this Court recognized that a contemporaneous conviction (especially under a principal theory) diminishes the weight that should be given to this aggravating factor. Like Terry, Loran Cole had absolutely no prior violent history before that fateful day in the forest. A glance at Cole's presentence

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[27] Indeed, Dr. Pillow testified that John Edwards would not have been able to talk or yell after his throat was cut. (T760) With the trachea cut, the body has no ability to vocalize words or "gagging" sounds.

investigation report reveals just a string of property crimes.[28] (R892-94)

The trial court also found that the murder was committed while Cole was engaged in the commission of kidnaping.[29] (R914) The court wrote that:

> ...the Defendant forcibly subdued and tied John's hands and feet....the Defendant robbed him of money and personal possessions. The Defendant dragged John into the woods and repeatedly returned to "check" on him. Ultimately, the Defendant killed John...

(R914) The evidence recited by the trial court simply does not support a finding that the murder was committed during the commission of a kidnaping. Certainly, Cole and Paul both jointly kidnaped Pam Edwards after killing John Edwards. However, the slight movement of John Edwards down the trail from his sister is insufficient asportation to support a finding of this aggravating factor. The State failed to meet its burden of proving this circumstance beyond a reasonable doubt.

Additionally, the evidence is insufficient to support the trial court's finding that the murder was committed for pecuniary gain.[30] The trial court pointed out that, after forcibly subduing and binding John Edwards, the defendants took personal property, money and car keys. (R915) The codefendants told John and Pam that they wanted their cars to escape the state. (R915)

The pecuniary gain factor is limited to situations where the primary motive for the

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[28] Cole's first juvenile offense cites "Assault and/or Battery," but that is the **only** potential crime of violence in a lengthy criminal history. (R892-4)

[29] §921.141(5)(d), Fla. Stat.

[30] §921.141(5)(f), Fla. Stat.

killing is monetary gain. See, e.g., Simmons v. State, 419 So.2d 316, 318 (Fla. 1982). Here, the evidence clearly reveals that John Edwards was murdered based on his fight with codefendant, Chris Paul. Pam Edwards testified that Cole and Paul were extremely angry at her brother for his short but successful struggle against Paul. Evidently, Paul was seriously hurt by Edwards. After the pair subdued the brother and sister, they extracted their revenge on Edwards for injuring Paul. Pam Edwards testified that both cursed John and Cole repeatedly asked, "Why did you hurt my brother?" Clearly, the primary, dominant motive for the murder was anger, not robbery.

C. The trial court erred in its consideration of the mitigating evidence.

The trial court concluded that no statutory mitigating circumstances were proved. The court classified the nonstatutory mitigation into three categories: (1) disparate treatment of the codefendant; (2) mental incapacity; and (3) deprived childhood. The trial court conceded that Loran Cole established that he was raised in a "difficult and disruptive household. The only stability appears to be the periods of time he spent as a foster child with Ms. Halm and with his sister." (R921) The trial court sorted through the evidence which established that Cole's father was an alcoholic who often fought with Cole's mother until he finally left the household. Cole's mother was absent from the home frequently, spending time in prison. The children were shuttled to various substitute living arrangements, including several foster homes. When she was home, Cole's mother physically beat the children. As an adolescent, Loran Cole had difficulty interacting with other children and had problems with marijuana and alcohol. (R920-21)

After finding in mitigation that Loran Cole suffered through a poor childhood, the trial

court gave the factor only slight weight. The trial court's reasoning was that:

> However, there is no evidence that the Defendant was physically or sexually abused as a child, or that the circumstances of his childhood substantially affected his adult behavior.

(R921) Initially, Appellant points out that the trial court's statement at (R921), that there is no evidence that Cole was physically abused as a child, contradicts the court's written finding that Don Cole testified that "Ann would beat the children." (R920) Don Cole saw his wife hit Loran "upside the head." (T1395) She would grab whatever was handy, a broom, a mop, or use her hand to strike the children.[31] (T1395)

The trial court's most glaring error in its treatment of the mitigating evidence lies in his conclusion that "there is no evidence...that the circumstances of his childhood substantially affected his adult behavior." (R921) This is the same mistake that the trial court made in Nibert v. State, 574 So.2d 1059 (Fla. 1990). Nibert's trial judge rejected the defendant's abused childhood as mitigation, pointing out that "at the time of the murder the Defendant was twenty-seven (27) years old and had not lived with his mother since he was eighteen (18)." Nibert, 574 So.2d at 1062. This Court correctly pointed out that psychological and physical abuse during a person's formative years is ***per se*** mitigation. Id. Ironically, Loran Cole was also twenty-seven years old at the time of the murder. (R918) Like Nibert, it had been several years since he had been able to successfully extricate himself from his mother's clutches. Cole's oldest sister described her escape from their mother as something that she

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[31] Some members of the family were unaware of the physical abuse of the children. (T1385) However, the trial court did not cite any conflict in the evidence when he initially pointed out the evidence of physical abuse, then inexplicably stated there was none. (R920-21)

had to do in order to cope with life.

The trial court also erred in its weighing of Loran Cole's mental illness. Dr. Berland explained Cole's organic brain damage and mental disabilities. Dr. Berland found evidence of psychosis but could not determine its severity. (R919) The trial court also recognized that mental illness clouds a person's perception and judgment. Further, alcohol and marijuana intensify the symptoms of psychosis. (R919) However, the trial court pointed out that Cole was not delusional and, although he had been drinking prior to the murder, "there was no evidence that such affected the Defendant's ability to understand the consequences of his action and control of the circumstances." (R919) The trial court ultimately concluded that, although the evidence established organic brain damage and mental illness, the testimony "failed to establish that such affected the Defendant's judgment in any significant way." (R920) Since Dr. Berland was unable to "definitively connect any psychotic influence" on Cole's criminal acts, the trial court attached only "slight to moderate weight" to this mitigating factor. (R920)

Appellant submits that the trial court's consideration of this mitigating factor shows a basic lack of understanding of mental illness. **Of course** Loran Cole's organic brain damage and mental illness affected Cole's judgment. Dr. Berland explained that the illness has a "panoramic effect, covering all of his thinking, his perceptions and his judgment." (T1473) The fact that Cole had been drinking inflamed his already existing psychotic symptoms. (T1475) This in and of itself lessened his ability to understand the consequences of his actions. Dr. Berland's testimony in this regard was unrefuted by the State. The trial court is apparently giving this mitigating circumstance "slight to moderate weight" because the evidence did not establish either of the statutory mental mitigating circumstances. In and of

itself, this does not lessen the weight that should be given to this valid, nonstatutory mitigating circumstance. The judge applied the wrong standard. In so doing, the trial court incorrectly and illegally gave this evidence insufficient weight.

Finally, the trial court erred in its consideration of the disparate treatment of Cole's codefendant, William Paul. Paul pled *nolo contendere* to first-degree murder, two counts of armed kidnaping, and two counts of robbery with a deadly weapon. The court sentenced Paul to life imprisonment with a minimum mandatory of twenty-five years without parole and concurrent terms of life imprisonment. (R918-19) The trial court concluded that the codefendant should be treated differently where, "the Co-Defendant received head and hand injuries during the initial attack on John Edwards, and did not participate further in the beating and murder of John." The trial court found that Cole was the dominate actor, director, and murderer. (R919)

Appellant disputes the trial court's contention that he must establish "by a greater weight of the evidence" that Cole and Paul were "equal participants" before they are entitled to "equal treatment." (R919) Once again, Appellant submits that that is not the standard. A defendant would have that duty to prove the statutory mitigating circumstance dealing with accomplices, but not the nonstatutory mitigating circumstance regarding the sentence of a codefendant. Even the trial court recognized that Paul would have been more active in the actual murder if he had not been injured by Edwards. Paul was certainly an active, willing, and equal participant in the initial attack. Only after John Edwards got the better of Paul did his participation in the crimes abate.

A defendant in a capital case need not prove by the greater weight of the evidence that

he and his codefendant were equal participants before the application of this type of nonstatutory mitigating circumstance. Although lack of equality may determine the proper **weight** in considering nonstatutory mitigating circumstances such as this one, lack of absolute equality should not prevent the **finding** of the circumstance.

Furthermore, the trial court completely ignored a myriad of nonstatutory mitigators proposed by Appellant. Defense counsel asked the trial court to instruct the jury on his proposed list but the trial court would not. Defense counsel listed Cole's (1) drinking; (2) his behavior during the trial; (3) maternal neglect; (4) physical abuse as a child; (5) foster homes; (6) an alcoholic father; (7) violence in the home; (8) no domestic stability; (9) Cole's mental illness; (10) no parental guidance; and (11) drug abuse. (T1528-31) In the sentencing order, the trial court made absolutely no mention of Cole's behavior during trial nor his drug abuse. The failure of the trial court to do so violates long standing precedent of this Court. See, e.g., Rogers v. State, 511 So.2d 526 (Fla. 1987). Campbell v. State, 571 So.2d 415 (Fla. 1990), and Nibert v. State, 574 So.2d 1059 (Fla. 1990).

POINT V

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER A STATE WITNESS REFERRED TO APPELLANT'S PRIOR CRIMINAL RECORD.

After leaving Pam Edwards tied up in a remote location, Paul and Cole went to visit their Salvation Army acquaintances who were renting a nearby trailer in the Ocala National Forest. They were riding in John Edwards' blue Geo. During the visit, Mary Gamble, one of their friends that lived at the trailer, found a sales receipt for a sleeping bag in the name of "John Edwards." (T893) The prosecutor asked Ms. Gamble how she discovered the receipt.

> Q: Can you tell us about that, how that happened?
>
> A: I was nosey and **knew some history on K.C.**, so I decided to go outside and look at the tag on the car. And then when I walked around to the driver's side --

(T889) (Emphasis supplied). At that point, defense counsel objected and moved for a mistrial based on the obvious reference, in the context of the testimony, that Cole had a prior criminal history. (T890) The State argued that "history" would not be taken to mean "criminal history" by the average layman. (T891) The State also contended that the witness was not necessarily referring to Cole's criminal history, but rather to his dishonesty and deceit. (T891-92) The trial court denied the motion for mistrial. (T892) The State suggested a curative instruction if defense counsel requested. When defense counsel responded that he did not intend to heighten the error, the prosecutor praised him, "Good move." (T892)

"[A] defendant's character may not be assailed by the State in a criminal prosecution unless good character of the accused has first been introduced." Young v. State, 141 Fla.

529, 195 So. 569 (1939). See also, §90.404(1), Fla. Stat. (1995). In Hardie v. State, 513 So.2d 791 (Fla. 4th DCA 1987), five police officers were allowed to express their opinions as to the identity of the people depicted in a videotaped recording of the commission of the crime. The appellate court reversed because the testimony created the distinct impression that Hardie had been involved in other criminal activities or had a prior record. The identification at trial was based on the policemen's prior knowledge and contact with the defendant. Hardie v. State, 513 So.2d at 792. The appellate court concluded that the officers' testimony that they were acquainted with Hardie, as well as direct references to "other investigations," made it inconceivable that the jury would not have concluded that Hardie had been involved in prior criminal conduct.

The same conclusion can be drawn in Loran Cole's case. Although Mary Gamble was not a police officer, her testimony was clear. Reference to Loran Cole's "history" could mean nothing but a criminal history. This is especially true when one considers that Gamble referred to Cole's "history" as the reason for checking out the car's license. She thought the car was stolen and she was right. But she based her suspicions on her knowledge of Cole's "history." The jury already knew that these folks met at the Salvation Army where they all lived for several months. They also knew that Cole and his codefendant had aliases. They undoubtedly concluded, from Gamble's remark, that Loran Cole had a prior criminal "history."

Even a reference to "mug shots" can be grounds for a new trial. See, e.g., Russell v. State, 445 So.2d 1091 (Fla. 3d DCA 1984). Another appellate court acknowledged that a police officer's statement that he had had other occasions to "run across [the defendant]"

arguably did carry an inference of prior criminal conduct. Coit v. State, 440 So.2d 409 (Fla. 5th DCA 1983). This Court has held that the erroneous admission of irrelevant collateral crimes evidence "is presumed harmful error because of the danger that a jury will take the bad character or propensity of the crime that is demonstrated as evidence of guilt of the crime charged." Straight v. State, 396 So.2d 903, 908 (Fla. 1981). Accord Peek v. State, 488 So.2d 52, 56 (Fla. 1986).

Even if this Court finds the error harmless in the guilt phase, substantially different issues arise during the penalty phase of a capital trial that require an analysis *de novo*. Castro v. State, 547 So.2d 111 (Fla. 1989). The State cannot demonstrate beyond a reasonable doubt that there is no reasonable possibility that error below affected the jury's verdict of guilt and the resulting death recommendation. See State v. Lee, 531 So.2d 133 (Fla. 1988).

POINT VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE WHERE PRETRIAL PUBLICITY PRECLUDED THE SELECTION OF A FAIR AND IMPARTIAL JURY.

Prior to trial, Appellant filed a motion for change of venue accompanied by a memorandum of law. (R692-706) This case received an enormous amount of publicity, both print and electronic media. (R693) The Ocala community was inundated with the horrific facts surrounding the "Murder in the Forest." (R693,700) The pretrial publicity included accusations (later proven to be unsubstantiated) that Appellant was responsible for a 1993 double homicide at a liquor store in Georgia. (R698) A front page story detailed Appellant's attempt to escape from the Marion County Jail where he awaited trial. (R702-3;T494-98) Another story contained a photograph of a Marion County Sheriff employee[32] displaying Appellant's arrest record[33] at a meeting of Stop Turning Out Prisoners (STOP). (R704) The media coverage was so pervasive that defense counsel felt compelled to move for closure of some pretrial hearings. The trial court agreed and excluded the press for part of the proceedings. (T3-7,434-36,494-98) The court refused to exclude the press for the entire balance of the trial. (T533-34) The trial court took the motion for change of venue under advisement with the explanation that they would attempt to select a fair and impartial jury. (T7-10) After the jury was seated, Appellant renewed his motion for change of venue pointing

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[32] Interestingly, the employee is the wife of the partner of Cole's trial lawyer. (R225)

[33] A computer printout of Appellant's arrest record stretched from the floor to the employee's shoulders. (R704)

out that 80% of the venire had read about the case. (T409) Nevertheless, the trial continued in Ocala.[34]

In Sheppard v. Maxwell, 384 U.S. 333 (1966), the United States Supreme Court held that the trial court's failure to protect Sheppard from pervasive and prejudicial publicity resulted in a denial of his right to a fair trial. Sheppard recognized an affirmative, fundamental duty on the part of the trial court to assure a fair trial by an impartial jury.

> ...But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity....

Sheppard v. Maxwell, 384 U.S. at 362. Traditionally, the record of voir dire has been found to be, not only the best, but also the most reliable source of evidence to indicate the existence or absence of both juror and community prejudice. Rideau v. Louisiana, 373 U.S. 723 (1963).

Although a jury was selected without great difficulty, the vast majority of potential jurors were aware of the pervasive media coverage of the case. However, all of the jurors claimed that they could disregard any prior knowledge of the case and decide the case fairly on the evidence. See e.g. (T51-56,63-65,71-73,87-93,97-100,102-6,115-17,124-26,141-44,152-56) No one likes to admit that they could not be fair. See Williams v. Griswald, 743 F.2d 1533, fn. 14 (11th Cir. 1984). "[G]oing through the form of obtaining the jurors' assurances

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[34] The trial court did ask the jury (who were selected and remained unsequestered for one full week prior to the commencement of trial) about media exposure, but they all dutifully denied any taint. (T536-7)

of impartiality is insufficient...." Silverthorne v. United States, 400 F.2d 627, 638 (5th Cir. 1968); See also Irving v. Dowd, 366 U.S. 717, 728 (1961) [Jurors' statements of their own impartiality to be given "little weight"]. General conclusory protestations of impartiality during voir dire are not sufficient to rebut the prejudice due to pretrial publicity. Coleman v. Kemp, 778 F.2d 1487, 1543 (11th Cir. 1985); See also Robinson v. State, 506 So.2d 1070 (Fla. 5th DCA 1987). Under certain circumstances, a trial court commits reversible error by permitting jurors to decide whether their ability to render an impartial verdict is impaired. United States v. Gerald, 624 F.2d 1291, 1297 (5th Cir. 1980). In United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981), no member of the collective panel admitted to having formed an opinion on the guilt of the accused. Yet, because forty-eight of the fifty-six prospective jurors stated that they had read or heard about the case, the court reversed, holding that the trial court's inquiry was insufficient to reveal possible prejudice.

The test in Florida for determining whether a change of venue is required is:

> [W]hether the general state of mind of the inhabitants of the community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence in the courtroom.

Provenzano v. State, 497 So.2d 1177, 1182 (Fla. 1986), citing McCaskill v. State, 377 So.2d 1276, 1278 (Fla. 1978). The burden is on the defendant to raise a presumption of partiality. Provenzano v. State, 497 So.2d 1177 (Fla. 1986). The question of jury partiality is one of mixed law and fact, requiring an appellate court to independently evaluate the voir dire testimony of impanelled jurors. Irving v. Dowd, 366 U.S. 717 (1961).

This Court's review of the record should conclusively demonstrate that Loran Cole did not receive a fair trial by a reliable, impartial jury. The vast majority of the venire had read or heard media reports in some detail concerning the case. During the lunch break on the first day of jury selection, one potential juror went home for lunch and saw television coverage about the crimes.[35] (T331-34) The television story convinced Venireman White that he could not be fair as a juror at Cole's trial.

A number of other potential jurors were also honest enough to admit that their prior knowledge of the crimes would make it impossible to fairly decide Cole's fate. See, e.g., (T50,107-10,110-12,351) Juror Wilyat had read media accounts and "according to the paper, you couldn't help but to form an opinion." (T87-91) However, Juror Wilyat maintained that the evidence would form a basis for his opinion **more than the paper**. (T87-93) Incredibly, Wilyat ended up on the jury. (T403-4)

Venireman Liversidge was **shocked** at the details of the crimes. (T94-97) Venireman Robert Adler was "kind of prejudiced...after reading the details in the paper" and was excused for cause. (T107-10) When the newspapers reported on Cole's arrest, Venireman Fenclau formed an opinion that he probably committed the crimes. Fenclau insisted that he could put that opinion aside and be fair. (T343-48) Everyone recognized that newspapers sometimes make mistakes. The jurors' assurances that they could be fair under the circumstances are incredible and unreliable. Loran Cole did not receive a fair trial on the issues of guilt and the proper penalty. He deserves at least that. Amends. V, VI, VIII and XIV, U.S. Const.; Art.

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[35] He was in the portion of the pool that was not present in the courtroom when the trial court instructed the venire to avoid any media accounts of the crimes. (T333)

I, §§ 9 and 16, Fla. Const.

POINT VII

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND ALLOWING GRUESOME PHOTOGRAPHS INTO EVIDENCE WHERE THE PREJUDICE OUTWEIGHED THE SLIGHT PROBATIVE VALUE.

Prior to trial, Appellant filed a motion in limine in an attempt to exclude particularly gruesome, irrelevant photographs of the victim. (R460-61) The parties agreed to proffer the photographs before their admission into evidence. (R498-502) At trial, Appellant did not object to every photograph of the victim. Rather, defense counsel focused on the more prejudicial and duplicative. Initially, Appellant objected to State's Exhibits 20, 21, and 22 [all three of which depicted the body at the scene of the crime] during the testimony of Investigator Sowder. (T615-17) Additionally, the State proffered the photographs of the victim introduced during the testimony of the medical examiner. (T723-33) Dr. Pillow admitted that the photographs **were not necessary**, but would aid her testimony. (T725-26) During the proffer, Appellant objected to the duplicative nature of several of the photographs. Specifically, State's 56 depicted the throat wound which was also shown in State's 57 from a different angle. (T728-29) State's 45 elicited a similar argument. The trial court overruled Appellant's objections and ruled that the three photographs were distinct enough to warrant the admission of all three of them. (T728-30) The trial court also overruled Appellant's objections to State's 39 and 40. (T733-34) The trial court also overruled Appellant's objection to State's 55 which was an autopsy photograph depicting the undersurface of the right side of the scalp and the outside portion of the cranium. (T727-28,730-32) This

photograph showed the scalp cut off the skull bone and peeled back at the autopsy. (T727-28,730-32) Dr. Pillow once again admitted that the photograph was not necessary for her testimony. However, she explained that the photograph demonstrated the bruising of the skull which indicates the force used and reveals that the victim was alive when the blow was delivered. (T730-32) All of the objectionable photographs were subsequently admitted over Appellant's renewed objections. (T752-56)

The issue of gruesome photographs is one of the most troubling in capital cases today. Too often, appellate courts are asked to rubber stamp the admission of truly revolting pictures, even though "[i]t is unrealistic to believe, even after a limited view, that the horror engendered by these slides could ever be erased from the minds of the jurors...." Commonwealth v. Garrison, 331 A.2d 186, 188 (Pa. 1975).

> [A] trial is conducted not only to determine that an atrocious crime has occurred, but to determine whether the accused committed the crime. Too often the former obscures the latter.

Johnson v. State, 476 So.2d 1195, 1209 (Miss. 1985). (Emphasis supplied).

Even if relevant to some degree, the horrible pictures were not necessary. See, e.g., Commonwealth v. Rogers, 401 A.2d 329, 330 (Pa. 1979). Had there been any significant probative value, the prosecution might easily have had "the photograph...reproduced in black and white in order to reduce its potential for prejudice." State v. Polk, 397 A.2d 330, 334 (N.J. Super. 1977).

The prejudice escalated at the penalty phase. The prosecutor apparently used four of the photographs during closing argument. (T1579-1585) As fate would have it, the jury

requested three of the photographs (State's Exhibits 45, 56, and 57) in the midst of their deliberations. (T1578,1585-86; R789) These three photographs depicted the severe neck injury. (T727-30) The slight probative value of the myriad of gruesome photographs was outweighed by the substantial prejudice. §90.403, Fla. Stat. (1995).

POINT VIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED FOLLOWING HIS ILLEGAL ARREST WHERE POLICE HAD NO PROBABLE CAUSE, THUS VIOLATING THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION.

Appellant filed a motion to suppress evidence seized following his warrantless arrest. (R724-25) Appellant maintained that he was arrested without probable cause, thus making his arrest illegal, with any fruits thereof suppressible. Following a hearing on September 19, 1995, the trial court denied Appellant's motion to suppress. (T437-94) At Appellant's trial, the State introduced the evidence seized over Appellant's renewed objections. (T123-24,937, 957-61, 972-76)

On February 20, 1994, Detective Bill Sowder met with Pam Edwards at a local hospital. Edwards subsequently showed Detective Sowder the area where the crimes occurred and described the attack in detail. She described the assailant known as "Kurt" as having a goatee and "longer hair." (T437-43) The other assailant was known to her as "Kevin" and "K.C." Edwards noticed these initials on the belt he wore. (T443)

Based on Edwards' description, Detective Sowder issued a BOLO[36] describing Kevin (K.C.) as a thirty-six-year-old, 5' 6 to 7" male weighing approximately 200 pounds, with strawberry blonde hair that was thin on top and curly around the collar. He wore a beard, a

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[36] A law enforcement bulletin literally meaning "be on the lookout." (T591)

military utility cap, a black and blue flannel shirt with a black T-shirt underneath with gold writing on it.[37] He wore a belt with his initials, K.C., on the belt buckle. (T451-52) He had several tattoos, some on his right forearm. He wore black jeans and had a stocky, muscular build. (T445) Edwards described the second assailant, called "Kurt" or "Chris," as a thin man with shoulder-length brown hair and a goatee. He weighed approximately 155 pounds, was about 5' 8", and appeared to be in his late teens or early twenties. He also wore a black T-shirt with lettering on it. He wore work/hiking boots and had a severe injury to his left hand. (T446) Edwards reported that "K.C." had a scabbard knife and both men claimed to have guns. (T447)

Detective Thomas Bibb received the above information from Investigator Sowder. Bibb helped issue a BOLO for John Edwards' missing blue Geo automobile. (T454-56) Late Sunday night, Deputy Bibb visited Pam Edwards at a motel and obtained further information. She said that "Kurt/Chris" wore an earring, had a chipped tooth, and wore shoes with protective leggings. (T456-57)

On Monday morning, Bibb reported for work to start the second day of the investigation. At that time, Detective Bibb learned that John Edwards' car had been found in the parking lot of the NAPA store. (T458-59) The car contained a note indicating mechanical difficulty and a promise from the driver to return in the morning. (T459) Within minutes of learning of the car's discovery, Detective Bibb received a report from Lieutenant Lumpkin that a caller identified only as "Molly" had just reported that she had spotted the two suspects

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[37] Something about Key West.

behind the NAPA store in Ocala. (T458)

Detective Bibb grabbed Detective DeFalco and drove the three miles to the NAPA store with lights and siren blaring. (T460) They found nothing at the NAPA store and proceeded to the next street. (T461) As he approached the railroad tracks a woman, subsequently identified as "Molly" (the caller), flagged him down. (T461,475) She told Bibb that the two suspects were headed south, although she did not know exactly where they went. (T461) Bibb drove his car to the next intersection and turned south. He then turned east and proceeded to Tuscawilla Park. (T461) Approximately three to four blocks from his encounter with "Molly," Bibb arrived at a railroad crossing where he noticed several cars lined up waiting for the train to pass. (T461-62) As he drove up in the westbound lane, Bibb noticed two men standing near a truck that was waiting for the train to clear the crossing. (T462) The men had their backs turned toward Bibb and DeFalco. (T462-63) Even from the back, Bibb noticed the pair's camouflaged clothing, their hair, and especially the leggings that Edwards had described. "Everything matched. It matched perfectly." (T462) Bibb and DeFalco looked at each other and had "no doubt that [the men] were the people we were looking for, and we proceeded to take them down."[38] (T462)

Before their car even stopped rolling, Bibb and DeFalco were out with guns drawn pointing at the backs of Paul and Cole. (T477-78) Bibb yelled, "Freeze. Police!" and the pair turned around. (T478) "They turned around. We had both drawn guns down on both of them. And by that time, we were closer than me and you. And they turned around and facial

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[38] Even though the detectives had still not seen the men's faces or fronts.

hair and everything matched completely." (T462-63) The suspects hit the dirt as ordered. Bibb was on Paul's back and DeFalco was on Cole's. (T463) After the "take-down," Bibb noticed a knife in the small of Cole's back. He also noticed "K.C." on the back of Cole's belt. (T463,481) Cole wore a camouflaged cap. (T484) Paul wore an earring. (T484-85) Backup units arrived and Cole and Paul were cuffed and taken to jail. (T463-64) A pat-down at the scene of the arrest revealed jewelry, a checkbook, a driver's license, and other items belonging to the victims. (T464-65)

Detective Bibb admitted that the men were not free to leave the moment that he and DeFalco jumped out of their still rolling car and pointed their guns. (T478) Detective Bibb admitted that he did not know whether the pair was formally arrested prior to the search. (T479-80)

Article I, Section 12 of the Florida Constitution provides that the right of citizens to be secure in their persons against unreasonable searches and seizures shall not be violated and that no search and seizure will occur absent probable cause. See also Amend. IV, U.S. Const. While a person may be searched incident to a lawful arrest [see Chimel v. California, 395 U.S. 752 (1969)] no arrest shall occur without a warrant or absent probable cause. D'Agostino v. State, 310 So.2d 12 (Fla. 1975); §901.15, Fla. Stat. (1993).

It is not disputed that the Appellant was under arrest at the outset of the police encounter. The moment Detective Bibb saw the two men waiting for the train to pass with their backs turned toward him, he believed they were the culprits. Detectives Bibb and DeFalco responded immediately by detaining the men at gunpoint and ordering them to the ground. This detention (which was followed by a full search) certainly amounts to more than

a mere encounter or an investigatory stop. See London v. State, 540 So.2d 211, 213 (Fla. 2d DCA 1989); Dunaway v. New York, 442 U.S. 200 (1979). While an officer may temporarily stop an individual for a very limited investigatory stop on less than probable cause, as outlined in Terry v. Ohio, 392 U.S. 1 (1968), it must be considerably less intrusive than a seizure of the person, such as occurred here. It was evident that the defendant, lying on the ground at gunpoint, was not free to leave but was being restrained against his will. London v. State, supra; Dunaway v. New York, supra. Therefore, probable cause to believe that the defendant committed a felony must have existed prior to the seizure to justify the detention and commit such an intrusion. See also D'Agostino v. State, supra.

As stated in D'Agostino:

> The probable cause required for a warrantless arrest has been compared to a magistrate's assessment of "probable cause" for a search or arrest warrant to issue. Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971) rejected application of any lesser standard by a court reviewing a police assessment at the scene of probable cause for such a warrantless arrest as here. Whiteley also involved an arrest by an officer acting on a BOLO and reiterated the necessity of facts in the officer's possession to support the probable cause necessary for making the arrest and then the search. See Collins v. State [65 So.2d 61 (Fla. 1953)] supra.
>
> It is settled that in order to make a valid arrest probable cause must exist prior thereto. Moreover, a BOLO alert does not in and of itself constitute adequate probable cause for an arrest, absent some supporting factual data in the possession of the arresting officer prior to making the arrest, which would support a finding of probable cause. See Whiteley v. Warden, supra. Clearly the information in the BOLO did not contain sufficient and actual data as the basis for probable cause for making an arrest or search. The arresting officer must be

> possessed of information prior to the arrest which would constitute the required probable cause to justify the arrest being made.

Id. at 15. See also Smith v. State, 389 So.2d 654 (Fla. 2d DCA 1980).

The probable cause standard for a law enforcement officer to make a legal arrest is whether the officer has reasonable grounds to believe that **the person** has committed a felony. Blanco v. State, 452 So.2d 520 (Fla. 1984); State v. Joseph, 593 So.2d 594, 595 (Fla. 3d DCA 1992). While a **detailed** description provided by a witness, coupled with proximity in time and place to the scene of the crime, can furnish probable cause to make an arrest [see State v. Gavin, 594 So.2d 345 (Fla. 2d DCA 1992); State v. Joseph, supra], such was lacking in the instant case.

Detective Bibb admitted that the suspects' backs were turned toward them. **The police could not even see the suspects' faces.** All they saw was that the pair wore camouflage clothing and that one of them wore protective leggings. (T462) Bibb also noticed the pair's hair. From the rear he could only have seen that one had shoulder-length brown hair while the other had strawberry-blonde hair that was curly around the collar. Cole's thinning hair (on top) could not have been noticed by Bibb since Cole wore a cap. (T484) What is left is a mere general description of two men in camouflage clothing, unruly hair, with one wearing leggings. Such is probably not an unusual sight in the Ocala area, especially during hunting season.

In D'Agostino v. State, supra, a general description was given by witnesses to the burglary that the perpetrator had "bare legs, and white socks and shoes." The defendant, who apparently fit this general description, was stopped, arrested, and searched, with the search

revealing the stolen jewelry. This Court indicated that this general description was "too flimsy" upon which to base probable cause.

> To allow it would permit a game of "blind man's bluff" and if the person caught turns out to have stolen property, then, contrary to all legal principles, this could be allowed to relate back as a reason for the arrest and search. To be sure, discovery here of apparently stolen goods upon a search would make it appear that some crime had perhaps been committed, but it would also lay a dangerous predicate for the arrest, search and seizure of innocent citizens which our Constitution and laws have jealously guarded through the years. Such a "hit and miss" approach to arrests cannot be permitted.

D'Agostino v. State, supra at 16. See also United States v. Fisher, 702 F.2d 372 (2d Cir. 1983); Commonwealth v. Jackson, 331 A.2d 189 (Pa. 1975). Cf. 1 LaFave, Search and Seizure, §3.4(c), at 737-745 (2d Ed. 1987).

Similarly, in London v. State, supra, the court ruled that a general description fell short of establishing the requisite probable cause for an arrest. In London, a police officer received a report that a black male, armed with a handgun, and wearing a mask had just robbed a sandwich shop. On the way to the scene six minutes after the robbery, the officer observed an older white Oldsmobile Cutlass occupied by two blacks which was traveling in a direction away from the scene. Upon arrival at the scene, a witness told the officer that he had seen a white vehicle parked across from the sandwich shop which later pulled off at a high rate of speed in the direction the officer had observed the Oldsmobile driving. The officer, convinced that the car he had seen was the same one described by the witness, issued a BOLO for the vehicle. A short time later another officer observed a car fitting the description with two black males inside. It was the only car on the road at the time and the driver appeared suspicious,

making eye contact with the officer, then quickly averting his eyes. She stopped the car and arrested the occupants, who confessed to the crime. In suppressing the confession, the court ruled that "a vague description will not justify law enforcement in stopping, much less arresting, every individual or vehicle which might possibly meet that description." London v. State, 540 So.2d at 213. See also Smith v. State, supra, wherein the court noted that the description of the robber as being a black male, 6'3" tall, weighing 180 pounds with a beard, was "so generalized that, standing alone, it could not have provided probable cause for the arrest" two hours after the crime (but that coupled with the very specific description of the vehicle the robber was driving, there was probable cause to arrest). Smith v. State, 389 So.2d at 655, n. 1.

Therefore, the probable cause necessary for the arrest was lacking based solely on this generalized description. Even if the actions here amounted only to an investigatory stop, a general description, as indicated above in London v. State, supra, will not provide a particularized reasonable suspicion to stop the defendant and search for weapons. See also State v. Hetland, 366 So.2d 831 (Fla. 2d DCA 1979), **approved** 387 So.2d 963 (Fla. 1980); Bristol v. State, 584 So.2d 1086 (Fla. 2d DCA 1991).

The Marion County Sheriff's Office lacked probable cause to arrest Loran Cole. Detective Bibb admitted that he saw the two suspects only from the rear. The only characteristics he noticed were the camouflaged clothing, the scruffy hair, and the fact that one man wore leggings. These generalized and vague details cannot form the basis of probable cause. The evidence seized as a result of Appellant's illegal arrest must be suppressed as fruits of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963).

POINT IX

THE INTRODUCTION OF IRRELEVANT AND PREJUDICIAL EVIDENCE WHICH THE STATE COULD NOT TIE TO THE CRIME DENIED LORAN COLE HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Evidence technicians dispatched to the crime scene collected a lot of evidence from Hopkins Prairie in the Ocala National Forest. The entire crime scene was immense and they grabbed anything they thought **might** be of value. Appellant did not object to much of the evidence introduced at his trial. However, defense counsel did object to a forty-seven inch length of oak. Initially, defense counsel had no objection subject to the State establishing relevance. (T689-90,692-93) However, Appellant objected when the State sought to introduce the stick into evidence prior to final summation. (T1201-5) Defense counsel pointed out that there were lots of sticks in forests. The State failed to establish that their exhibit was the walking stick used in the attack on John Edwards. The trial court overruled the objection and allowed the evidence. (T1201-5)

All relevant evidence is admissible, except as provided by law. §90.402, Fla. Stat. (1995). Relevant evidence is evidence tending to prove or disprove a material fact. §90.401, Fla. Stat. (1995). The State failed to prove the relevance of the oak walking stick/club introduced at Cole's trial. No one could identify it. Defense counsel pointed out that it was found some distance from the crime scene. (T1201-5) Defense counsel contended that the stick was probably not the one wielded by William Paul that night. However, the trial court allowed the introduction of the club. Where the State failed to establish relevance, the court

should have excluded the evidence. Any slight probative value was outweighed by the substantial prejudice. §90.403, Fla. Stat. (1995).

POINT X

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY ON THE APPLICABLE LAW AT BOTH THE GUILT AND PENALTY PHASES.

Florida Rule of Criminal Procedure 3.390(a) states:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel....

At both the guilt/innocence phase as well as the penalty phase, defense counsel requested several special jury instructions. Although the trial court did partially grant some of Appellant's requests, the court committed reversible error in denying numerous requests for special instructions. Many of Appellant's requested instructions were accurate statements of the applicable law. Many refined and clarified the standard instructions. In a capital case, the jury's judgment and discretion must be adequately channeled. See, e.g., Espinosa v. Florida, 505 U.S. 1079 (1992). Additionally, this Court has frequently recognized the inadequacy of the standard jury instructions. See, e.g., Yohn v. State, 476 So.2d 123 (Fla. 1985) and Harich v. State, 437 So.2d 1082 (Fla. 1983).

A. Guilt Phase Instructions.

(1) The Independent Act Instruction.

At the conclusion of the evidence at the guilt/innocence phase, Appellant requested, in writing, an instruction regarding independent acts.

> If you find that the State has failed to prove beyond a reasonable doubt that Loran Cole killed John Edwards and if you further find that the victim John

> Edwards was killed by the co-defendant William Paul and that killing by William Paul was outside of and foreign to any common design entered into by William Paul and Loran Cole, then you should find the defendant Loran Cole not guilty of first degree murder.

(T1214-15;SR43) Defense counsel pointed out that there was a time period on the trail when Cole escorted Pam Edwards to the bathroom while Paul stayed behind in the vicinity with John Edwards. (T1218-19) The State contended that the instruction was inappropriate where the evidence showed that Cole and Paul planned the felony which subsequently resulted in murder. Defense counsel disputed the State's contention that there was any evidence of a plan to commit the felony. (T1215-19) The trial court concluded that the standard instruction on principles covered the argument that defense counsel wanted to make. The court denied the requested instruction saying:

> And I think with that instruction [on principles], Don, you can argue and I'm going to let you argue that your client had nothing to do with the murder; while she was in the bathroom or he was doing something else, the other defendant killed him, and it wasn't part of the scheme;...I think that you can argue that within that. I think, the facts of this case, it would be inappropriate to give that [the requested special instruction on independent act]....

(T1220) In essence, the trial court ruled that defense counsel could argue his defense theory, but no instruction would be forthcoming from the court on that theory.

A defendant is entitled to have the jury instructed on the law applicable to his theory of defense if there is any evidence introduced to support the instruction. Laythe v. State, 330 So.2d 113 (Fla. 3d DCA 1976). If evidence exists from which a jury could determine that the acts of a co-felon resulting in murder were independent of the joint felony, a defendant is

entitled to an instruction on that theory of defense. Rodriguez v. State, 571 So.2d 1356 (Fla. 2d DCA 1991). In Rodriguez, the trial court refused to instruct the jury that if the murder was an independent act, not committed in furtherance of or in the course of a joint felony, the jury should find Rodriguez not guilty of felony murder. The district court reversed even though counsel focused on this defense in closing argument. See also, Lewis v. State, 591 So.2d 1046 (Fla. 1st DCA 1991). The requested instruction correctly stated the law and was critical to Cole's case. See Savino v. State, 555 So.2d 1237, 1239 (Fla. 4th DCA 1989). The instruction went directly to Cole's theory of defense. The trial court's refusal to adequately instruct the jury deprived Cole of his constitutional right to a fair trial.

(2) Theft as a Mere Afterthought.

The second specially requested jury instruction at the guilt/innocence phase:

> If the evidence shows that the taking of the property occurred after the use of force or violence which resulted in the death of John Edwards as an afterthought, the taking does not constitute robbery but may still constitute theft. If you find from the evidence that the death of John Edwards occurred initially in the series of events and any subsequent kidnaping of Pamela Edwards and/or robbery of Pamela Edwards was an afterthought, then you should not find the defendant Loran Cole guilty of first degree felony murder.

(SR42;T1221-23) After hearing argument, the trial court denied the requested instruction. This, too, was error. As defense counsel argued, the jury could find from the evidence that John Edwards was murdered, after which his property was taken as a mere afterthought. The State is required to prove their case beyond a reasonable doubt. The requested instruction was an accurate statement of the law and, if accepted by the jury, would provide an imperfect

defense to robbery and felony murder. The trial court should not deny the instruction based solely on his interpretation of what the evidence showed.

B. Penalty Phase Instructions.

Due process of law applies "with no less force at the penalty phase of a trial in a capital case" than at the guilt determining phase of any criminal trial. Presnell v. Georgia, 439 U.S. 14, 16-17 (1978). The need for adequate instructions to be given to a jury to guide its recommendation in capital cases was expressly noted in Gregg v. Georgia, 428 U.S. 153, 192-93 (1976).

Appellant's requested instruction #1 told the jury that, in all likelihood, Loran Cole would never be released from prison if he were sentenced to life imprisonment (with a minimum mandatory term of twenty-five years without possibility of parole). (SR30) The trial court denied the instruction, after the State pointed out that, "They parole people everyday." (T1519-20) While the prosecutor correctly stated the law, Appellant submits that the instruction was misleading to the jury. In fact, even if this Court reduces Cole's sentence to life imprisonment, he will never be released.

The trial court also denied Appellant's requested instruction #4. (SR31) That particular instruction attempts to correct the standard jury instruction which shifts the burden of proof regarding mitigating circumstances to a capital defendant after the State proves sufficient aggravating circumstances to justify the death penalty. The requested instruction correctly placed the burden of proof on the State, rather than on the defendant. (T1520-21)

The first paragraph of Appellant's requested penalty instruction #8 was denied by the trial court. (SR33;T1524-26) The instruction would have told the jury that they must be

unanimous in any decision that the State has proved an aggravating circumstance beyond a reasonable doubt. The prosecutor pointed out that Florida law does not require unanimity. The prosecutor is right, but the law should be changed. Lack of unanimity at this stage of the proceedings results in unconstitutional, arbitrary and caprecious sentencing. Amend. VIII, U.S. Const.

Requested instruction #9 (SR34) told the jury that the finding of a single aggravating circumstance would authorize the jury to consider recommending imposition of the death penalty. Such a finding would not require the imposition of death, even absent any mitigating circumstances. The trial court denied Appellant's request. (T1526) The requested instruction was a correct statement of the law and should have been given.

Appellant's requested instruction #11B (SR37) attempts to define the term "mitigating circumstance" for the jury. (SR37;T1527-28) The requested instruction also explained that, once a mitigating circumstance is established, the jury must give it appropriate weight and not ignore it completely. This Court has instructed trial courts to treat mitigating evidence in such a manner. Juries should be told no less. Additionally, a definition of "mitigating" is helpful and necessary.[39]

Finally, the trial court denied the last sentence in Appellant's requested instruction #14. (SR40;T1541-42) The requested sentence correctly told the jury that Florida's death penalty is "reserved for only the most aggravated of first degree murders." (SR40) This Court has upheld that pronouncement many times. Indeed, the requested instruction should also have

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[39] The trial court should have listed, as requested, the nonstatutory mitigators that Appellant proposed. (T1512,1538-41)

included "and least mitigated" as well. The trial court's denial of the requested jury instructions denied Loran Cole his constitutional right to a fair penalty phase. The requested instructions were correct statements of the law and would have accurately channeled the jury's discretion in making this momentous decision.

POINT XI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S PRETRIAL MOTIONS AND ALLOWING THE STATE TO PROCEED UNDER BOTH A PREMEDITATION AND A FELONY MURDER THEORY WHERE THE JURY RETURNED A GENERAL VERDICT.

The grand jury indicted Loran Cole for the first-degree murder of John Edwards "from a premeditated design to effect the death...". (R104) Appellant moved to prohibit the State from referring to felony murder during the trial, since the indictment alleged only premeditated murder. (T18-20) The trial court denied the motion, and the State proceeded on both theories. Appellant also requested that the State announce which theory they intended to pursue. The State pointed out that, under existing law, they were not required. The court denied Appellant's motion. (T527-28;R470-75)

In Mills v. Maryland, 486 U.S. 367, 376 (1988), the United States Supreme Court stated:

> With the respect of findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. [citations omitted]. In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds...

This Court cannot be certain which of the two theories (premeditated versus felony murder) the jury relied on in reaching their verdict. The evidence establishes that the crime was a classic case of felony murder. The evidence does not support a conviction for

premeditated murder. The trial court instructed the jury on both theories. (T1275-77) The verdict is a general one finding the defendant "guilty of first degree murder...as charged in the indictment." (R763) The verdict must therefore be set aside and Loran Cole must be retried with proper jury instructions. Amends. V, VI, VIII, and XIV, U.S. Const.

POINT XII

THE TRIAL COURT ERRED IN IMPOSING AN UNLAWFUL ORDER OF RESTITUTION WHICH INCLUDED TRAVEL EXPENSES FOR A STATE WITNESS.

On December 20, 1995,[40] the trial court sentenced Loran Cole to death in Florida's electric chair. At the sentencing hearing, the State announced that they had three restitution orders and the amounts set forth in the Presentence Investigation for "Mr. and Ms. Edwards for their expenses." (R96) The prosecutor admitted, "Quite honestly, Your Honor, we don't expect to ever recoup on those restitution orders, but we'd like to make them a matter of record in whatever instance Mr. Cole may come into some amount of money, that they would be a matter of record that we could move to impose them at that time." (R96) That was the only discussion concerning restitution. The trial court rendered three restitution orders that day. (R924-25) The first ordered that $1,636.00 be paid in restitution for the funeral expenses of John Edwards. (R923) The second was in the amount of $515.00 for reimbursement for counseling expenses. (R924) The third was in the amount of $5,934.99 for "Travel to and from Okinawa, Japan following death of John Edwards and repair to damaged vehicle." (R925) There was no inquiry concerning Appellant's ability to pay. Indeed, the State apparently admitted that Cole had no present ability to pay the restitution amounts. In fact, Cole's trial counsel was appointed and paid at county expense due to his

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[40] Although the cover page of the transcript of sentencing (R92) reflects a date of December 21, 1995, this is apparently an error. The trial court sentenced Cole to death on December 20, 1995. (R913)

indigency. (R163) The trial court also found Cole indigent for purposes of appeal. (R953-54)

There are numerous problems with the trial court's orders setting restitution amounts. Primary among them is the order requiring the Appellant to pay for the travel of the victim's parents to and from Okinawa, Japan following the murder. (R925) See, e.g., Gluesenkamp v. State, 636 So.2d 1367 (Fla. 1st DCA 1994) [court errs in awarding restitution to victim's parents for travel, telephone, and lost wages.] See also Martel v. State, 596 So.2d 100 (Fla. 2d DCA 1992) [error to order restitution for expenses incurred by theft victim for travel and accommodations.], and Little v. State, 632 So.2d 689 (Fla. 2d DCA 1994) [error to order restitution to pay for victim's brother's air fare so he could attend the trial where the brother was not a witness.][41] Furthermore, the State failed to provide any documentary evidence in support of the restitution amounts. This was error. See, e.g., Williams v. State, 645 So.2d 594 (Fla. 2d DCA 1994) [the State failed to meet its burden of proof where they provided no documentary evidence and presented only the testimony of the victim about the value of the property lost.]

Additionally, Appellant apparently received no notice of the restitution hearing. Furthermore, the only evidence presented as to restitution was the prosecutor's bald statement concerning the contents of the PSI. Such a procedure is so fundamentally flawed that due process is violated and the order must be reversed. Moment v. State, 645 So.2d 502 (Fla. 4th DCA 1994). See also Hamrick v. State, 648 So.2d 274 (Fla. 4th DCA 1995). Finally, the

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[41] Mr. Edwards did testify very briefly. He identified one piece of John's property. (T1091)

trial court erred in imposing restitution without considering and making findings regarding Appellant's ability to pay. See, e.g., Filmore v. State, 656 So.2d 535 (Fla. 4th DCA 1995). In fact, the prosecutor below conceded Appellant's **inability to pay**. For the above-stated reasons, the orders of restitution should be vacated.

POINT XIII

APPELLANT'S SENTENCES ON THE NONCAPITAL OFFENSES ARE ILLEGAL.

The State prepared a sentencing guidelines scoresheet in anticipation of Appellant's sentencing on the six noncapital offenses (two counts of sexual battery while armed, two counts of kidnaping while armed, and two counts of robbery with a deadly weapon. (R926-27) The trial court sentenced Cole to life imprisonment on each offense. (R933-38) The court ordered the life sentences to run concurrent with each other but consecutive to the death sentence. (R940) The sentences imposed on the noncapital offenses were departure sentences. The trial court cited the unscored capital offense as the sole reason justifying departure. (R97,927)

The oral pronouncement of sentence on the noncapital offenses reveals that the court sentenced Loran Cole to life in prison. (R98) However, the written sentence indicates a term of life in prison with a twenty-five year minimum mandatory without possibility of parole. (R933-38) This is clearly error. The written sentence is an illegal one. The "mandatory quarter" in effect at the time of Appellant's crimes would have applied only if the trial court had sentenced Cole to life imprisonment for first-degree murder. §775.082(1), Fla. Stat. (1993). The "mandatory quarter" does not apply to life felonies nor first-degree felonies punishable by life. §775.082(3), Fla. Stat. (1993). Additionally, the written sentence does not conform with the oral pronouncement. Where there is a discrepancy, the oral pronouncement generally controls. Wilkins v. State, 543 So.2d 800 (Fla. 5th DCA 1989).

POINT XIV

CONSTITUTIONALITY OF SECTION 921.141, FLORIDA STATUTES.

1. The Jury

a. Standard Jury Instructions

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

i. Heinous, Atrocious, or Cruel

The instruction does not limit and define the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application in violation of the dictates of Maynard v. Cartwright, 486 U.S. 356 (1988); Shell v. Mississippi, 498 U.S. 1 (1990); and Espinosa v. Florida, 112 S.Ct. 2926 (1992). The "new" instruction in the present case (T1569-70) violates the Eighth Amendment and Due Process. The HAC circumstance is constitutional where limited to only the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Espinosa, supra. Instructions defining "heinous," "atrocious," or "cruel" in terms of the instruction given in this case are unconstitutionally vague. Shell, supra. While the instruction given in this case states that the "conscienceless or pitiless crime which is unnecessarily torturous" is "intended to be included," it does not limit the circumstance only to such crimes. Thus, there is the likelihood that juries, given little discretion by the instruction, will apply this factor arbitrarily and freakishly.

The instruction also violates Due Process. The instruction relieves the state of its

burden of proving the elements of the circumstances as developed in the case law. For example, the instruction fails to inform the jury that torturous intent is required. See McKinney v. State, 579 So.2d 80, 84 (Fla. 1991) ("The evidence in the record does not show that the defendant intended to torture the victim."). Appellant filed a pretrial motion to declare this portion of the statute illegal on constitutional grounds (both facial and as applied). (R629-42) The motion also attacked this Court's inconsistent application of this aggravating circumstance in its appellate review. The trial court denied the motion immediately prior to the start of trial. (T427-28) Appellant also challenged the constitutionality of the factor at trial. (T427-28;R629-42)

ii. Felony Murder

This circumstance fails to narrow the discretion of the sentencer and therefore violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Appellant's motion attacking the constitutionality of this portion of the statute as well as the standard jury instruction (both facially and as applied) was denied. (R664-69; T428-30)

b. Majority Verdicts

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

reason that the same principle applies to capital sentencing. Our statute is unconstitutional, because it authorizes a death verdict on the basis of a bare majority vote.

In Burch, in deciding that a verdict by a jury of six must be unanimous, the Court looked to the practice in the various states in determining whether the statute was constitutional, indicating that an anomalous practice violates Due Process. Similarly, in deciding Cruel and Unusual Punishment claims, the Court will look to the practice of the various states. Only Florida allows a death penalty verdict by a bare majority. Appellant challenged the constitutionality of the statute based on this particular flaw in Florida's death penalty sentencing scheme. (R627-28) The trial court denied the motion. (T425-26)

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

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. See State v. Dixon, 283 So.2d 1 (Fla. 1973). The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 490 U.S. 638 (1989). Appellant's requested special jury instruction would have cured this error. (SR33)

d. Advisory Role

The standard instructions do not inform the jury of the great importance of its penalty verdict. The jury is told that their recommendation is given "great weight." But in violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320 (1985) the jury is told that its "recommendation" is just "advisory." Appellant raised this issue at trial. (T516)

2. Counsel

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

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

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

Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases. The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. The Trial Judge

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

4. The Florida Judicial System

The sentencer was selected by a system designed to exclude African-Americans from participation as circuit judges, contrary to the Equal Protection of the laws, the right to vote,

Due Process of law, the prohibition against slavery, and the prohibition against cruel and unusual punishment.[42] Because Appellant was sentenced by a judge selected by a racially discriminatory system this Court must declare this system unconstitutional and vacate the penalty. When the decision maker in a criminal trial is purposefully selected on racial grounds, the right to a fair trial, Due Process and Equal Protection require that the conviction be reversed and the sentence vacated. See State v. Neil, 457 So.2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986); Swain v. Alabama, 380 U.S. 202 (1965). When racial discrimination entrenches on the right to vote, it violates the Fifteenth Amendment as well.[43]

The election of circuit judges in circuit-wide races was first instituted in Florida in 1942.[44] Prior to that time, judges were selected by the governor and confirmed by the senate. 26 Fla.Stat. Ann. 609 (1970), Commentary. At-large election districts in Florida and elsewhere historically have been used to dilute the black voter strength. See Rogers v. Lodge, 458 U.S. 613 (1982); Connor v. Finch, 431 U.S. 407 (1977); White v. Regester, 412 U.S. 755 (1973); McMillan v. Escambia County, Florida, 638 F.2d 1239, 1245-47 (5th Cir. 1981), modified 688 F.2d 960, 969 (5th Cir. 1982), vacated 466 U.S. 48, 104 S.Ct. 1577, on remand

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[42] These rights are guaranteed by the Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, and Article I, Sections 1, 2, 9, 16, 17, and 21 of the Florida Constitution.

[43] The Fifteenth Amendment is enforced, in part, through the Voting Rights Act, Chapter 42 United States Code, Section 1973, et al.

[44] For a brief period, between 1865 and 1868, the state constitution, inasmuch as it was in effect, did provide for election of circuit judges.

748 F.2d 1037 (5th Cir. 1984).[45]

The history of elections of African-American circuit judges in Florida shows the system has purposefully excluded blacks from the bench. As recently as 1990, Florida as a whole had eleven African-American circuit judges, 2.8% of the 394 total circuit judgeships. See Young, Single Member Judicial Districts, Fair or Foul, Fla. Bar News, May 1, 1990 (hereinafter Single Member District). Florida's population is 14.95% black. County and City Data Book, 1988, United States Department of Commerce. In Marion, Lake, Hernando, Citrus, and Sumter Counties (which comprise the Fifth Circuit), there are eighteen circuit judgeships, none of whom are black.[46]

Florida's history of racially polarized voting, discrimination[47] and disenfranchisement,[48] and use of at-large election systems to minimize the effect of the black vote shows that an invidious purpose stood behind the enactment of elections for circuit judges in Florida. See Rogers, 458 U.S. at 625-28. It also shows that an invidious purpose exists for maintaining this system in the Fifth Circuit. The results of choosing judges as a whole in Florida,

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[45] The Supreme Court vacated the decision because it appeared that the same result could be reached on non-constitutional grounds which did not require a finding of intentional discrimination; on remand, the Court of Appeals so held.

[46] October 9, 1996 telephone call to Patricia Jenkins, long-time practitioner in the Fifth Circuit.

[47] See Davis v. State ex rel. Cromwell, 156 Fla. 181, 23 So.2d 85 (1945) (en banc) (striking white primaries).

[48] A telling example is set out in Justice Buford's concurring opinion in Watson v. Stone, 148 Fla. 516, 4 So.2d 700, 703 (1941) in which he remarked that the concealed firearm statute "was never intended to apply to the white population and in practice has never been so applied."

establish a prima facie case of racial discrimination contrary to Equal Protection and Due Process in selection of the decision-makers in a criminal trial.[49] These results show discriminatory effect which, together with the history of racial bloc voting, segregated housing, and disenfranchisement in Florida, violate the right to vote as enforced by Chapter 42, United States Code, Section 1973. See Thornburg v. Gingles, 478 U.S. 30, 46-52 (1986). This discrimination also violates the heightened reliability and need for carefully channeled decision-making required by the freedom from cruel and unusual capital punishment. See Turner v. Murray, 476 U.S. 28 (1986); Beck v. Alabama, 447 U.S. 625 (1980). Florida allows just this kind of especially unreliable decision to be made by sentencers chosen in a racially discriminatory manner and the results of death-sentencing decisions show disparate impact on sentences. See Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.R. 27 (1984); see also, Radelet and Mello, Executing Those Who Kill Blacks: An Unusual Case Study, 37 Mercer L.R. 911, 912 n.4 (1986) (citing studies).

Because the selection of sentencers is racially discriminatory and leads to condemning men and women to die on racial factors, this Court must declare that system violates the Florida and Federal Constitutions. It must reverse the circuit court and remand for a new trial before a judge not so chosen, or impose a life sentence.

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[49] The results in choosing judges in the Fifth Circuit (no black circuit judges and only one black county judge in modern history) is such stark discrimination as to show racist intent. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

5. Appellate review

a. Proffitt

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

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

b. Aggravating Circumstances

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

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death-eligible persons, or channel discretion as required by Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988). The

aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

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

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts).[50]

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

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[51] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

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

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

c. Appellate Reweighing

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

d. Procedural Technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.[52] See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of Eighth Amendment); and Smalley v. State, 546 So.2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated Eighth Amendment). Capricious use of retroactivity principles works similar mischief. In this regard, compare Gilliam v. State, 582 So.2d 610 (Fla. 1991) (Campbell[53] not retroactive) with Nibert v. State, 574 So.2d 1059 (Fla. 1990) (applying Campbell retroactively), Maxwell v. State, 603 So.2d 490 (Fla. 1992)

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

[53] Campbell v. State, 571 So.2d 415 (Fla. 1990).

(applying Campbell principles retroactively to post-conviction case, and Dailey v. State, 594 So.2d 254 (Fla. 1991) (requirement of considering all the mitigation in the record arises from much earlier decisions of the United States Supreme Court).

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[54] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

6. Other Problems With the Statute

a. Lack of Special Verdicts

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

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

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

b. No Power to Mitigate

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

c. Florida Creates a Presumption of Death

Florida law creates a presumption of death where, but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case).[55] In addition, HAC applies to any murder. By finding an aggravating circumstance

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

always occurs in first-degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[56] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the United States Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to Due Process and the heightened Due Process requirements in a death-sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

d. Florida Unconstitutionally Instructs Juries Not To Consider Sympathy.

In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), reversed on procedural grounds sub nom. Saffle v. Parks, 494 U.S. 484 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violate the Lockett[57] principle. The Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987) (upholding constitutional instruction prohibiting consideration of mere sympathy), writing that sympathy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Parks, 860 F.2d at 1553. The instruction given in this case also states that sympathy should play no role in the process. The prosecutor

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

[57] Lockett v. Ohio, 438 U.S. 586 (1978).

below, like in Parks, argued that the jury should closely follow the law on finding mitigation. A jury would have believed in reasonable likelihood that much of the weight of the early life experiences of Appellant should be ignored. This instruction violated the Lockett[58] principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

e. Electrocution is Cruel and Unusual.

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

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

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[58] Lockett v. Ohio, 438 U.S. 586 (1978).

CONCLUSION

Based upon the foregoing cases, authorities, and policies cited herein, Appellant respectfully requests this Honorable Court to grant the following relief:

As to Points I, II, V, VI, VII, VIII, IX, X, and XI, vacate the conviction and sentences and remand for a new trial;

As to Point III, vacate the death sentence and remand for a new penalty phase;

As to Points IV and XIV, vacate Appellant's death sentence and remand for imposition of a life sentence;

As to Point XII, vacate the orders of restitution; and,

As to Point XIII, vacate Appellant's life sentences and remand for a new sentencing proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Loran Cole, #335421 (R2S6), Florida State Prison, P.O. Box 747, Starke, FL 32091-0747, this 9th day of October, 1996.

for: CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER