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IN THE SUPREME COURT OF FLORIDA

LEROY POOLER

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

SUPREME COURT NO. 87,771

CIRCUIT NO.95-1117 CF A02

INITIAL BRIEF OF APPELLANT

Michael D. Lebedeker, Esq.
Florida Bar No. 351288
711 North Flagler Drive
West Palm Beach, FL 33401
Telephone: (407) 832-5661
Facsimile: (407) 832-4766

Counsel for Appellant

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PRELIMINARY STATEMENT

The Appellant was the defendant and Appellee was the prosecution in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. In this Brief the parties will be referred to by name or as Appellant and Appellee.

The following symbols will be used:

The symbol **"R"** will denote the record on appeal.

The symbol **"T"** will denote the court reporter's transcript.

STATEMENT OF THE CASE

The Appellant, LEROY POOLER, was charged by indictment on February 13, 1995, with first degree murder with a firearm, burglary of a dwelling while armed with a firearm, and attempted first degree murder with a firearm (R 42-43). Jury selection began on January 9, 1996 (T 265) and the jury was sworn on January 11, 1996 (T 758). Pretrial instructions were given by the court and testimony began the same date (T 766-792). At the close of the State's case the Appellant moved for a judgment of acquittal (T 1146-1147). That Motion was denied (T 1148-1149) and Appellant announced that he did not intend to call any witnesses (T 1149). Appellant was found guilty on January 17, 1996 of first degree murder with a firearm as charged in Count I of the Indictment, burglary of a dwelling with a firearm as charged in Count II of the Indictment and attempted first degree murder with a firearm as charged in Count III of the Indictment (T 1321).

The penalty phase began on February 7, 1996 (T 1362). On February 8, 1996, the jury, by a vote of nine to three, advised and recommended to the court that it impose the death penalty upon Leroy Pooler (T 1630). At the close of the allocution hearing on February 23, 1996, the court indicated that it was going to exceed the guideline sentences as to Count II and Count III (T 1691) and the court did sentence Appellant to life imprisonment with a

mandatory three year minimum, concurrent on each Count **and** concurrent with whatever sentence the Court would subsequently impose in regard to Count I (T 1691). On March 29, 1996, the trial judge sentenced Leroy Pooler to death for the first degree murder of Kim Wright Brown (T 1700).

A timely Notice of Appeal was filed on April 16, 1996 (R 792). Leroy Pooler is 48 years old (R 35).

BTATEMENT OF THE FACTS

GUILT PHASE

Alvonza Colson, 18 year old 11th grade high school student, was the State's first witness (T 792). Mr. Colson is the brother of the victim in this case, Kim Wright Brown (T 793). Mr. Colson testified that he had known Appellant, Leroy Pooler for approximately a year during which time Mr. Pooler was dating Kim Wright Brown (T 793).

Alvonza Colson testified that on January 30, 1995, he was in bed when his sister Kim responded to a knock at the front door at approximately 8:00 a.m.(T 794). Appellant was at the door (T 794). Mr. Colson stated that Kim Brown told Appellant "Leroy, I don't want you no more." (T 794) At that point Appellant asked to come in and Mr. Colson opened the door approximately half way (T 794). Appellant pleaded with Mr. Colson: "Alvonza, can I please talk to Kim? Can I please talk to Kim?" and Alvonza replied that he could not. According to Mr. Colson Appellant offered to let Mr. Colson try his car, would help Mr.Colson with his car and again asked if he could please talk to Kim. Mr. Colson once again responded that he could not (T 795).

At that point, according to Alvonza Colson, Appellant pulled a gun from his pants and Mr. Colson let go of the door and attempted to run (T 795). Mr. Colson testified that Appellant then shot him in the back (T 795).

Mr. Colson testified that after he was shot by the Appellant

Appellant was pulling on his leg while Mr. Colson was trying to get away (T 795). Mr. Colson stood up in the hallway of the home and Ms. Brown, asked Appellant not to kill her and her brother. Mr. Colson stated that his sister Kim suggested that they take Mr. Colson to the hospital, to which the Appellant replied "Okay" (T 796). Mr. Colson did not want to go with Appellant (T 796).

According to Mr. Colson the Appellant then told him to stay and call the ambulance and Appellant asked his sister to go with him (T 797). As Appellant walked out the front door ahead of Mr. Colson and his sister, Alvonza and Kim slammed and locked the door (T 797). Alvonza testified he then told his sister to run out the back door and that he (Alvonza) would stay and call an ambulance (T 797). When he attempted to use the telephone to call for an ambulance and the police, Mr. Colson stated that the phone wires had been cut (T 797).

Mr. Colson testified he next heard glass break and he saw Appellant sticking his hand through the door, unlocking the front door (T 797). Mr. Colson testified that he then ran to his next door neighbor's back porch where he hid behind a wall (T 798). Mr. Colson heard the back door to his residence shut and then he was approached by Appellant who "never mind me" (T 798). Mr. Colson stated that he heard his sister calling for help (T 798) and that Appellant went to the next building, approximately 10 feet away, to try to catch up with Kim Brown (T 799). Mr. Colson heard a gunshot at that point, looked to see his sister, and saw Appellant "pulling" his sister (T 799). Mr. Colson testified that

he next heard some gunshots (T 799), then ran in his back door, shut and locked the back door (T 799), went out the front door, locking the front door with his key, and went to the next door neighbor's house (T 800).

Mr. Colson testified that he next ran to a gym across the street from his house where he asked a man to call the police and an ambulance (T 800). Mr. Colson was subsequently taken to St. Mary's Medical Center (T 801).

On cross examination Appellant's counsel elicited some inconsistent statements from Mr. Colson (T 804-809) regarding whether or not he had told the police prior to his trial testimony that he had or had not seen Appellant shoot his sister. Finally, Mr. Colson testified that he did not in fact see Appellant shoot his sister but that he had seen Appellant reloading a gun so he **"assumed** he had shot my **sister"** (T 809). Mr. Colson reiterated that he did not see Mr. Pooler actually shoot his sister (T 809). Alvonza Colson again testified on cross examination that he had heard gunshots and had **"assumed"** that Appellant had shot Kim Brown because he saw Appellant reloading the gun (T 812). Mr. Colson further testified on cross examination that he did not see Appellant cut the telephone wire (T 816) as had been alluded to previously. Appellant's counsel on cross examination, further elicited inconsistent statements from Mr. Colson viz-a-viz previous statements made to investigating police officers (T 819). Mr. Colson testified that after he and his sister had locked Appellant out of the house, while his sister was getting ready to flee, he

heard banging and glass breaking next to the front door (T 822-824). Mr. Colson saw a hand come through the glass but he did not actually see how the glass was broken (T 824-825).

W.C. Burgess was sitting in his car early the morning of January 30, 1995, (T 838) when he saw Kim Wright Brown, who he had known for approximately 6 years (T 838). Mr. Burgess had left his home, stopped by a store where he purchased a beer and a pack of cigarettes, when he was stopped by Appellant who asked him if he had seen his "sister" (T 839). Mr. Burgess told Appellant that he had not (T 839-840). Mr. Burgess got into a car with some friends and they were all sitting drinking some wine when he observed Kim Brown come running from upstairs of her residence, and Appellant came out the back door behind her (T 840). Mr. Burgess testified that he observed Kim Brown run to the next building asking people to open the door to let her in (T 841). Mr. Burgess stated that he saw Appellant grabbing and pulling Kim Brown trying to get her into a car when his gun went off (T 841). After the gunshot Mr. Burgess stated that he saw Appellant continue to pull the victim telling her "Bitch, didn't I tell you I kill you?", after which Appellant "put the gun to her and pop it to her" (T 842). Mr. Burgess testified that he saw Appellant shoot Kim Wright Brown (T 843). He was unable to state how many times Appellant shot Kim Brown because there was confusion with people ducking and trying to leave (T 843). After that Mr. Burgess left the scene in the car he was sitting in but returned shortly when an ambulance and police had arrived (T 843).

At this point in the proceedings Appellant's counsel formerly invoked "The Rule" (T 846).

Mr. Burgess identified a photograph of the deceased, Ms. Brown. On cross examination Mr. Burgess testified that he knew that Appellant was "going out with Kim" and that "everybody" knew that they were "messing around together" (T 866-867). Mr. Burgess did not contact the police relative to this incident for a week or possibly three or four days (T 875).

Ruby Thomas had lived near the home of Kim Brown for approximately nine years and had known Kim Brown since she was a little girl (T 879). On January 30, 1995, Ruby Thomas was awakened by a grandchild who told her that she had heard shots (T 880). Ms. Thomas looked out of her house and heard approximately six gun shots (T 880-881). Ms. Thomas testified that when she looked out of her window she saw Appellant shooting Kim Brown (T 881). Ms. Thomas identified Appellant in court, (T 882) as had previous witnesses. Ms. Thomas testified that Appellant was close to Kim Brown when he shot her (T 882).

During cross examination Appellant's counsel questioned Ms. Thomas regarding an unfortunate incident in which her daughter had been killed. Ms. Thomas did not want to discuss that matter but the Court instructed her to answer the questions (T 900-901). Ms. Thomas did not want to discuss the matter of her daughter's death or of the fact that the perpetrator of that crime was released from prison after twelve years (T 901-904). Ruby Thomas did testify on cross examination that she did not see Appellant chase Kim Brown

(T 904). On re-direct examination Ruby Thomas in response to the State's question as to whether she had actually seen Appellant pulling the trigger and shooting Kim Brown "through the window" replied "yes" (T 905). It is unclear from this questioning whether Ruby Thomas had seen Appellant shooting Ms. Brown through a window or whether Ms. Thomas had been looking through a window and observed the Appellant shoot the victim.

Charlie Ware was familiar with the apartment complex where Kim Brown lived and he knew her since she had been about eight or nine years old (T 907-908). Mr. Ware testified that he was sitting in his car when he observed Kim Brown run down the sidewalk with Appellant behind her (T 909). Mr. Ware thought that Appellant was Kim Brown's boyfriend (T 909). When asked to identify Appellant in Court Mr. Ware stated "no, no, I don't see nobody." (T 909) Mr. Ware testified that he knew Appellant for a little more than a year and had seen him several times at Ms. Brown's apartment complex (T 909). Mr. Ware testified that he observed Appellant hit Ms. Brown "upside the head" with the gun and that the gun went off, following which Appellant "took her down" and tried to get her in the car but was unable to do so (T 910). Mr. Ware then stated that he observed Appellant hit Ms. Brown, shoot her in the head and then shoot her several more times after which he got into the car and drove off (T 910).

Following this testimony the Prosecutor asked Mr. Ware to once again "look all over the courtroom" to see if he could see the man he referred to as Appellant (T 912). Appellant's counsel and the

Prosecutor were permitted to approach the bench at which time Appellant's counsel, Mr. Salnick, informed the court that he had observed witnesses in the back of the courtroom who were pointing toward Mr. Pooler, specifically the witness, Ruby Thomas. Mr. Salnick informed the court that Ms. Thomas was "surprised that I caught her" and pretended to be scratching herself. The court asked "what do you want me to do about that?" Mr. Salnick replied that he did not know but that "they" were communicating with Mr. Ware in an effort to help him identify Mr. Pooler (T 912-913). After this exchange Mr. Ware left the witness stand and was able to identify Appellant.

On cross examination Mr. Salnick asked Mr. Ware whether he was able to see Ms. Thomas point in Mr. Pooler's direction (T 914). The State objected and court overruled that objection (T 914-915). Mr. Ware testified that he did not see Ms. Thomas point (T 915). At that point Mr. Ware's cross and re-direct examination were concluded and the court recessed for the day (T 921-922).

The next morning, January 12, 1996, Appellant's counsel moved for a mistrial relative to what counsel observed during the testimony of Charlie Ware, alluded to previously (T 925-927). The court denied the Motion for a Mistrial stating that she did not think that "identity is really at issue in this case and I didn't see the behavior you're complaining of, and I don't know whether or not the witness did either." (T 927)

Dr. Michael Smith, a trauma surgeon at St. Mary's Hospital (T 928) testified that he 'had treated both Alvonza Colson and Kim

Brown the morning of January 30, 1995. Mr. Colson had been shot in the left flank with an exit in the right groin. Dr. Smith performed surgery on Mr. Colson who remained in the hospital for approximately a week (T 929-932). Dr. Smith also treated Kim Brown at approximately 9:15 a.m. on January 30, 1995, but he stated that Ms. Brown had no signs of life and he did not attempt to treat her for any of her injuries, merely confirming that she was in cardiac arrest from multiple gunshot wounds and was pronounced dead (T 932-933).

Clara Wright, the mother of Kim Wright Brown (T 936), testified that Kim Brown on January 30, 1995, was seeing Leroy Pooler and that she "had a new friend" who she had been seeing for about a week or two (T 942-943). Ms. Wright testified that prior to January 30, 1995, her daughter, Kim, had stopped seeing the Appellant (T 943). Ms. Wright further testified that on January 30, 1995, the Appellant did not have her consent to enter her home but that he "just came, popped up." (T 944)

Dr. James Benz, District Medical Examiner of Palm Beach County (T 947) testified that he performed an autopsy on Kim Wright Brown on February 1, 1995 (T 949). Dr. Benz testified that his examination indicated that Ms. Brown had been shot five times (T 949). Dr. Benz testified as to the locations of the various gunshot wounds (T 951-959). He also testified that he had removed from the body a .38 caliber class bullet (T 954). Dr. Benz was unable from his examination to form an opinion as to the position that the body was in for any of the gunshot wounds (T 958-959). Dr. Benz

testified that none of the wounds sustained by Ms. Brown were "immediately fatal" (T 960).

On cross examination Dr. Benz testified that he was unable to determine the distance from which the shots were fired into Ms. Brown (T 962-964) (T 966).

The State called Freddie Jackson as a witness (T 968). Prior to his testimony Appellant's counsel and the Prosecutor approached the bench where Appellant's counsel, Mr. Salnick, informed the court that he was objecting to Mr. Jackson being called as a witness because he (Mr. Salnick) had observed Mr. Jackson sitting in the back of the courtroom during the testimony of Ms. Wright and Dr. Benz (T 968-969). After discussion at the bench and argument by counsel the court determined that she would allow Mr. Jackson to testify (T 968-970). Mr. Salnick moved for a mistrial based upon the court's ruling, (T 971) which Motion was denied by the court (T 971).

Mr. Jackson testified that he had not been in the courtroom during any of the testimony and that he had not heard any of the testimony of witnesses who had come before him (T 973). Counsel once again approached the bench; Mr. Salnick informed the court he would like to either submit an affidavit or put himself under oath and testify regarding Mr. Jackson's presence in the courtroom; the court said it would allow Mr. Salnick to submit an affidavit at a later time and the bench conference concluded (T 975-976).

Mr. Jackson testified that he knew almost all of the residents in or around the apartment complex where Kim Brown had resided, and

that he had known Kim Brown for almost all of her life (T 977-978). Mr. Jackson testified that he last saw Kim Brown behind her apartment running, followed by Appellant (T 978-979). Mr. Jackson identified the Appellant in court (T 979). Mr. Jackson testified that Ms. Brown was wearing night clothes and Appellant told her "I told you I was going to kill you. I told you I was going to kill you." (T 980) Mr. Jackson then testified that he saw Appellant grab Ms. Brown, hit her in the head with a pistol and "it went off." (T 981) After that Mr. Jackson testified he saw Appellant grab Ms. Brown around the neck trying to force her into a car but she wouldn't get in, during which Appellant allegedly said "Bitch, I told you I was going to kill you, didn't I?" (T 981-982) Subsequently, Mr. Jackson testified that he saw Appellant start to shoot and Ms. Brown "slumped" (T 982-983). Mr. Jackson stated that after Appellant had stopped shooting Ms. Brown, Mr. Pooler "went back to his truck and reloaded." (Emphasis added) (T 983) After that Appellant walked back to his car, (emphasis added) got in the oar and drove away (T 984).

Jack McCall, a crime scene investigator for the West Palm Beach Police Department (T 1004) testified that on January 30, 1995, he was involved in a homicide investigation in the 500 block of 22nd Street in the City of West Palm Beach (T 1005). Mr. McCall prepared a diagram of the area (T 1006) and retrieved from the crime scene area several spent shell casings of .38 caliber (T-1009). A projectile and several articles of clothing were obtained by Mr. McCall at the crime scene (T 1011-1013). Mr. McCall further

testified that he recovered other spent shell casings and projectiles in the area, all from .38 caliber Winchester bullets (T 1018-1021). The record does not indicate that Mr. McCall was able to tie any of the physical evidence to the Appellant.

Mr. McCall did testify that inside of the Kim Brown residence he noticed a telephone whose wire had been "stretched and the end of the cable had been pulled, appeared that it had been pulled out of the wall." (T 1031) Mr. McCall testified that he did not analyze any of the evidence other than the "effort to deal with fingerprints." (T 1035)

The State did not call any other witnesses to testify as to analysis of physical evidence in this case, except for John O'Rourke.

On cross examination Mr. McCall testified that he did not see any indication that the above-described telephone cord had been cut but that it had been stretched and that he (Mr. McCall) was unable to determine when it was stretched (T 1041).

The State next called Sgt. Jerry Chestnut of the West Palm Beach Police Department (T 1050) who testified that his involvement in this case was limited to crowd control and protection of the crime scene (T 1052-1054).

Officer Frank Alonzo of the West Palm Beach Police Department testified that he participated in the homicide investigation of the instant case and that his involvement primarily consisted of standing post by an apartment that was part of the crime scene (T 1055-1056). Officer Alonzo observed a "smashed" pane of window to

the left of the front door (T 1056). Officer Alonzo testified that he reached through the broken window and unlocked the door to see if there were any other possible bodies or injured persons in the apartment (T 1057). Officer Alonzo saw overturned furniture and some shell casings and a live round on the kitchen floor of the residence and at that point he left the apartment (T 1058).

The trial continued on January 16, 1996. John O'Rourke, Forensic Firearms Examiner with the Palm Beach County Sheriff's Office next testified (T 1072). Mr. O'Rourke's testimony was lengthy, consisting of 42 pages of transcript. Most of Mr. O'Rourke's testimony consisted of general firearms facts and forensic firearms procedure. The essence of his testimony in this case was that projectiles and shell casings obtained at the crime scene were of .38 class (T 1094). Mr. O'Rourke testified that the projectiles, shell casings and one live round of ammunition were .380 auto rounds (T 1094-1095). Mr. O'Rourke testified that there were several types of firearms designed and manufactured to discharge the .380 auto cartridge, (T 1095) and that there is a group of ten different manufacturers that make firearms that could have fired the projectiles presented (T 1096). Mr. O'Rourke also studied several items of clothing from the crime scene (T 1099) but he was unable to place a distance from the end of the barrel of the gun to these items of clothing (T 1100). Nowhere in Mr. O'Rourke's testimony was he able to connect any of the forensic evidence in this case to the Appellant.

Fannie M. Rolle testified that she saw a shooting take place

on January 30, 1995 (T 1114). Ms. Rolle testified that she saw a man pulling a lady by the arm off of the porch next door to her residence (T 1115). Ms. Rolle went into her house and dialed 911 and then went back to the door.

Ms. Rolle saw the man try to force the woman into his car, a brown and beige car, and noted that the woman would not get into the car (T 1116-1117).

Ms. Rolle then stated that the woman would not get into the car and the man told her "I told you I was going to kill you", then Ms. Rolle heard a shot and saw the woman fall (T 1117). After that the man pulled the woman, turned her over, pulled her up by the arm and then "unloaded his gun into her head" (T 1117). After that the man went to his car, got in and drove away (T 1118). Ms. Rolle had never seen the man before that day (T 1119).

Ms. Rolle did not identify the Appellant in court as the man she described in her testimony.

Finally, the State called as a witness Carolyn Glass. Ms. Glass knew Appellant for a year or two and also had known Kim Brown since she was five or six years old (T 1129). Ms. Glass testified that she saw Leroy Pooler on or about January 25, 1995 (T 1130). On that date she talked with him about Kim Brown and she also spoke with him on the 23rd and the 25th of January (T 1130). Ms. Glass testified that the Appellant had told her that he was going to kill Kim Brown and that he loved her and that if he couldn't have her nobody else would (T 1130-1131). Ms. Glass stated that she spoke with Appellant for about thirty minutes (T 1131). At that time Ms.

Glass told Appellant that she was going to tell Kim Brown what he had said and that she did in fact tell Ms. Brown that on the morning of January 28, 1995 (T 1131).

On cross examination Ms. Glass testified that after the Appellant told her he had intended to kill Kim Brown she did not go to the police, did not call anybody about the threat, did not inform Ms. Brown or her mother (T 1142).

On re-direct examination Ms. Glass testified that she had observed Leroy Pooler outside of Kim Brown's apartment on the Sunday before she was killed; that Appellant just walked back and forth looking up but did not make any threats to people in the apartment (T 1144). Ms. Glass further testified that all that day, the Sunday, (before Ms. Brown was killed) Appellant had been drinking and would be looking up at the apartment (T 1145).

After Ms. Glass testimony the State rested (T 1146). At the conclusion of Ms. Glass testimony Appellant's counsel moved for a judgment of acquittal with respects to Count I, II and III of the Indictment (T 1146-1149). The court denied Appellant's Motions (T 1149). Appellant's counsel indicated to the court that he did not intend to call any witnesses (T 1149). Mr. Pooler stated that he agreed with his counsel's decision not to have Appellant testify (T 1149-1150).

PENALTY PHASE

On February 7, 1996, the penalty phase of Leroy Pooler's trial began (T 1335). The court gave penalty phase instructions to the jury (T 1360-1362). The Prosecutor made his opening statement (T 1362-1368), followed by Appellant's counsel's opening statement (T 1368-1376).

Laurence Levine, Ph.D., a Neuropsychologist (T 1376) testified that his practice primarily consists of evaluation of patients who have a known or suspected brain involvement (T 1378). Dr. Levine testified that he had been contacted by Appellant's counsel to perform a competency examination on Appellant (T 1379). Dr. Levine spent approximately eight hours with Mr. Pooler, (T 1380) and testified that, with regard to Mr. Pooler's cognitive functioning compared to an average individual, almost all of Appellant's performances were below average, most of them being in the low average to mildly impaired range (T 1381). Dr. Levine further testified that an average intelligence would have a value of 100, and that Appellant's performances were generally about "85,80, a few at 75", putting Appellant in the low average to mildly impaired range (T 1382). According to Dr. Levine Appellant's performance I.Q. rating was 79, putting him in the borderline range and Appellant's averages of verbal and performance I.Q.'s averaged out to 80 which is "right on the cusp of the low average to the borderline range" (T 1384). Dr. Levine testified that Appellant's reading was "dramatically impaired". His grade level was third

grade level (T 1392-1393). It was Dr. Levine's opinion that the Appellant would require consultation time with his attorney to understand pretrial legal arguments and documents (T 1397).

Dr. Levine's testimony was interrupted in order to permit the court to take testimony from Dr. Jude Desormeau, a Psychiatrist with the Palm Beach County Sheriff's Office (T 1412). Dr. Desormeau is a physician specializing in psychiatry (T 1413). He examined Appellant on February 2, 1995, after Appellant was referred to him in the jail by a psychiatric nurse (T 1413). At that time Appellant was "very upset and emotional; he was tearful, anxious, depressed," and had suicidal ideations and had been placed under special precautions because he expressed ideation and a plan to harm himself (T 1413). Dr. Desormeau concurred with the findings of the psychiatric nurse and described Appellant as "shaking like a leaf" and Dr. Desormeau had to intervene with medications and tranquilizers (T 1414). Appellant was on suicide watch for about 48 hours (T 1414) and he subsequently became stabilized after receiving medication, and was transferred to the care of another psychiatrist, Dr. Armstrong, in the jail's transitional unit (T 1415).

On cross examination Dr. Desormeau testified that Appellant did not mention that he was worried about what was going to happen to him (T 1418). According to Dr. Desormeau approximately a week after he was transferred to the transition unit, Dr. Armstrong decided that Appellant could be transferred back to the general jail population (T 1420).

Dr. Levine returned to the witness stand and the State continued its cross examination (T 1422). The Prosecutor cross examined Dr. Levine in some detail regarding questions which were a part of the testing administered to Appellant (T 1422-1442).

Arthur Rock, a deputy sheriff at the Palm Beach County Sheriff's Department main correctional facility (T 1448) testified that he was a classification officer at the jail (T 1449). Deputy Rock brought with him Appellant's inmate jail file (T 1449). That file contained all paperwork relative to the inmate submitted by the inmate or by the jail, with the exception of medical records, to include evidence of any discipline problems while incarcerated (T 1450). Deputy Rock testified that there was one disciplinary report in Appellant's file which consisted of a September 24, 1995 incident where Appellant allegedly had threatened another inmate (T 1450). There was no hearing on the disciplinary report and there was no indication of violence on the part of Mr. Pooler who the deputy characterized as a well behaved inmate (T 1451). The deputy further testified that there was nothing contained in Appellant's file relative to him posing a threat of violence, or not following rules (T 1452).

Michael Armstrong, M.D., a Staff Psychiatrist at the Palm Beach County Jail (T 1455) testified that he treated Appellant for approximately two weeks (T 1455-1456). Dr. Armstrong testified that Appellant's record indicated that he had been hearing a voice and that this voice, which called out his name, started when he came to the jail (T 1459). Dr. Armstrong testified that

Appellant's diagnosis at the time of discharge from the mental health unit was "a judgment disorder with mixed figures which "should read mixed emotional features" (T 1460). Dr. Armstrong stated that this condition could be because of Appellant's arrest and his facing imprisonment after a trial or it could be because of the loss of a loved one (T 1460). Dr. Armstrong further testified that the initial mental health form relative to the Appellant had a block checked that it was an emergency admission with Appellant suffering from severe depression (T 1466).

Alice Bradford, an employee of U&Me Moving & Storage Company worked with the Appellant for seven or eight years (T 1475). Ms. Bradford testified that he was reliable, appearing on the job every day and on time (T 1476). Ms. Bradford was aware of Kim Brown because she would call during working hours asking to speak with Appellant (T 1477). Ms. Bradford had had Appellant do personal work for her at her house. She trusted him to be in her house and he never did anything inappropriate there (T 1478-1479). Ms. Bradford stated that she trusted Appellant around her child (T 1479-1480).

Stephen R. Alexander, Ph.D., a Psychologist in practice for approximately 25 years, (T 1483-1484) testified that he initially met with Appellant in the Palm Beach County Jail for approximately two hours and that at the end of that evaluation it was his opinion that Appellant was not competent to proceed to trial (T 1486-1487). Dr. Alexander stated that Appellant did not, in his opinion, have the capacity to relate pertinent information to his

attorney; was greatly misinformed for what appropriate court procedure was and what role he would take in the trial, and that Appellant would totally misunderstand the proceedings and due to misunderstandings and misperceptions possibly even be disruptive to the process of the trial (T 1487).

Dr. Alexander evaluated Appellant to see whether he was faking or malingering and determined that he was not (T 1489-1491). Dr. Alexander testified that Appellant's I.Q. was between 75 and 85 (T 1492). Dr. Alexander testified that Mr. Pooler was the type of individual that functions best with limited responsibilities, limited choice and direct supervision (T 1495). The doctor testified that Appellant's success in the military and his enjoyment of military life was reflective of that, and that his eight year job with the moving company indicated his desire to keep things the same and not have a great deal of change (T 1495). Dr. Alexander's opinion was that Appellant was not competent to proceed to trial because of limited intelligence (T 1497). Dr. Alexander testified that Mr. Pooler was not malingering and that he was trying his best to answer questions and was fully cooperative to the extent of his ability and was genuine and sincere (T 1499-1500).

The Appellant's brother, Henry Pooler, Jr., (T 1507) testified that Appellant had four children, all girls, and that he took care of them when they were growing up (T 1508). Mr. Pooler testified that Appellant had served in the U.S. Marine Corp. including combat service in Viet Nam, and that when he left the Marine Corp., he had

changed in that he had a bad temper (T 1512).

Carolyn Pooler, the Appellant's sister, testified that Appellant was raised in a religious family (T 1514). Ms. Pooler testified that Appellant raised four girls and that he was "a very good father, a good provider" (T 1515-1516).

Henry Pooler, Sr., Appellant's father testified (T 1519-1522).

SUMMARY OF ARGUMENT

1. The Appellant was denied due process when the trial court failed to take corrective action after the Prosecutor made an adverse comment to the jury panel during the voir dire process regarding the Appellant's presumption of innocence.

2. Although the evidence was clear that the attempted first degree murder of Alvonza Colson was committed during the course of a burglary, the indictment did not charge premeditation and the court should have instructed the jury in the penalty phase of the trial as to the felony murder theory.

3. The trial court erred in its finding as a statutory aggravating circumstance that the capital felony of the murder of Kim Brown was especially heinous, atrocious and cruel, when compared with holdings of this court in other cases.

4. The trial court should not have found as a statutory aggravating circumstance a felony involving the threat of violence to the person, where the only other convictions of Appellant for any felony at all were contemporaneous to the homicide conviction.

5. Death is not proportionately warranted in this case.

6. The trial court should not have rejected the statutory mitigating factor where evidence established that Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were substantially impaired.

7. The trial court should not have rejected the statutory

mitigating circumstance where the evidence established that Appellant acted under extreme duress at the time of the offense.

a. The trial court should not have rejected the non-statutory mitigating circumstance that Appellant had a good jail record and showed an ability to adapt to prison life.

9. The trial court should not have rejected the non-statutory mitigating factor where the evidence established that Appellant was of low normal intelligence.

10. The trial court should not have rejected the non-statutory mitigating factor where the evidence indicated that Appellant suffered from mental health problems.

11. The trial court should not have rejected the non-statutory mitigating factor where the evidence indicated that Appellant is rehabilitable.

12. The trial court should not have rejected the non-statutory mitigating factor where the evidence showed that the homicide was the result of a heated domestic dispute.

13. The trial court should not have rejected the non-statutory mitigating factor which was established by the evidence that Appellant is unlikely to endanger others and will adapt well to prison.

14. The Appellant is being denied due process and a full and fair appellant review due to the absence from the record of the pre-sentence investigation report upon which the court relied in its determination of the sentence.

15. The aggravating circumstance relied upon by the court in

imposing sentence that the capital felony was especially heinous, atrocious and cruel is unconstitutional.

16. The trial court should not have departed from the guideline sentence as to Counts II and III without a contemporaneous departure order.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN TARING NO ACTION REGARDING THE PROSECUTOR'S COMMENT DURING VOIR DIRE ON APPELLANT'S PRESUMPTION OF INNOCENCE.

The Appellant has been deprived of due process. During the jury selection process and after the panel had been "death qualified" the Prosecutor was questioning individual jurors. In speaking to a panelist, Ms. Hershman, the dialogue was as follows:

Mr. Volker: Now, as we sit, Mr. Pooler is presumed to be innocent.

Ms. Hershman: Right.

Mr. Volker: That doesn't mean that he is innocent, but you have to presume that (T 586).

Appellant's counsel, Mr. Salnick, objected and asked to approach the bench. The court replied "let's go ahead" (T 586). The court never ruled on Mr. Salnick's objection.

The presumption of innocence which attaches to the defendant in a criminal case is arguably the most fundamental right afforded an accused person under our criminal justice system in the United States. It is a fundamental due process protection. In Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930 (1978) Justice Powell stated; "the presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." The Taylor court characterized this as a due process right, citing to the Fourteenth Amendment of the United States Constitution.

Although Appellant was unable to locate any precedent which was exactly on point with the instant case, there are a number of reported cases dealing with prosecutorial misconduct. In Pacific0 v. State, 642 So.2d 1178 (Fla. 1st DCA 1994), the court stated that it is improper for a Prosecutor to express a personal belief in the guilt of the accused Id. at 1183. The Pacifico court pointed out that the cumulative affect of improper prosecutorial comments during closing argument amounted to fundamental error. In the instant case the Prosecutor's comment to a jury panel was particularly significant because the jury members selected from that panel would have been under the influence of the proper comment throughout all of the trial and therefore an improper comment made early on in the proceedings is likely to have a greater affect then one made later in the trial, eg: during closing argument.

In Rilev v. State, 560 So.2d 279 (Fla. 3rd DCA 1990) the court held that prejudicial comments of the Prosecutor in closing argument, during which the State expressed a personal belief in the guilt of the accused, were such as to require an new trial. The Prosecutor said, referring to the defendant, "because he's guilty of first degree premeditated murder." Id. at 280. A Prosecutor's comment denigrating Appellant's presumption of innocence has a greater affect and is more improper than a mere comment as to the defendant's guilt.

Similarly, in Jones v. State, 449 So.2d 313 (Fla. 5th DCA 1984) the court reversed a guilty verdict and remanded the case for

a new trial where the Prosecutor alluded to or stated his personal belief in the defendant's guilt. In Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984) the court held, citing Grant v. State, 194 So.2d 612 (Fla. 1967), that improper prosdcutorial remarks can constitute reversible error when such remarks may have prejudiced and influenced the jury into finding the defendant guilty. The Ryan court referred to a Florida Supreme Court decision, State v. Murray, 443 So.2d 955 (Fla. 1984) in which Justice Shaw stated: "prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless." Here the Prosecutor's improper comment as to Appellant's presumption of innocence constitutes a comment upon arguably the most basic right of an accused in our criminal justice system, and for that reason the cause should be remanded for a new trial.

POINT II

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE FELONY MURDER THEORY IN COUNT III OF THE INDICTMENT CHARGING ATTEMPTED FIRST DEGREE MURDER WITH A FIREARM OF ALVONZA COLSON.

Appellant was charged in an indictment with three counts: Count I was first degree murder with a firearm; Count II was burglary of a dwelling while armed with a firearm; and Count III was attempted first degree murder with a firearm. Count I specified that the murder was done by premeditated design. Count III was silent as to the theory upon which the charge was based, i.e. attempted first degree murder from a premeditated design, or in the course of the commission of an enumerated felony (R 42-43).

The jury convicted Appellant of Count III, attempted first degree murder with a firearm, as charged in the indictment (T 1321).

Prior to the jury retiring to deliberate, the court instructed the jury. As to Count I of the indictment, the court instructed as to first degree felony murder (T 1254) **and** first degree premeditated felony murder (T 1259) **and** on premeditation relative to first degree premeditated murder (T 1253). (Emphasis added) Therefore, as to Count I of the indictment the court instructed the jury as to both premeditated and felony murder theories.

The court instructed on attempted murder in the first degree (T 1263-1267). In instructing on attempted first degree murder the court included the question of premeditation and defined the meaning of a premeditated design (T 1266). The court did **not** instruct the jury as to the felony theory as it relates to attempted first degree murder. (Emphasis added)

The evidence clearly shows that the attempted murder of Alvonza Colson occurred during the commission of an enumerated felony, i.e. burglary. Mr. Pooler was found guilty of burglary with a firearm as charged in Count II of the indictment (T 1321).

The trial testimony clearly indicated that the Appellant shot Alvonza Colson in the back after having first forced himself into the apartment where Alvonza and his sister Kim Brown were living (T 795-796). Additionally, the record is replete with references by the State to Alvonza Colson having been shot during the course of a burglary.

Had the court instructed the jury on felony first degree

murder there is a good chance Appellant would have been convicted of that crime.

In State v. Gray, 654 So.2d 552 (Fla. 1995) the Supreme Court held that there is no crime of attempted felony murder. Gray further required that the decision must be applied to all cases pending direct review or not yet final. Id. at 554. The verdicts and sentencing in the instant case were subsequent to Gray. In Wilson v. State, 660 So.2d 1067 (Fla. 3rd DCA 1995) the court cited Gray and certified a question regarding whether lesser included offenses remained viable for a new trial or reduction of the offense.

This court in State v. Wilson, 21 Fla. L. Weekly S292 (Fla. 1996) answered the certified question described above and held that the proper remedy was to remand to the trial court for retrial on any of the other offenses instructed on at trial.

Appellant is mindful of this court's very recent decision in Curtis v. State, 21 Fla. L. Weekly S442 (Fla. 1996). This court in Curtis held that Gray only applies to attempted first degree felony murder and the Appellant Curtis was charged with attempted premeditated (Emphasis added) murder. In the instant case, the Appellant was not charged with attempted premeditated murder but merely with attempted first degree murder with a firearm. Likewise, Appellant Pooler was not charged in the indictment with felony first degree attempted murder. The indictment was silent as to the theory.

In its sentencing order, the court found that a capital felony

was committed while Appellant was engaged in the commission of a burglary (R 728). The court also found in its sentencing order, as an aggravating factor, that the defendant was previously convicted of a felony involving the use of threat of violence to the person, i.e. his contemporary conviction of attempted first degree murder with a firearm (R 728).

Accordingly, we have here a situation in which Appellant was sentenced to death based to a significant degree, upon the two above-described aggravating factors. However, it is unfair and illogical for the defendant to be sentenced pursuant to an aggravating factor of his contemporaneous conviction of attempted first degree murder and a second aggravating factor that he murdered Ms. Brown while engaged in the commission of a burglary, when in fact the felony involving the use of threat of violence to a person (the attempted first degree murder of Alvonza Colson) was clearly committed while Appellant was engaged in the commission of a burglary, making the crime an attempted first degree felony murder. The unfairness of this situation is compounded by the fact that the indictment did not charge nor did the jury convict Appellant of premeditated attempted first degree murder.

Following this line of reasoning, it was error for the court to fail to instruct the jury as to the elements of attempted first degree felony murder. If the court had so properly instructed the jury, the jury certainly could have convicted Appellant of attempted first degree felony murder and that, pursuant to Gray, would not be a crime at this time and could not be used as an

aggravating factor in sentencing the Appellant to death,

POINT III

THE TRIAL COURT ERRED IN ITS FINDING THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

In its sentencing order, the court found as an aggravating factor that the capital felony was especially heinous, atrocious and cruel citing Florida Statute 921.141(5)(h) (R 729).

Evidence presented at trial indicated that Appellant chased Kim Brown from her apartment into an alley behind her residence. W.C. Burgess testified that he observed Kim Brown run from her residence with Appellant behind her to a neighboring building asking people to open the door and let her in (T 840-841). Mr. Burgess testified that he saw Appellant grabbing and pulling Kim Brown trying to get her into a car when his gun went off (T 841). After the gunshot Mr. Burgess stated that he saw Appellant continue to pull the victim telling her, "Bitch, didn't I tell you I'd kill you? ", after which Mr. Burgess saw the Appellant "put the gun to her and pop it to her" (T 842).

Another witness, Charlie Ware, testified that he observed Kim Brown run down the sidewalk with Appellant behind her (T 909). Mr. Ware saw Appellant hit Ms. Brown "upside the head" with the gun and the gun went off and Appellant then tried to get her into a car but was unable to do so (T 910). Mr. Ware then stated he observed Appellant hit Ms. Brown, shoot her in the head, and then shoot her several more times after which she got in the car and drove off.

Dr. James Benz, the Medical Examiner, testified that Ms. Brown

had been shot five times (T 949). He was unable to determine the distance from which the shots were fired into Ms. Brown (T 962-964) and opined that none of the wounds sustained by Ms. Brown were "immediately fatal" (T 960). The record does not indicate the order in which the wounds were fired, which wound was the fatal wound, and when in the sequence of the offense the victim lost consciousness and died.

Freddie Jackson testified that Appellant told Ms. Brown "I told you I was going to kill you" (T 980), after which Mr. Jackson testified he saw Appellant hit her in the head with a pistol and again tell Ms. Brown he was going to kill her (T 981-982), and that after that Appellant shot Ms. Brown who "slumped" (T 982-983).

Fannie Rolle testified that she saw a man pulling a woman by the arm (T 1115-1116). Ms. Rolle testified that the man attempted to force the woman into a car. When the woman would not go he told her "I told you I was going to kill you", after which Ms. Rolle heard a shot and saw the woman fall (T 1117).

Carolyn Glass testified that the Appellant had told her that he was going to kill Kim Brown, that he loved her and that if he couldn't have her nobody else would (T 1130-1131). This conversation took place on or about January 25, 1995 (T 1130-1131).

The above were the only witnesses who testified as to what happened to the victim prior to her death.

There is a line of cases emanating from this court which deal with the statutory aggravating factor that a murder was especially

heinous, atrocious and cruel. Going back to State v. Dixon, 283 So.2d 1 (Fla. 1973), the court held that the term heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. This court continued that what is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-- conscienceless or pitiless crime which is unnecessarily torturous to the victim. Id. 9 There is no evidence here that Appellant or Appellant's acts, as bad as they may have been, were extremely wicked or shockingly evil when compared with other cases. There is no evidence that Appellant's acts against Kim Brown were designed to inflict a high degree of pain, nor is there any evidence that Appellant acted with utter indifference or enjoyment of the suffering of Kim Brown. While the evidence may have indicated that defendant acted out of rage, passion and frustration, his acts did not rise to the level of that set forth in Dixon.

In 1982 in Simmons v. State, 419 So.2d 316 (Fla. 1982) the defendant struck the victim twice in the head with a roofing hatchet killing him. The court held that this crime was not especially heinous, atrocious and cruel. The court stated that it had consistently held that in order for a capital felony to be considered heinous, atrocious or cruel it must be "accompanied by

such additional acts as to set the crime apart from the norm of capital felonies" Id. 319. Similarly, in Herzos v. State, 439 So.2d 1372 at 1380 (Fla. 1983) this court held that the evidence was insufficient to justify the application of the heinous, atrocious and cruel aggravating factor where the defendant had caused the victim's death by wrapping telephone wire around her neck and strangling her. In Herzog, prior to strangling the victim, the Appellant had gagged the victim and attempted to smother her with a pillow. This court held in Herzog that the heinous, atrocious and cruel factor is applicable where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

There was no evidence adduced at Appellant's trial that his crime was conscienceless, pitiless, or which unnecessarily tortured Kim Brown. Despite the fact that the multiple murders in Craig v. State, 620 So.2d 174 (Fla. 1993) were fully premeditated, the court found that they were carried out quickly by shooting, and that they did not meet the standard of especially heinous, atrocious or cruel. In the instant case the victim was killed by shooting and there was no evidence as to how soon in the sequence of events the victim died, and therefore to what degree of suffering, if any, she was subjected.

In 1990, in Jones v. State, 569 So.2d 1234 (Fla. 1990) this court found that evidence that shooting sleeping occupants in a

truck in order to steal the truck was not especially heinous, atrocious or cruel. The evidence showed that three shots had been fired and there were two victims involved.

In Williams v. State, 574 So.2d 136 (Fla. 1991) this court found that the aggravating factor of heinous, atrocious or cruel may only be found in "torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain, or utter indifference to, and enjoyment of, the suffering of another." Id.138 There is no evidence in the instant case that Appellant murdered Kim Brown in a torturous manner or that he evinced extreme and outrageous depravity, or any desire to inflict a high degree of pain or enjoyment of any suffering by Kim Brown. In the same vein this court in Robertson v. State, 611 So.2d 1228 (Fla. 1993), did not find the circumstances to be heinous, atrocious or cruel and stated, quoting Cheshire v. State, 568 So.2d 908,912 (Fla. 1990)(referring to Dixon above), that those circumstances applied only in torturous murders where there was a desire to inflict a high degree of pain or enjoy the suffering of another. The court in Robertson further pointed out, citing Lewis v. State, 398 So.2d 432,438 (Fla. 1981) that "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious or cruel." The evidence in the case at bar did not indicate anything that would set it apart from the norm of premeditated murders, all of which must inherently contain bad elements.

In Bonifay v. State, 626 So.2d 1310 (Fla. 1993) this court held that where the victim was shot multiple times, first in the body and then twice in the head after begging for his life and talking about his wife and children, the murder, although vile and senseless, did not rise to one that is especially heinous, atrocious or cruel as contemplated in Dixon. The record in Bonifay, as in the case at bar, failed to demonstrate an intent by the Appellant to inflict a high degree of pain or to otherwise torture the victim. The court in Bonifay stated that the fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor, absent evidence that the Appellant intended to cause the victim unnecessary and prolonged suffering, citing Santos v. State, 591 So.2d 160 (Fla. 1991). The circumstances of death in the Bonifay case are almost exactly on point with the case at bar,

In Kearse v. State, 662 So.2d 677 (Fla. 1995) this court determined that the murder of a police officer was not heinous, atrocious or cruel, despite the fact that the officer sustained extensive injuries from numerous gunshot wounds. There was no evidence that the Appellant intended to cause the officer unnecessary and prolonged suffering. Despite the fact that the victim in Kearse was shot thirteen times, this court found that the crime did not rise to the level of heinous, atrocious or cruel, essentially for all of the reasons stated above.

Finally, in Hamilton v. State, 678 So.2d 1228 (Fla. 1996) this court found that evidence concerning the shooting death of both

Appellant's wife and stepson was insufficient to establish that the crimes were heinous, atrocious or cruel as an aggravating factor. The court found that there was no evidence of desire to inflict a high degree of pain, nor was there utter indifference to, or enjoyment of the suffering of the victims. The court found that in the context of a domestic quarrel, reloading of the weapon could have been consistent with a rage killing lacking the requisite intent. The Court refers to Santos v. State, 591 So.2d 160 (Fla. 1991). Once again, in the case at bar there was insufficient evidence that Appellant intended to inflict a high degree of pain or to otherwise torture Kim Brown, nor was there any evidence that he derived any satisfaction or enjoyment from her suffering, although he may have demonstrated characteristics consistent with rage and passion.

POINT IV

THE TRIAL COURT ERRED BY FINDING THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR, WHERE THE ONLY OTHER CONVICTIONS OF PRIOR VIOLENT FELONIES WERE CONTEMPORANEOUS TO THE HOMICIDE CONVICTION.

Two of the aggravating factors found by the court in sentencing Appellant were the result of contemporaneous convictions. The trial court found that the defendant was previously convicted of a felony involving the use of threat of violence to the person: that being the attempted first degree murder with a firearm of Alvonza Colson, and that the felony was committed while defendant was engaged in the commission of a burglary (R 728-729). In its sentencing order the court cited Florida Statutes 921.141(5)(b)(d) (R 728).

In Santos v. State, 629 So.2d 838 (Fla. 1994), this court held that in the capital sentencing procedure the trial court should have found in mitigation that the defendant had no prior history of criminal conduct, i.e. when the defendant had no history of criminal activity prior to the murders with which he was charged. In the case at bar Appellant had three old misdemeanor convictions, according to the sentencing guidelines score sheet (R 692).

In Stein v. State, 632 So.2d 1361 (Fla. 1994) this court held that contemporaneous conviction of a violent felony may (emphasis added) support the aggravating factor of a prior conviction for a violent felony, so long as the two crimes involve multiple victims or separate episodes. Here the evidence is clear that both aggravating factor crimes were part of the same episode, as stated in the sentencing order itself (R 729), as to the burglary aggravator. As to the attempted first degree murder aggravator, the testimony of Alvonza Colson indicates that his shooting was a part of a continuous chain of events. The attempted murder of Alvonza Colson obviously involved a person separate from the victim of the homicide, Kim Brown. However, the burglary of the residence which was occupied by Mr. Colson and Ms. Brown could be considered to be a crime in which Ms. Brown was also the victim.

Earlier, in Bello v. State, 547 So.2d 914 (Fla. 1989) this court had ruled that a history of prior criminal conduct cannot be established by contemporary crimes for purposes of establishing an aggravating circumstance. Similarly, in Scull v. State, 533 So.2d 1137 (Fla. 1988), the court ruled that a history of prior criminal

conduct could not be established by contemporaneous crimes. In Scull, this court receded from its previous ruling in Ruffin v. State, 397 So.2d 277 (Fla. 1981).

Appellant is aware of the court's more recent ruling in Windom v. State, 656 So.2d 432 (Fla. 1995), wherein the court stated that in a capital sentencing proceeding, contemporaneous conviction prior to the sentencing could (emphasis added) qualify as previous convictions in multiple convictions situations. Because of the court's use of the word "can" in Windom and "may" in Stein, Appellant believes that it was the intention of this court to retain some flexibility, in that contemporaneous convictions "may" or "can" be used as aggravators as opposed to language stating that contemporary convictions "will" or "shall" be used as aggravators. Looking at the facts of the instant case the theory that these convictions are truly "prior" convictions is a legal fiction created by the courts which flies in the face of real-world reason and logic.

POINT V

DEATH IS NOT PROPORTIONATELY WARRANTED IN THIS CASE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809,811 (Fla. 1988). Its application is reserved for "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So.2d 1,8 (Fla. 1973). Sentences of death are not clothed with a presumption of correctness, regardless of the jury's recommendation.

The death of Kim Brown was not, strictly speaking, the result of a domestic dispute. There is no evidence that Appellant and Kim Brown shared a common domicile, which would appear to be one of the requirements for a domestic relationship. However, there was evidence that Appellant and Ms. Brown had a romantic relationship which was arguably "domestic" in nature. Ms. Brown's brother, Alvonza Colson, testified that when Appellant initially went to their residence, Kim Brown told Appellant "Leroy, I don't want you no more" (T 794). The general tenor of Appellant's conversation with Mr. Colson indicated that the two of them had developed a relationship that was perhaps akin to that of a middle aged man and his girlfriend's "kid brother" (T 794-795). Charlie Ware testified that he had known the Appellant for a little more than a year and that he had seen him several times at Ms. Brown's apartment complex (T 909). Clara Wright, Kim Brown's mother, testified that her daughter was "seeing" Leroy Pooler and that she had a "new friend" who she had been seeing for about a week or two (T 942-943). Ms. Wright further testified that prior to the murder of her daughter, Kim Brown had stopped seeing the Appellant (T 943). Ms. Wright pointed out that, although Appellant did not have her consent to enter her home on January 30, 1995, that he "just came, popped up" (T 944), indicating that Appellant had been a regular visitor. Carolyn Glass testified that she had known Appellant for a year or two (T 1129), that she spoke with Appellant on or about January 23 and January 25, 1995 (T 1130), and that Appellant had told her he was going to kill Kim Brown and that he loved her and if he

couldn't have her nobody else would (T 1130-1131). Ms. Glass further testified that she had observed Appellant when he had been drinking and he would look up at the apartment where Kim Brown resided (T 1145).

Dr. Desmoreau testified that on February 2, 1995, in the Palm Beach County Jail Appellant was "very upset and emotional; he was tearful, anxious, depressed" and had suicidal ideations (T 1413). Dr. Desmoreau described Appellant as "shaking like a leaf" (T 1414). Dr. Alexander testified that Appellant was the type of person who desired to keep things the same in his life and not have a great deal of change (T 1495).

Domestic disputes (in this case a woman rejecting a man who loved her and who had rejected that man for another) involves some of the most intense passion, and in such cases the death penalty is not proportionately warranted. Garron v. State, 528 So.2d 353 (361) (Fla. 1988) "...when the murder is a result of a heated domestic confrontation, the penalty of death is not proportionately warranted". In cases that are factually similar, if not more egregious to this one, the penalty of death has been disapproved. In Garron, the court held

> "in Wilson v. State, 493 So.2d 1019 (Fla. 1986) this court stated that when the murder is a result of a heated domestic confrontation, the penalty of death is not proportionately warranted. See Ross v. State, 474 So.2d 1170 (Fla. 1985); Blair v. State, 406 So. 2d 1103 (Fla. 1981). The record shows that this is clearly a case of aroused emotion, occurring during a domestic dispute. While this does not excuse Appellant's actions, it significantly mitigates them.

528 So.2d at 361 (emphasis added). In this case death is not proportionately warranted, as it is not warranted in a heated domestic dispute.

In Blakelev v. State, 561 So.2d 560 (Fla. 1990), Blakelev awakened his children to tell them he had killed his wife. She had been bludgeoned to death with a hammer. In Blakelev the court cited Garron and pointed out that it has expressly applied this proportionality review to reverse the death penalty in a number of domestic cases. The court in Blakelev noted that the killing resulted from an ongoing and heated domestic dispute that was factually comparable to that in Ross v. State, 474 So.2d 1170 (Fla. 1985), where a husband bludgeoned his wife to death with a blunt instrument. In Irizarry v. State, 496 So.2d 822 (Fla. 1986) the court had overridden a jury recommendation for a life sentence. Nevertheless, this court noted that from the evidence presented, the jury could have reasonably believed that Appellant's crime resulted from "passionate obsession" and that the jury recommendation was consistent with cases involving similar circumstances. Id. 825. In the case at bar the evidence indicates that Appellant's crimes were the result of a passionate obsession.

Fead v. State, 512 So.2d 176 (Fla. 1987), notwithstanding that this is another case in which the court overrode the jury's recommendation of life in prison, this court found that the imposition of the death penalty, where Fead had shot and killed his girlfriend during a lover's quarrel, was not proportional. The Fead court said that the events leading to the murder essentially

constituted a lover's quarrel, similar to the facts in the case at bar. The court went on in Fead to point out that:

> "In the past, we have found a jury override improper where the defendant and his roommate victim after consuming alcohol and sedatives became embroiled in a lover's quarrel, the defendant proceeded to gag the victim, smother her with a pillow, strangle her with a telephone cord, place her in a garbage bag, douse the body with gasoline and set her afire. Herzos v. State, 439 So.2d 1372,1374-75 and 1381 (Fla. 1983)."

The facts in the case at bar are nowhere near as egregious as those in Fead.

In Porter v. State, 564 So.2d 1060 (Fla. 1990), in Justice Barkett's dissent Id.1065, the Justice pointed out:

> "I do not suggest that there is an 'unrequited love' exception to the death penalty. Nonetheless, this court consistently has accepted as a substantial mitigation the inflamed passions and intense emotions of such situations. In almost every other case where a death sentence arose from a lover's quarrel or domestic dispute, this court has found cause to reverse the death sentence, regardless of the number of aggravating circumstances found, the brutality involved, the level of premeditation, or the jury recommendation."

In Niebert v. State, 574 So.2d 1059 (Fla. 1990) the defendant stabbed the victim seventeen times. Nevertheless, the court found that the death penalty was disproportionate, despite the heinous, atrocious or cruel stabbing by the defendant, when defendant was under the influence of extreme mental or emotional disturbance, and that the death sentence was disproportionate when compared with other capital cases where the court has vacated the death sentence and imposed life imprisonment.

Similarly, in Cheshire v. State, 568 So.2d 908 (Fla.1990) this court pointed out that events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court, citing Lockett v. Ohio, 438 U.S. 586,98 S.Ct. 2954, 57 L.Ed.2nd 973 (1978).

In Farinas v. State, 569 So.2d 425 (Fla. 1990) this court determined that, although the murder was heinous, atrocious and cruel (defendant ignored victim's pleas for mercy, victim was in frenzied fear of her life, defendant repeatedly shot victim after unjamming his gun three times, and that the victim was fully conscious during the time defendant unjammed the gun and was aware of her impending demise) the death penalty was not proportional. The victim in Farinas was the defendant's girlfriend. The facts and circumstances in Farinas are similar to the case at bar.

The victim in White v. State, 616 So.2d 21 (Fla. 1993), was, as in the case at bar, a woman the defendant had been dating. In White, the court found that the death sentence was not proportional and the court further pointed out that any sentence of death, "regardless of the jury's recommendation", is not clothed with a presumption of correctness. A death sentence must be proportional when considered in the totality of circumstances and compared with other capital cases. Sinclair v. State, 657 So.2d 1138 (Fla. 1995)

Appellant is mindful of this Honorable Court's very recent decision in Spencer v. State, 21 Fla. L. Weekly S366 (Fla. 1996) In Spencer the court addressed the "domestic dispute" factor in

imposition of the death penalty. The Spencer court upheld the trial court's finding that the murder was heinous, atrocious and cruel, and a prior violent felony aggravating circumstance. The court pointed out that it "has never approved a 'domestic dispute' exception to the imposition of the death penalty." This court pointed out that in some murders resulting from domestic disputes, it has determined that the cruel calculating and premeditated aggravator had been erroneously found because the heated passions involved were anti-ethical to "cold" deliberation, (Emphasis added), and noted that the court has only reversed the death penalty if the striking of the cold, calculated, premeditated aggravator results in the death sentence being disproportionate.

Here, Appellant notes that there was no cold, calculated because the instant crime was one of passion and rage and did not have the element of heightened premeditation necessary. This court does not have to strike the CCP factor because there was none. There was premeditation, however, otherwise Appellant could not have been convicted of first degree murder. Appellant should not be penalized for this. The instant crime, although having domestic/quasi-domestic implications, similar to all of the domestic cases in which death was found to be disproportional cited above, was one of passion and rage, grounded in jealousy of a lover's quarrel nature and therefore a sentence of death is disproportional.

POINT VI

THE TRIAL COURT ERRED IN REJECTING THE MITIGATING FACTOR IN SECTION 921.141(6)(f) OF THE FLORIDA STATUTES WHERE

IT WAS ESTABLISHED THAT APPELLANT'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED.

Dr. Levine testified that, compared to an average individual, Appellant's cognitive functioning was below average, in most areas being in the low average to mildly impaired range (T 1381). Dr. Levine stated that on a scale of 100 Appellant's competency performance was in the range of between 85 and 75, putting Appellant in the low average to mildly impaired range (T 1382). Dr. Levine stated that Appellant's performance I.Q. rating was 79, putting him in the borderline range, and that his averages of verbal and performance I.Q.'s averaged out to 80 which is "right on the cusp of the low average to the borderline range" (T 1384).

In its sentencing order (R 730-731) the court rejected the statutory mitigating factor captioned above, stating that the defendant had graduated from high school and was a good student, was honorably discharged from the U.S. Marine Corp. as a non-commissioned officer, had held a job for approximately seven years, and was a good employee, was "fairly smart" and that he had a Florida driver's license.

Dr. Stephen Alexander, to whom the court referred in its sentencing order (R 730), had spent a total of approximately two hours with Appellant (T 1486-1487). Dr. Alexander determined that Appellant's I.Q. was between 75 and 85 (T 1492) and that, at the time Dr. Alexander examined Appellant, Appellant was not competent to proceed to trial because of limited intelligence (T 1497). Dr. Alexander rendered an opinion that although Appellant was a high

school graduate, he didn't "get the full benefits of his high school education" (T 1492). It is Appellant's position that when he arrived at Kim Brown's residence on January 30, 1995, after having brooded for several days previously about Kim Brown rejecting him for another man, and was told by Alvonza Colson that he could not enter the apartment to talk with Kim, he lost the ability to conform his conduct to the requirements of the law.

Dr. Levine had earlier testified that defendant's reading level was *'dramatically impaired" and that his grade level was the third grade level (T 1392-1393). The Appellant's brother, Henry Pooler, Jr., testified Appellant went to a segregated school in Louisiana in the 1960's (T 1510). So much for Appellant's having graduated from high school.

The job held by Appellant for approximately seven years during which he was a good employee, referred to by the court in its sentencing order (R 731), involved working on a truck for a moving and storage company, and Appellant argues that neither this job nor his education are adequate grounds upon which to base the rejection of the above captioned statutory mitigating factor. The fact that Appellant had a Florida driver's license referred to in the sentencing order (R 731) likewise has no relevance to the above captioned mitigator.

The facts related above were uncontroverted and support the circumstance that Appellant's ability to conform his conduct to the requirements of the law were substantially impaired. "The rejection of a mitigating factor cannot be sustained unless

supported by competent substantial evidence refuting the existence of the factor." (Emphasis added) Maxwell v. State, 603 So.2d 940 (Fla. 1992). As this court noted in Johnson v. State, 660 So.2d 637 (Fla. 1995), the uncontroverted factual evidence supported by expert testimony cannot be ignored or rejected.

> "The Johnson case also appears to suggest that, had he introduced expert testimony about his mental state in the penalty phase, the trial court could simply have rejected the testimony wholesale under walls. Actually walls stands for the proposition that opinion testimony unsupported by factual evidence can be rejected, but that uncontroverted and believable factual evidence supported by opinion testimony cannot be ignored". Walls v. State, 641 So.2d at 390-391 (Fla. 1994) Johnson did in fact introduce uncontroverted facts supporting a case for mental mitigation, but the record completely and substantially supports the trial court's determination of weight. Johnson v. State, 660 So.2d at 647 (emphasis added). Thus, while the court had discretion as to the weight to give to the impaired capacity mitigator, it was not free to totally reject testimony which was based on uncontroverted facts from several witnesses. Moreover, the impaired capacity mitigator has been generally recognized to exist when a defendant's obsession or compulsion has been triggered. See Irizarrv v. State, 496 So.2d 822,824 (Fla. 1986) Impaired capacity mitigator existed because the crime resulted in "passionate obsession". Irizarrv was "obsessed" that his ex-wife had jilted him, causing impairment of capacity to appreciate criminality of his conduct; Kampff v. State, 371 So.2d 1007 (Fla. 1979) (Impaired capacity, where Kampff had "obsessive desire to regain former status as a husband"),

both of the above similar to the case at bar.

Part of the reason the court gave for rejecting the impaired capacity mitigator had to do with Appellant's accomplishments, e.g. his military service; his job (R 730-731). This is irrelevant as

to whether Appellant had an impaired capacity at the time of the offense, This is more akin stating that Appellant was not insane. The court used the wrong standard in rejecting the mitigator. It is reversible error to reject a mental mitigator by use of an incorrect standard, such as sanity, See Campbell v. State, 571 So.2d 415, 418-19 (Fla. 1990) (Court's improper use of "sanity" standard in rejecting "impaired capacity" as a mitigator); Ferguson v. State, 417 So.2d 639, 644-45 (Fla. 1982) (Trial court concluded that Ferguson had "absolute understanding of events and consequences"; it was error to reject impaired capacity by use of a wrong standard). There are many cases where the defendant recognized what he had done as demonstrated by, as in the case at bar, turning himself in, or by means of a confession, and yet the impaired capacity mitigator was found or upheld. See Wright v. State, 586 So.2d 1024 (Fla. 1991) (Defendant surrendered to police, when mitigator was impaired capacity).

This improper rejection of mitigating evidence denied Appellant due process and a fair, reliable sentencing. Florida Constitution, Article I, §9 and 17; U.S. Constitution Amendments v, VI, VIII, XIV.

POINT VII

THE TRIAL COURT ERRED IN REJECTING THE MITIGATING CIRCUMSTANCE IN SECTION 921.141(6)(e) OF THE FLORIDA STATUTES WHERE IT WAS ESTABLISHED THAT APPELLANT ACTED UNDER EXTREME DURESS AT THE TIME OF THE OFFENSE.

The extreme duress mitigator is supported by uncontroverted evidence. The court rejected this non-statutory mitigating factor (R 731). However, in the same sentencing order (R 730), the court

stated that the record showed "some evidence of mental or emotional disturbance". The court found that Appellant was angered by the breakup of his relationship with the victim, by her having a new boyfriend, and that Appellant was depressed and suicidal after the killing.

The trial court did not elaborate on its rejection of this mitigating factor. The court did state that there had been no external provocation established and that the victims were peacefully in their home at the time the defendant began his assault. While the latter is supported by the evidence, it is clear from the evidence that there was "external provocation" resulting from Kim Brown rejecting the Appellant in favor of another man.

In the case at bar there was both internal pressure (Appellant's obsession with Kim Brown) and external provocation (Kim Brown's rejecting Appellant for another man) that ignited the internal pressure. Toole v. State, 479 So.2d 731,734 (Fla. 1985) (External provocation, rather than merely internal pressure, must be the catalyst for the killing). See also Fead v. State, 512 So.2d 176 (Fla. 1987) (Fead acted under extreme duress because of his obsessive jealousy over his former wife and the external provocation included seeing her dancing with other men on the evening of the killing). Here the external provocation was the refusal of Alvonza Colson to allow Appellant to see Kim Brown.

The erroneous rejection of mitigating evidence denied Appellant due process and a fair, reliable sentencing. Florida

Constitution, Article I, §9 and 17; U.S. Constitution Amendment V, VI, VIII, XIV.

POINT VIII

THE TRIAL COURT ERRED IN REJECTING THE NON-STATUTORY MITIGATING FACTOR THAT APPELLANT HAD A GOOD JAIL RECORD AND HAS SHOWN AN ABILITY TO ADAPT TO PRISON LIFE.

The court based its rejection of this mitigator solely on the testimony of Deputy Sheriff Arthur Rack (sic) that Appellant's file covering his stay in the Palm Beach County Jail contained a single disciplinary report of a threat to another inmate (R 731-732). In point of fact Deputy sheriff Arthur Rock testified that Appellant's jail file did contain one incident consisting of a disciplinary report "for threatening another inmate" (T 1450). The Deputy further testified, however, that there was no hearing conducted and that "the time expired due to manpower shortage" (T 1451). Deputy Rock testified that a threat is common and that there was no indication of violence with respect to Appellant and that based upon his jail file he was a "well behaved inmate" (T 1451-1452).

Dr. Alexander testified that the Appellant was the type of individual who functions best with limited responsibilities, limited choices and direct supervision (T 1495). This is, if nothing else, a description of life in prison. Dr. Alexander went on to explain that Appellant's success in the military and his enjoyment of military life was reflective of the above, and that his eight year job with a moving company indicated his desire to keep things the same and not to have a great deal of change.

In Valle v. State, 502 So.2d 1225 (Fla. 1987) this court remanded a death sentence for a new sentencing hearing where evidence had shown that Valle had been a model prisoner and would be a model prisoner in the future. Based upon Deputy Rock's testimony, above, Appellant likewise has been a good prisoner with essentially no disciplinary record. In Valle, this court cited Skinner v. South Carolina, 106 S.Ct. 1669, 90 L.Ed.2nd 1 (1986). In Skinner the U.S. Supreme Court found that evidence of probable future conduct in prison is relevant mitigating evidence and evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.

POINT IX

THE TRIAL COURT ERRED IN REJECTING THE NON-STATUTORY MITIGATING FACTOR THAT APPELLANT WAS OF LOW NORMAL INTELLIGENCE.

A trial court's duty to evaluate mitigation is clear.

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, is it truly of a mitigating nature. See Rogers v. State, 511 So.2d 526 (Fla. 1987). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. Campbell v. State, 571 So.2d 415,419 (Fla. 1990).

This court held in Maxwell v. State, 603 So.2d 490,491 (Fla. 1992) that "the rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor."

Here the court has rejected as a non-statutory mitigating factor, the defendant's low-normal intelligence. The court stated that although the defendant's I.Q. tested at 80, testimony revealed the defendant functioned at higher levels as evidenced by his high school, military service, and job record. This mitigator was not established by the trial judge and was not considered (R 732).

As has been previously stated herein, Dr. Laurence Levine, Neuropsychologist, evaluated Appellant over a period of approximately eight hours (T 1380) and testified that Mr. Pooler's cognitive functioning compared to an average individual was below average, most of his cognitive functioning being in the low average to mildly impaired range (T 1381). According to Dr. Levine, Appellant's performance I.Q. rating was 79, putting him in the borderline range and Appellant's averages of verbal performance and I.Q.'s averaged out to 80 which is "right on the cusp with the low average to the borderline range" (T 1384).

Insofar as Appellant's high school education is concerned, Appellant has already called attention to Dr. Levine's testimony that Appellant's reading was "dramatically impaired" reaching a third grade level (T 1392-1393), notwithstanding the fact that he had been graduated from his racially segregated Louisiana school.

The evidence presented did indicate that Appellant had a successful military service and job record. His job however was working on a truck for a moving and storage company (T 1476) which does not necessarily require a great dealof intelligence. As to his military service, during which Appellant obtained the rank of

"sergeant" (in the U.S. Marine Corps. that rank equates to E-5, and is the lowest of the "sergeant" enlisted ranks in the Marine Corps.) Further commenting on Appellant's military service as it relates to his low-normal intelligence, Appellant's counsel notes: "You don't have to know nothing to be in the infantry". Staff Sercfeant Robert Mathena, U.S.M.C., Drill Instructor, U.S. Naval School of Preflight, U.S. Naval Air Station, Pensacola, Florida (1961).

POINT X

THE TRIAL COURT ERRED IN REJECTING THE NON-STATUTORY MITIGATING FACTOR THAT THE DEFENDANT IS REHABILITABLE.

The court rejected this factor based on the "totality of his past criminal history" as revealed by the defendant's presentence investigation and his disciplinary report while awaiting trial (R 732-733). As has been pointed out above, the Appellant's disciplinary report while awaiting trial consisted of one alleged threat made by Appellant which was never investigated and was never substantiated. As stated above, Deputy Sheriff Rock's testimony was that Appellant had been a good inmate.

Defendant's presentence investigation report is not included in the Record on Appeal. However, Appellant's guideline sentencing score sheet, used as a basis for sentencing on Counts II and III of the indictment, (R 692-694) showed three prior misdemeanors (of indeterminate age): one for assault, one for battery, and one for resisting without violence (R 692). This past criminal history documented in the record does not constitute evidence sufficient for the court to conclude that Appellant is not rehabilitable and

the rejection of this non-statutory mitigator is error.

POINT XI

THE TRIAL COURT ERRED IN REJECTING THE NON-STATUTORY MITIGATING FACTOR THAT THE HOMICIDE WAS THE RESULT OF A HEATED DOMESTIC DISPUTE.

This point has been partially addressed elsewhere above. Testimony from the victim's brother, Alvonza Colson, indicated that Appellant had been dating the victim, Kim Brown, for approximately a year (T 793). Mr. Colson further stated that his sister had told Appellant "Leroy, I don't want you no more" (T 794). Mr. W.C. Burgess testified that Appellant was "going out with Kim" and that "everybody" knew that they were "messing around together" (T 866-867). Kim Brown's mother, Clara Wright, testified that her daughter was seeing Appellant and that she "had a new friend" who she had been seeing for about a week or two (T 942-943). Ms. Wright further testified that prior to the date of the homicide her daughter had stopped seeing Appellant (T 943). This and other testimony clearly indicates that there had been a domestic, or quasi-domestic relationship between Appellant and Kim Wright Brown. The evidence also indicates clearly that the dispute resulted once the victim's relationship with Appellant had ended and that it arose, according to the evidence, <u>because</u> that relationship had ended. (Emphasis added)

Appellant is concerned and does not understand the court's reason for stating its belief "that women are entitled to the same protection of the law as anyone else" (R 733). Earlier in the proceedings, while counsel was arguing Motions with the court

outside of the presence of the jury, the State commented regarding a defense motion concerning aggravating circumstances, and the State pointed out a case involving a question as to whether or not there was a heated domestic confrontation, The State was arguing that the instant case had been planned and was not of the nature of a heated domestic confrontation (T 1145-1148). In the course of that discussion the court stated that it agreed with the State's argument and that "I always fail to see why women should not receive the full protection of the law just because they have a relationship with their murderer, so I'm going to deny that Motion"(T 1347-1348). It is Appellant's concern that the above statement by the court, combined with the one contained in the sentencing order (R 733), indicates a tilt by the court in favor of women, particularly when they are subject to abuse in a domestic situation. Appellant wonders, if the roles were reversed, whether the court would indicate its belief that men are entitled to the same protection of the law as anyone else.

Prior to instructing the jury, both counsel and the court engaged in a lengthy discussion of homicides that occurred as a result of domestic disputes (R 1538-1549). This discussion centered around the cold, calculating and premeditated aggravator (which the court ultimately did not use in sentencing). Nevertheless, the discussion assumed throughout that the killing of Kim Brown occurred during a domestic dispute.

At one point in the above-described discussion (T 1548) the court, referred to Justice Barkett's dissent in Besaraba v. State,

656 So.2d 441 (Fla. 1995). The court commented that Justice Barkett had written:

> "In almost every other case where a death sentence arose from a lover's quarrel or a domestic dispute, this court has found to reserve the death sentence regardless of the number of aggravating factors that involve the level of premeditation or the jury recommendation."

From this discourse Appellant once again argues that the trial court itself viewed this case as a domestic dispute.

Thus, it appears clear from the record and from the entire tenor of this case, that the matter was in fact a domestic dispute. As to whether or not it was a"heated" domestic dispute, Appellant points out that when a dispute or confrontation reaches the point at which one individual shoots and kills another, that dispute is inherently a heated dispute.

For the reasons stated above in this point of argument, the court was in error when it rejected the non-statutory mitigating circumstance that the homicide was the result of a heated domestic dispute.

POINT XII

THE TRIAL COURT ERRED IN REJECTING THE NON-STATUTORY MITIGATING FACTOR THAT APPELLANT IS UNLIKELY TO ENDANGER OTHERS AND WILL ADAPT WELL TO PRISON.

Appellant has already argued herein that he is not likely to endanger others and that he will adapt well to prison. Testimony related above by Drs. Levine and Alexander and by Appellant's co-worker, Alice Bradford (T 1475-1480), indicates that the Appellant is one who functions well in a highly structured environment in

which few responsibilities are imposed upon him, and in which he is unlikely to encounter change. This is precisely the environment provided in the Florida prison system. As to the likelihood that Appellant would endanger others, nowhere in the record does it appear that Appellant has ever posed a danger to others, except for the events involved in this case, which are unlikely to ever occur again. We do not know enough about Appellant's three prior misdemeanors, not even when they occurred, to be able to meaningfully discuss them in this context. Appellant is a mature individual who has demonstrated the ability to function well in a structured environment and consequently it was error for the court to reject this non-statutory mitigating factor.

POINT XIII

APPELLANT IS BEING DENIED DUE PROCESS IN A FULL AND FAIR APPELLANT REVIEW DUE TO AN INCOMPLETE APPELLANT RECORD.

In its sentencing order the court made reference to Appellant's presentence investigation (R 732-733). The presentence investigation is not listed in the master index of the Record on Appeal, in any of the indexes of individual volumes, and Appellant's counsel did not locate the presentence investigation report in his multi-phase review of the Record in this case. The right to due process and effective assistance of counsel entitles Mr. Pooler to a complete Record on Appeal. Lipman v. State, 428 So.2d 733,737 (Fla.1st DCA 1983); Loucks v. State, 471 So.2d 131,132 (Fla. 4th DCA 1985). This is especially true in this capital case, demanding a unique need for reliability under the Eighth Amendment and Article I, §17, Florida Constitution. Delap

v. State, 350 So.2d 462,463 (Fla. 1977); Section 921.141, Florida Statutes (1993); Rule 9.140(f), Florida Rules of Appellate Procedure.

The question of the court's rejection of the non-statutory mitigating factor that the defendant is rehabilitable may have been based on the information contained in the presentence investigation. Thus, a complete Record is needed in order for this court to conduct a fair and complete appellate review. Lack of a complete record denies due process, a reliable appeal, and effective assistance of counsel. Amendments V, VI, VIII and XIV, U.S. Constitution.

POINT XIV

THE TRIAL COURT ERRED IN DEPARTING FROM THE GUIDELINE SENTENCE IN COUNTS II AND III WITHOUT A CONTEMPORANEOUS DEPARTURE ORDER.

The trial court erred in departing from the guideline sentences in Counts II and III without a contemporaneous order of departure. The score sheet reflects a total of 142 points for the offenses of attempted first degree murder with a firearm, with an additional offense of burglary of a dwelling while armed (R 692-693). The guideline sentence for those offenses was calculated at 114 months with an increase to 142.5 maximum state prison months (R 693). On February 23, 1995, the court sentenced Appellant on Counts II and III of the indictment. Appellant's counsel argued about Appellant's sentence on the non-capital Counts in light of the newly received presentence investigation (T 1682-1692). (Note that the presentence investigation report is not a part of the

appellate record). The Appellant's counsel requested the court to sentence within the sentencing guidelines (T 1690-1691). The court responded that "this seems to be one of those cases where the guidelines call for a ridiculous sentence; therefore I am not going to sentence him within the guidelines". The court pointed out that it would not make the sentence consecutive to whatever the sentence was in the capital murder case, which the court had not decided at that time (T 1691). The court continued that on Counts II and III it was going to exceed the guidelines for the reasons that Appellant has an unscoreable capital murder conviction, and the court did sentence Appellant to life imprisonment with a mandatory three year minimum concurrent on each Count and concurrent with whatever sentence imposed in regard to the capital Count. The court did not issue a departure order. The master index of the Record on Appeal does not list any guidelines departure order and a review of the record does not disclose such an order, contemporaneous or otherwise. The trial court gave no reasons for departure from the guidelines other than its feeling regarding the guidelines sentence as noted above.

Sentences imposed upon Appellant on Counts II and III of the indictment are a departure from the guidelines. There must be a contemporaneous written order of departure. Padilla v. State, 618 So.2d 166 (Fla.1993). Accordingly, resentencing within the guidelines is required.

POINT XV

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Florida's capital sentencing scheme, facially and as applied to this case, is unconstitutional for the reasons set forth below.

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.

1. Felony murder

The standard jury instruction on felony murder does not serve the limiting function required by the Constitution and arbitrarily creates a presumption of death for the least aggravated form of first degree murder. It applies an aggravating circumstance to every first degree felony murder. Further, the instruction turns the mitigating circumstance of lack of intent to kill' into an aggravating circumstance. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process clauses of the state and federal constitutions.

b. 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 at 9. The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17

[1]See Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (death penalty statute unconstitutional where it did not provide for full consideration of, inter alia, mitigating factor of lack of intent to cause death).

of the State Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal Constitution.

2. Counsel

Almost every capitaldefendanthas 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 to the present. See, e.g. Elledge v. State, 346 So.2d 998 (Fla. 1977) (no objection to the 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 on 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

a. The role of the 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 is considered the ultimate sentence

so that constitutional errors in reaching the penalty verdict can be ignored under, e.g., Smalley v. State, 546 So.2d 720 (Fla. 1989). This ambiguity and like problems prevent evenhanded application of the death penalty.

That our law forbids special verdicts as to theories of homicide and as to aggravating and mitigating circumstances makes problematic the judge's roles in deciding whether to override the penalty verdict. The judge has no clue of which factors the jury considered or how it applied them, and has no way of knowing whether the jury acquitted the defendant of premeditated murder (so that a sentencing order finding of cold, calculated and premeditated murder would be improper), or whether it acquitted him of felony murder (so that a finding of killing during the course of felony would be inappropriate).' Similarly, if the jury found the defendant guilty of felony murder aggravating circumstance would fail to serve to narrow the class of death eligible persons as required by the Eighth Amendment.

b. The Florida Judicial System

The judge was selected by a system designed to exclude blacks from participation as circuit judges[3] contrary to the equal protection of the laws, the right to vote, due process of law, the

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[2] See Delapt v. Dugger, 890 F.2d 285 (11th Cir. 1989) (double jeopardy precluded use of felony murder aggravating circumstance where it appeared that defendant was acquitted of felony murder at first trial).

[3] This is demonstrated through the fact that none of Broward County's 43 circuit judges are black even though blacks comprise 13.5% of the people in Broward County.

prohibition against slavery, and the prohibition against cruel and unusual punishment.[4] Because Appellant was sentenced by a judge selected by a racially discriminatory system this court must declare this system unconstitutional and vacate the penalty.

4. Appellate review

a. Proffitt

In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (Fla. 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 250-2521, 252-253,258-259. Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is unconstitutional.

b. Aggravating circumstances

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwrisht, 108 S.Ct. 1853, 1857-58 (1988) (Eighth Amendment requires greater care in defining aggravating circumstances that 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.

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

United States, 447 U.S. 381, 100 S.Ct 2247, 65 L.Ed.2d 205 (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, 99 S.Ct. 2190, 60 L.Ed.2d 743 (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, 108 S.Ct. 546, 554-55 (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) (reinterpreting 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).[5]

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

Similarly, the "great risk of death to many persons" factor has been inconsistently applied and construed. Compare King v. State, 390 So.2d 315, 320 (Fla. 1980) (aggravator found where defendant set house on fire; defendant could have "reasonably foreseen" that the fire would pose a great risk) with King v. State, 514 So.2d 354 (Fla. 1987) (rejecting aggravator on same facts) with White v. State, 403 So.2d 331, 337 (Fla. 1981) (factor could not be applied "for what might have occurred, "but must rest on "what in fact occurred").

The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict construction in favor of the accused would be that the circumstance should apply only where the prior felony conviction (or at least the prior felony) occurred before the killing. The cases have instead adopted a construction favorable to the state, ruling that the factor applies even to contemporaneous violent felonies. See Lucas v. State, 376 So.2d 1149 (Fla. 1979).

The "under sentence of imprisonment " factor has similarly been construed in violation of the rule of lenity. It has been applied to persons who had been released from prison on parole. See Aldridse v. State, 351 So.2d 942 (Fla. 1977). It has been indicated that it applies to persons in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). See Peek v. State, 395 So.2d 492,499 (Fla. 1981)

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,[6] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. Appellate reweighing

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

d. Procedural technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate application of the law in capital sentencing.' See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper

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

'In Elledse 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.

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). Use of retroactivity principles works similar mischief.

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[8] cases. As this court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal doctrines are also arbitrarily and inconsistently applied in capital cases.

5. Other problems with the statute

a. 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

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[8]Tedder v. State, 322 So.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.").

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.

Our law in effect 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 State Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal Constitution.

b. 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[9]). In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances

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

sufficient to outweigh the presumption." This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the Federal Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988). 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.

6. 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, §17 of the Florida Constitution. Many experts argue that electrocution amounts to excruciating torture. See Gardner, Executions and Indisnities--An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment. 39 Ohio State L.J. 96, 125 n.217 (1978). 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.

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[10] The presumption for death appears in §921.141(2)(b) and (3)(b) which requires the mitigating circumstances outweish the aggravating.

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). A punishment which was constitutionally permissible in the past becomes unconstitutionally cruel when less painful methods of execution are developed. Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., dissenting). Electrocution violates the Eighth Amendment and the Florida Constitution, for it has now become nothing more than the purposeless and needless imposition of pain and suffering. Coker, 433 U.S. at 592.

CONCLUSION

Based on the foregoing arguments, this court should vacate Appellant's convictions, and **vacate** or reduce his sentences, and remand this cause for a new trial or for resentencing, or grant such other relief as it deems appropriate.

Respectfully submitted,

MICHAEL D. LEBEDEKER, ESQ.
Florida Bar No. 351288
Attorney for Appellant
711 North Flagler Drive
West Palm Beach, FL 33401
Telephone: (407) 832-5661
FAX: (407) 832-4766

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by courier to **CELIA TERENZIO,** Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, FL 33401, on this 22 day of November, 1996.

MICHAEL D. LEBEDEKER, ESQ.
Florida Bar No. 351288
Attorney for Appellant
711 North Flagler Drive
West Palm Beach, FL 33401
Telephone: (561) 832-5661
FAX: (561) 832-4766