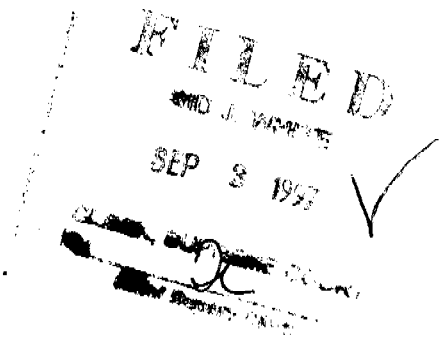
IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,783



THOMAS KNIGHT, n/k/a
ASKARI ABDULLAH MUHAMMAD

Appellant,

-vs.-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is a direct appeal from a sentence of death entered after a resentencing proceeding before The Honorable Rodolfo Sorondo, Jr., Judge of the Eleventh Judicial Circuit in and for Dade County, Florida. In this brief the clerk's record on appeal is cited as "R.," and the transcript of the proceedings as "T." The appellant's name was legally changed in 1982. In this brief, he will be referred to as Thomas Knight before that date and as Askari Abdullah Muhammad thereafter.

STATEMENT OF THE CASE AND FACTS

Appellant was indicted for the first-degree murders of Sydney Gans and Lillian Gans. He was convicted on both counts after a jury trial and was sentenced to death. This Court affirmed on direct appeal. *Knight v. State*, 338 So. 2d 201 (Fla. 1976). This Court denied the appellant's petition for habeas corpus, *Knight v. State*, 394 So. 2d 997 (Fla. 1981), and affirmed summary denial of his motion for postconviction relief, *Muhammad v. State*, 426 So. 2d 533 (Fla. 1982). On December 8, 1988, the Eleventh Circuit Court of Appeals reversed the death sentences because the trial court unconstitutionally restricted consideration of nonstatutory mitigating evidence. *Knight v. Dugger*, 863 F.2d 705 (11th Cir. 1988). The resentencing proceeding commenced on January 23, 1996. The jury recommended by a vote of 9 to 3 that Mr. Muhammad be sentenced to death for each of the two murders. On February 20, 1996, the judge sentenced Mr. Muhammad to death. (R. 1516-54).

Thomas Otis Knight, Jr. -- 1951 to 1966

Thomas Otis Knight, Jr. was born on February 4, 1951, in Fort Pierce, Florida, the son of Steve Thomas Knight and Anna Moore Knight. (R. 1396). There were nine children in the household. Thomas was the second child, and the eldest son. Anna Knight also had five children by a previous marriage; these children visited from time to time, but did not live with the Knights

on a permanent basis. (T. 2708, 2717). Evidence presented by the defense at resentencing--including documentary evidence and the testimony of appellant's sisters (Mary Ann, Doris, and Edna) and of Deputy Patrick Duval--showed a childhood of poverty, hunger, and brutal beatings.

The Knights lived in a community of black field hands in the colored section of Fort Pierce. (R. 218-22, 2055). They were poor, even by comparison with their neighbors, who often had to provide them with food. (T. 2724). When HRS workers visited the house in 1960 and 1961, the roof was in disrepair, the porch was falling apart, and there was no indoor plumbing or toilet. (R. 1401-2). A subsequent PSI report described the house as "dilapidated . . . always in ill repair, filthy, and exhibiting very little in the way of pride." (R. 220). There were only two beds for the nine children. (T. 2709). Farm animals lived in the house and would urinate and defecate throughout. (R. 2056). The house, Mary Ann recalled, was "something you can't really hardly stay in." (T. 2669).

The family had a history of mental illness and neurological problems. Thomas's maternal grandfather had been found mentally incompetent and committed to a mental institution after he killed two women. (T. 2515, 2715). Thomas's sister Catherine and his brothers John and Dewitt would also require psychiatric or pyschological intervention (T. 2677, 2715), including, at least in the case of John, antipsychotic medication (R. 682). Thomas's half-sister, Willie Mae, died in a mental institution; she was diagnosed as having tuberous sclerosis and grand mal epilepsy. (R. 682).

Thomas's father, Steve T. Knight, was an alcoholic. (R. 220; T. 2672, 2722). By 1960, he was no longer providing for his family. (T. 2672, 2710, 2722, 2932). Mary Ann testified that her mother "would try to do the working." (T. 2670). Mrs. Knight was a field worker. (T. 2669-70). The work was seasonal. By the 1960s she was frequently unable to work in the fields because of illness or pregnancy, even when work was available. (R. 1398, 1402). The children went without

food or clothing. (T. 2670, 2722). Their childhood, Thomas's sisters testified, was "a lot of us not having" (T. 2722); "sometimes we had food and sometimes we didn't have it." (T. 2670). Sometimes the neighbors gave them food. (T. 2724). Often the children went hungry. (T. 2722).

Deputy Patrick Duval had known the family since Thomas was a small child. He was frequently called to the house because Steve Knight did not provide support for his wife and children. (T. 2929, 2932). Deputy Duval was also called to the house because Steve "beat his wife quite a bit". (T. 2932). He beat his children as well. (T. 2709, 2717, 2932). He was usually drunk, but he was abusive and brutal even when he was not drinking. (T. 2717, 2722). He was, his daughter Doris testified, "very cruel," "very hateful," and "very brutal." (T. 2709-10).

On June 20, 1960, Steve Knight raped his ten-year-old daughter Mary Ann. (R. 1396, 1407; T. 2671). Nine-year-old Thomas either witnessed the rape of his sister and tried to stop it (R. 1396, 1399; T. 2671), or was told about it by Mary Ann immediately after it occurred (T. 2711). To family members the significant fact was that Thomas reported the rape. (R. 1399; T. 2711). Steve Knight was arrested and was confronted by his son at a judicial hearing. (R. 1399; T. 2672). He eventually pled guilty to attempted incest and was sentenced to five years in state prison. (R. 1409).

After her husband's arrest, Anna Knight applied for welfare assistance. She had six young children to care for, was six-months pregnant, and was unable to work. (R. 1398). Her only income was a $10 per week grocery order from the county welfare department. (R. 1399). HRS calculated a monthly budgetary deficit of $229, and awarded Mrs. Knight a grant of $81 a month. (R. 1400).

Although Thomas was only nine years old, he was cast in the role of head of the household. The family expected him to take charge. (T. 2713). HRS workers reported that "it seems that Tom may have the role of substitute father in this family." (R. 1402). Thomas attempted to live up to

those expectations. He was very protective of his sisters and of his mother. (T. 2725). Mary Ann testified that he tried to find work and "he tried to be a father to us." (T. 2672). He would steal food for them, "because we had no one else to do it." (T. 2673).

On July 19, 1960--within a few days of his father's arrest--Thomas had his first contact with the juvenile authorities. (R. 219). He was arrested for theft and placed on probation. (R. 219). Two months later, he was again arrested for theft, and this time he was committed to the Florida School For Boys at Okeechobee. (R. 220). He was nine years old--the youngest child ever sent to that institution, where the children were more typically fifteen and sixteen years old. (T. 2514).

HRS workers reported that the family appeared to feel that Thomas's being sent to reform school was "no disgrace." (R. 1402). "Mrs. Knight talked with pride about Tom advancing to the 5th grade in only two months." (R. 1402). She did not visit him. He asked her to visit several times, but she was unable to arrange transportation. (R. 1402).

Thomas's father was released from prison in December 1962, after serving two years of his five-year sentence for attempted incest. (R. 220). Prison life had not improved him. He remained, in the words of Thomas's probation officer, an "irresponsible drunkard" and was "in constant difficulty with law enforcement authorities." (R. 220). With Steve Knight back in the home, the family could no longer receive assistance from the state. They often went hungry. (T. 2722). To make ends meet, the older children (Mary Ann, Thomas, and Doris) were required to skip school and go to work in the fields. (T. 2712).

Steve Knight continued to beat his wife and children. (T. 2673-74, 2714, 2717, 2932). There was often no apparent reason for the beatings. (T. 2673-74, 2714, 2717). He was usually drunk (T. 2722)--and it was worse then (T. 2714)--but he "was brutal without drinking sometimes" (T. 2717).

Family members suspected that there was "something really wrong" with him, beyond his habitual drinking, brutality, and cruelty. (T. 2712). He apparently resented the fact that his children had to eat. He had once thrown Mary Ann's food on the floor and told her to eat it there, and on another occasion had slammed the refrigerator door shut, telling her that she could not have anything in there because it belonged to himself and his wife. (T. 2675). When they had no food, he would flip quarters for the children, asking them to guess whether the coin was heads or tails. (T. 2712).

The state returned Thomas to the home at about the same time that it released his father from prison. (R. 220). During the next four years, he and his father were in continual conflict. (T. 2674-75, 2714). Thomas was very protective of his sisters. (T. 2725). He felt responsible for the fact that he had not been able to prevent the rape of Mary Ann, to whom he was very close. (T. 2711, 2712-13, 2716). He hated the way his father treated his mother. (T. 2713). He was not able to protect them. His father was stronger than he was. (T. 2712).

Steve Knight beat everyone in the family (T. 2932), but he beat Thomas with particular frequency and brutality (T. 2671-73, 2718, 2722-23). He beat Thomas often--more than once a week--with sticks and extension cords. (T. 2673, 2713-14, 2722-23). Thomas was also forced to sleep on the floor, or outside. (T. 2716). Doris thought her father had it in for Thomas because he had reported the rape of Mary Ann and sent his father to prison (T. 2712-13, 2718). But he was also the eldest son. Edna observed that after Thomas was sent away again, her father began to beat her other brother more frequently. (T. 2724-25). Also, Thomas refused to cry. (T. 2723). He would just stare at his father with an expression that seemed to be asking, "Why?" (T. 2723). Steve Knight wanted to see tears when he beat his children. (T. 2723) Doris recalled that once her father had ordered Thomas to wash a dishpan and when he did not do it immediately, her father stripped him,

tied him to the bed, then beat him until he bled. (T. 2709, 2714). Her father would interrupt the whipping from time to time and leave the room, but "ever so often he would go back in there and start beating him again." (T. 2714).

Thomas was now often in trouble with the law. This was not unusual in his neighborhood. (R. 220). His younger brothers would also engage in delinquent behavior when they got older. (T. 2720). However, according to Deputy Duval, who had detained him several times, Thomas was peculiar. (T. 2928-29, 2931-33). Deputy Duval found Thomas's delinquent behavior baffling. His crimes were property crimes (thefts and burglaries), but they often did not make any sense. (T. 2931). For instance, when Thomas was fourteen he broke into a grocery store and took ham, pork chops, bread, and cigarettes. He then dumped all the stolen items into a tub of water. (T. 2931). He was always doing strange things like that. (T. 2931). "[H]e was just wacky;" and it got worse as he grew older. (T. 2933).

Generally, Deputy Duval would punish Thomas "with a whack." (T. 2931). In those days, police officers were authorized to administer physical punishment to juveniles, and carried a strap for that purpose. (T. 2931). Thomas did not like to be hit with the strap, but he didn't complain about it either. "It was all right." (T. 2932).

Appalachee Correctional Institution

When he was fifteen years old, Thomas was arrested for "B&E of Tom's Department Store in the colored section." (R. 220). He was already on probation for another burglary. He pled guilty to a lesser-included felony and was sentenced as an adult to serve a total of four years in state prison. (R. 220). He was released three-and-a-half years later, on January 24, 1970. (R. 220).

While in prison Thomas obtained his GED and a degree in baking. (R. 220-21). During the

months following his release, he was occasionally employed for short periods--two months as an oven loader in a bakery in Fort Pierce; a couple of weeks as a baker in a restaurant in New Jersey--but his work record was erratic. (R. 221). He had begun drinking at age eleven; by now he was abusing other substances as well. (R. 345, 358; T. 2515-16). He had also acquired his father's fondness for guns. (T. 3218).

Commitment to Northeast Florida State Hospital

In November 1970, when he was nineteen years old, Thomas Knight returned to Fort Pierce to visit his mother. (R. 221). A few days later, he induced a gunshop owner to show him a pistol, and then ran off with it. He was later arrested in a bar for exhibiting a deadly weapon. (R. 219).

On December 21, 1970, a committee of three doctors determined that Thomas Knight was mentally incompetent. He was diagnosed as suffering from schizophrenia. The doctors made the following observations: "affect inappropriate, speech rambling, loose associations, homicidal, wants to kill to see the blood." (R. 344, 297). He was adjudicated mentally incompetent and committed to a state hospital. (R. 299, 360). He entered Northeast Florida State Hospital on January 13, 1971. (R. 343). At admission, he was examined by Dr. Amos Calleja. The provisional diagnosis was psychosis with drug and poison intoxication (marijuana) and habitual excessive drinking. (R. 346). To this Dr. Calleja later added the diagnosis of paranoid personality. (R. 358).

During his stay at the hospital, Knight was observed to be "somewhat hyperactive without medications." (T. 352). Accordingly, he was medicated with the psychotropic drug Thorazine (R. 346, 352-53, 357), which is used to treat persons with schizophrenic conditions (T. 2527-28). With the medication, he became "fairly reasonable, friendly, cooperative and very manageable." (R 352).

After a month, Knight escaped, in order to see his mother. (R. 352-53). He was returned to

the hospital after nine days. On readmission, he was "dressed fancifully" and was aggressive, angry, loud, argumentative, overproductive in speech, and irritable. (R. 353). He was "fairly coherent but not very relevant." (R. 353). Thorazine medication was continued. (R. 353). He began "functioning well in an open ward." (R. 353). He became less hyperactive. He was sociable and "fairly agreeable to his fellow patients," and did not show as much hostility as he used to. (R. 353).

A month later, Knight escaped again. His mother, who had no telephone, was sent a telegram. (R. 353). Knight returned four days later (apparently on his own). (R. 355). On readmission he was friendly, sociable, quiet, and somewhat apprehensive, but also showed poor impulse control and irritability. He apologized for the escape but "tended to justify it by saying that he wants to see his mother." (R. 355). The dosage of Thorazine was increased after he became involved in a fight, but was discontinued because it made him drowsy. (R. 357-58). He had been placed in a locked ward because of his tendency to escape. (R. 355). After psychotropic medication was discontinued, he remained "generally coherent and relevant," but showed poor impulse control, irritability, aggressiveness, and on one occasion some violence. (R. 355).

The hospital was satisfied that the patient was no longer actively psychotic and was competent to stand trial, and that further hospitalization would not lead to further improvement. (R. 356; T. 2738-39). He was released to the custody of the sheriff on April 27, 1971. (R. 343, 358). Before his release, Knight was evaluated by Dr. Arthur M. Wells. Dr. Calleja had previously concluded that while the patient was no longer actively psychotic, he had "an underlying paranoid personality which is not difficult to believe that he can go into acute psychotic paranoid state under the influence of illegal drugs or even alcohol intoxication." (R. 354). Similarly, Dr. Wells concluded that Knight was "a latent schizophrenic who could decompensate under environmental stress or

under the toxic effects of certain drugs." (R. 356).

Dr. Wells also noted that Knight was fascinated by firearms, had a powerful underlying hostility which could be overpowering, behaved impulsively and without intellectual control, and tended to act out his hostilities. (R. 356; T. 2735, 2747-49). Dr. Wells thought that this patient would probably kill someone with a gun within the next five years. (T. 2738). However, Dr. Wells thought that conclusion "too bold" to put in the report, so he kept it to himself. (T. 2738). Dr. Wells did include in the report his observation that "there is a good chance that the patient will return to the use of drugs, probably becoming psychotic again, perhaps being dangerous to others." (R. 356). Based on an analysis of the patient's unresolved personality conflicts, and the nature of his paranoid ideation, Dr. Wells also concluded that in a psychotic state Thomas Knight "could kill a male in delusional defense" of his mother. (R. 356). Out-patient treatment was recommended. It was recognized, however, that the requisite treatment was not likely to be available in the patient's community. Accordingly, the prognosis was "somewhat guarded." (R. 356; T. 2740).

Lake Butler and Miami

After his release from the state hospital, Knight pled guilty to a reduced charge of attempted grand larceny and was sentenced to two-and-half years in state prison. (R. 219-24). On his admission to the prison, he was given a psychological screening by psychologist Robert F. Moore. (R. 224). Moore found him to be "highly unpredictable." (R. 224). He seemed "unable to relate to others" and to become "explosive under minor stress." (R. 224). Moore recommended close supervision and urged that Knight's "unpredictability, hostility, and explosiveness should be acknowledged and appropriate steps taken to curtail or prevent inappropriate behavioral responses by the subject." (R. 224). During his imprisonment at Lake Butler Correctional Center, Knight was

medicated with Thorazine for a while, as he had been at the mental hospital. (T. 2527-28). After his release from Lake Butler, he would never receive psychotropic medication again. (T. 2551-52).

Thomas Knight was released from prison in 1972. (R. 572). He went to Miami to live with his sister. (T. 2679). He married in December 1973. (R. 572). He worked for the Sydney Bag and Paper Company for a short time, and then for a tile company. In June 1974 he was again working at the Sydney Bag and Paper Company (T. 2361), as a "bundler" (T. 2367). It was piece work. He was not paid by the hour but based on the bundles of bags he put together. (T. 2367).

The Murder of Mr. and Mrs. Gans

On July 16, 1974, Knight had been working for the Sydney Bag and Paper Company for three or four weeks. (T. 2361). He left work very early that morning. Company records do not show why he left so early. He had not been fired. (T. 2370).

The next morning, July 17, 1974, Sydney Gans drove his yellow Mercedes Benz to the Sydney Bag and Paper Company and pulled into the executive parking lot, where he had a designated parking space. (T. 2212, 2358). As he was about to get out, a black man whom he did not recognize came out from behind some bushes. (T. 2212, 2220, 2229). The trial jury concluded that the man was Thomas Knight. Knight was wearing sandals, clear eyeglasses, and a cap. (T. 1986-89, 2354, 2388-90). He was holding a carbine. (T. 1970-71, 2212). He told Mr. Gans to stay in the car, then got into the rear seat and instructed Mr. Gans to drive home. (T. 2212-13).

When they arrived at the Gans residence, Knight told Mr. Gans to honk the horn, to get his wife. (T. 2213, 2371). Mrs. Gans came to the car and was instructed to get in front. (T. 2213). They proceeded to downtown Miami, where Knight told Mr. Gans to pull into an alley. (T. 2213). Mr. Gans did so and turned off the engine. (T. 2213). Knight said he wanted $50,000. (T. 2213).

Hoping to draw the attention of the police, Mr. Gans decided to go to the bank near the courthouse where his company had an account, rather than to his own bank. (T. 2213). They arrived at the City National Bank in downtown Miami at about 9:45 or 9:50 a.m. (T. 2207). Knight told Mr. Gans to be back with the money in twenty minutes; meanwhile Mrs. Gans would drive the Mercedes; Knight remained in the back seat. (T. 2213, 2216). Mr. Gans informed the bank's president what had occurred. (T. 2210-11). He was ashen white. (T. 2207). The bank president began to arrange a loan and called the FBI. (T. 2215-17). FBI agents and City of Miami police officers began to arrive at the bank about fifteen minutes later. (T. 2215, 2228). Some of the officers were in uniform; a marked police car was parked in front of the bank. (T. 2229). At the request of Mr. Gans, no action was taken outside the bank. (T. 2304).

Among the officers conducting surveillance outside the bank were FBI Agents Terry Nelson and Perruci. They parked their unmarked vehicle near the bank at about 10:20 or 10:25 a.m.. (T. 2029-30, 2032). They saw the Mercedes arrive and park across the street from the bank. (T. 2033, 2072, 2075). Mrs. Gans was driving; a black man was sitting in the back, on the right side. (T. 2034-35, 2073-74). Nelson learned through radio communcations that other FBI agents had walked by the Mercedes and observed that the black man had a rifle across his lap. (T. 2054-46).

In the half hour or so that it took to arrange for the loan and to write down the serial numbers of the bills, law enforcement officers put together a surveillance effort. At 10:40 a.m. Mr. Gans left the bank, carrying a paper bag containing the money. (T. 2218, 2223). He got into the front passenger seat. (T. 2036, 2074).

The Mercedes drove away at 10:45 a.m., followed by Agents Nelson and Perucci and several other surveillance vehicles. (T. 2035-37, 2084). It proceeded out of the downtown area, then took

the expressway and drove to southern Dade County, a distance of about twenty miles, always staying within the speed limit and the normal flow of traffic. (T. 2037-39, 2080, 2088-89).

At least ten unmarked vehicles participated in the surveillance. (T. 2084).[1] Three agencies were involved: FBI, Dade County police, and City of Miami police. (T. 3564, 3569). The FBI was apparently coordinating the impromptu surveillance effort. However, it did not share its radio frequency. Observations and instructions were relayed through FBI and Dade County dispatchers. (T. 2375). As they followed the Mercedes, the surveillance vehicles interchanged positions. Some of the vehicles were behind the Mercedes; others overtook and passed it; others drove on parallel streets. (T. 2078-79, 2083, 2087). Agent Nelson testified that by the time the Mercedes began driving out of the downtown area, a fixed-wing police airplane was also involved in the surveillance, and a helicopter was in the air while the Mercedes proceeded down the expressway. (T. 2081, 2089-90). The aircraft were flown by Dade County officers. (T. 3553).

Of the officers and agents who participated in the surveillance, only Agent Nelson testified at resentencing. His car had not always been immediately behind the Mercedes and he had not had it in view at all times. (T. 2037, 2078, 2082, 2087). When he did have it in view, the Mercedes was sometimes as close as thirty feet and sometimes it was much further away. (T. 2078, 2087). From what Nelson was able to observe, it did not appear that Knight was aware of the surveillance--he was not continually looking over his shoulder, although he did turn his head. (T. 2083, 2088).

After arriving at U.S. 1, at the end of the expressway, the Mercedes turned west onto Southwest 112th Street, and then made several turns, proceeding south and west to the area of 128th

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[1]There may have been as many as twenty. (T. 2459).

Street and 112th Avenue. (T. 2043-44, 2090). In 1974, this area of south Dade was beginning to be developed. (T. 1956-57). The area was being cleared for construction and there was "[a] lot of excavation, a lot of wide open spaces." (T. 2044).

Through radio communications, Agent Nelson, who had momentarily lost sight of the Mercedes, learned that it had stopped at a vacant lot near the intersection of Southwest 112th Avenue and 128th Street and that all three occupants got out. (T. 2044-45, 2090-91). A surveillance helicopter was in the air at that point, but Agent Nelson did not know exactly where it was. (T. 2092). After two or three minutes, Mr. and Mrs. Gans and the black man got back inside the Mercedes, which then drove to the area of Southwest 131st Street. (T. 2046-47, 2091).

Agents Nelson and Perucci followed the route taken by the Mercedes, but lost sight of it again when it went behind "some large excavation area and a row of trees." (T. 2047, 2055). The agents jumped out of their car and climbed a large mound of dirt, but did not see the Mercedes. (T. 2047-50, 2095). Two Dade County homicide detectives came by, spoke to the agents, then took the same route as the Mercedes. (T. 2049-50, 2098). It was about 11:35 a.m. (T. 2101). Agent Nelson lost sight of the detectives when they drove behind a ridge. (T. 2049-50). Nelson testified that immediately after that, the surveillance helicopter, which had observed the Mercedes stop a second time (T. 2097), radioed that "shots were fired . . . there were two individuals shot and a black male running into the woods." (T. 2101-2).

The Mercedes was parked between a canal and a twenty-foot-high embankment that was covered with brush. (T. 1958-60, 1964). The trunk and both doors on the passenger's side were open. (T. 1965). Mr. and Mrs. Gans had each been shot once through the neck. (T. 2164-68, 2175, 2189). The shots were fired from the rear seat. (T. 2168-69, 2177-78). Mrs. Gans died instantly.

(T. 2171-72, 2193). Her body was still in the driver's seat. (T. 1965-66). Mr. Gans quickly lost consciousness, perhaps in less than a minute's time. (T. 2182, 2193-94). His body had been dragged from the front passenger seat and into the bushes, about ten feet from the road. (T. 1978-82, 2200, 2384). One of the gunshots destroyed the driver's side window; the other made a hole in the windshield. (T. 1965-67, 2380). Knight's thumbprint was found on the trunk of the car. (T. 2405).

For the next four or five hours, approximately thirty officers and FBI agents conducted a massive manhunt in the area. The search effort was recounted to the resentencing jury in extensive and dramatic detail.[2] Knight was found by Sergeant Kubic about thirty or forty feet from the command post. (T. 2129). Kubic placed his gun against the back of Knight's head. "After that slowly--only his head turned which I could see him squarely in the face and my pistol was literally between his eyes. And he said 'Please don't kill me.'" (T. 2127-28).

Under the matted-down grass where Knight had been lying, the officers found a carbine, the bag of money, and two magazines which had been glued together and contained a total of 27 rounds. (T. 1972-73, 1983-85, 1990-91). The weapon was a 30 caliber carbine. (T. 1970-71). It had been purchased by Knight on February 1, 1974. (T. 2397-2403). The barrel had been shortened to a length of about 12 inches. (T. 1999). The word "trouble" had been written on each side of the barrel. (T. 2012). Because of the shortened barrel, the rifle would no longer operate semi-automatically, but had to be cycled manually after each shot. (T. 2000-1). An unfired round was found near the left rear fender of the Mercedes; there was a casing on the rear seat, and another in the carbine. (T. 1973-75). This evidence indicated that the rifle had been cycled twice, once outside the car, and once after

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[2]Defense counsel unsuccessfully objected and moved to strike this testimony on the ground that it was irrelevant. (T. 2054, 2133-35).

firing the first shot, and that there had been only two shots. (T. 2009).

A "Burned" Surveillance?

During the defense case in mitigation, defense counsel posed a hypothetical to the defense expert witnesses which incorporated certain facts, particularly about the aerial surveillance, suggesting that the defendant became aware of the police presence before the murders occurred. (T. 2531-37, 2759-63, 2866-70, 2964-67, 3044-48). The hypothetical was based on the testimony of FBI Agent Nelson. Agent Nelson had testified that a police airplane was in the air and involved in the surveillance when the Mercedes began driving out of the downtown area (T. 2081), and both the plane and the helicopter were in the air when the Mercedes proceeded down the expressway to south Dade County (2089). Moreover, the helicopter had been in the air when the Mercedes stopped next to a vacant lot and the three occupants got out for a few minutes (T. 2090, 2092, 2094). The "individuals in the helicopter" had seen the Mercedes stop at its final location at the canal (T. 2096-97), and the helicopter was the first to report that Mr. and Mrs. Gans had been shot (T. 2101-2).

The defense experts diagnosed the defendant as suffering from a mental illness which made him liable to lose contact with reality and, especially, to lose control over his impulses, when subjected to environmental stress, such as (in the opinion of Dr. Fisher, Dr. McClaine, Dr. Wells, Dr. Carbonell, and Dr. Toomer), the stress of discovering the police presence.[3] These experts testified that at the time of the murders Mr. Muhammad was under the influence of extreme mental

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[3]Dr. Fisher, Dr. Carbonell, Dr. Toomer, and Dr. Rothenberg diagnosed paranoid schizophrenia. (R. 573, 693; T. 2518, 2853-54, 3079, 3096, 3247). Dr. McClaine also diagnosed schizophrenia with characteristics of both the paranoid and undifferentiated type. (T. 2952). Dr. Wells testified that the symptoms might best be accounted for by a diagnosis of borderline personality disorder with paranoid ideation and antisocial traits which could become a psychotic disorder under stress. (T. 2768).

or emotional disturbance and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (T. 2518, 2529-31, 2537-38, 2763-68, 2853-54, 2871-72, 2955, 2962, 2968-70, 3048-50, 3079, 3096, 3191-92, 3247).

To counter the defense contention that the defendant shot Mr. and Mrs. Gans while in a state of panic and mental confusion after discovering that he was being followed by the police, the state presented the hearsay testimony of Detective Greg Smith. Detective Smith had not been involved in the original investigation. (T. 2345-46, 3563). He had reviewed various reports and documents as well as certain portions of the trial transcript which the prosecutor had asked him to read. (T. 2349, 2459). Detective Smith testified both in the state's case-in-chief and in rebuttal. He was permitted to remain in the courtroom during the entire resentencing proceeding, over defense objection that his presence violated the witness sequestration rule. (T. 123-29, 1888). Over defense objection that the testimony violated the defendant's confrontation and due process rights (T. 2352-53, 2358-59, 2361-64, 2386-87), Detective Smith related to the jury the observations of the pilots of the surveillance aircraft and of Detective Ojeda, who had been among the first officers on the scene. None of these witnesses testified at resentencing. The helicopter pilot had not testified at the trial. (T. 3558). The state offered no explanation for their absence, other than that Detective Ojeda no longer worked with the Dade Police Department (T. 2345-46).

According to Detective Smith, statements made by these absent witnesses showed that the defendant could not have observed the surveillance aircraft until after the murders. There had been no aircraft in the air during the time that the Mercedes was on the expressways. The aircraft appeared on the scene only at the very end, when the murders had already occurred. In its sentencing order, the trial court observed that these facts were "extremely significant" and contradicted key facts

included in the hypothetical question posed by defense counsel. (T. 1543-45). Detective Smith's testimony regarding the aerial surveillance was as follows:

The helicopter pilot had been called to participate in the surveillance shortly after 11:00 a.m. (T. 3555). The airplane pilot was notified at about the same time, at "approximately 11:10 [a.m.], give or take 15 minutes." (T. 3554).[4] After agents on the ground lost sight of the Mercedes, the helicopter pilot was instructed to land because of concern that the loud noise and low altitude of the helicopter would disclose ("burn") the surveillance. (T. 3556-57, 3586-87). Neither of the two pilots saw the Mercedes until after the shootings took place. (T. 3557-58, 3562). The airplane pilot saw it first. He was at 1,000 feet. The Mercedes was parked beside a canal and a black male was running away. (T. 3555). The airplane pilot notified the helicopter and guided it to the scene. (T. 3555, 3557). The helicopter pilot, who was flying at an altitude of 100 feet, saw the Mercedes from a distance of about a quarter-mile. A black male was running away. (T. 3573-74, 3576).

Detective Ojeda and his partner, Detective Godikey, became involved in the surveillance as the result of a radio transmission. (T. 2373). They knew that the FBI was following the Mercedes, but, because the Dade police and the FBI did not share a frequency, all they knew about the FBI's activities was what the FBI chose to relay to them through a dispatcher. (T. 2375). At some point, Ojeda became aware that the FBI had lost sight of the Mercedes. (T. 2375). The detectives drove east along a road next to a canal until they came to a 20-foot-high embankment. (T. 2375-76).

Detective Ojeda and his partner arrived in the vicinity of the canal and embankment at 11:37

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[4]This time range--10:55 to 11:25 a.m.--included the period when, according to Agent Nelson the Mercedes was still on the expressway. Nelson had testified that the Mercedes drove away from the bank at 10:45 a.m. and then traveled 20 miles to south Dade, at all times staying within the speed limit and the normal flow of traffic.. (T. 2035-39, 2080, 2084, 2088-89).

a.m. (T. 2374). They saw Agent Nelson running toward the embankment. (T. 2376). The road continued between the embankment and the canal, but they could not proceed because there was a bar across the road. (R. 175; T. 2376). The detectives drove along the other side of the embankment until they came to an opening which allowed them to go back to the dirt road along the canal. (R. 175; T. 2376). They parked their car and continued on foot. (T. 2375-78). They saw the Mercedes as they came around a curve in the road. (T. 2378). The Mercedes was 108 feet away. (T. 2377). The trunk and the two doors on the right hand-side were open; Mrs. Gans's body was in the driver's seat, slumped over against the driver's side window. (T. 2377-79). A black male was running down the road, about 150 feet east of the Mercedes. (T. 2377-79). He turned and held what appeared to be a machine gun at waist level. (T. 2379). Ojeda and his partner took cover along the canal bank. (T. 2379). As he took cover, Ojeda could hear a helicopter behind him. (T. 2380). He motioned for it to go in the direction of the man he had seen running. (T. 2380).

As further rebuttal of the defense mental mitigation evidence, Detective Smith testified that he had reviewed the testimony of employees of the paper bag company and had found no evidence that Knight presented any bizarre or unusual behavior during the time he worked there. (T. 3559). Detective Smith further testified that according to the company's comptroller, company records indicated that a woman had called in at 9:30 a.m. to say that Knight was sick. (T. 2360).

Pretrial Interviews By Dr. Rothenberg, Dr. Corwin, and Dr. Mutter

Shortly after Thomas Knight's arrest, he was interviewed by Dr. David Rothenberg at the Dade County Jail. Dr. Rothenberg saw Knight four times between July 23 and 30, 1974, and administered a battery of psychological tests. (T. 3140-87). Dr. Rothenberg concluded that Knight was a paranoid schizophrenic, and that his schizophrenia would be aggravated by stress. (T. 3188-

92). He also believed that Knight was very intelligent. (T. 3226). Some of the same tests were later readministered by Dr. Carbonell and Dr. Marina (in 1989 and 1991, respectively), and the results of those later tests also indicated schizophrenia. (R. 691-92, 758-60; T. 2853, 3000-5).[5] Dr. Rothenberg was called by the defense at resentencing.

Knight was also interviewed at the jail by another defense expert witness, Dr. William Corwin. Dr. Corwin examined Knight on July 30, 1974, August 6, and August 23, 1974. (T. 2684, 2692, 2694). Dr. Corwin was unable to make a diagnosis. There was an underlying problem, but Knight tended to exaggerate his symptoms. Dr. Corwin recommended that he be hospitalized so that he could be observed over a longer period time, and also recommended psychological testing to determine the nature of his emotional problems. (T. 2699).

On September 19, 1974, Thomas Knight and ten other prisoners escaped from the jail. (R. 250). Knight was taken into custody several months later. The resentencing jury was aware of the escape, though not of the details, through comments made by some of the witnesses. (T. 2935). After his rearrest, Knight was the subject of several incident reports: he burned his mattress twice, ripped the toilet off the wall, and tore a piece of pipe from the wall. (R. 235-49; T. 2559-61).

On March 30, April 3, and April 5, 1975, Knight was interviewed by Dr. Charles Mutter. Dr. Mutter's initial diagnosis was paranoid personality disorder, but he later changed it to antisocial

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[5]Dr. Rothenberg, Dr. Carbonell, and Dr. Marina each gave the defendant the Rorschach protocol and Bender Gestalt tests; the results in each of the three testings indicated schizophrenia. (R. 691-92, 759; T. 2853, 3000-5, 3146-50). Dr. Rothenberg and Dr. Marina also gave the defendant the House-Tree-Person Projective Test, and the Thematic Apperception Test. (R. 758-60; T. 3150-60), which also revealed schizoid features. Each of the three doctors also administered other tests.

personality disorder. (T. 3631).[6] He found Knight to be intelligent and articulate. Knight knew right from wrong but had no conscience. (T. 3628). At resentencing, the state called Dr. Mutter in rebuttal. He testified that the defendant was not suffering from a major mental disorder at the time of the crime, did not commit the crimes as a result of an extreme mental or emotional disturbance, and was not substantially impaired in his ability to conform to the requirements of law. (T. 3628). Dr. Mutter explained that Knight's personality disorder did not render him "insane" or unable to know right from wrong, and would not give rise to any "lapses of insanity." (T. 3628, 3634). Knight could have controlled his behavior but chose not to. (T. 3628). Dr. Mutter further testified that various aspects of the crime--such as keeping the gun on his lap while in the Mercedes, proceeding to a secluded location, taking the money and hiding after the murders were committed--showed organized behavior and that Knight knew that what he was doing was wrong. (T. 3622-28).

Trial; Appeal; Postconviction Proceedings

Thomas Knight was convicted on both counts of first-degree murder after a jury trial, and sentenced to death on April 21, 1975. (R. 375, 379-80, 412). This Court affirmed on September 30, 1976, denied habeas corpus relief on February 24, 1981, (Fla. 1981), and affirmed the summary denial of Knight's motion for post-conviction relief on December 16, 1982. Knight had petitioned the Governor for executive clemency in the fall of 1979. (T. 2540). A hearing was held in December 1979. The petition was denied on January 28, 1981, when the Governor signed Knight's death

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[6]During the first interview, Knight had been very hostile and belligerent, and denied that there was anything wrong with him. He called Dr. Mutter a "cracker" and threatened to take care of him when he got out of jail. (T. 3599). Dr. Mutter thought that Knight was "play[ing]" with him. (T. 3600). During the next two interviews, Knight was very cooperative and continued to deny that he had any mental problem; his behavior was not bizarre or unusual. (T. 3605-18).

warrant. (R. 575-76).

Dr. Fisher

Dr. Brad Fisher interviewed Mr. Muhammad in August 1979, in connection with the clemency proceeding. (T. 2540, 2545). He also evaluated Mr. Muhammad in 1989 and 1996. (T. 2510). Dr. Fisher was a clinical psychologist who had specialized in the evaluation of prisoners, the prediction of dangerous behavior, and prisoner classification. (T. 2502-9). Based on his examinations of the defendant and his review of the records, his diagnosis was schizophrenia, paranoid type. (T. 2518). In his August 1979 report, Dr. Fisher observed that during the interview Mr. Muhammad was high strung, suspicious, somewhat disoriented at times, and exhibited a rush of frequently incoherent statements that suggested a serious thought disorder. (R. 573). Dr. Fisher had strongly urged that appropriate medication and treatment be given. (R. 573).

The Murder of Officer Burke

On October 12, 1980, while his clemency petition and postconviction appeal were still pending, Mr. Muhammad fatally stabbed a prison guard, Officer Richard Burke. A certified copy of the conviction for first-degree murder, and testimony of the circumstances, were introduced at the resentencing proceeding, over defense objection that this conviction could not be used as an aggravator because it was not a previous conviction within the meaning of section 921.141(5)(b) of the death penalty statute. (T. 2235, 2265-70). Sergeant Harry Owens and Captain Billy Jarvis described the circumstances:

The attack occurred at 5:50 p.m., while Officer Burke was escorting Muhammad to the shower. (T. 2318). Muhammad stabbed the officer repeatedly with a sharpened serving spoon handle. (T. 2318-19). When Sergeant Owens arrived at the scene, Burke was lying on his back, and

Muhammad was on one knee, attempting to stab him. Officer Burke had his hands up, trying to defend himself, and was saying, "Please, please, please don't hurt me." (T. 2319, 2324, 2327-28). Muhammad backed off after Sergeant Owens shouted at him to leave Burke alone. (T. 2320). He paced back and forth, and dropped the knife in a garbage box, while Owens tried to assist Officer Burke. (T. 2320). Other officers arrived and handcuffed Mr. Muhammad. (T. 2320).

Earlier in the day, Mr. Muhammad had been told that he could not receive a scheduled visit from his mother, because he had not shaved. (T. 2262). He had been issued a pass which, for medical reasons, allowed him to clip his beard short instead of shaving, but his pass had expired. (T. 2287). He became very angry and said, "I guess I'm going to have to start sticking people" or "words to that effect." (T. 2262-63). Officer Burke had nothing to do with denying Mr. Muhammad a visit from his mother, and had not had any previous problem with him. (T. 2317-18, 2335).

At the resentencing proceeding, three defense expert witnesses--Dr. Fisher, Dr. Carbonell, and Dr. McClaine--testified that in their opinion, at the time of this homicide Mr. Muhammad was under the influence of a severe mental or emotional disturbance and that his ability to conform to the requirements of law was substantially impaired. (T. 2555-56, 2874-76, 2970-74).

At resentencing, the state also presented, over defense objection, the testimony of Captain Jarvis that Mr. Muhammad had represented himself at his trial for the murder of Officer Burke, and that he had presented legal documents he had written, picked a jury, given opening and closing statements, and cross-examined witnesses. (T. 2271-73). The defense called Stephen Bernstein, who had been appointed to represent Mr. Muhammad in the Burke case. Mr. Bernstein testified that he had been unable to communicate with Mr. Muhammad. Mr. Muhammad was very suspicious and evasive and insisted on speaking about his Islamic religion and other abstract subjects that did not

help Bernstein in preparing a defense. (T. 3390-3402). Mr. Muhammad was wrapped up in his own world, which fit logically together but did not take into consideration the facts in Bernstein's world, "which were the facts and the witnesses that we were going to have to deal with and the rules of law that we were going to have to argue." (T. 3401). Bernstein withdrew and Mr. Muhammad proceeded pro se. (T. 3393-95). The resentencing judge did not permit the defense to elicit Mr. Bernstein's observations regarding Mr. Muhammad's conduct of his defense.

Q Wing

After the Burke homicide Mr. Muhammad was placed in solitary confinement in Q Wing. (T. 2271, 3535). While all inmates at Florida State Prison, regardless of their sentence, are housed in single-man cells, their cells are adjacent to those of others; the inmates can communicate through the bars with other inmates on the same corridor, and are allowed yard privileges. (T. 2295, 3536). Death-row inmates are allowed yard privileges (or at least may congregate in the area of the corridor outside their cells) for two hours a week and have a television set in their cells. (T. 2256).

Q Wing is different. During his confinement there, Mr. Muhammad was completely isolated. (T. 2297). He had no yard privileges and no television. (T. 2296, 3547). Unlike the cells on death row, this cell did not look out onto a corridor, but was completely enclosed. It had a sort of foyer with an outer solid door. (T. 3536). The door would be opened a few times each day, for a minute or so, in order to check on the inmate. (T. 3548). Mr. Muhammad stayed in that cell for nine years. (T. 3536). He finally succeeded in being transferred back to death row in 1989 (T. 3536), and his yard privileges were restored in 1992 (T. 2296, 2314-15).

Resentencing

Mr. Muhammad's death sentences were reversed by the Eleventh Circuit Court of Appeals

in December 1988. He was examined by several psychologists and psychiatrists to determine his competence to proceed. After a hearing held on November 1, 1991, Judge Juan Ramirez, Jr. found the defendant to be competent. As a result of litigation concerning the payment of the fees and expenses of the defense expert witnesses, and continuances taken by both sides, the resentencing proceeding did not begin until January 23, 1996, before Judge Rodolfo Sorondo, Jr.

Mr. Muhammad was excluded from the courtroom on the first day of voir dire because of comments he had interjected during the proceedings and his assertion that he would not remain quiet because he believed that the United States Supreme Court gave him the right to comment during the proceedings. (T. 292-94). The initial group of prospective jurors was dismissed. (T. 344). The proceedings continued without Mr. Muhammad. He was brought to court each morning to determine whether he was willing to remain silent. Each morning Mr. Muhammad indicated that he would not be silent, and was removed from the courtroom before the jurors entered. (T. 356-70, 696-701, 1147-48, 1539-40, 1888-90, 2141-42, 2431-45, 2818-20, 3112-16, 3409-12, 3747-52). The jurors never saw him until the verdict was rendered.

Over defense objection, the court instructed the prospective jurors that Mr. Muhammad was absent because of his misconduct in the courtroom. (T. 382, 1158). Later during the proceedings, the court and the state became concerned that Mr. Muhammad's absence might make the jurors sympathetic to him. To prevent this, the court instructed the jurors, over defense objection, that Mr. Muhammad was brought to court each morning, that each morning he indicated that he would not act appropriately and was unwilling to be quiet, and that this was why the proceedings never began on time. (T. 2418-25, 2453-54).

The judge began voir dire by reading to the jurors the indictment and a brief summary of the

facts, which included the fact that Mr. Muhammad had subsequently murdered Officer Burke. (T. 385-87).[7] The jurors were instructed that their role was to recommend either a sentence of death or a sentence of life imprisonment with no possibility of parole for 25 years. (T. 547, 1164-69). Several prospective jurors were concerned that a life sentence would mean that Mr. Muhammad could be released in just three years, since he had already served 22 years in prison. The court instructed the jurors that he had the authority to impose either concurrent or consecutive sentences. (T. 894-95, 897-901, 912-17, 968-70, 1015-18, 1716-19). Jurors continued to express the same concern. One prospective juror asked if the jury could recommend consecutive sentences. The judge said this could not be done and terminated the discussion with the statement that ultimately it was his responsibility to decide what sentence to give. (T. 1716-20). The court denied the defense motion to determine in advance whether the sentences would be concurrent or consecutive and to instruct the jurors accordingly. (R. 1425-35; 3738). Subsequently, when defense counsel attempted in closing argument to say that the defendant would be at least 65 years old by the time he became eligible for parole, the prosecutor successfully objected, and observed that "the sentence goes back to 1974 when they calculate the 25 years." (T. 3894).

In its case in chief, the state presented testimony regarding the facts of the murders of Mr. and Mrs. Gans, as well as of the murder of Officer Burke. As previously noted, defense counsel objected to the hearsay testimony of Detective Smith and to any mention of the Burke homicide.

The defense called Mr. Muhammad's three sisters, Deputy Duval, Steven Bernstein, and

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[7]The defense objections that the murder of Officer Burke should not be included in the recital of the facts or mentioned during the proceedings because it could not be used as an aggravating circumstance were overruled. (T. 133-43, 349).

seven expert witnesses. The defense experts testified as follows:

Dr. David Rothenberg, a clinical psychologist, examined the defendant in July 1974 and administered a battery of psychological tests. (T. 3140-87). His diagnosis was paranoid schizophrenia; the mental illness would be aggravated by stress. (T. 3188-92).

Dr. William Corwin, a psychiatrist, examined the defendant in July and August 1974. He was unable to make a diagnosis. There was an underlying problem, but the defendant tended to exaggerate his symptoms. Dr. Corwin recommended hospitalization and psychological testing to determine the nature of the defendant's emotional problems. (T. 2699).

Dr. Brad Fisher, a clinical psychologist, examined the defendant in 1979, 1989, and 1996, and had reviewed the records and the reports of other doctors. (T. 2510). His diagnosis was schizophrenia, paranoid type. (T. 2518). During cross-examination by the prosecutor, Dr. Fisher testified that unless Mr. Muhammad received "heavy medication" and "heavy structure" he would have great difficulty in functioning, which might well include aggression. (T. 2534). He would be very difficult to treat "and his best prognosis would be guarded." (T. 2579). Dr. Fisher was puzzled by the fact that, while Mr. Muhammad had apparently responded well to psychotropic medication in 1971, he had not been given any medication since then. (T. 2578, 2599-2600).

Dr. Joyce Carbonell, a clinical psychologist, examined Mr. Muhammad in February 1989, and administered psychological tests and an intelligence test. (T. 2847). She found him to be of normal intelligence. The Rorschach test indicated schizophrenia. (R. 692; T. 2853). Based on her testing, interview, and review of the records, Dr. Carbonell diagnosed Mr. Muhammad as a paranoid schizophrenic. (R. 693).

Dr. Thomas McClaine, a psychiatrist, examined Mr. Muhammad on October 31, 1991, and

also reviewed records and reports. (R. 2977, 2949). He diagnosed chronic schizophrenia, with characteristics of both the undifferentiated and paranoid type. (T. 2952). Mr. Muhammad also presented a severe mixed personality disorder; he met the criteria for both paranoid and antisocial personality disorder, and also showed characteristics of schizotypal, borderline, and narcissistic personality disorders. (T. 2952-55). A person with such a severe personality disorder might present symptoms which were indistinguishable from schizophrenia but of shorter duration, particularly when under great stress. (T. 2944-46, 2955). However, there was a chronic schizophrenic process and, under the DSM-IV's system of classification, the schizophrenic illness takes diagnostic precedence over personality disorders that may also be present. (T. 2954-55).

Dr. Arthur M. Wells, who had examined Mr. Muhammad in 1971 at the state mental hospital, testified that the symptoms might best be accounted for by a diagnosis of borderline personality disorder with paranoid ideation and antisocial traits which could become a psychotic disorder under stress. (T. 2768).

Dr. Jethro Toomer, a psychologist, interviewed Mr. Muhammad on October 13, 1994. (T. 3028). Mr. Muhammad was highly suspicious, defensive, and confrontational. (T. 3031). He insisted on talking at length about his confinement on Q Wing, about his belief that his lawyers were involved in a conspiracy with the system to kill him as quickly as possible, and about the fact that he had been denied the right to speak. (T. 3031-34). It was not possible to administer any tests. (T. 3035). There was no indication of malingering. (T. 3041). Dr. Toomer concluded that Mr. Muhammad was a paranoid schizophrenic. (T. 3040-42, 3096). During cross-examination, the prosecutor elicited Dr. Toomer's opinion that Mr. Muhammad would have these mental problems all of his life. (T. 3096).

Except for Dr. Corwin (who had been unable to make a diagnosis), these witnesses testified that in their opinion, at the time of the crime the defendant was under the influence of an extreme mental and emotional disturbance and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (T. 2529-31, 2537-38, 2763-67, 2871-72, 2968-70, 3048-50, 3190-91). Dr. Fisher, Dr. Carbonell, and Dr. McClaine also testified that in their opinion this was also the case at the time of the murder of Officer Burke. (T. 2555-56, 2874-76, 2970-74).

In its case in rebuttal the state called Detective Smith, Captain Javis, and three expert witnesses--Dr. Eileen Fennell, Dr. Charles Mutter, and Dr. Lloyd Miller.

Dr. Fennell, a neuropsychologist, interviewed Mr. Muhammad on July 5 and August 21, 1991. She also reviewed the records of the prison, jail, and mental hospital, and the reports of other doctors. She diagnosed Mr. Muhammad as having a paranoid personality disorder. He did not appear to be schizophrenic at the time she saw him and she believed he was feigning mental illness. She did not offer an opinion as to Mr. Muhammad's mental state on July 17, 1974. (T. 3305-8, 3328, 3347, 3350).

Dr. Mutter, a psychiatrist, had examined the defendant in March and April 1975. His initial diagnosis had been paranoid personality but he later changed that to antisocial personality. (T. 3631). In Dr. Mutter's opinion, the defendant was an intelligent sociopath who knew right from wrong but had no conscience. He had not been suffering from a major mental disorder at the time of the crime, did not commit the crimes as a result of an extreme mental or emotional disturbance, and was not substantially impaired in his ability to conform to the requirements of law. (T. 3628). Dr. Mutter explained that the defendant's personality disorder did not render him "insane" and would not give

rise to any "lapses in insanity." (T. 3628, 3634).

Dr. Lloyd Miller saw Mr. Muhammad in October 1991 and on January 23, 1996, for the sole purpose of evaluating his competence to proceed. (T. 202, 204, 3506). During the 1991 examination, Mr. Muhammad refused to acknowledge that he knew the answers to the simplest questions, and said he saw things which he obviously was not seeing. (T. 3509-17). In 1996, Dr. Miller saw Mr. Muhammad briefly in a holding cell. He did not obtain any responses.[8] Dr. Miller questioned the guards and other persons, to determine whether Mr. Muhammad's jailhouse behavior was consistent with his conduct in court. Dr. Miller concluded that Mr. Muhammad was malingering. (T. 3520). Dr. Miller's testimony was admitted over defense objection that the doctor was not listed as a witness, had only been appointed for the purposes of determining competence, and his testimony was irrelevant and outside the scope of rebuttal. (T. 3486-87, 3492-93).

The state also presented testimony that inmates are seen by the prison's psychological services once a month, Mr. Muhammad had never been prescribed any psychotropic medication, he had books and legal materials in his cell, could play chess, and had coherently plead for clemency. (T. 2238-39, 2258, 2547-48, 2551-52, 2599-2600, 3067-71, 3540, 3544). Captain Jarvis testified that Muhammad had accumulated 543 disciplinary reports from 1975, when he entered the prison, to the time of resentencing; most death-row inmates are the subject of only five or six such reports in a ten-year period. (T. 3537). Many of the reports resulted from Mr. Muhammad's refusal to respond to the name Thomas Knight. Mr. Muhammad had converted to Islam in late 1979. (T. 2295). In 1982, his name was legally changed from Thomas Knight to Askari Abdullah Muhammad.

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[8]At the competency hearing, Dr. Miller testified that Mr. Muhammad paced slowly around the holding cell, mumbling to himself, and yelling "Ahla aktbar." (T. 205).

(T. 3533). The prison system, however, would not recognize the change of name. (T. 2292-93). Eventually a compromise was reached under which, at master count, he would give his prison number, followed by his Islamic name. (T. 3534-35).

The jurors learned, through the state's cross-examination of defense witnesses, that Mr. Muhammad had lost his appeals, that he had sought clemency from the Governor, that the previous jury had rejected his plea of insanity, and that according to prison guards, one of the lawyers who represented Mr. Muhammad at the clemency proceeding had spread her legs during an interview and allowed Mr. Muhammad to look up her dress. (T. 2896-97).

When almost all the testimony had been taken, there was an incident in which a clerk commented on the case in the presence of three jurors. These jurors were removed from the panel on the state's motion, and over defense objection. The details are set forth in Issue VIII.

The court instructed the jurors on the previous-violent felony, CCP, HAC, avoid arrest, pecuniary gain, and felony murder aggravating circumstances. The court overruled defense counsel's objections to the HAC, CCP, and previous-violent-felony aggravators, declined to give an instruction on the merging of aggravating circumstances, and denied the defense-requested instruction clarifying the statutory mental mitigators. (T. 7, 13-14, 3695-3702, 3718-22, 3917).

The jury recommended death by a vote of 9 to 3. A hearing was held before the judge at which the defense presented the testimony of Mr. Muhammad's former appellate counsel, Roy Black, describing the investigation done to prepare the motions and petitions for postconviction relief. (T. 2050-57). The daughter of Sydney and Lillian Gans, Mrs. Harriet Shapiro, read a statement to the court setting forth the impact of the murders upon her family. (T. 2036-41). On February 20, 1996, the court entered an order sentencing Mr. Muhammad to death. (R. 1516-54).

SUMMARY OF THE ARGUMENT

I. The court erred in allowing the state to present the hearsay testimony of Detective Smith, which was not within any exception to the hearsay rule, in violation of appellant's right to confront adverse witnesses, to due process, and to a reliable sentencing hearing.

II. The court erred in allowing Detective Smith to remain in the courtroom, in violation of the rule against witness sequestration, where he was not shown to be an "essential" witness.

III, IV. The state's reliance on the nonstatutory aggravating circumstance of future dangerousness, and the court's refusal to determine in advance whether the sentences would be consecutive or concurrent, allowed the state to create a "false dilemma" for the jury, prevented the jury from considering mitigation evidence, and denied appellant due process and a reliable sentencing hearing.

V. The court erred in instructing the jury that the appellant was absent because of his misconduct, and that the daily delays were attributable to him. The instruction was unnecessary and unfairly prejudicial, and constituted an impermissible judicial comment on the evidence.

VI. Dr. Miller's testimony regarding his competency examination of the appellant, was admitted in violation of Rule 3.211(e), appellant's Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel, and was irrelevant and unfairly prejudicial.

VII. The trial court erred in denying defense counsel's peremptory challenge to Juror Rivero-Saiz, where the reason given for the challenge was ethnic and gender neutral and not a pretext.

VIII. The court erred in removing three jurors during the resentencing proceeding.

IX. Appellant was denied a fundamentally fair and reliable sentencing hearing by the prosecutor's improper argument that appellant should be shown the same mercy he had shown the

victims, by the prosecutor's misleading insinuations regarding appellant's juvenile record, and by the prosecutor's improperly bringing to the jury's attention irrelevant and unfairly prejudicial matters, such as that the defendant's death sentence had been affirmed on direct appeal, that he had unsuccessfully plead for clemency from the Governor; that the previous jury had rejected his insanity defense; and that, according to prison guards, one of his former lawyers had spread her legs and allowed him to look up her dress during an interview at the prison.

X, XI, XII, XIII, XIV. The court erred in refusing to instruct on the merging of aggravators established by a single aspect of the crime; in instructing the jurors on the aggravating circumstances of "previously convicted of a violent felony," CCP, and HAC; and in refusing to give appellant's requested instruction on the statutory mental mitigators.

XV. The court erred in finding the HAC, CCP, pecuniary gain, and avoid arrest aggravators; in separately finding the felony murder aggravator; in giving great weight to the "previous" conviction for the subsequent murder of Officer Burke; in rejecting the statutory mental mitigators; and in giving little weight to the nonstatutory mitigators. Moreover, the court's findings, and the reliability of the sentencing decision, are undermined by the court's reliance on an incident which never happened, and which reflects a serious misapprehension of the facts.

XVI. Florida's death penalty statute is unconstitutional because it improperly shifts the burden of proof and persuasion to the defense and fails adequately to guide the jury's discretion, and does not require written findings regarding the sentencing factors, thereby precluding adequate appellate review.

XVII. Mr. Muhammad's execution after he has had to endure more than two decades on death row, would be unconstitutionally cruel and unusual punishment.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT THE HEARSAY TESTIMONY OF DETECTIVE SMITH, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9, 16, AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VI, VIII, AND XIV.

The state's principal witness at resentencing was Detective Greg Smith. (T. 128). Detective Smith had not participated in the original investigation. (T. 3563). He had read various reports and other documents, as well as certain portions of the trial transcript that the prosecutor had asked him to read. (T. 2349, 2459). Over defense objection (T. 2352-53, 2358-59, 2361-64, 2386-88), Detective Smith summarized the results for the jury, and related, based on this hearsay, what other witnesses had purportedly said or done. The admission of this hearsay testimony violated Mr. Muhammad's right to confrontation, due process, and a reliable resentencing proceeding.

This Court has repeatedly recognized that the rights guaranteed by the Confrontation Clause of the Sixth Amendment, and of Article I, Section 16 of the Florida Constitution, apply at the penalty phase of a capital case, *Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989); *Tompkins v. State*, 502 So. 2d 415, 420 (Fla. 1986); *Walton v. State*, 481 So. 2d 1197, 1200 (Fla. 1985); *Gardner v. State*, 480 So. 2d 91, 94 (Fla. 1985), as well as at the final sentencing process before the judge, *Engle v. State*, 438 So. 2d 803, 813-14 (Fla. 1983).[9] As the United States Supreme Court has made clear, the

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[9]The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Article I, section 16 of the Florida Constitution guarantees the accused the right "to confront at trial adverse witnesses."

Clause not only requires the opportunity to cross-examine the particular witnesses called by the prosecution, it also forbids the introduction of presumptively unreliable hearsay. *Idaho v. Wright*, 497 U.S. 805 (1990); *Ohio v. Roberts*, 448 U.S. 56 (1980).

The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. *Maryland v. Craig*, 497 U.S. 836, 845 (1990); *Roberts*, 448 U.S. at 63-64. The Clause ensures the requisite "rigorous testing" by the "combined effect of these elements of confrontation--physical presence, oath, cross-examination, and *observation of demeanor by the trier of fact* . . . ." *Craig*, 497 U.S. at 845-46 (emphasis added). The defendant must be permitted to cross-examine the declarant "face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895), *quoted in Craig*, 497 U.S. at 845 *and Roberts*, 448 U.S. at 64.

The admission of hearsay evidence against a defendant is limited by the Clause because the defendant cannot confront or cross-examine the out-of-court declarant. *Roberts*, 448 U.S. at 63, 66. Hearsay statements that do not fall within a "firmly rooted" exception to the hearsay rule are "presumptively unreliable" and "must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Wright*, 497 U.S. at 818. It is the burden of the state "as the proponent of evidence presumptively barred by the hearsay rule and the Confrontation Clause" to show that the statements bear "sufficient indicia of reliability to withstand scrutiny under the Clause." *Wright*, 497 U.S. at 816.

Section 921.141(1), Florida Statutes (1995), states that any evidence relevant to an

aggravating or mitigating circumstance is admissible in the penalty phase, "provided the defendant is accorded a fair opportunity to rebut any hearsay statements" and the evidence has not been secured in violation of the federal or Florida constitutions. In *Chandler v. State*, 534 So. 2d 701, 702 (Fla. 1988), this Court held that the statute does not deny the right to cross-examine state witnesses.

Since the Confrontation Clause applies at the penalty phase, that statutory language must be construed in light of the constitutional limitations the Clause imposes on the introduction of hearsay. Although certain decisions of this Court appear to suggest that the statute is satisfied by something less than the constitutional requirement of a firmly-rooted exception to the hearsay rule or particularized guarantees of trustworthiness[10], those cases do not actually assert that the state may introduce hearsay without regard to the Confrontation Clause; and it is certain that the statute cannot make permissible what the Constitution forbids. To hold, for example, that hearsay is admissible whenever the defendant has the opportunity to present contrary evidence, or whenever he is able to cross-examine the witnesses through whom the state presents the statements of out-of-court declarants, would be squarely in conflict with the Court's interpretation of the Clause. *See Wright*, 497 U.S. at 818 (hearsay not within a firmly rooted exception must be excluded as "presumptively unreliable); *id.* at 820 (to satisfy Confrontation Clause requirements hearsay "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial").

The concern for reliability is heightened when the evidence is being used to obtain a sentence of death. The Eighth Amendment "imposes a heightened standard 'for reliability in the determination that death is the appropriate punishment in a specific case.'" *Simmons v. South*

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[10]*See Lawrence v. State*, 691 So. 2d 1068, 1073 (Fla. 1997); *see also Clark v. State*, 613 So. 2d 412, 415 (Fla. 1992); *Waterhouse v. State*, 596 So. 2d 1008, 1016 (Fla. 1992).

Carolina, 114 S.Ct. 2187, 2198 (1994) (Souter, J., concurring, joined by Stevens, J., concurring) (quoting *Woodson v. North Carolina*, 428 U.S. 208, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Due process also requires that the evidence used to obtain a death sentence be reliable. *See Gardner v. Florida*, 430 U.S. 349, 357-59 (1976). The use of presumptively unreliable evidence--such as hearsay that is not shown to have the requisite indicia of reliability--violates the defendant's right to confront adverse witnesses, his right to due process, and his right to a reliable sentencing determination.

A. The Introduction of Detective Smith's Hearsay Testimony Regarding the Surveillance Violated the Defendant's Constitutional Right of Confrontation and Undermined the Reliability and Fairness of the Penalty Proceeding.

The central issue presented in the resentencing proceeding was that of Mr. Muhammad's state of mind at the time that the murders were committed. That state of mind was relevant to mental mitigating circumstances and to certain aggravators, for example, CCP. The defense called several expert witnesses to establish that Mr. Muhammad suffered from a serious mental illness and that he was liable to become psychotic as a result of any significant stress.[11] The mental illness was chronic in nature and in the opinion of these experts it would have been present at the time of the crime. (T. 2518-19, 2529-30, 2593, 2767, 2865, 2870-71, 2876, 2962, 3096, 3191).

Defense counsel posed a hypothetical question to Dr. Fisher, Dr. McClaine, Dr. Carbonell, Dr. Wells, and Dr. Toomer, which incorporated certain facts regarding the aerial surveillance

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[11]Dr. Fisher, Dr. Carbonell, Dr. Toomer, and Dr. Rothenberg diagnosed Mr. Muhammad as a paranoid schizophrenic. (R. 573, 693; T. 2518, 2853-54, 3079, 3096, 3247). Dr. McClaine testified that Mr. Muhammad was a schizophrenic of either paranoid or undifferentiated type. (T. 2952). Dr. Wells, who had evaluated Mr. Muhammad in 1971, testified that the symptoms might best be accounted for by a diagnosis of borderline personality disorder with paranoid ideation and antisocial traits which could become a psychotic disorder under stress. (T. 2768).

suggesting that Mr. Muhammad became aware of the presence of the police before the murders occurred. (T. 2531-37, 2759-63, 2866-70, 2964-67, 3044-48). In the opinion of these experts at the time of the crime Mr. Muhammad was under the influence of extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (T. 2529-31, 2537-38, 2763-67, 2871-72, 2968-70, 3048-50). Substantial stress, such as that resulting from discovering the police presence, would cause Mr. Muhammad to lose contact with reality and, especially, to lose control over his impulses. (T. (T. 2518, 2529-31, 2537-38, 2766-68, 2853-54, 2871-72, 2955, 2962, 2968-70, 3079, 3096, 3191-92, 3247). The defense hypothetical was based on evidence presented during the state's case in chief, which reflected the following facts:

The Mercedes drove away from the bank at 10:45 a.m., with Mrs. Gans at the wheel, Mr. Gans in the front passenger seat, and Mr. Muhammad in the back. It proceeded out of the downtown area, took the expressway, and drove a distance of about 20 miles to south Dade County. (T. 2035-39, 2080, 2084, 2088-89). At the end of the expressway, it turned west onto Southwest 112th Street, and then proceeded south and west to the area of Southwest 112th Avenue and 128th Street, where it stopped near a vacant lot. (T. 2043-45, 2090-91). All three occupants got out at this point. (T. 2045). After a few minutes, they got back inside and the Mercedes drove to the area of Southwest 131st Street. (T. 2046-47). Agent Nelson had been following the Mercedes from a distance, but lost sight of it at 11:35 a.m. when it went behind a "ridge line" (T. 2047, 2095, 2101). The Mercedes parked next to a canal, on a road which ran between the canal and an embankment. (T. 1958-60, 1964). Two detectives came by, spoke to Nelson, then took the same route as the Mercedes. (T. 2049). Nelson lost sight of them when they went behind the ridge. (T. 2049). Immediately

thereafter, "the helicopter told us by radio transmission shots were fired, Mr. and Mrs. Gans -- or there were two individuals shot and a black male running into the woods." (T. 2101-2).

This was an area of "wide open spaces." (T. 2044). As aerial photos show, the land had been bulldozed and cleared for construction. (R. 70). Aircraft flying in or near the area would have been easily spotted. Agent Nelson's testimony made clear that police aircraft were participating in the surveillance from shortly after 10:45 a.m., when the Mercedes drove away from the bank. (T. 2081). They were in the air when the Mercedes drove down the expressway to south Dade (T. 2089), and when the Mercedes stopped at the vacant lot and the occupants got out for a few minutes, in an area which had been cleared for construction and offered no impediment to the observation of low-flying aircraft (T. 2090, 2092, 2094). These facts, together with the fact that the defendant suddenly decided to take a different course of action and directed Mrs. Gans to drive the Mercedes to the only nearby location offering any sort of cover from observation from the air (R. 70; T. 2045-47), and the fact that the shooting took place inside the Mercedes, destroying the driver's window and putting a bullet hole in the windshield (T. 1965-67, 2380), strongly supported the defense contention that the defendant had discovered the police presence and panicked.

To counter the defense theory, the state presented the hearsay testimony of Detective Smith, who related the observations of the pilots of the surveillance aircraft and of Detective Ojeda, who had approached on foot. None of these witnesses testified at resentencing; the pilot of the helicopter had not testified at the trial. (T. 3558, 3575-76). The state asserted generally that it had been unable to locate witnesses, but offered no specific explanation for the absence of these police officers, other than to say that Detective Ojeda was no longer with the police department. (T. 124).

According to Detective Smith, neither the airplane nor the helicopter could have been in the

air while the Mercedes was driving down the expressway, or when it stopped at the vacant lot in south Dade--as Agent Nelson had testified (T. 2081, 2089-90, 2092)--because the aircraft did not get involved until the very end, and the first time any of the officers saw the Mercedes it was already parked beside the canal and the defendant was running away. (T. 3554-57, 3562, 3571-73).

The resentencing judge found the "discrepancies" between the facts relied upon by the defense and the testimony of Detective Smith to be "extremely significant" because they undermined the defense contention that "the increasing stress created by the police presence aggravated the defendant's psychotic state." (R. 1544). The judge relied on Detective Smith's testimony to reject the expert opinions presented by the defense in mitigation. (R. 1543-45). The prosecutor urged the jury to do the same in closing argument. (T. 3782-84).

The statements purportedly made by the absent officers were obviously hearsay, that is, the statements of an out-of-court declarant introduced to prove the truth of the matter asserted. § 90.801(1)(c), Fla. Stat. (1995). As set forth below, the statements did not come within any exception to the hearsay rule, much less a "firmly rooted" one. They were accordingly "presumptively unreliable." *Wright*, 497 U.S. at 818. Their introduction violated Mr. Muhammad's right to confront adverse witnesses and denied him a fair and reliable sentencing hearing.

1. The Helicopter Pilot's Statements

According to the statements attributed to the helicopter pilot, he was not called to participate in the surveillance until shortly after 11:00 a.m. (T. 3555). After agents on the ground lost sight of the Mercedes (T. 3556, 3586-87), the helicopter pilot was instructed to land because the agents were concerned that the noise and low altitude of the helicopter would disclose the police presence (T. 3556-57). It is not clear from the reported statements exactly where the helicopter was at this time.

The reported statements of the two pilots did not indicate the time that either aircraft arrived in the area, nor what they did when they got there. However, according to Detective Smith, the helicopter pilot did not see the Mercedes until after the shootings had taken place (T. 3557-58, 3562), and--contrary to Agent Nelson's testimony that the shootings were first reported by helicopter personnel--the helicopter was guided to the location of the Mercedes by the airplane pilot. (T. 3557). The helicopter pilot said that when he saw the Mercedes, from a quarter-mile away and at an altitude of 100 feet, a black male was running away. (T. 3573-74, 3576)

The pilot of the helicopter had not testified at the trial. (T. 3558). Detective Smith based his hearsay testimony on a sworn statement given by the pilot. (T. 3558). The state did not suggest that any of the statements attributed to the helicopter pilot came within an exception to the hearsay rule, and it is apparent that they did not. Far from coming within any exception, the introduction of these statements was squarely contrary to the main reason that the Confrontation Clause was placed in the Constitution, namely, to prevent depositions or *ex parte* affidavits from being used against the prisoner in lieu of a personal examination and cross-examination of the witness, "face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox*, 156 U.S. at 242-43, *quoted in Craig*, 497 U.S. at 845 *and Roberts*, 448 U.S. at 64.

Cross-examination face to face with the jury was essential to test the reliability of these statements. The vagueness of the statements concerning the whereabouts of the aircraft during the last twenty-five minutes or so of the surveillance, and the implausibility of conducting an aerial search within a limited area while staying out of sight of someone whose location was not even known, could not be confronted through cross-examination of Detective Smith. He had no

knowledge beyond the statements he had read, and, when pressed on cross-examination, simply offered his own conjectures (always favorable to the state) as to the location of the aircraft at different times. (T. 3571-73). Moreover, the helicopter pilot and the other absent officers had reason to be vague and guarded regarding their participation in the surveillance. The possibility that the surveillance had been prematurely disclosed to the defendant had evidently crossed the officers' minds at the time of the event (T. 3555-57), and it was clearly in their interest to avoid any inference that such premature disclosure had in fact occurred, or that they, or their agency, might have been responsible. The jury should have had an opportunity to observe their demeanor while they explained how their actions could not have "burned" the surveillance.

Since this testimony did not come within any exception to the hearsay rule, and there was no showing of "particularized guarantees of trustworthiness," it was presumptively unreliable and its introduction violated the Confrontation Clause. *Wright*, 497 U.S. at 818; *Roberts*, 448 U.S. at 66.

Moreover, admission of this hearsay was contrary to section 921.141(1), because there was no "fair opportunity to rebut" it. Since the state had asserted (albeit without any specifics) that it was calling Detective Smith to give hearsay testimony because of its inability to locate the declarants (T. 124), it could hardly argue that the declarants were somehow available for cross-examination by the defense. The helicopter pilot had not testified at trial and there was no indication that the defense had been present when he gave his statement. There was accordingly no opportunity to rebut the helicopter pilot's statements, and Detective Smith's testimony regarding those statements was inadmissible under section 921.141(1), Florida Statutes. *See Rhodes v. State*, 638 So. 2d 920, 924 (Fla. 1994) (error to allow police officer's testimony regarding contents of doctor's report which defendant had no opportunity to rebut); *Gardner v. State*, 480 So. 2d 91 (Fla. 1985) (reversible error

to allow officer to testify to statements made by defendant's accomplice who did not testify at trial and could not be confronted by the defendant).

2. Statements of the Airplane Pilot and of Detective Ojeda

According to Detective Smith, the airplane pilot said he was not notified to take to the air until "approximately 11:10 [a.m.], give or take 15 minutes" (T. 3554). When he first saw the Mercedes, it was already parked beside the canal and a black male was running away. (T. 3554-55). It was not clear from the pilot's statements where he had been circling in the time between his arrival in the area and his spotting of the Mercedes. Since he had been called in for the purposes of surveillance, he was presumably looking for the Mercedes in the general area where the agents on the ground had last reported it to be. It is unlikely that the airplane could have remained invisible to persons on the ground in that open area between the vacant lot and the canal. However, like the helicopter pilot, the airplane pilot said he never saw the Mercedes while it was in motion, or before it was parked beside the canal (T. 3562), thus implying that the defendant had not seen the aircraft before that time.

According to the statements attributed to Detective Ojeda, he and his partner, Detective Godikey, arrived in the vicinity of the canal and embankment at 11:37 a.m. (T. 2374). They saw Agent Nelson running towards the embankment. (T. 2376). Ojeda and Godikey drove along the other side of the embankment until they came to an opening which allowed them to reach the dirt road alongside the canal. (R. 175; T. 2376). They parked their car and continued on foot. (T. 2375-78). They saw the Mercedes as they came around a curve in the road. (T. 2378). A black man was running away and the helicopter was just arriving on the scene. (T. 2377-80).

Detective Ojeda and the airplane pilot had testified at the original trial. Detective Smith's

testimony was based partly on what he had read in the trial transcript, and partly on reports prepared by these officers. (T. 2373, 2460-61, 3551, 3554). Neither portion of this hearsay testimony was admissible. The reports evidently did not come within any exception to hearsay rule. The prior testimony was inadmissible without a showing that the declarants were unavailable. *Roberts*, 448 U.S. at 66, *clarified by United States v. Inadi*, 475 U.S. 387, 392, 394 (1986); *White v. Illinois*, 502 U.S. 346 (1992). For Confrontation Clause purposes, a witness is not unavailable unless the prosecution makes a good faith effort to obtain his presence. *Roberts*, 448 U.S. at 74. Here, the state did not indicate what efforts, if any, it had made to obtain the presence of the absent witnesses at the resentencing proceeding. The prosecutor merely stated that Detective Ojeda was no longer with the Dade Police Department, which did nothing to explain his absence. (T. 126). The state had nothing at all to say about the absence of the other witnesses; and the court made no findings as to the availability of any of them. Accordingly, this testimony was inadmissible. *Roberts*, 448 U.S. at 66.[12]

Even if a showing of unavailability had been made, this would only entitle the state to introduce the transcript of the trial testimony, not the interpretation of someone who, like Detective Smith, had no personal knowledge of the facts and had only read those portions of the transcript that the prosecution had given him. (T. 2349, 2459). "When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause

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[12]*See also Hitchcock*, 578 So. 2d 685, 690 (Fla. 1990) (not error to prevent the *defense* from introducing the trial transcripts of testimony of two police officers because the witnesses were not shown to be unavailable and "the rules of evidence apply to defendants as well as the state in penalty proceedings"), *vacated on other grounds*, 505 U.S. 125 (1992).

analysis, favor the better evidence." *Inadi*, 475 U.S. at 395.[13] Here, the trial transcript itself, not Detective Smith's selective regurgitation, would have been the better evidence.

There are decisions of this Court indicating that prior testimony may be admissible in the penalty phase without regard to the unavailability of the declarant,[14] and this Court has also indicated that the opportunity to cross-examine the declarant at trial renders harmless the unavailability of the declarant at a subsequent resentencing proceeding, *Lawrence*, 691 So. 2d at 1073. However, appellant respectfully submits that if, as this Court has held, the Confrontation Clause applies at the penalty phase, the preference of the Clause for adversarial testing before the jury must apply as well. Cross-examination of the conduit for hearsay does not make that hearsay any less unreliable. *See Roberts*; *Wright*. And the opportunity to cross-examine the declarant before some *other* trier of fact --whose assessment of the declarant's credibility is unknown because no written findings are required of the jury, and irrelevant because resentencing begins with a clean slate--does not satisfy the requirement that the declarant be cross-examined face-to-face with the judge and the jury that will determine the defendant's fate. *See Craig*, 497 U.S. at 845-46; *Roberts*,448 U.S. at 64.

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[13]*Cf. Hitchcock*, 578 So. 2d at 691(introducing prior trial testimony of unavailable witness did not violate confrontation clause, where the entire transcript of the testimony, including cross-examination, was introduced).

[14]*See Lockhart v. State*, 655 So. 2d 69, 72 (Fla. 1995) (testimony of detective who attended part of out-of-state trials and reviewed case files from those crimes was permitted by statute and defendant had opportunity to cross-examine the detective); *Clark*, 613 So. 2d at 415 (testimony of detective as to gist of testimony of other witnesses at trial for prior crime admissible because defendant had opportunity to rebut any hearsay); *Waterhouse*, 596 So. 2d at 1016 (testimony of detective who investigated out-of-state murder admissible because defense had opportunity to cross-examine him); *Chandler*, 534 So. 2d at 703 (court did not abuse its discretion in admitting at resentencing detective's testimony concerning statements made by witnesses at guilt phase, where these witnesses testified consistent with what the detective stated they said and defendant had vigorously cross-examined them).

B. Detective Smith's Hearsay Testimony that Employees of the Paper Bag Company Had Not Observed the Defendant Engage in Bizarre or Unusual Behavior, Violated the Defendant's Right of Confrontation, and his Right to Due Process and a Reliable Resentencing Proceeding.

Detective Smith testified during the state's case in rebuttal that he had reviewed the testimony given by employees of the Sidney Bag and Paper Company, and had found no evidence that the defendant presented any bizarre or unusual behavior during the time that he worked there. (T. 3559). This testimony was used by the prosecutor in closing argument (with some embellishment) to argue that there had been nothing mentally wrong with Mr. Muhammad at the time of the crime. (T. 3841). It was inadmissible for several reasons:

First, it was inferential hearsay, that is, testimony which implicitly contained the statements of out-of-court declarants, *Postell v. State*, 398 So. 2d 851, 854 n. 5 (Fla. 3d DCA), *review denied*, 411 So. 2d 384 (Fla. 1981), and was not shown to come within any exception to the rule against hearsay. Accordingly, it was presumptively unreliable and inadmissible under the Confrontation Clause. *Wright*, 497 U.S. at 818; *Roberts*, 448 U.S. at 66. Moreover, it was also inadmissible under section 921.141(1), Fla. Stat., because the defense was not given a fair opportunity to rebut it. There was no showing that the out-of-court declarants were available for cross-examination.

Second, the inferential hearsay statements--that the defendant had not behaved in a bizarre or unusual manner--constituted the opinion testimony of lay witnesses, and could not properly be admitted, even if the out-of-court declarants had testified themselves, without showing an adequate foundation for the opinion. Opinion testimony of a lay witness is only permitted if it is based on what the witness has personally perceived. § 90.701, Fla. Stat. (1995). Accordingly, "[b]efore lay opinion testimony can be properly admitted, a predicate must be laid in which the witness testifies

as to the facts or perceptions upon which the opinion is based." *Fino v. Nordine*, 646 So.2d 746, 749 (Fla. 4th DCA 1994). The observations on which the witnesses based their opinion, their opportunity to observe, and what they considered "bizarre" or "unusual" behavior, all needed to be shown.

Third, Detective Smith's testimony was an inadmissible conclusion about the opinions of other (absent) witnesses. His conclusion that, based on his review of the testimony of the absent witnesses, there was no evidence that the defendant had acted unusually or bizarrely, invaded the province of the jury and would have been inadmissible even if those other witnesses had testified. A witness is not permitted to make factual conclusions and credibility determinations which are properly for the trier of fact. *See* § 90.701(2), Fla. Stat. (1995). The fact that his conclusion was based on hearsay was yet another reason why it was inadmissible. A lay witness, such as Detective Smith, may not rely on hearsay in forming an opinion. *See Barnes v. State*, 415 So. 2d 1280, 1283 (Fla. 2d DCA), *review denied*, 424 So. 2d 760 (Fla. 1982).

Admitting this testimony violated appellant's rights to confront adverse witnesses, to due process and to a reliable penalty phase proceeding.

II.

THE TRIAL COURT ERRED IN ALLOWING THE STATE'S PRINCIPAL WITNESS, DETECTIVE SMITH, TO REMAIN IN THE COURTROOM THROUGHOUT THE RESENTENCING PROCEEDING, IN VIOLATION OF THE RULE AGAINST WITNESS SEQUESTRATION, SECTION 90.616, FLORIDA STATUTES.

Section 90.616, Florida Statutes provides that when the sequestration rule is invoked, the court "shall" exclude witnesses from the proceeding "so that they cannot hear the testimony of other witnesses" unless the witness's presence is shown to be "essential to the presentation of the party's

cause." § 90.616, Fla. Stat. (1995).

Here, over defense objection, the resentencing judge allowed Detective Smith, whom the state characterized as its "primary witness," to remain in the courtroom throughout the proceedings (T. 123-29), despite defense counsel's invocation of the rule of sequestration (T. 1888). The only reason the state gave for Detective Smith's presence was that he was familiar with the documents in the prosecutor's file and was needed to assist the prosecutor in the orderly presentation of the case. (R. 1169, 1173). This fell far short of a showing that this witness's presence was "essential." The state was not claiming that Detective Smith had any special personal knowledge of the facts of the case which was not equally available to the prosecutors through a review of their file. *Compare Goodman v. West Coast Brace & Limb*, 580 So. 2d 193, 195 (Fla. 2d DCA 1991) (witness's presence was essential for attorney to function effectively because he was "the only individual with intimate knowledge of the facts in the underlying personal injury action"). It must be assumed that the prosecutors themselves would be familiar with the contents of their own file. The rules of ethics require nothing less of any lawyer, including lawyers whose client is the state. Moreover, the prosecution's need for the assistance of someone who was familiar with the file was amply met by the presence in the courtroom, throughout the proceeding, of *three* assistant state attorneys, all of whom were there to assist in the presentation of the state's case.

The state also argued that the defendant would not be prejudiced, because Detective Smith's testimony was simply hearsay and thus not of the type which might be colored by listening to the testimony of other witnesses. (R. 1169-70, 1173-74). The logic of that argument is less than evident. That a witness has no personal knowledge of the facts does not mean he has no motivation to shade and tailor his testimony, and hearing the testimony of other witnesses would allow him to do so more

effectively. Detective's Smith role as a conduit for hearsay, and for opinions based on hearsay (for example, that the defendant had behaved normally in the days before the crime, see I(B), above), made such tailoring highly likely, since it already required selection and interpretation for the purpose of presenting a factual picture favorable to the state. Indeed, Detective Smith's testimony on rebuttal began with the assertion that he had now had the opportunity to review additional hearsay (T. 3550), which just happened to address the facts of the surveillance discussed during the testimony of the defense expert witnesses and of Agent Nelson.

III.

THE PROSECUTION'S RELIANCE ON THE NONSTATUTORY AGGRAVATING CIRCUMSTANCE OF FUTURE DANGEROUSNESS TAINTED THE VALIDITY OF THE JURY'S RECOMMENDATION AND UNDERMINED THE RELIABILITY OF THE SENTENCING HEARING, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

A defendant's future dangerousness and, in particular, the existence of an allegedly incurable and dangerous mental illness, cannot be used as a nonstatutory aggravating circumstance. *Miller v. State*, 373 So. 2d 882, 885 (Fla. 1979). Transforming such mitigating evidence regarding a defendant's mental illness into an aggravating factor violates both the legislative purpose of Florida's capital sentencing statute and the Eighth Amendment. *Miller*, 373 So. 2d at 886; *see also Zant v. Stephens*, 462 U.S. 862, 885 (1983) (state may not attach "'aggravating' label to factors . . . that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness") (citing *Miller*).

In the present case, the defense presented evidence that Mr. Muhammad was suffering from

a longstanding mental illness which could make him dangerously psychotic when under stress and for which he was receiving no medication at the time of the crime. (T. 2517-19, 2527-31, 2537-38, 2737-40, 2747-49, 2755-57, 2768, 2853-54, 2952, 2961-62, 3048-50, 3190-91). In the opinion of the defense experts, at the time of the murders Mr. Muhammad was under the influence of extreme mental or emotional disturbance and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (T. 2529-31, 2537-38, 2763-67, 2871-72, 2968-70, 3048-50, 3190-91). Several of the experts also testified that this was even more clearly the case at the time of the subsequent murder of Officer Burke. In the opinion, of Dr. Fisher, Dr. Carbonell, and Dr. McClaine, at the time of the Burke homicide, Mr. Muhammad was suffering from a severe mental disturbance. (T. 2555-56, 2874-76, 2970-74).

The state turned this mitigating evidence into a nonstatutory aggravating circumstance. First, the state elicited testimony that Mr. Muhammad's dangerous mental illness was very difficult or impossible to cure. (T. 2354-55, 3096). During cross-examination of Dr. Fisher, the prosecutor elicited the opinion that, unless Mr. Muhammad received "heavy structure" and "heavy medication," he would probably "not be able to function without great difficulties which may well include aggression in the outside community." (T. 2354). The prosecutor then pointed out that the heavy structure of a prison cell had not prevented the death of Officer Burke (T. 2355), and went on to discuss various instances where the defendant had allegedly displayed aggressive behavior while incarcerated after his arrest in 1974 (T. 2355, 2359-66). From Dr. Toomer, the prosecutor elicited that the defendant would have these mental problems all his life. (T. 3096).

In closing argument, the prosecutor drove the point home: Even Mr. Muhammad's own expert witnesses thought he was a dangerous and untreatable individual, who would "kill, and kill

and kill again" if not electrocuted:

> Back in 1970, the only time in his life he was sent to a hospital and the report says, "Homicidal, wants to kill to see the blood."
>
> That is Thomas Knight. That is what he is all about, and on July 17, 1974, that was what he did. He was like that in 1970. He was like that in 1974. He was like that in 1980 when he killed Officer Burke.
>
> *You have heard all the defense doctors and all the state doctors and whatever experts you want to listen to. They say that is all him, today, yesterday, tomorrow, forever.*
>
> You are going to have to decide if that is some form of mitigation, if that is an excuse, an explanation for his actions. This is a man who has no conscience. He does not feel for other people.
>
> What is the proper recommendation for a person like that? How do we punish somebody who has no conscience, who can act and act again, kill, and kill and kill again but does not have a conscience about it? Somebody who won't control himself.

(T. 3773-74). This argument could not be brought within permissible bounds by the device of mischaracterizing the defense testimony as indicating an unwillingness, rather than an inability to change. The state's rhetoric derived its wattage from the fact that even the defense doctors--who believed that the defendant would suffer recurring, dangerous psychotic episodes--testified that his condition was chronic and difficult to treat. The question of the defendant's likely mental state in 1974 in the absence of treatment was relevant, the question of whether he could successfully be treated in the future was not. The state's reliance on future dangerousness rendered the proceeding fundamentally unfair, tainted the validity of the jury's recommendation, and undermined the reliability of the sentencing determination, in violation of the Eighth and Fourteenth Amendments. Defense counsel's motion for mistrial, brought at the end of closing argument on the ground that the

prosecutor had in effect argued "that the jury should recommend death because of the continuing and future dangerousness of the defendant" (T. 3876), should have been granted. *See Miller.*

IV.

THE TRIAL COURT'S REFUSAL TO DETERMINE AND INSTRUCT THE JURY THAT IF SENTENCED TO LIFE, THE SENTENCES WOULD BE CONSECUTIVE, WITH MINIMUM MANDATORY TERMS TOTALING FIFTY YEARS, PRECLUDED THE JURY FROM CONSIDERING RELEVANT MITIGATING EVIDENCE, UNDERMINED THE RELIABILITY OF THE SENTENCING PROCEEDING, AND DENIED THE DEFENDANT DUE PROCESS, IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VI, VIII AND XIV.

By the time of resentencing, Mr. Muhammad had already served nearly 22 years on death row. If sentenced to life and the sentences were made concurrent, he would be eligible for parole in only three years; in 27 years if they were consecutive. Defense counsel filed a motion asking the trial court to determine in advance of submitting the case to the jury that Mr. Muhammad's sentences would be consecutive, with a combined minimum mandatory term of 50 years, and to instruct the jury that it could consider this fact in mitigation. (R. 1425-35). The court denied the motion and corresponding proposed instructions, but ruled that defense counsel could argue the point before the jury, and could say that "only an irresponsible judge could give a concurrent sentence in this case." (T. 3738). When defense counsel attempted in closing argument to say that the defendant would be at least sixty-five-years old by the time he became eligible for parole, the state objected, noting (for the benefit of the jury) that "the sentence goes back to 1974 when they calculate the 25 years." (T. 3894). The state's objection was sustained. (T. 3894). In his final sentencing order, the judge imposed consecutive sentences for the capital murder convictions. (R. 1554). Thus, if Mr.

Muhammad had not been sentenced to death, he would be serving two consecutive life sentences, with a combined minimum mandatory term of 50 years.

A. The Trial Court's Denial of the Motion to Determine in Advance Whether the Sentences Would Be Concurrent or Consecutive Undermined the Reliability of the Sentencing Process by Withholding from the Jury Relevant Mitigating Evidence and Accurate Sentencing Information.

A capital defendant must be permitted to present at the penalty phase of his trial any relevant evidence that "might serve 'as a basis for a sentence less than death.'" *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986), *quoting Lockett v. Ohio*, 438 U.S. 586, 604 (1978). This Court has held that the length of time a defendant would be "removed from society" if sentenced to life imprisonment is relevant mitigating evidence that the jury must be permitted to consider. *Jones v. State*, 569 So. 2d 1234, 1239-40 (Fla. 1990); *accord Turner v. State*, 645 So. 2d 444, 448 (Fla. 1994).[15]

Information regarding the defendant's parole ineligibility responds directly to the incapacitative goal of capital punishment, and is also highly relevant, when considered in conjunction with other mitigating evidence, to the retributive purposes of capital punishment. *See Turner*, 645 So. 2d at 448. The length of the defendant's parole ineligibility is therefore potentially dispositive of the jury's ability to give effect to other mitigating evidence and thus of its ultimate decision whether the death penalty or its alternative is the appropriate sentence.

Moreover, "regardless of whether future dangerousness is an issue at sentencing," the Eighth Amendment "requires provision of 'accurate sentencing information,'" including the defendant's

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[15]Although information on parole ineligibility may not "relate specifically to [the defendant's] culpability for the crime he committed," it nevertheless is "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" *Skipper*, 476 U.S. at 4-5 (quoting *Lockett*, 438 U.S. at 604); *accord Jones*, 569 So. 2d at 1239; *Turner*, 573 So. 2d at 674.

parole ineligibility "as 'an indispensable prerequisite to a reasoned determination of whether [he] shall live or die.'" *Simmons*, 114 S.Ct. at 2198 (Souter, J., joined by Stevens, J., concurring) (quoting *Gregg v. Georgia*, 428 U.S. 153, 190 (1976)).

In the present case, the impact upon the jury of leaving uncertain the time within which the defendant could become eligible for parole is evident from the fact, of which the jury was well aware, that that period could be as short as three years.[16] That impact is also manifest from the transcript of the voir dire examination, in which prospective jurors repeatedly expressed their concern that they would not be able to recommend life if release within three years remained a possibility. At the outset of voir dire examination the judge read to the jurors the indictment and a brief summary of the facts, which included the fact that Mr. Muhammad had subsequently murdered Officer Burke. (T. 385-87, 1158-62).[17] The jurors were instructed that their role was to recommend either a sentence of death or a sentence of life imprisonment with no possibility of parole for 25 years. (T. 547, 1164-69). These preliminaries had a powerful impact on the prospective jurors. As the prosecutor observed, they appeared to be predisposed to imposing the death penalty. (T. 450). Of particular concern was the fact that, since Mr. Muhammad had already served 22 years, he could be released in just three years if sentenced to life. Several prospective jurors raised this question.

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[16]*Cf. Waterhouse v. State*, 596 So. 2d 1008, 1015 (Fla. 1992) (jury inquired on resentencing whether time defendant had already served would be credited against his minimum mandatory); *Downs v. State*, 572 So. 2d 895, 900-1 (Fla. 1990) (same).

[17]The jury was selected from two groups of prospective jurors, with the jurors selected from each group combined to give the panel. The same procedure was followed with both groups. Defense counsel's objection that the murder of Officer Burke should not be included in the court's recital of the facts because the conviction could not be used as an aggravator was overruled. (T. 349).

(T. 894-95, 897-901, 912-17, 968-70, 1015-18, 1716-19). The judge instructed the jurors that he could make the sentences consecutive or concurrent, and that although the judge had no say in the granting of parole, it was possible that the defendant might never be released. (T. 898-99, 1017). Jurors nevertheless continued to express the same concern. One prospective juror pressed the court for a definite answer to the question of whether the defendant might be released in three years. Since the court declined to give the requested reassurance, the juror asked if the jury could recommend consecutive life sentences. The judge responded that this could not be done, ending the discussion with the statement that the "bottom line is I will decide what the sentence is." (T. 1716-20).

Postponing the decision whether the sentences would be consecutive or concurrent withheld from the jury accurate sentencing information and, by interfering with the jury's ability to give effect to other mitigating evidence, skewed the balancing process in favor of death, "diminish[ing] the reliability of the sentencing determination" in violation of the Eighth Amendment to the federal constitution and Article I, § 17 of the Florida Constitution. *See Simmons*, 114 S.Ct. at 2198 (Souter, J. concurring).

B. The Court's Refusal to Determine in Advance Whether the Sentences Would Be Concurrent or Consecutive Violated Mr. Muhammad's Right to Due Process.

Moreover, because the state relied upon future dangerousness--arguing to the jury that the defendant should be given the death penalty because his own experts thought he was suffering from a dangerous, incurable mental illness (T. 3773-74)--the court's refusal to determine in advance whether the sentences would be consecutive or concurrent, and its sustaining of the state's objection when the defense attempted to suggest that there might be no parole eligibility for at least another 20 years, violated Mr. Muhammad's right to due process. The United States Supreme Court has

made clear that where the state puts a defendant's future dangerousness at issue in the penalty phase of a capital case, "elementary principles of due process" require that it cannot also deny the jury accurate information regarding the defendant's ineligibility for parole. *Simmons*, 114 S.Ct. 2187 at 2194 (plurality opinion of Blackmun, J.); *id.* at 2201 (O'Connor, J., concurring, joined by Rehnquist, C.J., and Kennedy, J.). While the Court's holding in *Simmons* specifically addresses only the defendant's right to inform the sentencing jury of a life without parole alternative, the underlying due process principles apply with equal force to a lengthy minimum mandatory term. 114 S.Ct. at 2201 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., concurring).

In this case, as in *Simmons*, the prosecution "raised the specter of future dangerousness generally but then thwarted all efforts by [the defendant] to demonstrate that contrary to the prosecutor's intimations, he never would be released on parole and thus, in his view, would not pose a future danger to society." *Simmons*, 114 S.Ct. at 2194. As the prosecutor and the judge well knew, there was no chance whatever that, if sentenced to life, Mr. Muhammad would receive concurrent sentences and be released within three years, as the jurors feared. (T. 916, 3738). However, this fact was concealed from the jury by the court's refusal to resolve alternative sentences in advance; and, when defense counsel attempted to argue that the defendant would be in prison for at least 20 years, the prosecutor successfully objected, taking the opportunity to remind the jurors that "the sentence goes back to 1974 when they calculate the 25 years." (T. 3894). Thus a "false dilemma" was created, which the prosecution exploited by suggesting that imposition of the death penalty was the only way the jury could be certain that Mr. Muhammad would never be released into society and kill again. (T. 3773-74). Such manipulation of the sentencing process violates elementary principles of due process. *See Simmons*, at 2191, 2198, 2194-95.

It was no solution to the jury's false dilemma to permit the defense to argue that consecutive minimum mandatory sentences were likely. Arguments of counsel regarding the defendant's parole inegibility are not an adequate substitute for an instruction by the court. *Simmons*, 114 S.Ct. at 2199 (Souter, J., concurring). Moreover, the trial court's suggested solution--that counsel should persuade the jurors that no responsible judge would give concurrent life sentences to someone like Mr. Muhammad--required counsel to plead for his client's life on the basis that it would be obvious to anyone that his client would always be a danger to society. Placing counsel in the position of having to make such an argument to resolve the false dilemma created by the unnecessary postponement of the parole eligibility determination, did not remedy the due process violation; it merely added a violation of the defendant's right to the effective assistance of counsel.

Due Process required an advance determination of parole eligibility, and a corresponding instruction to the jury. *Turner v. State*, 573 So. 2d 657, 674-75 (Miss. 1990), *cert. denied*, 500 U.S. 1910 (1991); *Clark v. Tansy*, 882 P.2d 527, 534 (N.M. 1994). In *Turner*, the state contended that the defendant was not entitled to an instruction on his parole inegibility because his habitual offender status was "totally speculative" at the time of his capital sentencing hearing. The Mississippi Supreme Court observed, however, that any uncertainty regarding the defendant's parole inegibility was solely the result of the discretionary practice of holding habitual offender hearings after the penalty phase and refused to accept this practice "as logical or justifiable." 573 So. 2d at 674-75. Because the habitual offender hearing could be held first, without "undue inconvenience," "logic and constitutional principles of due process and fundamental fairness" required that the defendant's parole ineligibility be resolved before the case was submitted to the jury at the penalty phase to allow the jury to consider accurate, "nonspeculative information" about the alternatives to the death

penalty. 573 So. 2d at 675 (emphasis omitted).[18] Similarly, in this case there was no valid reason why the trial court could not determine in advance that the defendant's sentences would be consecutive rather than concurrent. *See Simmons*, 114 S.Ct. at 2198 (Souter J., joined by Stevens J., concurring) (heightened concern for reliability in capital cases "invalidates 'procedural rules that ten[d] to diminish the reliability of the sentencing determination") (quoting *Beck v. Alabama*, 447 U.S. 625, 638 (1980)). The court's failure to make such a determination denied the defendant due process and a reliable sentencing determination.

V.

THE TRIAL COURT'S INSTRUCTION THAT THE DEFENDANT'S ABSENCE AT TRIAL WAS THE RESULT OF HIS MISCONDUCT IN THE COURTROOM, AND THAT THE DAILY DELAYS WERE CAUSED BY THE NEED TO REASSESS HIS WILLINGNESS TO BEHAVE, DENIED THE DEFENDANT DUE PROCESS AND A RELIABLE SENTENCING DETERMINATION, IN VIOLATION OF THE FLORIDA CONSTITUTION, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

Mr. Muhammad was excluded from the courtroom on the first day of voir dire examination because of his improper behavior and his assertion that he would not remain quiet because he believed that the decision in *Faretta v. California*, 422 U.S. 806 (1975) gave him the right to speak for himself. (T. 292-94). The initial group of prospective jurors was dismissed. (T. 344). The proceedings continued without Mr. Muhammad. He was brought to court each morning to determine whether he was willing to remain silent during the proceedings. Each morning Mr. Muhammad

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[18]*See also Clark v. Tansy*, 882 P.2d 527, 534 (trial court must, upon defendant's request, impose sentence for noncapital convictions prior to jury deliberations on death penalty); *State v. Henderson*, 789 P.2d 603, 606-7 (N.M. 1990) (recommending procedure made mandatory in *Clark*).

indicated that he would not be silent, and was removed from the courtroom before the jurors entered. (T. 356-70, 696-701, 1147-48, 1539-40, 1888-90, 2141-42, 2431-45, 2818-20, 3112-16, 3409-12, 3747-52). The jurors never saw Mr. Muhammad.

Over defense objection, the court instructed the prospective jurors that Mr. Muhammad was not present because of his misconduct in the courtroom. (T. 382, 1158). Subsequently, because the state and the court became concerned that the defendant might be garnering sympathy as a result of his absence, the court instructed the jury, over defense objection, that Mr. Muhammad was brought to court every morning; that every morning he indicated that he "would not conform to accepted courtroom behavior" and was "unwilling" to sit quietly and consult with his attorneys; and that this was why the proceedings never began on time. (T. 2418-25, 2453-54).

These instructions unfairly prejudiced the defendant. There was no need to tell the jurors that Mr. Muhammad had been disruptive, much less that his misconduct was ongoing. This information was irrelevant to the issues before the jury and highly prejudicial. To tell the jurors that he was responsible for the daily delays which they had to endure over the course of the two weeks of the resentencing proceeding gave each juror a personal reason to be angry at Mr. Muhammad. It was also not exactly true that he caused these delays. Mr. Muhammad had clearly stated that he did not want to be present without a right to speak and it was not at his request, or at the request of his counsel, that he was brought into the courtroom each day. The instruction also made it seem that Mr. Muhammad's behavior was worse than it actually was. Most of the colloquies with the judge were in fact very short and did not involve obstreperous conduct, only the reiteration of Mr. Muhammad's view that under *Faretta* he had the right to comment during the proceedings.

Moreover, when the court later allowed the state to introduce Dr. Miller's testimony that Mr.

Muhammad's courtroom behavior constituted malingering (T. 3486-3501, 3519-20) (see VI, below), the instruction became a comment on the evidence, which endorsed the state's position that Mr. Muhammad had never been mentally ill, but had always been a fake and a phony (T. 3856-57). By allowing Dr. Miller's testimony that Mr. Muhammad's courtroom behavior constituted malingering and by telling the jury that Mr. Muhammad was not present because of his own unwillingness to behave, the court made the present courtroom misconduct an issue, resolved it in favor of the state, and made that resolution unmistakably clear to the jury. Such judicial comments are impermissible because they destroy the impartiality of the trial. *Hamilton v. State*, 109 So. 2d 422, 424-25 (Fla. 3d DCA 1959).[19] By bringing before the jury irrelevant and unfairly prejudicial information, and by endorsing the state's evidence and position that the defendant was a malingerer, the court's instruction denied the appellant due process and a reliable sentencing hearing.

VI.

THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF DR. MILLER,WHO HAD BEEN APPOINTED SOLELY FOR THE PURPOSE OF EVALUATING APPELLANT'S COMPETENCE AND HAD NO OPINION AS TO HIS MENTAL STATUS AT THE TIME OF THE CRIME, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17 AND THE UNITED STATES CONSTITUTION, AMENDMENTS V, VI, VIII, AND XIV.

Dr. Lloyd Miller was appointed by the court in 1991 and 1996 for the sole purpose of evaluating Mr. Muhammad's competence to proceed. (T. 202, 204, 3506). On both occasions, Dr. Miller found that Mr. Muhammad was malingering. The state called Dr. Miller to testify at the

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[19]*See* § 90.106, Fla. Stat. (1995) ("A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused.").

resentencing proceeding, over defense objection that he was not listed as a witness, had only been appointed to evaluate the defendant's present competence, and his testimony was irrelevant and outside the scope of rebuttal. (T. 3486-87, 3492-93)

Dr. Miller testified that he was appointed by the court in October 1991 to determine whether Mr. Muhammad "was mentally competent to participate in court proceedings at that time." (T. 3506). He asked Mr. Muhammad questions to determine the various requirements of competency. (T. 3507-8). Mr. Muhammad did not acknowledge knowing the answers to the simplest questions, and said he saw things that he patently was not seeing. (T. 3507-16). In Dr. Miller's opinion, Mr. Muhammad was malingering symptoms of mental disorder. (T. 3518).

Dr. Miller further testified that he had been appointed to examine Mr. Muhammad on January 23, 1996, because of the court's concern about Mr. Muhammad's behavior. (T. 3519). As the jury knew, because it had been instructed on the matter, that behavior consisted of Mr. Muhammad's daily courtroom misconduct. (T. 382, 1158, 2418, 2453-54). Dr. Miller testified that Mr. Muhammad was not "forthcoming" but that he had obtained information from corrections officers and other persons which allowed him to determine whether Mr. Muhammad's behavior outside the courtroom was consistent with the way he behaved in court. (T. 3520). He concluded that Mr. Muhammad had been malingering on January 23, 1996, as well as on October 29, 1991, although he had no conclusion about what Mr. Muhammad had done in between those dates. (T. 3520). He was not asked to express an opinion as to Mr. Muhammad's mental state in July 1974.

A. Use of Dr. Miller's 1996 Competency Examination to Rebut Mental Mitigation Violated Florida Rule of Criminal Procedure 3.211(e).

Florida Rule of Criminal Procedure 3.211(e)(1) precludes the use of a competency evaluation

for *any* purpose, including the rebuttal of mental mitigation, other than to determine the defendant's competence to stand trial, unless the defendant himself first uses the evaluation for such other purpose. The rule expressly provides:

> The information contained . . . in any report of experts filed under this rule insofar as the report relates solely to issues of competency to proceed and commitment, and any information elicited during a hearing on competency to proceed or commitment held pursuant to this rule, *shall be used only in determining the mental competency to proceed or the commitment or other treatment of the defendant.*

Fla. R. Crim. P. 3.211(e)(1) (emphasis added). A defendant waives this restriction on the use of information obtained during a competency examination only if he "us[es] the report, or portions thereof, in any proceeding for any other purpose." Fla. R. Crim. P. 3.211(e)(2).

Here, the defense did not rely in any way on Dr. Miller's 1996 competency evaluation, and accordingly that evaluation could not be used for any purpose.[20]

B. Use of Dr. Miller's 1996 Competency Examination to Rebut Mental Mitigation Violated Appellant's Fifth Amendment Privilege Against Self-Incrimination.

Rule 3.211(e), which is substantially similar to Standard 7-4.6 of the American Bar Association's Standards for Criminal Justice, corresponds to the proper scope of the privilege against self-incrimination in the context of a competency evaluation. Unlike an insanity defense or the presentation of mental mitigation, competence to stand trial cannot be waived. *See Pate v. Robinson*, 383 U.S. 375, 384 (1966) ("it is contradictory to argue that a defendant may be incompetent, and yet

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[20]Because Dr. Miller was appointed solely for the purpose of a competency evaluation, this case is distinguishable from *Long v. State*, 610 So. 2d 1268, 1275 (Fla. 1992), *cert. denied*, 114 S.Ct. 104 (1993), in which this Court held that the confidentiality provisions of Rule 3.211(e) had not been violated by the testimony, to rebut mental mitigation, of an expert who had been appointed to examine the defendant for both competency *and* sanity.

intelligently 'waive' his right to have the court determine his capacity to stand trial"). Because proceedings against an incompetent defendant are null and void, *Thompson v. Crawford*, 479 So. 2d 169, 186 (Fla. 3d DCA 1985), the duty to ensure the defendant's competence to proceed is not limited to defense counsel; rather, the state may request a competency evaluation, and the trial court must order an examination *sua sponte*, if there is reason to believe that the defendant is incompetent. *Drope v. Missouri*, 420 U.S. 162, 181 (1975); *Pate*, 383 U.S. at 385; *Gibson v. State*, 474 So. 2d 1183, 1184 (Fla. 1985); Fla. R. Crim. P. 3.210(b).

Because competence to stand trial cannot be waived, a competency evaluation is involuntary in a way that a compelled examination to rebut insanity or mental mitigation is not. *See* ABA STANDARDS FOR CRIMINAL JUSTICE ("ABA Standards") Standard 7-4.6, Comment (2d ed. 1986) (Standard 7-4.6 "rests on the premise that, because trial of incompetent defendants denies due process of law, courts are obligated to determine defendant competency to ensure the constitutional validity of ensuing criminal proceedings"); Christopher Slobogin, *Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation*, 31 Emory L. J. 71, 89-92 (1982) (because obligation to raise competency is not limited to defense, competency determination is further from accusatorial model than issues of either sanity or mental mitigation).[21] A competency evaluation is therefore more analogous to testimony compelled under a grant of immunity than to a confession obtained in violation of the prophylactic rules of *Miranda v. Arizona*, 384 U.S. 436 (1966), and is

[21]Professor Slobogin emphasizes that this analysis is not altered if the defense rather than the state or the court requests the competency evaluation. Slobogin at 91.

accordingly not admissible against a defendant for any purpose, including rebuttal or impeachment.[22] Gerald Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 Geo. Wash. L. Rev. 375, 404 (1985); ABA STANDARDS, Standard 7-4.6, Comment nn. 14 & 15 (citing *Kastigar v. United States*, 406 U.S. 441 (1972) and *New Jersey v. Portash*, 440 U.S. 450 (1979)); Slobogin, *supra*, at 94 n. 97 (rejecting analogy to *Harris v. New York*, 401 U.S. 222 (1971), because disclosures during a competency evaluation cannot be considered "voluntary"). Thus, Rule 3.211(e) properly protects defendants' Fifth Amendment rights by precluding use of competency evaluations for any purpose other than determining competence to stand trial, unless the defense does so first. Slobogin, *supra*, at n. 98 (citing Fla. R. Crim. P. 3.211(e) as "an example of the type of protection required by the Fifth Amendment). The prosecution's use of the competency evaluation in violation of Rule 3.211(e) therefore violated his Fifth Amendment rights as well.

C. Use of Dr. Miller's 1996 Competency Examination to Rebut Mental Mitigation Violated Appellant's Sixth Amendment Right to Counsel.

Even if this Court were to find that appellant waived his Fifth Amendment rights by putting his mental status in issue at the penalty phase, "the introduction of psychiatric evidence to support" mental mitigating circumstances "does not waive [the defendant's] Sixth Amendment right to

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[22]Indeed, in *Estelle v. Smith*, 451 U.S. 454 (1981), the Supreme Court noted that, if the defendant had declined to waive his right to remain silent with regard to a broader examination, "the validly ordered competency evaluation nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose." 451 U.S. at 468. Thus, *Smith* itself suggests that an evaluation of a defendant's competence to stand trial could never be conditioned on, or deemed to be, a waiver of the defendant's Fifth Amendment right to remain silent. Significantly, in *Buchanan v. Kentucky*, 483 U.S. 402 (1987), in which the Court held that a compelled psychological examination could be used to rebut a mental status defense, it went to lengths to clarify that the report used by the prosecution in rebuttal was not from a competency evaluation. 483 U.S. at 411 n.11 & 413.

consult with counsel." *Holland v. State*, 636 So. 2d 1289, 1292 (Fla.), *cert. denied*, 115 S.Ct. 351 (1994); *accord Powell v. Texas*, 492 U.S. 680, 683 (1989). "Such consultation, to be effective, must be based on counsel's being informed about the scope and nature of the proceeding" and "on counsel's awareness of the possible uses to which petitioner's statements in the proceeding could be put," *Buchanan*, 483 U.S. at 424. Here, although defense counsel requested the examination and was obviously informed of it beforehand, counsel did not have notice that the state would use the evaluation to rebut mitigation. Counsel was entitled to assume that Dr. Miller's testimony would not encompass the 1996 competency evaluation, and that the use of that evaluation would be strictly limited as required by Rule 3.211(e). The state's use of the evaluation to rebut mental mitigation, in violation of Rule 3.211(e), was therefore also in violation of appellant's right to counsel.

D. Dr. Miller's Testimony was Irrelevant, Unfairly Prejudicial, and Exceeded the Proper Scope of Rebuttal.

Although the rules of evidence are relaxed in the penalty phase "they emphatically are not to be completely ignored." *Johnson v. State*, 660 So. 2d 637, 645 (Fla. 1995). Evidence whose probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, must be excluded. § 90.403, Fla. Stat. (1995); *Rhodes*, 547 So at 1204-5.

Dr. Miller testified that when he saw Mr. Muhammad in 1991 and 1996, for the purpose of evaluating his competence, Mr. Muhammad was faking symptoms of mental disorder to evade criminal responsibility. (T. 3506-20). This testimony was not relevant to any issue before the jury.

The defendant's competence to proceed at the resentencing was completely irrelevant. It was a legal issue which was not for the jury to decide, it was to be decided by the judge under a completely different standard than that which applies to mental mitigation, and it proved nothing

about Mr. Muhammad's mental state in July 1974, when the crime was committed. Nor was it admissible as rebuttal. The defense did not present any evidence or argument to the jury that Mr. Muhammad was incompetent to participate in the proceedings.

The fact that Mr. Muhammad was malingering on the two occasions that Dr. Miller saw him, in 1991 and 1996, was also irrelevant. Dr. Miller's observations on those two occasions could not rebut or impeach the observations made by other doctors on other occasions. Dr. Miller himself testified that he could not state whether Mr. Muhammad had been malingering at other times (T. 3520), and he did not offer an opinion on the defendant's mental status in 1974. Moreover, there was no contention on the part of the defense that Mr. Muhammad was incapable of attempting to fake mental illness. To the contrary, the defense experts acknowledged that Mr. Muhammad could and did sometimes malinger, and they took that into account in their own interviews.

Although irrelevant, Dr. Miller's testimony was highly prejudicial and misleading. It was used by the state as a springboard for its argument to the jury that Mr. Muhammad had always been a phony and a fake. (T. 3856-57). Moreover, the court's instruction to the jury that Mr. Muhammad had been excluded from the courtroom because of his unwillingness to behave appropriately (T. 382, 1158, 2453-54), was an apparent endorsement both of Dr. Miller's testimony and of the state's position, and guaranteed that it would be given great weight by the jury. *See Hamilton*, 109 So. 2d at 424-25 (because of dominant position occupied by a judge in a trial before a jury, his comments tending to express his view as to the weight of the evidence or the credibility of a witness destroy the impartiality of the trial). The admission of this irrelevant and unfairly prejudicial testimony denied Mr. Muhammad due process and his right to a reliable determination of his sentence.

VII.

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S PEREMPTORY CHALLENGE OF JUROR RIVERO-SAIZ, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9, AND THE UNITED STATES CONSTITUTION, AMENDMENT XIV.

The right to peremptorily challenge prospective jurors is guaranteed in Florida by statute and rule. § 913.08, Fla. Stat. (1995); Fla. R. Crim. P. 3.350. Arbitrary denial of the right violates the Fourteenth Amendment's guarantee of due process of law. *See Ross v. Oklahoma*, 487 U.S. 81, 89 (1988) (impairment of a statutory right to peremptory challenges violates due process "only if the defendant does not receive that which state law provides").

In the present case, when defense counsel attempted to exercise a peremptory challenge to excuse Juror Rivero-Saiz, the state objected that there appeared to be no reason to excuse this juror except her gender and ethnicity. (T. 1125). The court required defense counsel to explain the peremptory. (T. 1126). Counsel responded that Ms. Rivero-Saiz appeared to be a very weak juror, who would just go along with somebody else. (T. 1126). The court ruled that this was not an ethnic or gender neutral reason because the juror appeared to be very attentive, completely congenial and very cordial, and there was nothing in her personal history indicating that she would be unfair. (T. 1127). Counsel objected that the victims were not Hispanic and reiterated his reason for excusing the juror. (T. 1128). The peremptory challenge was denied. (T. 1128).[23] This was reversible error.

First, the reason given was in fact gender and ethnic neutral. *See Melbourne v. State*, 679 So.

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[23]Defense counsel renewed the objection to the denial of the peremptory challenge before selection of jurors began from a second, separate group of jurors (T. 1150-51), and again when the state subsequenly removed two jurors and one alternate from the panel that had been sworn to try the case (T. 3475).

2d 759, 764 n. 6 (Fla. 1996) (explanation is deemed race-neutral "as long as no predominant discriminatory intent is apparent on its face"); *Purkett v. Elem*, 115 S.Ct. 1769, 1771 (1995) (requirement that a race neutral reason be tendered "does not demand an explanation that is persuasive, or even plausible"); *see also Nelson v. State*, 688 So. 2d 971 (Fla. 4th DCA 1997) (state's explanation that juror tended to think emotionally was facially neutral reason for challenge); *Brown v. Kelly*, 973 F.2d 116, 119-21 (2d Cir. 1992) (prosecutor presented race-neutral explanation for striking four African-American venire persons by stating that one venire person was not going to be a strong juror because she was too quiet, another was too timid and probably the weakest of the jurors on the panel, another was flippant, and another was unresponsive).

Second, there is a presumption that peremptories are exercised in a non-discriminatory manner. *Neil v. State*, 457 So. 2d 481, 486 (Fla. 1984); *Melbourne*, 679 So. 2d at 764; *Purkett*, 115 S.Ct. at 1771 ("the ultimate burden of persuasion regarding racial motivations rests with, and never shifts from, the opponent of the strike"). Here, there was nothing to indicate discriminatory intent. Ms. Rivero-Saiz was the second juror peremptorily challenged by the defense. The first had been juror Robert Scott, who was evidently neither Hispanic nor a woman. (T. 1122). Indeed, far from seeking to exclude Hispanic women, defense counsel had objected when the court granted the state's motion to excuse for cause another Hispanic female juror (Michelle Rubiera) because she was worried about a statistics course she was taking (T. 1113-16).

There was also no indication that counsel's reason was a pretext or unsupported by the record. The court's observation that the juror was cordial, attentive, and "completely congenial" did not in any way detract from defense counsel's perception that she would be too willing to go along with the views of others. To the contrary, it confirmed that counsel's observation was based in fact.

The defense did not want someone so "completely congenial" or agreeable because she might be too inclined to defer to others. Whether or not that seemed to the court to be a good reason to excuse a juror was not the point. *Melbourne*, 679 So. 2d at 764 (the focus "is not on the reasonableness of the explanation, but rather its genuineness"). Counsel's reason was race neutral, supported by the record, and not shown to be a pretext. He was entitled to exercise the peremptory challenge. § 913.08, Fla. Stat. (1995); Fla. R. Crim. P. 3.350.

VIII.

THE TRIAL COURT ERRED IN EXCLUDING JURORS WELDON AND ZARIBAF, AND ALTERNATE JUROR CUNNINGHAM, FROM THE PANEL, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9 AND 16, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VI AND XIV.

After nearly two weeks of testimony there was an incident in which a clerk commented about the case in the presence of three jurors: Ms. Zaribaf, Ms. Weldon, and Mrs. Cunningham. The jurors brought this matter to the attention of the bailiff, and were questioned individually by the court and counsel for both parties. The jurors explained that they had been in the courthouse elevator when it stopped on the fourth floor, on which the courtroom was located. (T. 3442, 3446). A corrections officer said that no one could get off. (T. 3446). A woman who worked in the Clerk's Office, said, "Oh, Thomas Knight." (T. 3442). The officer said, "Yeah." (T. 3442). The elevator doors closed and the woman began speaking to another person in the packed elevator, saying, "You know, he is a psycho." (T. 3442, 3446, 3461). Although the jurors asked her, three times, to please stop talking, because they were on the jury, the woman continued, saying that Knight was in a wheelchair because he was on a hunger strike, was trying to starve himself to commit suicide, and had faked a suicide

attempt in order to jump the corrections officers. (T. 3443, 3446-47, 3461).

Each of the three jurors firmly stated that the incident would not affect their decision. (T. 3457-58). They had not told any of the other jurors about it. (T. 3445, 3447, 3459, 3461, 3463). They were upset by the fact that someone who worked in the courthouse was stupid enough to talk about the case when she had been repeatedly told that there were jurors present. (T. 3460). However, they were sure that they could set this aside and be fair to both parties. (T. 3443-45, 3449, 3450, 3456, 3458, 3462). Ms. Weldon had previously been questioned regarding a portion of a newspaper headline that she had seen. (T. 2823-39). The clerk's reference to a fake suicide attempt made her realize that this was what the headline had been about. She was certain that she could set this aside and completely disregard it in her deliberations. (T. 3449, 3456). Ms. Weldon further stated that she interpreted the fake suicide attempt as an attention-getting device on the part of Mr. Muhammad, and that this neither provoked nor persuaded her; she would not consider it, either way. (T. 3456-57). Both sides would receive a fair trial from her. (T. 3458).

The state moved to excuse the jurors, arguing that while they were potentially good state jurors, they had received information that other jurors did not have and it was necessary to remove them to foreclose a possible basis for collateral attack on the sentence. (T. 3466-67). Defense counsel objected to excusing the jurors, pointing out that they had clearly stated that they would disregard what they had heard; that if anyone was prejudiced by the improper contact, it was the defense; and that it was not for the state to say what position the defense should take. (T. 3467-68). The state had previously attempted to excuse Ms. Weldon for cause, based on the newspaper headline she had glanced at. (T. 2824-28, 2835-39). It appears that she was one of only three black jurors on the panel. (T. 1844). The court excused the three jurors, apparently adopting the state's

view that defense counsel might be found ineffective if they remained on the panel. The court explained that the jurors now had outside information about the defendant's mental state and of the fact that for security reasons no one was permitted to leave the elevator on the fourth floor when Muhammad was being moved. They knew about the hunger strike and the attempted suicide. (T. 3472-73). The court believed that when considering the mental mitigators Ms. Weldon would be unable to put aside her conclusion that the defendant's activities were fraudulent. (T. 3473). It also appeared that she would worry about having got the clerk into trouble. (T. 3474). The defense renewed its previously stated objection to Juror Rivero-Saiz, and moved for a mistrial. These motions were denied. (T. 3475).

Granting the state's motion to excuse these jurors for cause on the ground that defense counsel's failure to excuse them would subject the sentence to collateral attack, violated Mr. Muhammad's right to counsel. As the court and the prosecution both recognized, any prejudice from the improper contact was obviously to the defense, not the state. The state could not be injured by the fact that the jurors had heard comments which agreed with what the state had been urging upon them throughout the proceeding: that Mr. Muhammad was a psychopath, a malingerer, and a fraud. *See McKinney v. State*, 579 So. 2d 80, 83 (Fla. 1991). Since the state was not prejudiced, it had no basis upon which to remove these jurors for cause. Neither the state nor the court could substitute themselves for defendant's counsel. Counsel's decision to have these jurors remain on the panel was clearly his to make; it was, moreover, obviously "strategic" and could not possibly have been grounds for an ineffectiveness claim. Denying counsel the right to make that choice violated Mr. Muhammad's right to the effective assistance of counsel and to due process.

IX.

THE DEFENDANT WAS DENIED A FUNDAMENTALLY FAIR AND RELIABLE SENTENCING HEARING BY THE PROSECUTOR'S IMPROPER ARGUMENT, COMMENTS, AND INTRODUCTION OF IRRELEVANT AND HIGHLY PREJUDICIAL FACTS, IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

Through comments and questions directed at the defense expert witnesses, the prosecutor placed before the jury the following irrelevant, highly prejudicial, and inflammatory information:

First, the jurors learned, through the state's cross-examination of Dr. Fisher and Dr. Carbonell, that Mr. Muhammad had lost all his appeals from his death sentence, had (obviously unsuccesfully) sought clemency from the Governor, and that the previous jury had rejected his plea of insanity. (T. 2540-41, 2877, 2893, 2897-98). Placing before the jury the irrelevant fact that several other decision makers, including a previous jury, the appellate courts, and the Governor, had come to the conclusion that a death sentence was appropriate in this case, improperly pressured the jury into recommending a death sentence.

Second, the prosecutor misled the jurors as to Mr. Muhammad's juvenile record. In a question directed at Dr. Toomer, the prosecutor asserted that Mr. Muhammad must have done "some really bad things" to be sent to reform school at the age of nine. (T. 2285). Then, through the device of a hypothetical question, the prosecutor insinuated that those crimes might have included such offenses as rape, arson, and cruelty to animals: As part of the hypothetical posed to Dr. Toomer, ostensibly for the purpose of securing his assent to the DSM-IV definition of antisocial personality disorder, the prosecutor read to the jury the entire list of antisocial activities that might be considered in making this diagnosis, including cruelty to animals, extortion, sexual battery, arson, and numerous

other crimes, and then asked the doctor to assume that "three or more of those things may have applied to this defendant before he was eighteen years old." (T. 3081). Contrary to the question's implication, the defendant had never been accused of any sexual crimes, or of extortion, or of cruelty to animals, or arson. The prosecutor's insinuations were inflammatory and misleading. Although it is standard procedure for the state to dehumanize and to demonize a defendant, it must not be permitted to do so on the basis of false insinuations.

Third, in an apparent attack on the integrity of anyone who spoke or testified on Mr. Muhammad's behalf, the prosecutor suggested that one of his former lawyers was in fact a tramp, asking Dr. Carbonell whether it was not true that, according to the prison guards, one of the lawyers who represented Mr. Muhammad at the clemency proceeding had spread her legs during an interview and allowed Mr. Muhammad to look up her dress. (T. 2896-97).

In addition, during closing argument the prosecutor not only urged the defendant's future dangerousness as a reason to execute him (see III, above), he also argued that the "big question" was whether the defendant's life was worth more than that of his victims, and that although the defendant had decided to be the judge, jury and executioner of his victims, "he asks you to find mitigation in his life for his character to excuse, explain, what he has done to these poor people." (T. 3795). This plea to show the same mercy to the defendant as he showed to the victims was an improper appeal to the sympathies of the jury. *See Rhodes v. State*, 547 So. 2d 1201, 1204 (Fla. 1989).

Cumulatively and individually, these instances of improper questioning, commentary, and argument denied appellant due process and a reliable sentencing hearing.

X.

THE TRIAL COURT'S REFUSAL TO INSTRUCT ON THE MERGING OF AGGRAVATORS ESTABLISHED BY A SINGLE ASPECT OF THE OFFENSE UNDERMINED THE RELIABILITY OF THE JURY'S RECOMMENDATION IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

In addition to the previous-violent-felony and CCP aggravators, the court instructed the jurors on the aggravating circumstances of HAC, § 921.141(5)(h), avoid arrest, § 921.141(5)(e), pecuniary gain, § 921.141(5)(f), and commission of the capital offense while engaged in or fleeing from the crime of kidnapping. § 921.141(5)(d). The trial court denied defense counsel's request to instruct the jurors on the merging of aggravating circumstances based on a common aspect of the offense. (T. 3720-22). This was error. When applicable, and requested by the defense, the court should instruct the jurors on the merging of aggravating factors. *Castro v. State*, 597 So. 2d 259, 261 (Fla. 1992). Specifically, the jurors should be instructed that the state may not rely upon a single aspect of the offense to establish more than one aggravating circumstance, and that if they find that two or more of the aggravating circumstances are proven beyond a reasonable doubt by a single aspect of the offense, they are to consider that as supporting only one aggravating circumstance. *Standard Jury Instructions in Criminal Cases*, 22 Fla. L. Weekly S98, 99 (Fla. March 6, 1997).

The instruction on the felony murder aggravator stated that the capital offense had been committed while the defendant was engaged in or fleeing from the crime of kidnapping, which was defined as an abduction with intent to (1) hold for ransom or as a shield or hostage, and/or, (2) commit or facilitate commission of any first degree murder, and/or (3) inflict bodily harm upon or to terrorize the victim or another person. (R. 1473). Each of these alternatives corresponded to an

aspect of the crime used to establish another aggravating circumstance, namely, pecuniary gain, murder committed for the purpose of avoiding arrest, and HAC. The only financial gain was the ransom secured by the kidnapping. Continuing the abduction after the ransom had been obtained was, according to the state, for the purpose of taking the victims to a secluded spot where they could be eliminated as witnesses, thus avoiding arrest. And, because the victims were killed by single gunshot wounds and their deaths were instantaneous or nearly instantaneous, the only basis for a finding of HAC was the apprehension and uncertainty caused by the automobile ride, that is, by the abduction. *See Knight v. State*, 338 So. 2d 201 (Fla. 1976); *Preston v. State*, 607 So. 2d 404 (Fla. 1992). Because the jurors could properly conclude that the kidnapping merged with at least one of these other aggravators, the failure to give the merging instruction undermined the reliability of the jury's sentencing recommendation, and thus of the sentencing process. *See Espinosa v. Florida*, 505 U.S. 1079 (1992) (Florida penalty phase jury is a co-sentencer). The error cannot be deemed harmless because the judge was required to give the jury's recommendation great weight, and did not himself merge any of the aggravators.

XI.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURORS ON THE PRIOR-VIOLENT-FELONY AGGRAVATING CIRCUMSTANCE, AND IN ALLOWING THE STATE TO PRESENT EVIDENCE AND ARGUMENT REGARDING THE DEFENDANT'S CONVICTION FOR THE SUBSEQUENT MURDER OF OFFICER BURKE, IN VIOLATION OF FLORIDA LAW, THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

Over defense objection, the state was allowed to present evidence of the subsequent murder of Officer Burke--which occurred several years after the convictions for the murders of Mr. and Mrs.

Gans--and to argue that it should be considered as an aggravating circumstance. (T. 133-43, 1150-51, 1776, 2235, 2250-55, 2265-69). Also over defense objection, the trial court gave a state-requested special instruction regarding the prior violent felony aggravator, § 921.141(5)(b), Fla.Stat. (1995), instructing the jurors that each of the capital murders for which the defendant was to be sentenced could be considered an aggravating circumstance of the other, and that a conviction for a subsequent violent felony met the aggravator's definition of "previously convicted." (R. 1472; T. 3695-3702, 3917). The instruction on this aggravator read as follows:

> THOMAS KNIGHT n/k/a ASKARI ABDULLAH MOHAMMAD has been previously convicted of another capital offense.
>
> *A conviction for a capital offense committed on a person other than the victim of the homicide for which the defendant is to be sentenced, and which occurs at the same time, can be considered a prior conviction.*
>
> *"Previously convicted" means any conviction which exists at the time of sentencing.*

(R. 1472) (special instruction portion shown italicized).

Although this Court has approved application of the prior violent felony aggravator to subsequent convictions obtained before sentencing, *e.g.*, *Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977), as well as to a contemporaneous homicide conviction, *e.g.*, *Stein v. State*, 632 So. 2d 1361, 1366 (Fla. 1994), appellant respectfully submits it should be reserved for repeat violent felony offenders, *cf. State v. Barnes*, 595 So. 2d 22, 24 (Fla. 1992) (Kogan, J, concurring) (a defendant should not be habitualized "for separate crimes arising from a single incident"), whose other crimes were committed prior to the capital murder for which he is to be sentenced.

This Court has stated that the purpose of the previous violent felony aggravator is to allow consideration of the propensity to commit violent crimes, as part of the character analysis involved

in weighing aggravating and mitigating circumstances. *Elledge*, 346 So. 2d at 1001. However, this Court has also stated that the aggravating circumstances set forth in the statute "actually define" the sort of capital crime which may be punished by a death sentence. *Dixon*, 283 So. at 9. Crimes are normally defined by reference to the actions and circumstances existing at the time of the offense itself. The culpability for an act, or its degree of criminality, is not normally thought to be aggravated by actions taken several years later. Indeed, all of the other statutory aggravators involve circumstances which exist at the time of the crime. The prior violent felony aggravator is, like the others, in effect an element of the crime of death-punishable first-degree murder, *see Dixon* at 9, and, like any other element of a crime, must be proved by facts which can be ascertained at the time the crime occurred. Accordingly, the statutory term "previously convicted" must be given its plain meaning of a conviction obtained before the commission of the murder for which the defendant is to be sentenced. It was error to instruct on this aggravator, and to allow the state to present evidence of the Burke homicide.

XII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURORS ON THE CCP AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10, AND AMENDMENTS VIII AND XIV.

A. Instructing on the CCP Aggravating Circumstance Violated the Defendant's Rights under the Ex Post Facto Clause.

The Ex Post Facto Clause precludes a state from increasing the punishment for an offense after the crime has been committed. *Lynce v. Mathis*, 117 S.Ct. 891 (1997); *Collins v. Youngblood*, 497 U.S. 37 (1990); *Miller v. Florida*, 482 U.S. 423 (1987); *Weaver v. Graham*, 450 U.S. 24 (1981).

A statute violates the Clause if (1) it is retrospective, that is, applies to events occuring before its enactment, *Lynce*, 117 S.Ct. at 896 and (2), it "disadvantages" a defendant by "altering the definition of criminal conduct or increasing the punishment for the crime," *Lynce*, 117 S.Ct. at 896.

Here, application of the CCP factor was clearly retrospective. The offenses for which Mr. Muhammad was to be sentenced occurred in 1974, five years before the Legislature added the CCP aggravating circumstance to the death penalty statute. And, since neither the 1974 first-degree murder statute nor the death penalty statute contained any of the requirements of CCP, *compare Jackson v. State*, 648 So. 2d 85 (Fla. 1994), applying CCP to this case clearly "disadvantage[d]" appellant by "altering the definition of criminal conduct or increasing the punishment for the crime," *Lynce*, 117 S.Ct. at 896. Although this Court has held that application of the CCP factor to crimes which were committed before that aggravator was added to the statute do not violate the Ex Post Facto Clause, *Combs v. State*, 403 So. 2d 418 (Fla. 1981), the appellant respectfully submits that the issue should be reconsidered.

B. The CCP Aggravating Circumstance and the Corresponding Standard Instruction are Unconstitutionally Vague.

Defense counsel asserted below that both the CCP statutory aggravating circumstance, §921.141(5)(i), Fla. Stat. (1995), and its corresponding standard jury instruction are unconstitutionally vague. (R. 924-25, 1240-41; T. 7, 13-14, 3718). The instruction given by the court followed that set out in *Jackson v. State*, 648 So. 2d 85, 89 n. 8 (Fla. 1994). That instruction does not entirely cure the vagueness problem because the definition of "cold" omits to state that this circumstance does not apply where the act is prompted by emotional frenzy, panic, or a fit of rage, as stated in *Jackson* and other decisions of this Court. *See Jackson*, 648 So. 2d at 89 (citing

Richardson, 604 So. 2d at 1109). The definition of coldness as excluding an act prompted by emotional frenzy, panic, or a fit of rage was potentially dispositive of the CCP aggravator in this case, because the state's evidence was circumstantial, and was contradicted by the mental mitigation presented by the defense.

XIII.

THE TRIAL COURT'S INSTRUCTION ON THE HAC AGGRAVATING CIRCUMSTANCE DENIED THE DEFENDANT DUE PROCESS OF LAW AND UNDERMINED THE RELIABILITY OF THE JURY'S RECOMMENDATION, IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

Defense counsel asserted below, that the HAC statutory aggravator and its corresponding standard jury instruction are unconstitutionally vague. (R. 924-25, 1240-41; T. 7, 13-14, 3717).

A. The Standard Jury Instruction on HAC is Unconstitutionally Vague.

Because the bare statutory language of the HAC aggravating circumstance, § 921.141(5)(h), Fla. Stat., is unconstitutionally vague, its validity depends on the consistent application of a constitutionally adequate limiting construction. *See Espinosa v. Florida*, 505 U.S. 1079, 1081(1992).

In *Proffitt v. Florida,* 428 U.S. 242 (1976), the United States Supreme Court found the HAC aggravator not to be unconstitutionally vague because, under the limiting construction adopted in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), the aggravator appeared to be limited to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." 428 U.S. at 255-56. However, while the Court found sufficient a definition under which HAC applied *only* to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim," it did not approve the entire *Dixon* statement which corresponds to the present standard instruction. *See Sochor v. Florida*, 504 U.S. 527

(1992). That statement, when read as an instruction, is too vague to satisfy Eighth Amendment requirements because it "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman*," *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988).

The present standard jury instruction, does *not* limit HAC to unnecessarily torturous crimes. It merely points to such crimes as examples within the much broader, and vaguer, category of "heinous, atrocious or cruel" crimes, defined by plugging into the first sentence of the instruction the meanings given for the terms "heinous," "atrocious," and "cruel." The jurors are told that they should find HAC if the crime was "extremely wicked or shockingly evil" or "outrageously wicked and vile" or "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." Such a definition has been held to be constitutionally insufficient by the United States Supreme Court. *Shell v. Mississippi*, 498 U.S. 1 (1990) (per curiam); *see Maynard v. Cartwright*, 486 U.S. 356 (1988).

Although this initial, vague portion of the instruction is followed by a sentence derived from the limiting construction approved in *Proffitt,* simply adding this nonmandatory language is insufficient. The final sentence merely suggests that an unnecessarily torturous crime is one *example* of the type of crime that may be deemed to be HAC. The jury is not told that the circumstance applies *only* to such crimes. Nothing precludes the jurors from going beyond the limits of the suggested example and applying the broader test of whether the first-degree murder was "heinous" or "atrocious" or "cruel" as those terms were defined for them in the instruction. Pointing to the 'core' conduct intended to be covered might overcome a Fourteenth Amendment due process challenge, but it does not sufficiently channel and limit the jurors' discretion to satisfy the

requirements of the Eighth Amendment. *See Maynard*, 486 U.S. at 361-62.

At best, the instruction provides the jurors with alternative definitions, one broad and easy to apply, and another somewhat narrower and more burdensome to the trier of fact. Because one of those definitions is overbroad and vague, and is not foreclosed as an alternative, its inclusion renders the instruction as a whole unconstitutional. "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction [or verdict] be set aside." *Shell*, 498 U.S. at 3, 111 S.Ct. at 314 (Marshall, J., concurring), *quoting Leary v. United States*, 395 U.S. 6, 31-32 (1969).

The standard jury instruction is also vague because it suggests that this aggravator may be found when a crime is "conscienceless" *or* "pitiless and unnecessarily torturous to the victim" rather than accurately stating that the crime must be *both* conscienceless or pitiless *and* unnecessarily torturous to the victim. *Richardson v. State*, 604 So. 2d 1107, 1109 (Fla. 1992) (emphasis in original). Because every first-degree murder can be characterized as "conscienceless," the standard instruction remains unconstitutionally vague.

The present standard instruction was adopted at a time when the requirements of *Maynard* were thought not to be applicable to Florida. It was believed that the jury need not be instructed with specificity because it had a merely advisory role and the trial judge was the ultimate sentencing authority. *Smalley v. State*, 546 So. 2d 720 (Fla. 1989). However, as this Court has recognized, the *Espinosa* decision, which held that the jury is a co-sentencer for Eighth Amendment purposes, discredited that rationale. *Jackson v. State*, 648 So. 2d 85, 88 (Fla. 1994). As co-sentencers, "neither actor must be permitted to weigh invalid aggravating circumstances." *Espinosa*, 505 U.S. at 1082. *See Johnson v. Singletary*, 612 So. 2d 575, 576 (Fla. 1993). Although this Court stated in *Hall v.*

State, 614 So. 2d 473 (Fla. 1993), that the standard instruction "defines the terms sufficiently" to save the instruction and the aggravator from vagueness challenges, the appellant respectfully submits that the nonmandatory 'limiting' language of the instruction does not cure the Eighth Amendment vagueness of the instruction as a whole.

B. The Standard Jury Instruction on HAC is Inaccurate and Relieves the State of its Burden of Proof.

Since the jury exercises sentencing authority, it must be accurately apprised of the applicable sentencing law. *See Espinosa*. The standard instruction fails to do so because it does not clearly and accurately inform the jury that HAC may be properly found only if (1) the defendant intended to cause pain and suffering to the victim,[24], and (2) the victim suffered for a substantial period of time before death.[25] Because it does not inform the jury of these requirements, the standard instruction improperly relieves the state of its burden of proving each element of the aggravating circumstance beyond a reasonable doubt. *See Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *see also Motley v. State*, 155 Fla. 545, 20 So. 2d 798, 800 (1945) (failure to instruct on each element of a crime or defense violates due process under Florida Constitution).

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[24]*See, e.g., Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990) (HAC aggravator "is proper only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another") (quoting *Dixon*, 283 So. 2d at 9); *see also Bonifay v. State*, 626 So. 2d 1310, 1313 (Fla. 1993); *Mills v. State*, 476 So. 2d 172, 178 (Fla. 1985).

[25]*E.g., Robinson v. State*, 574 So. 2d 108 (Fla. 1991) (no evidence that victim, who was kidnapped, raped and murdered, labored under the apprehension she was about to be murdered).

XIV.

THE TRIAL COURT'S REFUSAL TO GIVE THE DEFENSE REQUESTED INSTRUCTION ON THE STATUTORY MENTAL MITIGATING CIRCUMSTANCES DENIED THE DEFENDANT DUE PROCESS OF LAW AND UNDERMINED THE RELIABILITY OF THE JURY'S RECOMMENDATION, IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

The defendant requested an instruction to clarify that "a mental disturbance which interferes with, but does not obviate, the defendant's knowledge may be considered as a mitigating circumstance." (R. 1488). The requested instruction stated:

> In this regard, with reference to the mental health mitigating circumstances, you are instructed that a mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may be considered as a mitigating circumstance.

(R. 1488). This instruction was derived from *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973). It was necessary, and the trial court's refusal to give it was error, because the testimony of the state's expert, Dr. Mutter, suggested that to qualify as mitigating, the mental disturbance must be such that the defendant did not know right from wrong. (T. 3624-3628, 3633-34, 3646-48, 3650).

XV.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH IN VIOLATION OF SECTION 921.141, FLORIDA STATUTES, THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV.

A. The Trial Court Erred in Giving Little Weight to the Nonstatutory Mitigating Circumstances

The judge found three nonstatutory mitigators: (1) the defendant was the victim of abuse as

a child (R. 1550); (2) the defendant suffered from chronic mental disturbance, namely paranoia, which "came about at least in part because of the brutal way his father treated him," and "which made him the aggressive, hostile and extremely violent and dangerous man he was on July 17, 1974" (R. 1550-51); and (3) the defendant was raised in poverty (R. 1551). The trial court gave each of these mitigating circumstances "weight" but found that they "pale[d]" when compared to the aggravators. (R. 1553).

In assigning so little weight to these mitigators, the court failed to fully recognize the mitigating character of the evidence concerning Mr. Muhammad's upbringing. His childhood of abuse and poverty is mitigating not merely because it extenuates or reduces the degree of moral culpability for the crime committed.[26] It is also mitigating because it calls into question the state's moral authority to execute him. That brutal childhood, which, as the court found, made him the man he was at the time of the crime (R. 1550-51), was not simply the result of bad luck or of the failings of society in general. The State of Florida itself had a large hand in it. The state was in great measure responsible for the segregation, extreme poverty, and brutality in which Mr. Muhammad grew up, and which made him the man he was on July 17, 1974. When the defendant's mother turned to the state for assistance, the response was so inadequate that the Knight children were reduced to begging for food from neighbors and shoplifting. When the state released the defendant's father from prison and allowed him to return to the home, knowing what sort of man he was, the

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[26]*See California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse").

state must have known what the consequences would be for the child whose accusation had put that man in prison. The state was also directly responsible for a large part of the defendant's upbringing, having had him in its custody for a third of his childhood years. It must also take responsibility for the fact that it had recognized as early as 1971 that the defendant had serious emotional and mental problems, which required treatment, and yet released him into society without making such treatment available.

The decision to impose the death penalty must be a "reasoned *moral* response to the defendant's background, character, and crime." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J. concurring). There must be "fairness" in the decision whether "something in the life of the defendant . . . militates against the appropriateness of the death penalty." *Maxwell v. State*, 603 So. 2d 490, 491 n. 2 (Fla. 1992) (defining nonstatutory mitigation); *Rogers v. State*, 511 So. 2d 526, 534 (Fla. 1992) (same). Having done so much to make him the man he was on July 17, 1974, and so little to provide the treatment which might have prevented him from being the man he was on that date and on October 12, 1980, the State of Florida cannot, in fairness and equity, assert that Mr. Muhammad's death is necessary to "express[] society's moral outrage." *Gregg*, 428 U.S. at 183.

B. The Trial Court Erred in Finding the HAC Aggravating Circumstance and the Court's Reliance on an Incident that Never Happened Seriously Undermined the Reliability of the Sentencing.

As the resentencing judge recognized (R. 1521), in this case a finding of the HAC aggravating circumstance, § 921.141(5)(h), Fla. Stat. (1995), could not be based on the manner in which the murders were committed, since the victims were killed by single gunshot wounds and their deaths were instantaneous or nearly instantaneous. A finding of HAC would have to be based on the apprehension preceding the murders. *See Knight v. State*, 338 So. 2d 201 (Fla. 1976); *Preston*

v. State, 607 So. 2d 404 (Fla. 1992); *Robinson v. State*, 574 So. 2d 108 (Fla. 1991). The judge found HAC based on the fact that Mr. and Mrs. Gans had been abducted and taken to the undeveloped area of South Dade where the murders occurred.

In making that finding, the judge labored under a serious misapprehension of the facts. According to the judge, at one point the defendant ordered Mr. and Mrs. Gans to stop the car and get out and, once outside, "'racked' the action of his weapon, ejecting a live round onto the ground." (R. 1525). Then, according to the judge, the defendant "decided to prolong their agony by telling them to get back into the car and continue to drive" to the location where they were finally shot. After the "racking" of the gun, no reasonable person could have thought "anything other than that they were being driven to their deaths . . . as they took their last ride in an automobile." (R. 1525).

This incident, whose impact upon the thinking of the judge is evident from the order, never happened. The Mercedes did stop near a vacant lot, where the three occupants got out for a few minutes, and the vehicle did go on to the area of the canal. (T. 2043-47, 2090-91). However, there was no evidence that Mr. Muhammad "racked" the gun at the first stop, near the vacant lot. The unfired round which evidenced the "racking" was actually found at the second stop, near the canal, where the murders took place. (T. 1973, 1999, 2009). Far from evidencing a prolonged anticipation of certain death, the unfired round suggested the opposite. As the prosecutor recognized in closing argument, the fact that the live round was found next to the rear left fender of the Mercedes, together with the fact that Mr. and Mrs. Gans were shot while they were still in the car, indicated that the defendant "racked" the gun outside so that they would *not* hear or see "what is about to happen." (T. 3804). There are other indications in the record suggesting that Mr. and Mrs. Gans expected to be released, rather than shot; for example, Mr. Gans's instructions to the FBI not to take any action at

the bank. (T. 2304). And Mr. Gans also would have had the reassurance of knowing that FBI agents and police officers were all around.

The factual error was crucial. Without the fictitious scenario imagined by the judge, the evidence did not support a finding of the torturous apprehension of imminent death required to find HAC. *See Robinson v. State*, 574 So. 2d 108, 112 (Fla. 1991) (insufficient evidence to support HAC where stranded motorist was abducted at gunpoint, taken to a cemetery, raped twice and then shot in the head, where there was no evidence that the victim labored under the apprehension that she was to be murdered, and she was assured that she would be released).

Moreover, even if HAC could properly be found, this circumstance should have been merged with the felony murder (kidnapping) aggravator, since the only basis for finding HAC was the uncertainty and apprehension caused by the automobile ride, that is, by the abduction. The same aspect of the offense cannot be used to justify two different aggravators. *See Francois v. State*, 407 So. 2d 885, 891 (Fla. 1981); *Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976).

The fictitious "racking" of the gun at the first stop, and the image it naturally evoked--that of a cruel and cold-blooded killer taunting his victims with news of their approaching death--had a decisive impact upon the finding of HAC and also inevitably affected the court's finding of the CCP and avoid-arrest aggravators, the weight assigned to these aggravators, and the court's assessment of the mental mitigators. This error undermines the reliability of the sentencing decision.

C. The Trial Court Erred in Rejecting the Extreme Emotional Disturbance and Substantial Impairment Statutory Mitigating Circumstances.

The defense presented extensive and substantial evidence that Mr. Muhammad suffered from a serious mental illness and that he was liable to become psychotic as a result of any significant

stress. Dr. Fisher, Dr. Carbonell, Dr. Toomer, and Dr. Rothenberg diagnosed Mr. Muhammad as a paranoid schizophrenic. (R. 573, 693; T. 2518, 2853-54, 3079, 3096, 3247). Dr. McClaine testified that Mr. Muhammad was a schizophrenic of either paranoid or undifferentiated type. (T. 2952). Dr. Wells testified that the symptoms might best be accounted for by a diagnosis of borderline personality disorder with paranoid ideation and antisocial traits which could become a psychotic disorder under stress. (T. 2768).

The trial court's implicit rejection of the defense testimony that Mr. Muhammad suffered from a serious mental illness was contrary to the evidence. That diagnosis was based not only on observations of the defendant by numerous psychologists and psychiatrists over the years, but also on psychological tests, some of which (Rorschach protocol, Bender Gestalt) were administered at least three times and consistently indicated that Mr. Muhammad was a schizophrenic. (R. 691-92, 759; T; 2853, 3000-5). Not only was the objectivity of the tests uncontradicted, there was testimony that they were not susceptible to fakery or malingering. Dr. Carbonell, who had done research on the subject of malingering, testified that it is readily detectable during testing and that she had found no evidence that Mr. Muhammad was malingering when she tested him. (T. 2856-58, 2903). The uncontroverted evidence of the tests could not be summarily rejected. *See Spencer v. State*, 645 So. 2d 377 (Fla. 1994) (error to reject as speculative and conclusory uncontroverted expert opinions based on psychological and personality tests, as well as interviews, examination of the evidence, and a review of defendant's life history, school records and military records). That Mr. Muhammad was suffering from not only a severe personality disorder, but a mental disorder, was further evidenced by the fact that psychotropic medication had been found to dramatically change his condition, rendering him no longer aggressive and hostile, but "agreeable," "fairly reasonable, friendly,

cooperative and very manageable." (R. 352). His mental illness was further evidenced by the record of his life up to the time of the crimes--from his increasingly "wacky" behavior as a youth observed by Deputy Duval, through the undeniably psychotic episode which put him in a mental institution, to his evaluation as a dangerously hostile and aggresive "latent schizophrenic" made at the time of his release, to the observations of psychologist Robert Moore at the time he was admitted to prison.

The diagnoses of the defense experts could not be said to have been rebutted by competent and substantial state evidence. Dr. Fennell testified that she diagnosed Mr. Muhammad as having a paranoid personality disorder and that he did not appear to be schizophrenic when she interviewed him in 1991, but she also testified that she had no opinion as to his mental state in 1974, and could not disagree with the observations of schizophrenia made by other doctors at other times. (T. 3305-8, 3328, 3347, 3350). The diagnosis of Dr. Mutter (the only state expert who opined as to the defendant's mental state in 1974) that appellant was simply a sociopath, was not only contrary to the testimony of every other expert witness (including Dr. Fennell), it was not even accepted by the court itself, which found that appellant was suffering from "some degree of paranoia." (R. 1550).

Moreover, the court's reason for not considering the testimony of Dr. Fisher, Dr. McClaine, Dr. Carbonell, and Dr. Toomer--namely, that their interviews were conducted after the defendant had been several years on death row, and many years in the isolation of Q wing--relied on speculation to contradict the clear testimony of the experts themselves that Mr. Muhammad's illness was chronic and that, having been observed in 1971, and several times thereafter, it must have existed in 1974. It might be reasonable to suppose, as the court did, that years of confinement in the "austere conditions" of death row and Q Wing would have a "significant impact on a man's mind." (R. 1540). However, Dr. Fisher had seen Mr. Muhammad before, during, and after his isolation in Q Wing, and

had not changed his initial diagnosis of paranoid schizophrenia. Moreover, the effect of such isolation on a person with schizophrenia is simply not known; it could produce deterioration, improvement, or no change at all in the underlying mental illness. (T. 2593).

In rejecting the opinions that, at the time of the crime, the defendant was suffering from extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct and conform to the requirements of law was substantially impaired, the court emphasized that the defendant's actions leading up to the crimes appeared to be deliberate, purposeful and goal oriented. (T. 1541). However, the fact that the defendant was able to plan the kidnapping was not incompatible with the statutory mental mitigators. *See Spencer*, 645 So. 2d at 385 (trial court improperly refused to find mental mitigators where uncontroverted evidence established defendant with paranoid personality disorder believed his estranged wife was trying to steal his paint business). Mental mitigators may be found, and render death disproportionate, even where CCP is properly found. *See Strausser v. State*, 682 So. 2d 540 (Fla. 1996). To the extent that the court found "persuasive" Dr. Mutter's opinions regarding the import of certain facts of the crime (such as the defendant's holding the gun in his lap, or lying in wait for Mr. Gans), those opinions further undermine confidence in the court's decision, because Dr. Mutter's opinions were all stated in terms of whether the defendant was able to know right from wrong and act accordingly, which is not the appropriate standard in evaluating the mental mitigators. *See, e.g.*, *Morgan v. State*, 639 So. 2d 6, 13 (Fla. 1994); *Campbell v. State*, 571 So. 2d 415, 418-19 (Fla. 1990); *Mines v. State*, 390 So. 2d 332, 335, 337 (Fla. 1980), *cert. denied*, 451 U.S. 916 (1981).

The court recognized the defense contention that "as the stress of the situation mounted, the defendant's mental state deteriorated" (R. 1542), and that the stress created by the defendant's

discovery of the police presence aggravated his mental disorder (R. 1544). It rejected that contention based on the hearsay testimony of Detective Smith which, according to the court, established that there was no surveillance from the air until the very end of the chase, and made "eminently clear" that the defendant was unaware of the police presence until after the murders. (R. 1544-45). As discussed in I(A), above, Detective Smith's testimony on this subject was presumptively unreliable and inadmissible. It also was not conclusive. The hearsay statements did not say where the aircraft were during the last twenty minutes or so of the surveillance (11:10 a.m. to 11:35 a.m.). They must have been somewhere in the area since they were called in at "approximately 11:10, give or take 15 minutes." (T. 3554). The fact that the pilots did not spot the Mercedes until after the murders were committed clearly did not establish that the defendant could not have observed the aircraft before that time; for instance, when the Mercedes stopped at the vacant lot and he got out, along with Mr. and Mrs. Gans. That he apparently made a sudden decision to take a different course of action at that time, heading for the area of the canal, which offered some cover from observation from the air, supported the defense contention that Mr. Muhammad had discovered the police presence and panicked. The court's interpretation of this event, which must have been part of the basis for its conclusion that the defendant's actions showed that he was never in any kind of mental distress (R. 1541-42), was strongly influenced by its mistaken belief that Mr. Muhammad had "racked" the gun at the first stop while ordering Mr. and Mrs. Gans back into the car, and had thus given the "final, definitive evidence of the defendant's intentions." (R. 1525).

D. The Trial Court Erred in Finding that the Murder was Committed in a Cold, Calculated and Premeditated Manner.

As set forth above in XII(A), the appellant submits that application of the CCP aggravator,

§ 921.141(5)(i), Fla. Stat. (1995) aggravator violated his rights under the Ex Post Facto Clause of Article I of the United States Constitution, because that aggravating circumstance was not added to the death penalty statute until five years after the murders were committed.

Moreover, the same evidence which supported the existence of the statutory mental mitigators, raised the reasonable hypothesis that the killings were the result of the defendant's sudden loss of mental control upon being discovered by the police, and thus not "cold" as this Court has defined that term. The "coldness" element of CCP requires that the murder be "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." *Jackson*, 648 So. 2d at 89. The presence of substantial mental mitigation will negate the "coldness" element of CCP, despite evidence of planning, like that upon which the trial court relied here. *See, e.g.*, *Spencer*, 645 So. 2d at 385 (homicide not "cold" despite evidence of planning where defendant paranoid and emotionally unstable under stress); *Maulden v. State*, 617 So. 2d 298, 303 (Fla. 1993) (homicides not "cold" despite evidence of heightened premeditation where defendant experienced deepening depression, exacerbated by chronic schizophrenia, in period prior to killings); *Klocock v. State*, 589 So. 2d 219, 221-22 (Fla. 1991) (defendant suffering from bipolar disorder with paranoid features plotted retaliation against estranged wife). The trial court's conclusion that the defendant "coldly executed his victims" (R. 1528), like its finding of HAC, and its rejection of the statutory mental mitigators, inevitably was influenced by its erroneous belief that the defendant had announced, by "racking" the gun, his intent to murder Mr. and Mrs. Gans as early as the first stop.

E. The Trial Court Erred in Finding and Giving Great Weight to the "Prior Violent Felony" Aggravating Circumstance.

As set forth above in XI, appellant submits that the aggravating circumstance of having been

"previously" convicted of a violent felony, § 921.141(5)(b), Fla. Stat., should be reserved for offenses committed prior to the commission of the murders for which the defendant is to be sentenced and was improperly applied in this case.

Even if the aggravator was properly found, it was error to give the conviction for the murder of Officer Burke great weight because the uncontroverted testimony of three expert witnesses--Dr. Fisher, Dr. Carbonell, and Dr. McClaine (T. 2555-56, 2874-76, 2970-74)--and the facts of the homicide itself, show that it was committed under the influence of a severe mental or emotional disturbance and that Mr. Muhammad's ability to conform to the requirements of law was substantially impaired. Because the experts' uncontroverted opinions were strongly supported by the facts, they could not be rejected by the court, *see Spencer*, 645 So. 2d at 385; *Knowles v. State*, 632 So. 2d 62, 67 (Fla. 1993); *cf. Walls v. State*, 641 So. 2d 381, 390-91 (Fla. 1994), and this mitigating evidence militated against assigning great weight to this aggravator.

F. The Trial Court Erred in Finding the Pecuniary Gain Aggravator

This Court has consistently held that the pecuniary gain aggravator, § 921.141(5)(f), Fla. Stat., may be found only when the state has established beyond a reasonable doubt that "the murder [was] an integral step in obtaining some sought-after specific gain. *Chaky v. State*, 651 So. 2d 1169, 1172 (Fla. 1995). *Accord Peterka v. State*, 640 So. 2d 59, 71 (Fla. 1994); *Hardwick v. State*, 521 So. 2d 1071, 1076 (Fla. 1988); *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987). That is, pecuniary gain must be the "primary motivation" for the murder. *Hill v. State*, 549 So. 2d 179, 183 (Fla. 1989); *Scull v. State*, 533 So. 2d 1137, 1142 (Fla. 1988). Moreover, this aggravator may be inferred from circumstantial evidence only if "the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance." *Chaky*, 651 So. 2d at 1172; *Simmons v. State*,

419 So. 2d 316, 318 (Fla. 1982). Here, the defendant obtained the ransom money well before the murder. There was no need to kill Mr. and Mrs. Gans in order to make off with the money. Because the murders were not an "integral step" in obtaining the money, this aggravator did not apply.

G. The Trial Court Erred in Finding the "Avoid Arrest" Aggravator.

The court erred in finding the "avoid arrest" aggravator, § 921.141(5)(e), Fla. Stat., becasue the same evidence which supported the existence of the statutory mental mitigators, raised the reasonable hypothesis that the killings were the result of the defendant's sudden loss of mental control upon being discovered by the police. As previously set forth, the testimony of Detective Smith, upon which the court relied in rejecting the defense contention, was inadmissible hearsay and inconclusive. Moreover, the court's finding that the murder was for the purpose of eliminating Mr. and Mrs. Gans as potential witnesses, must have been strongly influenced by its mistaken belief that Mr. Muhammad had "racked" the gun at the first stop while ordering Mr. and Mrs. Gans back into the car, and thus had given the "final, definitive evidence of the defendant's intentions." (R. 1525).

H. The Trial Court Erred in Separately Finding the Felony Murder Aggravator.

As discussed in X, above, the felony murder aggravator--that the murders were committed during the course of a kidnapping--was based on aspects of the offense which were also the basis for the HAC, pecuniary gain, and avoid arrest aggravators. Accordingly, the felony murder aggravator merged with at least one of these other aggravators and should not have been separately found. *See Francois*, 407 So. 2d at 891; *Provence*, 337 So. 2d at 786.

XVI.

FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV, BECAUSE IT IMPROPERLY SHIFTS THE BURDEN OF PROOF AND PERSUASION TO THE DEFENSE, FAILS ADEQUATELY TO GUIDE THE JURY'S DISCRETION, AND DOES NOT REQUIRE WRITTEN FINDINGS REGARDING THE SENTENCING FACTORS THEREBY PRECLUDING ADEQUATE APPELLATE REVIEW.

A. Burden Shifting

Florida's capital sentencing statute requires both the sentencing jury and judge to determine "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumsntaces found to exist," § 921.141(2)(b), Fla. Stat. (1995), and therefore creates a presumption that, once one or more aggravating circumstances is established, death is the appropriate penalty. *See Dixon*, 283 So. 2d at 9. In *Jackson v. Dugger*, 837 F.2d 1469, 1473 (11th Cir.), *cert. denied*, 486 U.S. 1026 (1988), the Eleventh Circuit held that "[s]uch a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment." The language in the standard instruction has precisely the same effect as the instruction invalidated in *Jackson*, which advised the jury that "death is presumed to be the proper sentence unless [aggravating factors] are overridden by one or more . . . aggravating circumstances." 837 F.2d at 1473. The standard instructions place the ultimate burden of persuasion squarely on the defense, thus making death the presumptively appropriate sentence if aggravating and mitigating circumstances are in equipoise. The "burdenshifting" language in the standard instructions[27], like

[27]Defense counsel objected to the burden shifting language of the standard instruction at the charge conference. (T. 3690-92).

the instruction given in *Jackson*, therefore "tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state" and improperly precludes the jury from giving effect to mitigating evidence. *Id.*[28]

B. Inadequate Guidance and Lack of Written Findings by the Jury

Florida's capital sentencing statute violates the Eighth Amendment because it does not provide adequate safeguards against its arbitrary application.[29] The statute does not state whether jurors must find individual sentencing factors unanimously, by majority, by plurality, or individually and therefore fails to give the jury adequate guidance in finding and weighting the aggravating and mitigating circumstances, thereby undermining the reliability of the jury's recommendation. *See McKoy v. North Carolina*, 494 U.S. 433, 440 (1990); *Mills v. Maryland*, 486 U.S. 367, 375-77 (1988). Because the judge must give "great weight" to the jury's recommendation the constitutional flaws in the procedure by which the jury's "advisory" verdict is rendered also taint the ultimate decision of the judge. *Espinosa v. Florida*, 112 S.Ct. 2926 (1992); *Jackson*, 648 So. 2d at 88.

Moreover, the absence of any mechanism for determining which aggravating and mitigating circumstances the jury relied upon in sentencing "presents a serious *Furman* problem because, if *Tedder* deference is paid, both this Court and the sentencing judge can only speculate as to what

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[28]*Cf. Arango v. State*, 411 So. 2d 172, 174 (Fla. 1982) ("burden-shifting" instruction might violate due process under *Mullaney v. Wilbur*, 421 U.S. 684 (1975), but instructions *as a whole* properly instructed the jury that it could recommend death only "if the state showed the aggravating circumstances outweighed the mitigating circumstances"), *cert. denied*, 457 U.S. 1140 (1982).

[29]It is axiomatic that "[b]ecause of the uniqueness of the death penalty, . . . it [may] not be imposed under sentencing procedures that creat[e] a substantial risk that it [will] be inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S. at 188 (citing *Furman v. Georgia*, 408 U.S. 238 (1972).

factors the jury found in making its recommendation and, thus, cannot rationally distinguish between those cases where death is imposed and those where it is not." *Combs*, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring); *cf. Parker v. Dugger*, 498 U.S. 308, 321 (1991) (emphasizing importance of adequate appellate review to individualized sentencing). The failure to require specific jury findings therefore impermissibly undermines the reliability of the sentencing process and the adequacy of appellate review.

XVII.

BECAUSE OF THE THE INORDINATE LENGTH OF TIME THAT THE DEFENDANT HAS SPENT ON DEATH ROW, ADDING HIS EXECUTION TO THAT PUNISHMENT WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 17, THE UNITED STATES CONSTITUTION, AMENDMENTS VIII AND XIV, AND BINDING NORMS OF INTERNATIONAL LAW.

Mr. Muhammad has been on death row for 22 years. At least 14 years of the delay in carrying out his execution is attributable to the state, which denied him a constitutional capital sentencing hearing in early 1975. After his convictions and death sentences were affirmed on automatic, mandatory direct appeal, Mr. Muhammad initiated the post-conviction appeals in state and federal courts that led to his death sentences being vacated. Although he initiated these post-conviction appeals, this period of delay must be attributed to the state, because it was the state who denied him a constitutional sentencing hearing in the first place. *See O'Neil v. McAninch*, 115 S.Ct. 992, 998 (1995) ("the State normally bears responsibility for the error that infected the initial trial," and, thus, must bear responsibility for the delay between the initial trial and retrial); *see also State v. Richmond*, 886 P.2d 1329, 1333 (Ariz. 1994) (death row inmate not responsible for delay resulting

from a successful post-conviction appeal).

To execute Mr. Muhammad after he has already had to endure more than two decades of incarceration under sentence of death, would be unconstitutionally cruel and unusual punishment.

First, the inherent cruelty involved in the prolonged process of carrying out a death sentence has been recognized by numerous jurists and commentators.[30] Where, as here, the inherent cruelty of living under a sentence of death is prolonged for more than two decades, at least 14 years of which is attributable to the state's initial failure to give the defendant the constitutional sentencing hearing to which he was entitled, such suffering cannot be considered incidental to the processing of the appeals. It is unnecessary and thus unconstitutional. Such long-term suffering becomes a separate form of punishment, which is equivalent to or greater than an actual execution. *See Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari); *cf. In re Medley*, 134 U.S. 160, 172 (1890). As a result of the inordinate delay, death cannot be added to the punishment; the only permissible punishment under the Eighth Amendment is life imprisonment.

Second, the decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), holding that the Eighth

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[30]*E.g.*, *Furman*, 408 U.S. 238 at 382 (Burger, C.J., dissenting, joined by Blackmun, Powell & Rehnquist, JJ.) ("a man awaiting execution must inevitably experience mental anguish"); *Furman*, 408 U.S. at 288-89 (Brennan, J., concurring) ("[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution extracts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"); *People v. Anderson*, 493 P.2d 880 (Cal. 1972) ("Penologists and medical experts agree that the [protracted] process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."); *Suffolk County District Attorney v. Watson*, 411 N.E.2d 1274, 1289-95 (Mass. 1980) (Liacos, J., concurring) (describing the psychological pain and torture that the condemned person experiences while awaiting execution); *id.* at 1287 (Braucher, J., concurring) (arguing that capital punishment is unconstitutional under Massachusetts Constitution in part because "it will be carried out only after agonizing months and years of uncertainty").

Amendment does not prohibit capital punishment, rested in part on the ground that the death penalty was considered permissible by the Framers. However, execution of a condemned prisoner after inordinate delay attributable to state actors would have been considered cruel and unusual at common law, *see, e.g.*, IV Blackstone's Commentaries on the Laws of England 404 (5th ed. 1773), and cannot be justified by reference to the practice of 1789, when 14-year delays seldom, if ever occurred, *see Lackey v. Texas*, 115 S.Ct. 1421 (1995) (memorandum of Stevens, J., respecting the denial of *certiorari*, joined by Breyer, J.).

Third, carrying out the execution of a person originally condemned to die over two decades ago would constitute cruel and unusual punishment because such an execution would be a pointless and needless extinction of life which, at best, would only marginally effectuate the constitutionally-legitimate purposes of capital punishment. *See Furman*, 408 U.S. at 312-13 (White, J. concurring); *see also Lackey*, 115 S.Ct. at 1422 (opinion of Stevens, J.).[31] The Supreme Court has recognized that the two constitutionally legitimate purposes justifying capital punishment are retribution and deterrence. *Gregg*, 428 U.S. at 183. Neither purpose would be served by executing Mr. Muhammad for the capital offense which he was convicted of in 1975--at this point or at any point in the future.

Finally, the State of Florida has forfeited its right to execute the defendant under binding norms of international law. A proscription against "torture or cruel, inhuman, or degrading treatment or punishment," is contained in both the International Covenant on Civil and Political Rights and

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[31]The belief that capital punishment would be unconstitutional, as applied, if it failed to serve the legitimate penological ends it was designed to meet has been reiterated in subsequent opinions. *See Gregg*, 428 U.S. at 183-87 (joint opinion of Stewart, Powell, & Stevens, JJ.); *Coker v. Georgia*, 433 U.S. 584, 592 n. 4 (1977) (plurality) (capital punishment would be unconstitutional if it did not "measurably serve the legitimate ends of punishment"); *McKleskey v. Kemp*, 481 U.S. 279, 301 (1987) (quoting *Gregg*).

the Convention Against Torture and Other Cruel, Inhuman or Degrading Treament or Punishment. Since the early 1990s, the United States has been a signatory of both treaties. Under the Supremacy Clause, those two treaties are binding on the states as well as the federal government. *See Missouri v. Holland*, 252 U.S. 416 (1920).[32] Numerous leading international law tribunals have held that the prohibition against "cruel, inhuman or degrading punishment or treatment" prohibits a state from keeping a condemned person on death row for an inordinate period of time. *See, e.g., Pratt & Morgan v. Attorney General of Jamaica*, 2 A.C. 1 (British Privy Council 1993) (en banc) (citing numerous decisions of courts around the world); *Soering v. United Kingdom*, 11 E.H.R.R., 161 Eur. Ct. H.R. (Ser. A) (Eur. Ct. Hum. Rts. 1989). This Court should do likewise.

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[32]The U.S. has filed "reservations" with respect to both treaties, which contend that the U.S. understands the language "torture or cruel, inhuman or degrading punishment or treatment" to mean the same thing as the phrase "cruel and unusual punishments" in the Eighth Amendment. *See* David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DePaul L. Rev. 1183 (Summer 1993). No other signatory nation has filed a "reservation" or otherwise objected to that particular language in the treaty. Michael H. Posner & Peter Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights*, 42 DePaul L. Rev. 1209, 1216 (Summer 1993). Numerous signatory nations have lodged objections to the U.S. "reservations" in the United Nations. The fact that well over 100 nations are signatories of the International Covenant on Civil and Political Rights, *see id.* at 1212, means that the language in Article VII of the Covenant has assumed the status of a "peremptory norm" of international law, or *jus cogens*. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715-16 (9th Cir. 1992). Such a fundamental norm of international law is binding on the federal government and the states even in the absence of a treaty. *See The Paquete Habana*, 175 U.S. 677, 700 (1900).

CONCLUSION

For the foregoing reasons, appellant's sentences of death must be vacated and the cause remanded for imposition of a life sentence or, in the alternative, for a new sentencing proceeding before a jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, 444 Brickell Ave., Suite 950, Miami, Florida 33131 this 2nd day of September, 1997.

Louis Campbell
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