IN THE SUPREME COURT OF FLORIDA

SAMUEL FRANCIS WILLIAMS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 88,745

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the record and transcripts in this brief will be designated with the prefix "R" and "T" respectively. The volume number will immediately follow the letter prefix. A colon will follow the volume number and page number references will follow the colon. An appendix to this brief is attached.

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On January 27, 1995, an Okaloosa grand jury returned an indictment charging Samuel Francis Williams with first degree murder for the shooting death of Bobby L. Burke. (R 1:31) This case was consolidated with an information charging carrying a concealed firearm which had been filed on October 21, 1994. (R 1:1). The consolidated cases proceeded to a jury trial, which commenced on June 10, 1996. (T 7:1). The jury found Williams guilty of both charges on June 14, 1996. (R 5:862; T 12:1044)

The same jury reconvened on June 27, 1996, for the penalty phase of the trial. (T 13:1048-1218) After hearing additional evidence, the jury recommended a sentence of death by a vote of 8-4. (T 13:1217)(R 5:879)

Williams filed a motion for new trial on July 1, 1996. (R 5:881-885; T 14:1224-1269) The court denied the motion after an evidentiary hearing. (T 14:1268-1269)

Circuit Judge G. Robert Barron adjudged Williams guilty of both charges and sentenced him to death for the murder and five years for carrying a concealed firearm on August 6, 1996. (R 5:965-971, 974-977; T 6:998-1007) In sentencing Williams to death, the court found two aggravating circumstances: (1) Williams committed the homicide while under a sentence of imprisonment based on his escape from a juvenile commitment facility in Louisiana; and (2) the defendant committed the homicide for pecuniary gain. (R 5:974-975) In mitigation, the court found

one statutory mitigating circumstance and gave it substantial weight -- Williams was 18-years-old at the time of the offense. (R 5:975-976) Additionally, the court considered 11 nonstatutory mitigating circumstances the defense offered. (R 5:976-977)[1] The court rejected five of the nonstatutory mitigating factors. However, the court found the remaining six factors as non-statutory mitigating circumstances: (1) Williams had no disciplinary problems while detained awaiting trial; (2) Williams obtained his GED while incarcerated; (3) Williams was capable of rehabilitation and living a productive life in prison; (4) Williams had been participating in weekly Bible study and meetings with a minister for spiritual guidance; (5) Williams intends to continue his religious studies and become involved in a prison ministry; (6) Williams has a capacity for work and when employed in the past was a good worker.

Williams filed his Notice of Appeal to this Court on August 12, 1996. (R 6:1026)

Statement of Facts -- Guilt Phase

Bobby Burke was shot and killed in the street in front of his home. Around 10:20 p.m., on September 27, 1994, Burke walked to the street to carry out the garbage and feed some stray cats a bowl of table scraps. **(T** 8:306-309) Freddie Burke, his wife, had walked to the bedroom to prepare for bed. (T 8:309) She heard a

[1] The sentencing order is five pages in length. However, only four record page number references were assigned to the order. Page Four of the sentencing order did not receive a record page number. A copy of the sentencing order is attached as an appendix to this brief.

series of fast popping noises like a string of firecrackers. (T 8:310) She walked from the bedroom to the front door to meet her husband, and looking through the glass of the storm door, she saw something in the road. (T 8:310) The street was illuminated by a street light in front of her house. (T 8:309-310) She realized her husband was lying in the road with his head facing toward the house and his feet in the direction of the other side of the street. (T 8:310-311) At first, she thought he might have had a heart attack, but then she saw blood on his white T-shirt. (T 8:311). She called for assistance. (T 8:311)

Mrs. Burke's stated that she and her husband had lived at their residence for almost 40 years. (T 8:312) In the last few years, the street in front of their house, Savage Street, had been used by people walking between two housing projects. (T 8:313) A foot trail began on the south side of their house and lead across the nearby railroad tracks. (T 8:320-325) The tracks were in a ravine about 15 feet deep below the level of Savage Street. (T 8:324-325)

Sgt. Wayne Grandstaff of the Crestview Police Department arrived on the scene at 10:22 p.m. (T 8:316-317). He found Mr. Burke still alive but with no pulse. (T 8:317) A firefighter, Sody Smallwood, provide emergency medical assistance. (T 8:333-336) He stated there was sufficient lighting in the area for him to work. (T 8:335) Smallwood also indicated that Burke's pockets did not appear tampered with in any way. (T 8:336) Mrs. Burke also stated that her husband was wearing pants, a T-shirt and bedroom slippers and did not have his wallet with him. (T 8:313-

314). He was wearing a wedding ring and a diamond ring, and both of those items were recovered from him. (T 8:314)

Dr. Edmund Kielman conducted the autopsy. (T 8:370). However, due to Kielman's illness, Dr. Charles McConnell testified about the autopsy. (T 8:366-377) The autopsy showed that Bobby Burke suffered eight bullet wounds. (T 8:371) Seven were to the chest, and one to the hand. (T 8:371) Two of the bullet wounds to the chest were lethal. (T 8:371) One penetrated the heart causing massive bleeding into the chest. (T 8:371-372) McConnell concluded that death would have occurred within three to five minutes due to the bleeding. (T 8:375) McConnell also concluded that for two of the shots, the muzzle of the gun would have been within about ten inches. (T 8:376-377)

Four witnesses testified they saw Sam Williams shortly before the homicide. (T 8:378, 388, 394; T 9:412) Erin Davis, Paula Wilcox, Tommy Alford, and Darren Smith were at Paula Wilcox's house on September 27, 1994. (T 8:379-380, 389, 395-397; T 9 : 414-416) Around 10:00 p.m., Sam Williams came to the residence. (T 8:380-381, 390, 396-397; T 9:415-416) During the ten or fifteen minutes that Sam was present, Darren Smith saw Sam in possession of a handgun. (T 9:416-417) Tommy Alford testified that he did not see Sam with a firearm. (T 9:397-400, 406-408) The prosecutor confronted Alford with grand jury and deposition testimony in which Alford said he saw Sam with the gun, but Alford testified that he did not remember such questions or answers. (T 8:398-400) Alford, on cross examination, confirmed that he had not seen Sam with a firearm. (T 9:406-408) Sam left

Paula Wilcox's house about 15 minutes after his arrival and walked up Savage Street. (T 8:385-386, 392, 400; T 9:417-419) Paula Wilcox and Tommy Alford testified that as Sam left he said that he had "some business to take care of." (T 8:391-392, 397) Erin Davis did not remember Sam making such a statement. (T 8:381-385)

Alford and Smith left the residence about five minutes after Sam and walked up Savage Street. (T 9:403, 419) Alford said that as he and Smith reached the top of the hill on Savage Street, he left Smith and ran back to the house to get his cigarettes. (T 9:403) Alford was gone less than five minutes, and as he started back up the hill, he met Smith running down the hill acting scared and hollering. (T 9:403-404) Smith told him that Sam shot someone. (T 9:405) Alford said that he and Smith continued to a friend's house to borrow a board game. (T 9:405, 410) Alford also said that he heard the gunshots. (T 9:408-412) However, in previous statements, Alford had denied hearing gunshots. (T 9:408)

Darren Smith testified that he waited at the top of the hill on Savage Street while Alford returned to Paula's house for his cigarettes. (T 9:419) Although Smith is nearsighted, was not wearing his glasses, and the night was dark, he said he was able to see Sam Williams walking about a block and a half ahead of him on Savage Street. (T 9:419-420, 422-423, 437) Smith saw Mr. Burke at the street with cats around him and the garbage can. (T 9:421) He also observed Sam walk passed Mr. Burke's house and step into the trail located nearby. (T 9:420). According to

Smith, Sam then stepped back out of the trail, pulled a gun and fired. (T 9:421-422) Smith heard several shots. (T 9:422) After the shooting, Smith and Alford continued to a friend's house to get the board game. (T 9:423) On cross-examination, Smith admitted giving different statements during police interviews, (T 9:425-433), and to the grand jury. (T 9: 434-439) In one interview on September 28, 1994, Smith told the police that he and Alford were about halfway up the hill when they heard what sounded like firecrackers. (T 9:425) He did not tell the police officer anything about Sam during that interview. (T 9:425-426) He said he had no idea who might have shot Mr. Burke. (T 9:426) In a second interview on October 10, 1994, Smith told another detective that he could see Sam before he got to the top of the hill. (T 9:430) Also, when asked how he knew it was Sam who shot, Smith said that was his theory, that he was pretty sure it was Sam. (T 9:431-432) Later, Smith told the grand jury some different details. (T 9:434-435) Smith testified that he was upset with Sam Williams because Sam had had a sexual relationship with Smith's girlfriend. (T 9:416-417, 433, 443)

Shortly after the shooting, several witnesses saw Sam Williams at a beauty shop where some people were congregated. Nate Moorer testified that he was at Netta's Beauty Shop that night. (T 9:544, 551) He said there were several people there getting high. (T 9:552) He heard some gunshots from somewhere in the area and he dropped to the ground. (T 9:552-553) Moorer said two to five minutes after the gunshots, Sam Williams came walking to the group. (T 9:554) Sam was given a ride, but Moorer did not

remember if Sam asked for a ride. (T 9:555) The prosecutor confronted Moorer with his prior grand jury testimony on whether he later saw Sam and asked about the shooting, but Moorer said he did not remember the questions and answers from that testimony. (T 9:555-557) Moorer reiterated that he did not remember making a comment to that effect to police investigators. (T 9:557-575, 588-590)

Geraline Hutchinson and her sister Angenetta Moorer drove by Angenetta's beauty shop in the late evening hours of September 27, 1994. (T 9:599-600; T 10:603) Before they arrived at Netta's Beauty Shop, Hutchinson heard gunshots. (T 10:604) The shots sounded as if they were coming from across the railroad tracks. (T 10:604) They arrived at the beauty shop within a minute, Hutchinson's sister conversed with some of the people standing around the beauty shop, then they left. (T 10:605-606) Hutchinson said that Sam was dating her daughter, and he **was** frequently at her house. (T 9:600; T 10:608-611) She never saw him with a firearm while he was in her house. (T 10:611) Sam was at her house the night of the homicide, and he left walking sometime after 9:00 p.m. (T 10:608)

Tyrone Morris was at Netta's Beauty Shop around 10:00 p.m. on September 27, 1994. (T 10:620-622) He and a number of other people were getting high. (T 10:622) Morris heard gunshots, seven or eight shots coming from the directions of the woods and the railroad tracks. (T 10:622) This was the same area where Mr. Burke lived. (T 10:622-623) According to Morris, the shots sounded like a .22 caliber. (T 10:624) When Morris heard the

shots, he hit the ground for about ten seconds and got up again. (T 10:624) He said 10 to 20 seconds after he got up, he saw Sam Williams walking up. (T 10:624-625) Williams was running toward them, looking over his shoulder and was sweating. (T 10:626) Sam was about half a football field away when Morris first saw him. (T 10:626) Morris saw something tucked in Sam's pants which looked like the handle of a pistol. (T 10:627) Sam asked for a ride to Pensacola Hill. Morris did state there was some conversation after Sam was dropped off about Sam having shot someone. (T 10:628-629) Morris denied having said that when Sam came up he put his hands on top of the car and said to Nate Moorer, protect me. (T 10:628) Morris did admit that the statement appeared in the transcript of his grand jury testimony. (T 10:627-628)

Witnesses testified about alleged statements Sam Williams made to them about the shooting. Willie Mae Williams, who was staying at the Hutchinson residence where Sam Williams' girlfriend, Elizabeth Hutchinson, lived, testified that Sam awoke her at about 2:00 or 3:00 a.m. in the morning on September 28, 1994, and said the police were trying to pin a murder on him. (T 10:612-617) Williams acknowledged her grand jury testimony was correct where she had testified that Sam told her the police were trying to pin a murder on him, and he asked her to say that she did not know him. (T 10:616-617)

Clinton Dowling testified that he and Sam Williams had a sexual relationship in July of 1994. (T 10:654-656) He had known Sam since May of 1994. (T 10:655) Dowling said that Sam showed

him a dark-colored pistol in July and said that he was involved in a gang **in the Crestview area.** (T 10:657-658) He said to be a member of the gang he had to shoot someone and steal something of value. (T 10:657) Dowling said at a later time he went to Century to pick Sam up at the request of Barbara Williams and Shirley Jackson. (T 10:659-660) Sam stayed at Dowling's apartment. (T 10:661) Dowling talked to Sam about the murder of Bobby Burke. (T 10:661) The conversation lasted about three hours, and Sam ultimately admitted that he committed the murder. (T 10:661-**662)** Sam also told Dowling that the gun that 'he had earlier possessed, he loaned to a friend. (T 10:662) According to Dowling, after Sam admitted shooting Bobby Burke, he threatened Dowling if Dowling told anyone. (T 10:663-664) On cross-examination, Dowling admitted that he badgered Williams into making the statement admitting to the shooting. (T 10:668-669)

Roman Johnson met Sam Williams while they were both incarcerated in the county jail. (T 10:677-678) Johnson said he had a conversation with Sam on October 7, 1994, about the murder of Bobby Burke. (T 10:678-680) Sam allegedly said that he went out to rob someone, he walked by a house and saw Mr. Burke. (T 10:679) He tried to rob Burke, but Burke 'bucked." (T 10:679) Johnson explained that to 'buck" means to resist. (T 10:679) Johnson said that Sam told him that he ran after the shooting, crossed the railroad tracks, and spent the night at Tezzie's house. (T 10:679) Sam allegedly sent someone to get the gun out of a crate. (T 10:679-680) Sam said that he was there on a weapons charge and that without the gun, the police did not have

a case. (T 10:680) On October 30, 1994, Johnson had another conversation with Sam about the murder. (T 10:680-681) At that time, Sam stated that the pistol used was a .22. (T 10:681-682) Johnson said he did not expect anything as a result of his agreeing to testify for the state. (T 10:682-683). Johnson said he had provided information in two other murder cases to the State Attorney's Office and FDLE, but he denied that he was anticipating any favorable treatment for that information. (T 10:702-704)

Darrell Barge was confined in the Okaloosa County Jail in December of 1994, and became acquainted with Sam Williams. (T 10:710-712) Barge testified that Williams told him that he was accused of murder, although he never said that he murdered anybody. (T 10:712-715) Williams did say that after he came to Crestview, he shot someone with intent to rob him. (T 10:712, 716)

John Russell **was** incarcerated in the Okaloosa County Jail with Sam Williams. (T 10:717-718) Russell testified that Williams told him that he was in the area the night the man was murdered. (T 10:719) Williams allegedly said he was in the area looking for someone to rob, but he did not do the murder. (T 10:719) Williams did not tell Russell anything about a gun. (T 10:719) However, Russell overheard Williams tell someone else that they had no case because his girlfriend had the gun. (T 10:719) Williams indicated that his girlfriend was supposed to get rid of the gun. (T 10:720) Williams also related that he carried a gun on the streets everyday, but he did not say what

type of gun. (T 10:721-722) Russell admitted that he and Williams had gotten into a fight in the cell one day, and they were upset with each other. (T 10:723-726)

Mark Penny was a correctional officer at the Okaloosa County Jail where Williams was incarcerated pending trial. (T 10:736-738) Penny was working with a nurse who was in the maximum security area handing out medication. (T 10:738) Penny overheard a conversation as Williams was talking to Thomas Miller, another inmate. (T 10:738) Penny wrote a report about what he heard. (T 10:739) Penny heard Williams say that he shot someone. (T 10:740) When Penny got onto the cat walk, the conversation stopped. (T 10:740) The conversation began again, and Penny heard Williams state that he had been interviewed about the shooting; he had been called up front to see his attorney. (T 10:741) Williams said something about someone else having done the shooting. (T 10:741) He said an individual by the name of Darnell or Donnell had done the shooting. (T 10:742)

Mike Fuhrman, a newspaper reporter for the Northwest Florida Daily News, interviewed Sam Williams on November 13, 1994. (T 11:809-826) Williams said that he was walking south on North Savage Street and walked passed Burke's house. (T 11:827) Williams said he had crossed the dirt road adjacent to the railroad tracks and crossed the railroad tracks when he heard several gunshots. (T 11:827) Williams was **scared** and he ran. (T 11:827)

Lt. Worley of the Crestview Police Department interviewed the Williams on October 3, 1994. (T 11:828, 832) During the interview, Worley played a portion of an interview with Darren

Smith, where he identified Williams as the perpetrator. (T 11:834-835) Williams, at that point, changed his original statement and said he was in the area of the victim's house at the time of the shooting. (T 11:835) Williams said he walked passed the Burke residence, crossed the cut-through trail across the railroad tracks and was climbing up the other side when he heard three slow gunshots followed by several fast ones. (T 11:835) He said he could see and hear Darren Smith, and it was Smith who actually committed the murder. (T 11:835) Williams said he was on the embankment on the south side of the railroad tracks at the time. (T 11:835-836) Worley conducted another interview on October 21, 1994. (T 11: 838-839) At that time, Worley informed Williams that a witness said that he had put a gun in a box. (T 11:839) Williams responded, 'I don't know anything about a Pepsi box." (T 11:839) Worley said the Pepsi box statement was significant because no one had said anything about a Pepsi box. (T 11:839) Worley said he proceeded to look for a Pepsi box and found one in a vacant house on Railroad Avenue. (T 11:839-841) The vacant house is on a route between the railroad trail and Netta's Beauty Shop. (T 11:841) Worley found no firearm in the box. (T 11:841-842)

Three witnesses testified they saw Sam Williams with a pistol during the summer of 1994. Kenneth Bembo had a birthday party on August 27, 1994. (T 9:492-494) He saw Sam Williams in possession of a black pistol at the party. (T 9:495-497) He testified it was a revolver, but when confronted with his grand jury testimony in which he had stated that Sam took the clip out

of the pistol, he changed his testimony and acknowledged it was a semi-automatic. (T 9:497-498) Bembo said there were 12 to 15 people at the party, and a number of people were handling the pistol. (T 9:501-502) Bembo did not handle the gun himself. (T 9:502) Brian Pate was at the party, and he also saw Sam with a firearm. (T 9:478-481) Pate said other people were also holding the gun at the party, and he described the gun as a revolver, not an automatic. (T 9:487) Pate admitted on cross-examination that he wrote a letter stating he had seen Sam with a gun in order to possibly secure help on his own charges; the State was seeking to sentence as an habitual felony offender. (T 9:488-489) The State called Nate Moorer and attempted to elicit information about his having seen Sam with a firearm at Bembo's party. (T 9:544-549) However, when confronted with prior statements he had made to that effect, he testified that he did not remember making the statements. (T 9:544-549) Gearlnette Johnson testified she saw Sam at her mother's house in the summer of 1994 with a black gun. (T 9:514-517) The gun was an automatic. (T 9:517) She admitted on cross-examination that she had confrontations with Sam in the past, and at one time, she threatened to call the police on him. (T 9:520)

During the summer of 1994, Kevin Siler and Mario Lee burglarized the Silver Mine Pawn Shop. (T 9:522-525, 529-532) They took several firearms, including a .22 caliber Smith & Wesson semi-automatic pistol. (T 9:525-526, 531) Later, Lee sold the pistol to Sam Williams. (T 9:529-531) Both Siler and Lee fired the pistol and said the gun would hold twelve rounds of

ammunition in the clip. (T 9:525-526, 532-533) Lee testified that he fired the pistol at an old telephone pole along the railroad tracks in Crestview. (T 9:533) Lee assisted the police in finding the telephone pole into which he had fired the gun. (T 9:533) Investigator Terry Salvage recovered the telephone pole and sent it to the lab to recover bullet fragments. (T 9:538-542)

Edward Love, a firearm and toolmark examiner with FDLE, examined the empty shell casings found at the scene and two bullets recovered from the body of Mr. Burke. (T 10:783-795) He concluded that the shells were fired from a Smith & Wesson model 422 pistol, based upon the type of markings he found on the face of the shell casings and the fact that the capacity of that gun would account for 13 expended cartridges. (T 10:792-793) He also concluded that the two bullets removed from the body were both fired from the same gun. (T 10:794) Another firearms examiner, David Williams, examined the telephone pole submitted to him for recovery of bullets. (T 10:796, T 11:803-804) Most of the bullets he recovered were .22 caliber. (T 11:804) He was able to identify two of the recovered bullets positively, and two others with similarities. (T 11:804) He compared the two bullets removed from the body with bullets from the telephone pole and found that two of the bullets from the pole had sufficient markings to identify them with the bullets removed from the body of Mr. Burke. (T 11:804-805) He concluded that two of the bullets from the telephone pole were fired from the same gun as the two bullets recovered from Bobby Burke. (T 11:805-806) He also concluded that the bullets recovered from Mr. Burke and from the

pole were consistent with having been fired from the Smith & Wesson model 422. (T 11:806) He admitted that he reached his conclusion based on the rifling characteristics found on the bullets, the markings on the shell casings, and the fact that thirteen shell casings were found at the scene. (T 11:806-808) Those three factors narrowed the choice of possible weapons down to the Smith & Wesson model 422 pistol.

The defense presented three witnesses. Eddie Carmichael, a private investigator, testified for the defense. (T 11:879) He had been hired to make measurements of the various areas around Savage Street and trail through the railroad tracks and he testified to those various distances which he measured. (T 11:879-890)

Natasha Mathews heard gunshots on September 27, 1994. (T 11:895-896) She was on her front porch, and when she heard the shots, she ran to her fence and looked in the direction of the shots. (T 11:897) The shots sounded as if they came from the direction of the railroad tracks. (T 11:898) Within seconds after the shots, she saw a black man running to his truck parked on Martin Luther King. (T 11:898-899) She knew Sam Williams, and the person running was not him. (T 11:899-900) The man she saw was over six feet tall, and he got into an aqua-marine colored truck. (T 11:901-902)

Juanita Packett lived about a half a block away from the Burke residence. (T 11:903) Around 10:00 p.m., she heard a sound like firecrackers and went outside. (T 11:903-904) She looked down Savage Street toward the Burke residence. (T 11:905) She

saw something that looked like a rolled up piece of carpet in the road and a turned over garbage can. (T 11:905) The witness had known Mr. Burke since she was 7 or 8 years old. (T 11:906) She was not able to recognize the individual because it was very dark. (T 11:906-907) Prior to the firecracker-type sounds, she had seen three individuals walking south on Savage Street, perhaps 15 to 20 minutes before the noise. (T 11:907-908)

Geraline Hutchinson was recalled as a State's rebuttal witness. (T 11:915-919) She had testified earlier about going to Netta's Beauty Shop to ask some men there to leave. (T 11:916) On their **way** to the beauty shop, she heard some gunshots. (T 11:916) This occurred about three minutes before they arrived at the beauty shop. (T 11:916-917) There was a tree in the area, and she saw Anthony Dortch and John Beasley. (T 11:917) Dortch drives an aquamarine-colored pickup truck and she has seen him parked at this tree in the area perhaps three times a week. (T 11:918)

Penalty Phase and Sentencing

The State presented three additional witnesses during the penalty phase of the trial. (T 13:1083, 1094, 1097) Mr. Burke's wife and son were the first to testify concerning victim impact information. (T 13:1083, 1094) Freddie Burke was married to her husband for 43 years. (T 13:1084) She testified that her husband had a career in law enforcement which spanned 42 years before his retirement as an investigator from the State Attorney's Office. (T 13:1085) She stated that he was well known in the Crestview

area and was active in his church and community. (T 13:1086-1087) Mrs. Burke also described the relationship she had with her husband and the impact his death had on her. (T 13:1087-1089) Luis Burke, Bobby Burke's son, testified about the impact of his father's death. (T 13:1094-1095) Luis had maintained a close relationship with his father, and the grandchildren also missed him. (T 13:1094-1097)

The State presented the testimony of Reese London, a Colonel with the Department of Public Safety and Corrections for Louisiana. (T 13:1097) The defense objected to this testimony since it was introduced to establish the aggravating circumstance of being under a sentence of imprisonment at the time of the crime. (T 13:1051-1064) In May of 1994, London's job was to prepare information on juveniles who escaped from the Monroe Louisiana Training Institution. (T 13:1098) He stated that Sam Williams was in the institution. (T 13:1098-1099) Sam was 17 when he reached the facility, which is authorized to keep juveniles until their 21st birthday. (T 13:1100-1101) His release date was in December of 1994. (T 13:1103) In May of 1994, Sam escaped. (T 13:1098-1099) Sam and two other juveniles effected their escape by placing an object in a counselor's door, cutting the screen, and cutting another fence before leaving the grounds. (T 13:1099, 1101-1102) Since Sam was 17-years-old at the time of the escape, London issued an adult warrant for the escape. (T 13:1099-1100) In Louisiana, 17-year-olds are considered adults. (T 13:1099)

The defense presented three witnesses. A psychologist, James Larson, a minister, Alonzo Bloxson, and Sam Williams' own testimony. (T 13:1107, 1140, 1160) Additionally, the defense presented a letter from the county jail indicating that Sam's behavior had been routinely good, and he had not experienced any significant disciplinary problems while in the jail. (T 13:1105-1106)

James Larson testified about his examination and testing of Sam. (T 13:1107-1137) Larson concluded that Sam suffered from no major psychiatric problems. (T 13:1118-1120) Larson discovered no learning disabilities. (T 13:1123-1124) Sam's IQ is in the lower part of the average range, and he was achieving in the average range. (T 13:1121-1124) Larson was of the opinion that Sam was capable of adjusting to a general prison population, and he had the intelligence and basic stability to live a productive life in a prison setting. (T 13:1124) Larson stated that he had factored in Williams' previous escaped from the juvenile institution. (T 13:1128) On cross-examination, Larson also stated that information concerning disruptions while incarcerated would be important information for his reaching a conclusion on this issue. (T 13:1137)

Sam Williams testified in his own behalf. (T 13:1140) He said he was 19-years-old, 18 at the time of the homicide. (T 13:1141) He had been in Crestview for 3 1/2 months prior to his arrest, and he lived with his aunt, Regene Williams. (T 13:1141-1142) After the shooting of Bobby Burke, he left Crestview and took a couple a trips to Century. (T 13:1142-1143) While in

Crestview, Sam said he supported himself with day work moving furniture. (T 13:1144) He continues to have a relationship with Elizabeth Hutchinson, and they have a baby girl together. (T 13:1144-1145) His daughter, Tatiana Williams, was born in March of 1995. (T 13:1145) Sam related that he suffers from sight problems which is causing blindness, and he has vision in only one eye. (T 13:1145-1146) Sam has used his time in jail to read, primarily through his involvement in a Bible study program. (T 13:1147) He also meets with a minister, Alonzo Bloxson, every other weekend. (T 13:1147-1151) Bloxson has been acting as his spiritual adviser and helping to guide Sam in his Christian growth. (T 13:1147-1151) Sam said his plans would be to participate in a prison ministry if given a life sentence. (T 13:1152)

Alonzo Bloxson, a minister with the Covenant Community Church, works as a prison outreach minister, (T 13:1160-1162) He has been a minister for over 20 years and worked in the Crestview jail for four years. (T 13:1106-1163) Bloxson stated that he had worked with hundreds of people in the jail. (T 13:1164) He met with Sam approximately once a week for about an hour at a time to work with Sam's spiritual growth and Bible study. (T 13:1166-1167) Bloxson was of the opinion that Sam's spiritual development was genuine, and Sam indicated that he wanted to participate in a prison ministry. (T 13:1167-1170)

The State recalled Reese London in rebuttal. (T 13:1178) London said his records indicated that Sam had been involved in a theft and a fighting incident while in the juvenile institution. (T 13:1178-1180) The fight involved a group of individuals, and

London does not know if Sam was disciplined for his involvement. (T 13:1180) In his earlier testimony, London stated that Sam earned his GED while at the institution. (T 13:1102)

SUMMARY OF ARGUMENT

1. During the penalty phase of the trial, the court, over defense objections, permitted the State to introduce evidence that Sam Williams had escaped from a secure juvenile training facility in Louisiana and a warrant was outstanding for escape at the time of the homicide in this case. The trial court ruled this evidence admissible to prove the under sentence of imprisonment aggravating circumstance, sec. 921.141(5)(a), Fla. Stat., instructed the jury on the circumstance solely on this evidence, and found the aggravating circumstance in its sentencing order. William's commitment to a secure juvenile facility did not qualify for the under sentence of imprisonment aggravating circumstance. The jury's and the court's consideration of the factor in sentencing has unconstitutionally tainted the death sentence imposed.

2. The death sentence is not proportionally warranted in this case. The homicide was a shooting death during an attempted robbery when the victim resisted the attempt. Only the pecuniary gain aggravating circumstance validly exists in this case. The trial court found and gave substantial weight to the statutory mitigating circumstance of Williams' age at the time, eighteen-years-old. Six additional, nonstatutory mitigating factors were found to exist. Given the nature of the offense, the weight of the single aggravator, and the weight of the mitigation, a death sentence is disproportionate.

3. The prosecutor improperly told the jurors at voir dire and penalty phase closing argument that the law required them to

return a recommendation of death if the aggravating circumstances outweighed the mitigating ones. Additionally, the trial court followed with its own inquiry of the jurors and confirmed that the prosecutor had correctly stated the law. There is no legal requirement that the jury return a death recommendation if the aggravating circumstances outweigh the mitigating ones since the jury is always free to recommend mercy. The prosecutor's and court's comments tainted the jury and rendered the jury's recommendation unreliable.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE OF THE DEFENDANT'S COMMITMENT TO AND ESCAPE FROM A JUVENILE FACILITY IN LOUISIANA AS RELEVENT TO PROVE THE UNDER SENTENCE OF IMPRISONMENT AGGRAVATING CIRCUMSTANCE, IN INSTRUCTING THE JURY ON THE THIS AGGRAVATING CIRCUMSTANCE BASED SOLELY ON THIS EVIDENCE, AND IN FINDING AND WEIGHING THIS FACTOR IN THE COURT'S SENTENCING DECISION.

During the penalty phase of the trial, the court, over defense objections, permitted the State to introduce evidence that Sam Williams had escaped from a secure juvenile training facility in Louisiana and a warrant was outstanding for escape at the time of the homicide in this case. (T 13:1051-1064) The Louisiana court had committed Sam the secure juvenile facility. (T 13:1052-1053,1100) At the time of his escape, Sam was 17-years-old. (T 13:1099) Because 17-year-olds are considered adults in Louisiana, Sam was charge for the escape as an adult, and an adult arrest warrant was issued. (T 13:1099-1100) The homicide in this case occurred while the Louisiana warrant was outstanding and about a month after Sam's 18th birthday. (R: 1:31; T 13:1058, **1099**, 1141) Reese London, an officer at the Louisiana training facility, testified about the escape, which was accomplished by cutting a screen and a fence, and Sam's status at the facility. (T 13:1097-1103)

The trial court ruled this evidence admissible to prove the under sentence of imprisonment aggravating circumstance, sec. 921.141(5) (a), Fla. Stat., instructed the jury on the circumstance solely on this evidence, and found the aggravating circumstance in its sentencing order. (R 5:974-977; T 13:1051-1064,

1212, 1215-1216) William's commitment to a secure juvenile facility did not qualify for the under sentence of imprisonment aggravating circumstance. Sec. 921.141(5)(a), Fla. Stat. The jury's and the court's consideration of the factor in sentencing has unconstitutionally tainted the death sentence imposed. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const. Sam Williams now asks this Court to reverse his death sentence.

A. Commitment To Juvenile Facility Is Not A Sentence Of Imprisonment

(1) Florida Law

In Florida, a commitment to a secure juvenile facility is not **a** sentence of imprisonment. Chapter 39, Florida Statutes gives effect to the Legislature's intent to treat juvenile offenders differently that adults. As this Court noted:

> The Florida Legislature has established "a firm layer of protection for juveniles" in the area of juvenile justice. See, M.F. v. State, 583 So.2d 1383 (Fla. 1991). The Legislature has made clear its policy that juveniles are to be treated in the least restrictive manner while ensuring the safety of the community. See, Sec. 187.201(2)(b)(18), Fla. Stat. (1991). As this Court noted in Rhoden [448 So.2d 1013 (Fla. 1984)], the juvenile justice statutory scheme "grants to juveniles the right to be treated differently from adults." ***448*** So.2d at 1016.

Troutman v. State, 630 So.2d 528, 531 (Fla. 1993). An adjudication of delinquency under Section 39.053, Florida Statutes is not a conviction. See, Merck v. State, ***664*** So.2d 939, 944 (Fla. 1995). Disposition alternatives for a juvenile adjudication do not include imprisonment. Sec. 39.054, Fla. Stat. The most severe sanction provided for habitual juvenile offenders is

commitment to a secure treatment facility. Sec. 39.054(h), Fla. Stat. If Sam Williams had been in Florida, his commitment to a secure juvenile facility would have been no greater than to a treatment facility for habitual juvenile offenders provided for in Section 39.054(h), Florida Statutes.

(2) Louisiana Law

Under Louisiana law, a commitment to a secure juvenile facility is not a sentence of imprisonment. See, LSA - Ch.C., Arts. 897, 897.1; State v. Emerson, 345 So.2d 1148 (La. 1977); State v. Williams, 301 So.2d 327 (La. 1974). The Louisiana Children's Code provides for the treatment of juvenile offenders differently than adults. Articles 897 and 897.1 Louisiana Children's Code provide for disposition alternatives for felony-grade delinquent acts. (copies of these articles provided in the appendix to this brief). The most severe alternative permits commitment in a secure detention facility in the custody of the Department of Public Safety and Corrections. LSA - Ch.C. Art. 897.1. The Supreme Court of Louisiana has held that such a commitment is not a sentence of imprisonment. State v. Emerson, 345 So.2d 1148, 1151; State v. Williams, 301 So.2d 327, 328.

B. Section 921.141(5)(a) Does Not Include Juvenile Commitments

The aggravating circumstance provided for if the defendant was under sentence of imprisonment at the time of the capital felony has not been applied to commitments to juvenile treatment facilities. Section 921.141(5)(a), Florida Statutes (1993), which was applicable at the time of sentencing in this case,

provides for an aggravating circumstance if the at the time of the homicide the defendant was under a sentence of imprisonment or certain other legal restraint categories:

> (a) The capital felony was committed by a person under sentence of imprisonment or placed on community control.

This Court has consistently applied the "under sentence of imprisonment" element of Section 921.141(5)(a) to require the capital defendant to be serving an adult term of imprisonment, incarceration or some other form of delineated, post-sentence, legal restraint. See, Trotter v. State, 576 So.2d 691, 694 (Fla. 1990) ; Ferguson v. State, 417 So.2d 631, 636 (Fla. 1982); Peek v. State, 395 So.2d 492, 499 (Fla. 1981). Sam Williams was not confined in a prison. He was not under a sentence to be confined in a prison. He was committed as a juvenile to be confined in a juvenile treatment facility.

Although this Court has never expressly addressed this precise issue, a similar issue was decided in Merck v. State, 664 So.2d 939 (Fla. 1995). In Merck, the prosecution introduced evidence of a shooting incident in North Carolina, which resulted in Merck's adjudication of delinquency, as relevant to prove a previous conviction of a violent felony as an aggravating circumstance under Section 921.141(5)(b), Florida Statutes (1993). Merck argued that juvenile adjudications are not convictions for purposes of establishing the previous conviction for a violent felony aggravating factor. This Court agreed and wrote:

> However, we agree with Merck that the juvenile adjudication was not a conviction within the meaning of Section 921.141(5)(b), Florida Statutes (1993). This is expressly mandated in Section 39.053, Florida

> Statutes (1993), and Section 7A-639, General Statutes of North Carolina (1993). Despite correctly sustaining the objection to the admissibility of the North Carolina judgment, the trial court erred in stating in her sentencing order, 'This is also a proper aggravating factor under F.S. 921.141(5)(b)." We find the inclusion of this juvenile adjudication similar to the erroneous inclusion of community control as an aggravating factor in Trotter v. State, 576 So.2d 691 (Fla. 1990). As noted in Trotter, penal statutes must be strictly construed in favor of the one against whom a penalty is imposed. Id. At 694. We therefore conclude, as we did in Trotter, that a resentencing before a jury is required.

Merck, ***664*** So.2d at 944. Applying the same principles of strict construction of penal statutes, leads to the conclusion that Section 921.141(5)(a), Florida Statutes does not encompass juvenile commitments as ***a*** "sentence of imprisonment."

Recent Legislative action concerning Section 921.141(5)(a), Florida Statutes supports the conclusion that the Legislature did not intend juvenile commitment to qualify as a "sentence of imprisonment." In 1996, the Legislature amended Section 921.141(5)(a) to add felony probation as a qualifying restraint category. (See, HB 207 and Criminal Justice Committee Staff Analysis attached in the appendix to this brief.) The Legislature also added clarifying language and expressly stated, as this Court has always applied the statute, that the aggravator applies only to a sentence of imprisonment or other specifically enumerated types of legal restraint after an adult felony conviction. The statute now reads,

> (a) The capital felony was committed by a person ***previously convicted of*** a ***felony*** and under sentence of imprisonment or placed on community control or on felony probation.

Sec. 921.141(5)(a), Fla. Stat. (1996)(emphasis added).

The trial court erred in admitting the evidence of Sam Williams' commitment to a juvenile training facility as relevant to prove the under sentence of imprisonment aggravating circumstance. Further error occurred when the court instructed the jury on the circumstance based on this evidence and allowed the prosecutor to argue this factor to the jury. Finally, the court erred in finding and weighing this circumstance in his sentencing decision. Sam Williams now urges this Court to reverse his death sentence.

ISSUE I I

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH SINCE A DEATH SENTENCE IS DIPRORTIONATE.

In performing proportionality review, this Court evaluates the totality of the circumstances and compares the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. E.g., Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). Such a review in this case demonstrates that the death sentence is not proportional and must be reversed. Art. I, Secs. 9, 17, Fla. Const.

This case was prosecuted as a shooting death during an attempted robbery after the victim resisted the robbery attempt.[2] Only one valid aggravating circumstance exists -- the homicide was committed for pecuniary gain. (R 5:975) Although the trial court also found the under sentence of imprisonment aggravating

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[2] In finding the pecuniary gain aggravating circumstance, the trial court succinctly stated the facts of the case:

> ...On the night of the murder, the victim, Bobby Burke, had left his residence and walked outside after dark with a pan of scraps in his hand in order to feed some stray cats in the neighborhood. A few minutes thereafter his wife heard what later proved to be gunshots, and Mr. Burke lay dying in the street in front of his residence. The Defendant, subsequent to his arrest, made statements indicating that his intention was to rob the victim, the victim "bucked him" and that he therefore had to kill him. Although the evidence indicates that Mr. Burke left his residence without his wallet, and without any money on his person, the fact that this murder was committed for the purpose of attaining financial gain is quite obvious from the totality of the circumstances in addition to the Defendant's personal statements....

(R 5:975).

circumstance, this finding was improper. See, Issue I, supra. The trial court found and gave substantial weight to one statutory mitigating circumstance of Sam's age at the time of the crime; Sam had recently turned eighteen-years-old. (R 5:975-976) Additionally, the court found six nonstatutory mitigating factors. (R 5:976-977) These included: (1) expert testimony that Sam was capable of rehabilitation and leading a productive life in a prison setting; (2) Sam had few disciplinary problems while in jail; (3) Sam completed his GED while incarcerated; (4) **Sam was** a good worker when he was employed; (5) Sam had become involved in a bible study and met weekly with a minister who assisted him with his spiritual growth; and (6) Sam expressed an interest in pursuing a ministry in prison. Considering the nature of the offense, the weight of the single aggravating circumstance and the weight of the mitigation, a death sentence is inappropriate when compared to similar cases in which this Court disapproved imposition of death.

Similar Cases Where Death Held Disgrogortionate

In several previous cases, this Court has held a death sentence disproportionate where the murder occurred during a robbery or for pecuniary gain and this factor also constituted the sole or primary aggravation in the case. This Court has reached such a decision even where there was no or little mitigation. These cases are directly comparable to this case, and **as** in these cases, Sam Williams' death sentence is disproportional:

1. **Terry v. State,** 668 So.2d 954 (Fla. 1996). One of two robbery victims was shot and killed. Terry's codefendant, Floyd,

confessed that he and Terry were looking for a place to rob. Floyd also said that Terry was the one who robbed the deceased victim while he held the other victim. DNA tests matched stains on Terry's shoes to the victim's blood. Evidence supported the "theory that this was a 'robbery gone bad.'" **668** So.2d at 965. The jury recommended death by **a** vote of eight to four. In aggravation, the trial court found two aggravating circumstances -- prior conviction for a violent felony based on a contemporaneous aggravated assault and homicide committed during **a** robbery/for pecuniary gain. The trial court found no statutory or nonstatutory mitigating circumstances. ***This Court held the death sentence disproportionate.***

2. **Sinclair v. State,** 657 So.2d 1138 (Fla. 1995). Sinclair was convicted of murdering a taxicab driver during a robbery. The driver was shot twice in the head. An eleven to one vote from the jury returned a recommendation of death. The trial court found the homicide occurred during a robbery and for pecuniary gain as the sole aggravating circumstance. In sentencing Sinclair to death, the court found no statutory mitigating circumstances. The judge found three nonstatutory mitigating factors which he gave little or no weight. ***This Couxt held the death sentence disproportionate.***

3. **Thompson v. State,** 647 So.2d 824 (Fla. 1994). Thompson shot and killed the attendant at a sandwich shop during a robbery. The jury recommended a death sentence by a vote of nine to three. This Court struck as invalid three of the four aggravating circumstances the trial court found, leaving only the

homicide during a robbery factor. The trial court found some nonstatutory mitigating circumstances. ***This Court held the death sentence disproportionate.***

4. **Clark v. State, 609** So.2d 513 (Fla. 1992). Clark went drinking with two friends and another man, Carter, who had just been hired for a job which Clark had also sought. Clark stopped the car in ***a*** remote area and shot Carter once in the chest. Clark reloaded the shotgun and shot Carter again in the mouth. After the shooting, Clark said that he guessed he had the job now. The jury recommended death by a vote of ten to two. This Court held invalid three of the four aggravating circumstances the trial court found. Only the pecuniary gain circumstance ***was*** approved. The trial court found no mitigating circumstances, however, this Court concluded that evidence established nonstatutory mitigation. ***This Court held the death sentence disproportionate.***

5. **McKinney v. State,** 579 So.2d 80 (Fla. 1991). The robbery victim in this case was shot seven times and suffered lacerations to the head. His body was dumped from a moving car into an alley. The victim was semiconscious when found and gave a description of his assailant before he died at the hospital. McKinney was convicted for the crime. The jury recommended death by a vote of eight to four. This Court disapproved two of the three aggravating circumstances the trial court found which left only the circumstance that the murder occurred during a violent felony (robbery, kidnaping and burglary) . The trial court found one statutory mitigator -- no significant criminal history. The

court also found nonstatutory mitigation, but gave it little or no weight. ***This Court held the death*** *sentence* ***disproportionate.***

6. **Lloyd v. State,** 524 So.2d 396 (Fla. 1988). Lloyd was convicted of the shooting death of a young woman in her own home in the presence of her five-year-old son. She suffered two gunshot wounds, one to the neck and a contact wound to the top of the head. A jury reached a vote of seven to five for a death recommendation. This Court disapproved two of the three aggravating circumstances the trial court found. The only valid aggravator was the homicide was committed during an attempted robbery. One statutory mitigating circumstance existed -- Lloyd had no significant criminal history. ***This Court held the death*** *sentence* ***disproportionate.***

7. **Caruthers v. State,** 465 So.2d 496 (Fla. 1985). Caruthers murdered a convenience store clerk during a robbery. In his confession, Caruthers said the clerk jumped and he started shooting. The clerk was shot three times. The jury recommended death. This Court rejected two of the three aggravating circumstances the trial court found; only the homicide during a robbery circumstance remained. The trial court found the statutory mitigating circumstance of no significant criminal history and several nonstatutory factors. ***This Court held the death sentence disproportionate.***

8. **Rembert v. State,** 445 So.2d 337 (Fla. 1984). Rembert killed the elderly proprietor of a bait and tackle shop during a robbery. Rembert struck the victim with ***a*** club which resulted in severe brain injury and death. The trial court found four

aggravating circumstances, but this Court disapprove three of them. Only the factor of he homicide being committed during a robbery was approved. Although the defense presented some evidence of nonstatutory mitigating circumstances, the trial court found no mitigating circumstances. ***This Court held the death sentence disproportionate.***

Just as in the above discussed cases, the death sentence is disproportionate in this case, The crime here is a felony-murder. Only one valid aggravating circumstance exists: the homicide was committed for pecuniary gain. A significant statutory mitigating circumstance exists -- Sam's age at the time of the crime. The trial court gave substantial weight to this mitigating circumstance. Additionally, the trial court found six nonstatutory mitigating factors and gave them varying degrees of weight. In all material respects, the facts and circumstances of this case are no different that the above cases where death was deemed a disproportional sentence. Sam Williams, as the defendants in those previous cases, does not deserve to die for his crime. He urges this Court to reverse his death sentence and remand his case for imposition of a sentence of life in prison.

ISSUE III

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO TELL THE JURY DURING VOIR DIRE AND PENALTY PHASE ARGUMENT THAT THE JURY MUST RETURN A DEATH RECOMMENDATION IF THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES AND IN CONFIRMING THE PROSECUTOR'S MISSTATEMENT OF LAW.

The prosecutor improperly told the jurors at voir dire and penalty phase closing argument that the law required them to return a recommendation of death if the aggravating circumstances outweighed the mitigating ones. (T 7:91, 158, 194-195; T 8:227-231; T 13:1200-1201) After one of these comments, the trial court followed with its own inquiry of the jurors and confirmed that the prosecutor had correctly stated the law. (T 8:228-231) There is no such legal requirement, and the prosecutor's and court's comments tainted the jury and rendered the jury's recommendation unreliable. Art. I, Secs. 9, 16, 17, Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const.; Gregg v. Georgia, 428 U.S. 153 (1976); Henyard v. State, 21 Fla. L. Weekly S14 (Fla. Dec. 19, 1996); Alvord v. State, 322 So.2d 533 (Fla. 1975). Al though defense counsel did not specifically object to these comments, the error has negated a fundamental principle governing the jury's decision making. This structural defect in the sentencing process now requires reversal for a new penalty phase trial. Williams asks this Court to reverse his death sentence for a new sentencing proceeding with a newly impanelled jury.

A portion of the voir dire examination of prospective jurors was conducted with small groups of jurors, six at a time. (T 7:76; T 8:238) Seven groups were examined and the prosecutor made the improper comments in questions to four of the seven groups.

(T 7:91, 158, 194-195; T 8:227-231) Eight of the twelve jurors in this **case** were exposed to the prosecutor's comments. (Sweeney, Carrazales, Smith, Pettis, Ingersoll, Boe, Peterson, Kromer) (T 7:87, 153, 184; T 8:218) One of the eight jurors (Kromer) was also exposed to the trial court's comments confirming the prosecutor's statement as a correct statement of the law. (T 8:218) Both alternate jurors (Bafundo, Johnson) were exposed to both the prosecutor's and the trial court's remarks. (T 8:218) The prosecutor made these remarks while explaining the sentencing process to the jurors while exploring the jurors' death qualifications as follow:

> MURRAY: Now, this is not a mathematical game. In other words, you look at aggravating circumstances, and you look at mitigating circumstances. It's not a case where, okay, the State proved one or two, but then there were five or six or seven mitigators that may have come in. Not all evidence is going to have the same weight. It will be up to you to do a balancing and determine whether or not the aggravators outweigh the mitigators, or conversely, whether the mitigators outweighed the aggravators. Now, ***if you found that the aggxavators outweigh the mitigators, then you would be under*** **an** ***obligation*** **to return a** ***recommendation*** **for** ***death.*** On the other hand if the opposite was true, you found the mitigators outweighed the aggravators, then, under your oath, you'd be obligated to bring an advisory verdict back recommending that the Court impose life. Are all of you comfortable with that?

(T 7:90-91) (emphasis added)

* * * *

> **Now,** the group here, the five of you, do any of you have any fundamental objection to the death penalty, because, under your oath, ***if,*** **after** ***weighing the evidence you found*** **that** ***the aggravating circumstance ox circumstances outweigh the*** **mitigating** ***circumstances, then under your oath as jurors, it would be your obligation to come back with*** **an** ***advisory verdict recommending death.*** That's very serious, serious proposition, and my question to each of you is if you found that it was appropriate in this case, are you

emotionally capable of coming back and telling the judge, Judge, in this case, we feel it's appropriate, and we're recommending death?

(T 7:158) (emphasis added)

* * * *

MURRAY: *If, as members* of *the jury, you find that the aggravating circumstances do outweigh the mitigating* circumstances, *then you would be obligated, under youx oath, to come back with a recommendation to the Court for death.* Are each of you emotionally capable of coming into court and telling the judge, Judge, in this case my recommendation to you is that death is an appropriate penalty. Are you emotionally capable of that, each of you?

JUROR: I don't think I am.

(T 7:194-195) (emphasis added)

* * * *

MURRAY: *Okay, thank you, I appreciate* your *candor, and I respect your opinion.* If *the jury finds that the aggravating circumstance or circumstances outweigh the mitigation, then under* your *oath, you would be required to come back into court and tell the judge, Judge, in this case we think an appropriate sentence is death. Are all* of *you emotionally capable* of *doing that?*

JUROR: I'm not sure.

MURRAY: Which is why we ask these questions, Miss Rogers, because we rely on you to tell us whether or not you can do that. That *doesn't presume* for *a minute that the aggravating circumstances will outweigh the mitigating circumstances, but you're going to* take *an oath as a juror to follow the law given to you by the Court, and if you and* your *fellow jurors found that, yes, well, the aggravating* circumstance *does outweigh the mitigation, then, under* your *oath, you would be required to return an advisory sentence recommending death, and you wold have to look the judge and the defendant in the eye and say, Judge, that's my recommendation, death.*

ROGERS: I'm not sure I can do that.

MURRAY: Would that cause you difficulty in being fair and impartial during the penalty phase?

(T 8:227-228)

* * * *

MURRAY: Okay, thank you, I appreciate your candor, and I respect your opinion. ***If the jury finds that the aggravating circumstance or circumstances outweigh the mitigation, then under your oath, you would be required to come back into*** *court* ***and tell the judge, Judge, in this case we think an appropriate sentence is death. Are all*** **of** ***you emotionally capable*** **of** ***doing that?***

JUROR: I'm not sure.

MURRAY: Which is why we ask these questions, Miss Rogers, because we rely on you to tell us whether or not you can do that. That doesn't presume for a minute that the aggravating circumstances will outweigh the mitigating circumstances, ***but you're going to take*** **an oath** ***as a*** *juror* to *follow* ***the law given to you*** **by** ***the Court, and if you and your fellow jurors found that, yes,*** *well,* ***the aggravating*** **circumstance** ***does outweigh the mitigation, then, under your*** **oath, you** ***would be required to return an advisory sentence recommending death, and you wold have to look the judge and*** **the** ***defendant*** *in* ***the eye and say, Judge, that's my recommendation, death.***

ROGERS: I'm not sure I can do that.

MURRAY: Would that cause you difficulty in being fair and impartial during the penalty phase?

(T 8:227-228) The trial judge then became involved in asking prospective jurors questions and in so doing, the court improperly confirmed the prosecutor's misstatement of the law as a correct statement.

COURT: Ma'am, let me ask you a question. Do you understand the process that's been explained by the Court and Mr. Murray as far as the guilt phase?

ROGERS: Uh-huh.

COURT: And then we go into the second phase, and the state presents aggravating factors, and the defense presents mitigating factors?

ROGERS: Right.

COURT: ***Now, assuming that you are in that*** penalty ***phase, okay, and assuming that you hear evidence that you feel that the*** **aggravating factors** ***in*** **this** ***case***

outweigh the mitigating factors, *can you* ***vote for the death penalty, yes or no?***

ROGERS: In theory I believe in the death penalty, but when it gets right down to it, I'm not sure that I can say that in all honesty.

COURT: Well, I don't want to embarrass you or hurt your feelings in any way, but let me tell you this. The words I'm not sure, I think so or maybe or perhaps, they --

ROGERS: -- They don't count.

COURT: They don't count. We spend a lot of time in these proceedings getting through words such as that, so --

ROGERS: -- Okay, I would have to weigh the mitigating, and the other thing I would have to weigh, and it would have to be very strong, because I do fundamentally, you know, theoretically believe in the death penalty.

COURT: ***Well, I think to be fair to both sides, and that's what we're looking for in this case is jurors that tell us, yes, if I find a defendant guilty in a case such as*** **this,** ***then I*** **can** ***go in*** **there,** ***and I can listen to aggravating factors and mitigating*** **factors,** ***and*** **if** ***I find that the aggravating factors justify the death penalty, and the mitigating*** **factors** ***don't mitigate it down below the death penalty, then I'll vote*** **fox** ***the death penalty.*** On the other hand, you know, a juror says, well, I'll listen to it, and if I think the mitigating factors outweigh the aggravating factors, I'll vote for the life sentence. We understand that some people have a very, very tough time voting for the death penalty in a case, just as Miss Kozar there sitting there to you left has indicated. In all murder cases she'd have a hard time voting for anything other than the death penalty. Well, that's what we're really getting at right here. I need you to try to answer for us as she has. Do you fell like that in most first degree murder cases that you'd vote for a life sentence over a death penalty without regard to aggravating and mitigating factors?

KOZAR: I guess I can't say no, because I would have to hear -- I think the death penalty should only be used in very, very extreme murder cases. I don't think I should be used maybe as frequently as it is. Yes, I could vote for the death penalty if the evidence was strong enough, if the mitigating factors didn't -- but it would have to be very, very strong.

COURT: Let me go through it one more direction. There's no instruction that this Court's going to give you that says that it has to be very, very strong. There's no such instruction. *The instructions that I'm going to give you as a juror* are *that you must follow the law,* and *in order to be on this jury, you must agree to follow the law.* The *law is as we have explained it to you.* There's nothing in any of the instructions that's going to say that your feelings must be very, very strong. That's not part of the legal instructions you'll receive.

KOZAR: Well, okay, I should rephrase that and say -- I'm sorry, I have difficulty with this.

COURT: If you feel like that you can't honestly follow the law as it's spelled out and vote for a death penalty in a murder case, there's nothing wrong with you telling us that. That's where we want to try to get with the questions.

KOZAR: I probably couldn't. I said probably again. Okay, no, that's it.

COURT: *You couldn't vote for the death penalty in following the instructions the Court will give you as we have explained it to you. Is that your answer to that question?*

KOZAR: Yes.

(T 8:228-231)

In his closing penalty phase argument, the prosecutor again said as his final plea for a death recommendation:

If you keep bias, sympathy and prejudice out of that jury room and you look at the evidence of aggravation, you'll see that it clearly outweighs the mitigation because there is almost no mitigation whatsoever, and *it's a hard choice folks, hard choice, but it's* what *the law requires. And it's what this* community is *expecting you to do is* go back *and come back with a* just *decision according to the law.* Go back and look at all the evidence, listen, recall, discuss what you heard today, weigh the aggravators, look at the mitigation. *If the aggravators outweigh the mitigation then your vote must be for death.*

(T 13:1200-1201) (emphasis added)

The trial court compounded the misstatement of law to the jury by sustaining, in the jury's presence, the prosecutor's objection to defense counsel's closing when defense counsel mentioned mercy as a consideration at the beginning of his closing which immediately followed the prosecutor's misstatement of law:

> AMMON: Thank you, Your Honor, may it please the court, counsel. I noticed, ladies and gentlemen, that there was not one mention of the word justice in the prosecution's closing argument, not once was justice mentioned. I would submit to you all that one of the basic characteristics of humanity is that justice should be tempered with mercy --
>
> MURRAY: Judge, I'm going to object.
>
> COURT: Basis of the objection?
>
> MURRAY: It's not a correct statement of the law.
>
> COURT: Sustained.

(T 13:1201)

Although the court used the standard jury instructions, these did not remove the taint. Nothing in the standard instruction corrected the misstatement of law the prosecutor and the court conveyed to the jury. The courts instructions advised the jury **as** follows:

> ...Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.
>
> * * * *
>
> The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based upon these considerations.

(T 13:1212-1213)

In Henyard v. State, 21 Fla. L. Weekly S14 (Fla. December 19, 1996), this Court addressed a similar complaint about a prosecutor's statement to the jury during jury selection which improperly advised that the law required a death recommendation if the aggravating circumstances outweighed the mitigating ones. This Court held that the statement was error, but because it was an isolated one at the beginning of the trial, the error was harmless. Henyard, at S18. The issue was discussed in the Henyard opinion as follows:

> First, Henyard claims the trial court erred in allowing the prosecutor to instruct several prospective jurors during voir dire that "[i]f the evidence of the aggravators outweighs the mitigators by law your recommendation must be for death."
>
> In Alvord v. State, **322** So.2d 533, **540** (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976), we stated:
>
> > Certain factual situations **may** warrant the infliction of capital punishment but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case.
>
> See, **also,** Gregg v. **Georgia, 428** U.S. **153, 203, 96** S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976) (stating that a jury can constitutionally dispense mercy in case deserving of death penalty). Thus, a, jury is neither compelled nor required to recommend death where aggravating factors outweighed mitigating factors.
>
> In this case, we agree with Henyard that the prosecutor's comments that jurors must recommend death when aggravating circumstances outweigh mitigating circumstances were misstatements of law. But, contrary to Henyard's assertions, [foot note omitted] we cannot find that he was prejudiced by this error. Initially, we note the comments occurred on only three occasions during an extensive jury selection process. Moreover,

> the misstatement was not repeated by the trial court when instructing the jury prior to their penalty phase deliberations. In fact, the jury was advised that the statements of the prosecutor and defense lawyer were not to be treated as the **law** or evidence upon which a decision was to be based. Further, Henyard does not contend that the jury was improperly instructed before making an advisory sentence recommendation in the penalty phase of his trial. In this context, we find the prosecutor's isolated misstatements during jury selection to be harmless error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Henyard, at S18.

Unlike the circumstances in Henyard, the error is not harmless in this case. First, in this case, the prosecutor's comments were not limited to isolated ones early in the trial. He made the misstatements in voir dire and in his final comment to the jury in penalty phase closing argument. (T 7:91, 158, 194-195; T 8:227-231; T 13:1200-1201) Second, the trial judge confirmed that the prosecutor was making a correct statement of the law at least once during jury selection. (T 8:227-231) Third, at the beginning of defense counsel's **penalty** phase closing argument, the court sustained the prosecutor's objection to defense counsel's suggestion that the jury could consider mercy in its deliberations. (T 13:1201) Moreover, the court specifically sustained the objection in the jury's presence on the ground the defense counsel had misstated the law. (T 13:1201) Finally, the jury recommended death by a vote of 8 to 4 (T 13:1217), where the jury vote in Henyard was 12 to 0. 21 Fla. Law Weekly at S15.

Williams urges this Court to reverse his death sentence and remand for a new penalty phase before a new jury.

CONCLUSION

For the reasons presented in this brief, Appellant asks this Court to reverse his sentence of death and remand for imposition of a sentence of life imprisonment.

Respectfully submitted,

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by delivery to Richard B. Martell, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a **copy** has been mailed to appellant, Mr. Samuel F. Williams, on this 23 day of April, 1997.

W.C. McLAIN

Appendix A

IN THE CIRCUIT COURT IN AND FOR OKALOOSA COUNTY,FLORIDA
CRIMINAL DIVISION
CASE NO. 95-109

STATE OF FLORIDA

VS

SAMUEL FRANCIS WILLIAMS

SENTENCING ORDER

The Defendant was tried before this court on June 10,1996, through June 14, 1996. The jury found the Defendant guilty of First Degree Murder. The same jury reconvened on June 27, 1996, and evidence in support of aggravating factors and mitigating factors was heard. The jury returned a penalty phase recommendation by a vote of 8 to 4 that the Defendant be sentenced to death in the electric chair. On that same date, the Court requested memoranda from both counsel for the State and counsel for the Defendant. Defendant's memorandum was received on July 3, 1996, and on July 15, 1996, the Court received a proposed Sentence and Findings of Fact from the State which the Court has interpreted as a sentencing memorandum. On July 16, 1996, the Court held a further sentencing hearing where each side was offered the opportunity to present any additional evidence and/or argument in support of their respective positions. Upon conclusion of the final argument of counsel for the State and Counsel for the Defense, the Court set a final sentencing for this date, August 6, 1996.

This Court, having heard the evidence presented in both the guilt phase and the penalty phase, having had the benefit of legal memoranda and further evidence and argument both in favor and in opposition of the death penalty, finds as follows:

A. AGGRAVATING FACTORS

1. The Defendant committed the capital felony while under a sentence of imprisonment pursuant to Florida Statute 921.141(5)(a). The evidence presented during the penalty phase proceeding proved beyond a reasonable doubt that the Defendant, while a juvenile, was convicted in the State of Louisiana for the offense of robbery, and that while incarcerated in a juvenile facility attained seventeen years of age,the age of majority in Louisiana. After attaining adult status under

Louisiana law, the Defendant escaped from said facility. Thereafter, the State of Louisiana issued an adult arrest warrant for the Defendant for the offense of escape. The evidence is uncontroverted that the Defendant was eighteen years of age at the time of the murder of Bobby Burke and that the Defendant was still a fugitive from justice from the State of Louisiana with adult status. This aggravating factor has been proved beyond a reasonable doubt.

2. The Defendant committed the capital felony for pecuniary gain pursuant **to Florida Statute 921.141(5)(f).** On the night of the murder, the victim, Bobby Burke, had left his residence and walked outside after dark with a pan of scraps in his hand in order to feed some stray cats in the neighborhood. A few minutes thereafter his wife heard what later proved to be gunshots, and Mr. Burke lay dying in the street in front of his residence. The Defendant, subsequent to his arrest, made statements indicating that his intention was to rob the victim, the victim "bucked **him"** and that he therefore had to kill him. Although the evidence indicates that Mr. Burke left his residence without his wallet, and without any money on his person, the fact that this murder was committed for the purpose of attaining financial gain is quite obvious from the totality of the circumstances in addition to the Defendant's personal statements, This aggravating circumstance has been proved beyond a reasonable doubt.

None of the other aggravating factors enumerated by statute are applicable to this case and none other was considered by this Court.

Nothing except as previously indicted in paragraphs 1 and 2 above was considered in aggravation.

B. MITIGATING FACTORS.

Statutory Mitigating Factors:

In its sentencing memorandum, the Defendant requested the Court to consider the following statutory mitigating circumstance:

1. That the Defendant was eighteen years of age

at the time of the offense. This mitigating factor was proved by the evidence and the Court has given this statutory mitigator substantial weight in consideration of the sentence to be imposed upon the Defendant.

Nonstatutory Mitigating Factors:

In its sentencing memorandum, the Defendant has requested the Court to consider the following nonstatutory mitigating factors:

1. That the Defendant fully cooperated with law enforcement after his arrest. The Court finds that this requested mitigating factor has not been established by the evidence. To the contrary, the evidence indicates that the Defendant, following his arrest, attempted to blame another individual for the murder and has continued to do so until this date.

2. That the Defendant did not permanently flee the Crestview area after the crime, although he had numerous opportunities to do so. The Court finds that this fact, as worded in Defendant's memorandum, was established by the evidence. However, the Court further finds that this fact does not constitute a mitigating factor since the Defendant had no transportation and no money of his own, and he did flee the Crestview area immediately following the murder and stayed with a friend in Century, Florida, for several days. Upon his return to Crestview, he remained in hiding until involuntarily apprehended by law enforcement.

3. That the Defendant has a one year old daughter with whom he intends to maintain a relationship through his term of imprisonment. The evidence established that the Defendant does have a one year old daughter, but there was no evidence offered to indicate that the Defendant has ever had any type of meaningful relationship with this child. The evidence established that the child was produced from a casual relationship with the mother at a time when the Defendant was involved in other sexual relationships both heterosexual and homosexual. This is not a mitigating factor.

4. That the Defendant has had virtually no disciplinary problems in the jail over the last

twenty months while awaiting his trial. The Court finds that this mitigating factor was established by the evidence but is given little weight in that the evidence further indicated that the Defendant has been housed in the maximum security section of the Okaloosa County Jail under extremely intense supervision and observation.

5. That the Defendant obtained his G.E.D. while incarcerated. This mitigating factor was established by the evidence and given slight weight by the Court.

6. That the defense expert, Dr. James Larson, testified that the Defendant could live a productive life in prison and was capable of being rehabilitated. The Court finds that Dr. Larson's testimony was sufficient to establish this mitigating factor. However, his testimony further indicated that he was not aware of the Defendant's conduct, including escape, while incarcerated in the State of Louisiana. Accordingly, this mitigating factor is given some weight by the Court.

7. That the Defendant has been participating in Weekly Bible meetings and has routinely corresponded with Rev. Ozzie Bloxson regarding Biblical questions. This fact was established. by the evidence. However, there was no evidence tending to establish any particular religious or Biblical interests prior to his arrest for this murder. The Court attaches very little weight to the Defendant's claim of "jailhouse religion."

8. The Defendant testified that he intends to further his education and become involved in a prison ministry should he receive a life sentence. This fact was established by the Defendant's testimony, but once again, it's given very slight weight by the Court.

9. The Defendant is legally blind in one eye and is beginning to lose his vision in the other eye. This fact was established by the evidence. However, it does not constitute a mitigating factor.

10. That the Defendant has a capacity for hard work

and worked well when employed as he maintained employment at various furniture stores while residing in Crestview, Florida. The Court finds that this mitigating factor has been established to some extent. The evidence indicated that the Defendant, when employed, is a good worker and did indeed maintain employment at various times at various furniture stores. However, there was no evidence indicating that the Defendant had a "capacity" for hard work. To the extent that this mitigating factor has been accepted by the Court, it has been given slight weight.

11. The level of credibility of many of the State's key witnesses shows that they were sold gold liars. This so-called mitigating factor appears to constitute no more than argument by counsel as to credibility of witnesses and does not constitute a valid mitigating factor.

The Court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake and in the balance. The Court finds, as did the jury, that the aggravating circumstances applicable to this case outweigh the mitigating circumstances.

Accordingly, it is

ORDERED AND ADJUDGED that the Defendant, Samuel Francis Williams, is hereby sentenced to death for the murder of the victim, Bobby Burke, The Defendant is hereby committed to the custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

DONE AND ORDERED in Shalimar, Florida, this 6th day of August, 1996.

G. ROBERT BARRON
CIRCUIT JUDGE

Copies to:
James R. Murray, State Attorney
Jay Gontarek, Esq.
Reed Ammon, Esq.

Newman C. Brackin
Clerk of Court
BY _____
Deputy Clerk

Appendix B

Library References

Infants ⇐221.
WESTLAW Topic No. 211.
C.J.S. Infants §§ 57. 69 to 85.

Notes of Decisions

Judgment 1

1. Judgment

While juvenile court was authorized to defer or suspend execution of judgment of disposition and place juvenile on probation subject to various terms and conditions, court was required to render judgment of disposition, and its failure to do so was patently erroneous. State in Interest of Lucas, App. 1 Cir.1989, 543 So.2d 634.

Art. 897. Disposition after adjudication of a felony-grade delinquent act

A. After adjudication of any felony-grade delinquent act other than those described in Article 897.1, the court may:

(1) Reprimand and warn the child and release him into the custody of his parents either unconditionally or subject to such terms and conditions as deemed in the best interests of the child and the public.

(2) Reprimand and warn the child and release him into the custody of some other suitable person either unconditionally or subject to such terms and conditions as deemed in the best interests of the child and the public. The court shall, whenever practicable, select a person of the same religious faith as the child or his parents.

(3) Place the child on probation in the custody of his parents or other suitable person.

B. As conditions of probation, if ordered pursuant to Subparagraph A(3) of this Article:

(1) The court shall impose all of the following restrictions:

(a) Prohibit the child from possessing any drugs or alcohol.

(b) Prohibit the child from engaging in any further delinquent or criminal activity.

(c) Prohibit the child from possessing a firearm or carrying a concealed weapon, if he has been adjudicated for any of the following offenses and probation is not otherwise prohibited: first or second degree murder; manslaughter; aggravated battery; aggravated, forcible, or simple rape; aggravated crime against nature; aggravated kidnapping; aggravated arson; aggravated or simple burglary; armed or simple robbery; burglary of a pharmacy; burglary of an inhabited dwelling; unauthorized entry of an inhabited dwelling; or any violation of the Uniform Controlled Dangerous Substances Law which is a felony or any crime defined as an attempt to commit one of these enumerated offenses.

(2) The court may impose any other term and condition deemed in the best interests of the child and the public, including:

(a) A requirement that the child attend school, if the school admits the child.

(b) A requirement that the child perform court-approved community service activities.

(c) A requirement that the child make reasonable restitution to any victim for any personal or property damage caused by the child in the commission of the delinquent act.

(d) A requirement that the child participate in any program of medical or psychological or other treatment found necessary for his rehabilitation.

(e) A requirement suspending or restricting the child's driving privileges, if any, for all or part of the period of probation, In such cases, a copy of the order shall be forwarded to the Department of Public Safety and Corrections, which shall suspend the child's driver's license or issue a restricted license in accordance with the order of the court.

(f) A requirement prohibiting the child from possessing a firearm or carrying a concealed weapon,

(g) A requirement that the child pay a supervision fee of not less than ten nor more than one hundred dollars per month, payable to the Department of Public Safety and Corrections or other supervising agency, to defray the costs of supervision. The amount of the fee shall be based upon the financial ability of the payor to pay such a fee. The court may order a parent, tutor, guardian, or other p&son who is financially responsible for the care of the child to be responsible for payment of all or part of any supervision fee imposed.

C. Except as provided for in Article 897.1, the court may commit the child to the custody of a private or public institution or agency. When commitment is to be made to a private institution or agency, the court shall:

(1) Select one that has been licensed under state law, if licensure is required by law for such an institution or agency.

(2) Whenever practicable, select an agency or institution of the same religious faith as the child or his parents.

D. Except as provided for in Article 897. I, the court may commit the child to the custody of the Department of Public Safety and Corrections, with or without a recommendation that the child be placed in alternative care facilities through the department's client placement process or be referred to appropriate placement resources in the Department of Social Services.

E. Except as provided for in Article 897.1, the court may impose but suspend the execution of the whole or part of any order of commitment and place the child on probation subject to any of the terms and conditions authorized under Paragraph B of this Article.

Added by Acts 1991, No. 235, § 8, eff. Jan. 1, 1992. Amended by Acts 1992, No. 299, § 1; Acts 1993, No. 430, § 2.

Comments-1991

a. The source of Subparagraphs A(1) and (2) is C.J.P. Article 83(A)(1). It has been divided in recognition of the fact that leaving a child in his parents' custody and changing custody from the child's parents to some other "suitable

person" arc two very different dispositions. The source of the last sentence of Subparagraph A(2) is C.J.P. Article 86(C). The source of Subparagraph A(3) is C.J.P. Article 83(A)(2).

b. Under the former law, the only mandatory condition for probation was that contained in (B)(1)(c), the prohibition against possession of weapons, which was found in C.J.P. Article 83(B). Subparagraphs B(l)(a) and (b) contain a listing of additional mandatory conditions of probation upon adjudication for a felony-grade offense. They have been added as mandatory restrictions to emphasize the fact that such criminal conduct must be avoided by the child while he is on probation.

c. Subparagraph B(2) specifies permitted conditions. The source of condition B(2)(a) is C.J.P. Article 83(A)(3). The source of condition B(2)(b) is C.J.P. Article 83(A)(7)(a). The source of condition B(2)(c) is C.J.P. Article 83(A)(7)(b) as interpreted by the jurisprudence. Condition B(2)(d) is new although it was a commonly imposed condition under the general catch-all authorization of C.J.P. Article 83(A)(8). Condition B(2)(e) is new. Its source is Code of Criminal Procedure Article 895(C). The source of condition B(Z)(f) is C.J.P. Article 83(B).

d. The source of Paragraph C is C.J.P. Article 83(a)(6). The source of Subparagraph C(2) is C.J.P. Article 86(c).

e. The source of Paragraph D is C.J.P. Article 83(A)(4).

f. The source of Paragraph E is C.J.P. Article 83(A)(7).

Historical and Statutory Notes

The 1992 amendment added item B(2)(g), relating to the probation supervision fee.

The 1993 amendment substituted "any" for "a" preceding "felony-grade" and inserted "other than those described in Article 897.1" following "delinquent act" to the introductory paragraph of par. A; added "and probation is not otherwise prohibited" to item B(1)(c); and added "Except as provided for in Article 897.1," to the beginning of pars. C, D, and E, making necessary capitalization changes.

Cross References

Duration of disposition in juvenile cases, see Ch.C. arts. 686, 784, 898, 900.
Juvenile correctional institutions, see R.S. 15:901 et seq.
Mental retardation. involuntary commitment, see R.S. 28:404.
Office of youth development of Department of Public Safety and Corrections, responsibility for children adjudicated delinquent, see R.S. 36:408.

. Library References

Infants ⇐22 I .
WESTLAW Topic No. 2 I 1.
C.J.S. Infants §§ 57, 69 to 85.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.
Louisiana Criminal Justice Cases are available on WESTLAW database: LACJ-CS.

Notes of Decisions

1. Constitutional rights—Notice

Juvenile defendant who was on probation had adequate notice given to satisfy Louisiana and federal constitutional due process mandates (U.S.C.A. Const. Amend. 14 and LSA–Const. Art. I, § 2) that evidence of his association with "bad company" would be presented at hearing to revoke his probation. State in **Interest of** Wright, App.1980, 387 So.2d 75, writ granted in part and remanded for recomputation of sentence and otherwise'denied 391 So.2d 456.

Commitment of juvenile to the Department of Corrections of a charge other than that specified by petition filed against him was in violation of his statutory and constitutional rights. State in Interest of Simon, 295 So.2d 473.

2. —— Excessive punishment, constitutional rights

Commitment of 14–year-old juvenile found guilty of armed robbery to the custody of the Department of Public Safety and Corrections/Louisiana Training Institute until his 2 1st birthday was not excessive. despite probation officer's recommendation of six-month commitment, where previous probation' supervision did not deter juvenile's escalating delinquent behavior, and according to probation officer, juvenile showed no remorse for his past behavior. State v. R.B.. Jr., App. 5 Cir.1992, 595 So.2d 702.

Fact that 15-year sentence received by defendant, who was prosecuted as an adult for first-degree murder for an offense which was committed when he **was 16 years** old **and who was** ultimately convicted of manslaughter was much longer than that which could have been imposed had he been tried as a juvenile did not afford defendant a basis for claiming **a** violation of his Eighth Amendment rights. State v. Sheppard, Sup. 1979, 371 So.2d 1135.

3. —— Ex post facto clause, constitutional rights

Defendant, who was 16 years old at time of offense, who was convicted of first-degree murder and sentenced to death, and who, after mandatory death penalty provision of LSA-R.S. 14:30 was declared to be unconstitutional, was sentenced to life imprisonment, would not be granted petition for writ of habeas corpus on ground that, because he was a juvenile and subject only to death penalty or juvenile incarceration, life sentence violated ex post facto clause of United States Constitution (U.S.C.A. Const. Art. 1, § 10, cl. 1) in that it was more severe penalty than any available at time of offense; it was not a violation of the ex post facto clause for defendant to be sentenced to penalty less harsh than one that appeared he would be subjected to, and was given notice at moment of crime. Smith v. Johnson, D.C. 1977, 458 F.Supp. 289, affirmed 584 F.2d 7

4. Sentencing guidelines, application of

In juvenile proceedings, trial court is not required to follow guidelines of criminal sentencing statute; rather, after juvenile is adjudicated delinquent, court should follow articles of the Code of Juvenile Procedure to determine the appropriate disposition, and there is no requirement that court give reasons for its judgment. State v. R.B., Jr., App. 5 Cir.1992, 595 So.2d 702.

Sentencing guidelines in LSA–C.Cr.P. art. 894.1 did not apply to sentencing of juvenile who, in delinquency proceedings, pleaded guilty to aggravated assault, unauthorized use of movable, and resisting arrest. State in Interest of Winstead, App.1980, 385 So.2d 311.

5. Custody—In general

Minor's commitment to state training institute until 21st birthday, following adjudication that minor was delinquent for attempted first-degree murder, was legal. State in Interest of Smith, App. 4 Cir.1992, 597 So.2d 101.

Trial court clearly balanced needs of child with best interests of society in committing 15-year-old minor adjudicated a delinquent because of his participation in burglary of a residence to maximum of one year at training institute or any other institution recommended by the Department of Corrections. State in Interest of Ray, App. 5 Cir.1983, 432 So.2d 31

Juvenile committed to Louisiana Training Institute cannot be guilty of crime of escape, since committed juveniles are not "imprisoned" within meaning of R.S. 14:110. State v. William Sup.1974, 301 So.2d 327.

6. —— Proper departmental custodian, custody

Department of Health and Human Resources may be awarded custody of **delinquent minor**

DELINQUENCY
Title 8
acto clause, constitutional

as 16 years old at time of nvicted of first-degree mur- to death, and who, after nalty provision of LSA-P.S. to be unconstitutional, was prisonment, would not be writ of habeas corpus on se he was a juvenile and penalty or juvenile incar- ice violated ex post facto ates Constitution (U.S.C.A. cl. 1) in that it was more any available at time of a violation of the ex post endant to be sentenced to han one that appeared he o, and was given notice of, . Smith v. Johnson, D.C. 89, affirmed 584 F.2d 758.

elines, application of
dings. trial court is not re- delines of criminal sentenc- after juvenile is adjudicated ould Follow articles of the rocedure to determine an on. and there is no require- reasons for its judgment. pp. 5 Cir.1992, 595 So.2d

lines in LSA-C.Cr.P. art. to sentencing of juvenile proceedings, pleaded guilty t, unauthorized use of mov- u-rest. state in Interest of 385 So.2d 311.

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nt to state training institute following adjudication that it for attempted first-degree State in Interest of Smith. . So.2d 101.
y balanced needs of child of society in committing djudicated a delinquent be- ation in burglary of a resi- of one year at training insti- stitution recommended by orrections. state in Inter- Cir.1983, 432 So.2d 312. d to Louisiana Training In- lty of crime of escape, since are not "imprisoned" with- 14:110. state v. Williams. 327.

artmental custodian, custo-

alth and Human Resources stody of delinquent minor.

state in Interest of R.B., Jr., App. 5 Cir.1989. 538 So.2d 726.

Trial court improperly awarded joint custody of minor to Department of Public Safety and Corrections, Department of Juvenile Services, and the Department of Health and Human Resources/Office of Human Development after minor was committed to the Department of Public Safety and Corrections after admitting to offenses of illegal carrying of weapons and simple escape; joint custody order was in violation of Statute. State in Interest of R.U., App. 5 Cir. 1988, 534 So.2d 492.

Juveniles adjudicated delinquents could be put in custody of Department of Health and Human Resources, despite contention that Department of Public Safety and Corrections was proper custodian, since juvenile court had discretion in placing of juveniles. State in Interest of J.A.. App. 5 Cir.1988, 532 So.2d 943.

7. **Restricted visitation, custody**

Department of Public Safety and Corrections acted within its discretion in placing juvenile, who was adjudicated delinquent based on finding that he had committed sexual battery, in facility where visitation was restricted to one monthly visit by immediate family; Depanment had extensive case record to consider, including numerous psychological/psychiatric evaluations. State in Interest of J.L., Jr.. App. 5 Cir.1991. 592 So.2d 435, writ denied 597 So.2d 1031.

8. Costs of holding juveniles

Department of Public Safety and Corrections was obligated to pay parishes $18.25 for every day that parishes held juveniles adjudicated delinquent or in need of supervision while awaiting transfer to Department. Ouachita Parish Police Jury v. State Through Dept. of Public Safety and Corrections, App. I Cir.1987, 509 So.2d 74, writ denied 514 So.2d 21.

9. Restitution

Juvenile court had statutory authority in delinquency proceeding to order restitution for sexual battery victims' nonpecuniary damages. State v. J.B., App. 3 Cir. 1994, 94-2 13 (La.App. 3 Cir. 10/5/94), 643 So.2d 402.

Restitution award of $10,000 for each of two sexual battery victims in delinquency proceeding was reasonable, though juvenile was unemployed minor who was still in school, where predispositional investigation showed that juvenile and his mother received $4,700 monthly, plus year-end lump-sum payment from escrow account established as result of injury juvenile received when he was approximately two years of age. and that juvenile's mother estimated that by time juvenile reached 80 years of age he would have received approximately $13 million. State v. J.B., App. 3 Cir.1994, 94-213 (La.App. 3 Cir. 10/5/94), 643 So.2d 402.

10. Separate dispositions, necessity of specification of

In delinquency proceedings, trial court was required to specify separate dispositions for each charge it found juvenile committed, rather than single. general disposition and was also required to give juvenile credit for time served. State in Interest of J.G., App. 5 Cir.1994, 641 So.2d 633.

11. Mitigating factors

Alleged failure of sentencing judge to consider mitigating factors in sentencing juvenile was of no moment since juvenile presented no mitigating factors in his behalf. State in Interest of D. McK., App. 5 Cir.1991. 589 So.2d 1139.

12. **Discretion of court**

Much discretion is granted to the court because of the special nature of the juvenile proceeding. but the court must balance the needs of the child with the best interests of society. State in Interest of Ray, App. 5 Cir.1983, 432 So.2d 312.

13. **Review**

Record of delinquency proceeding must contain some factual basis for appellate review in order to implement the right of appeal from a judgment of disposition. State in Interest of George, App.1983, 430 So.2d 289.

Art. 897.1, Disposition-after adjudication of certain felony-grade delinquent acts

A. Notwithstanding any other provision of law to the contrary, after adjudication of a felony-grade delinquent act based upon a violation of R.S. 14:30, first degree murder; R.S. 14:30.1, second degree murder: R.S. 14:42, aggravated rape; R.S. 14:44, aggravated kidnapping; R.S. 14:64, armed robbery; or R.S. 14:113, treason; the court shall commit the child to the custody of the Department of Public Safety and Corrections to be placed within a secure detention facility until the child attains the age of twenty-one years without benefit of parole, probation, suspension of imposition or execution of sentence, modification, or furlough.

B. Notwithstanding any other provision of law to the contrary, after adjudication of a felony-grade delinquent act based upon a violation of R.S. 14:64, armed robbery, the court shall commit the child to the custody of the Department of Public Safety and Corrections to be placed within a secure detention facility for the length of the term imposed by the court at the disposition hearing without benefit of parole, probation, suspension of imposition or execution of sentence, modification, or furlough.

Added by Acts **1993, No. 430, § 2.**

Cross References

Release from commitment, recommendation by Department of Public Safety and Corrections, see R.S. 15906.

Notes of Decisions

Adult penal institution, confinement in 1

1. Adult penal institution, confinement in

District court was without authority to order incarceration of juvenile in adult penal institution after adjudication of delinquency. State v. Hillman, App. 3 Cir.1977, 353 So.2d 1356.

Art. 898. Duration of a disposition based on a felony-grade adjudication

A. No judgment of disposition shall remain in force for a period exceeding the maximum term of imprisonment for the felony forming the basis for the adjudication. The court shall give a child credit for time spent in secure detention\ prior to the imposition of disposition.

B. When modification and parole is not prohibited by Article 897.1, if an order of commitment to custody of the Department of Public Safety and Corrections is subsequently modified and the child is placed on parole, the maximum term of parole shall be the remainder of the sentence originally imposed.

C. These maximums do not apply if:

(1) The child was under thirteen at the time of a commitment to custody of the Department of Public Safety and Corrections, in which case the judgment shall terminate upon the child's reaching age eighteen.

(2) A portion of'an order of commitment was suspended, when permitted by law, in which case the term of parole shall end when the time period so suspended has elapsed.

(3) The child commits a felony after having been committed to the Department of Public Safety and Corrections or while on probation and is tried as an adult and convicted or pleads guilty, in which case the judgment of disposition in the juvenile court shall terminate as of the date of conviction. The child shall earn no diminution of his felony sentence based upon time served under the order of disposition.

(4) The judgment expires by its own terms, is modified when permitted by law, or is vacated.

(5) The child reaches age twenty-one.

Acts 1991, No. 235, § 8, eff. Jan. I, 1992. Amended by Acts 1992, No. 705, § I, eff. July 6, 1992; Acts 1993, No. 430, § 2.

Comments-1 99 1

a. The source of Paragraph A is C.J.P. Article 89(C).

b. The source of Paragraph B is C.J.P. Article 89(D).

c. The source of Subparagraph C(1) is C.J.P. Article 89(E). The source of Subparagraph C(2) is C.J.P. Article 89(A). The source of Subparagraph C(3) is C.J.P. Article 89(G). The source of Subparagraph C(4) is C.J.P. Article WA). The source of Subparagraph C(5) is C.J.P. Article 89(F)(1).

Comment- 1992

This amendment to Paragraph A makes time credits for juvenile offenders consistent with those applicable to criminal offenders. According to C.Cr.P. Articles 900(A)(5) and 880, time served in secure detention must be credited, while time served on probation may be credited when calculating the duration of any sentence imposed.

Historical and Statutory Notes

The 1992 amendment, in par. A, added the second sentence. allowing credit for time spent in secure detention.

The 1993 amendment added "When modification and parole is not prohibited by Article 897.1." at the beginning of par. B: inserted "when permitted by law" in par. C(2); and made a related capitalization change in subpars. C(Z) and C(3).

Cross References

Disposition of children adjudicated delinquent generally. see Ch.C. an. 894 et seq.
Duration of disposition in juvenile cases, see Ch.C. arts. 686. 784. 900.
Juvenile correctional institutions. see R.S. 15:901 et seq.
Mental retardation, involuntary commitment, see R.S. 28:404.
Office of youth development of Department of Public Safety and Corrections, responsibility for children adjudicated delinquent, see R.S. 36:408.

Library References

Infants ⇦221, 222.
WESTLAW Topic No. 21I.
C.J.S. Infants §§ 57, 69 to 85.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.
Louisiana Criminal Justice Cases are available on WESTLAW database: LACJ-CS.

Notes of Decisions

1. Constitutional violations

Fact that 15-year sentence received by defendant, who was prosecuted as an adult for first-degree murder for an offense which was com-

Appendix C

An act relating to capital felonies; amending s. 921.141, F.S.; revising the aggravating circumstances for capital felony sentencing: providing an aggravating circumstance when the capital felony was committed by a person previously convicted of a felony and placed on felony probation: providing an aggravating circumstance for capital felony sentencing when the capital felon has committed or attempted to commit abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; providing an aggravating circumstance when the victim of the capital felony was particularly vulnerable due to advanced age or disability or because the defendant stood in a position of familial or custodial authority over the victim: revising the mitigating circumstances for capital felony sentencing: requiring consideration of any factors in the defendant's background mitigating against imposition of the death penalty; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 921.141, Florida Statutes, is amended to read:

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--

CODING: Words stricken are deletions; words underlined are additions.

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems ta have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to-authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings* If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082,

(4) REVIEW OF JUDGMENT AND SENTENCE.--The judgment of conviction and sentence of death shall be subject to automatic

review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, anyf robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; or aircraft piracy; or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for: pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age,

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(6) MITIGATING CIRCUMSTANCES.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(7) VICTIM IMPACT EVIDENCE.--Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) APPLICABILITY.--This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.

Section 2. This act shall take effect October 1, 1996.

STORAGE NAME: h0207p1.cj
DATE: March 4, 1996

HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIMINAL JUSTICE
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: PCS/HB 207

RELATING TO: Capital Felonies

SPONSOR(S): **Committee** on Criminal Justice, Representative D. Prewitt and others

STATUTE(S) AFFECTED: **s.** 921.141, F.S.

COMPANION BILL(S): SB 1292 (s), Compare: HB 163, HB 385, SB 116, SB 158, and CS/SB 452

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) CRIMINAL JUSTICE
(2) APPROPRIATIONS
(3)
(4)
(5)

I, SUMMARY:

PCS/HB 207 expands the list of aggravating and mitigating circumstances that may be considered by the jury and the court when determining if a capital felon should be sentenced to death or life imprisonment. Specifically, the following aggravating circumstances are added to s. 941.121(5), F.S.:

- The capital felony was committed by a person on felony probation.
- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, the offense of abusing an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement.
- The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

The following *mitigating* circumstance is added to s. 941.121(6), F.S.:

- The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty. [The addition of this mitigating circumstance simply codifies a mitigating factor that may already be considered by the jury and the court in capital felony sentencing proceedings.]

To the extent that expanding the list of aggravating circumstances increases the number of capital felony prosecutions, this bill may have a fiscal impact upon state and local governments. A precise fiscal impact is indeterminate.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Caoital Felonv Sentencing

Capital felonies in Florida include, but are not limited to, first degree murder and throwing or discharging a destructive device that results in the death of another person. A capital felony is punishable by either death or life imprisonment [s. 775.082, F.S.]. In the past, capital felons sentenced to life imprisonment were required to serve a 25-year mandatory minimum period of imprisonment before becoming eligible for parole. Legislation passed in 1995 eliminated parole eligibility for offenders convicted of capital felony offenses committed on or after October 1, 1995. Any capital felon sentenced to life imprisonment for a capital felony* will die in prison [*any capital felony committed on or after October 1, 1995].

Upon a defendant's conviction or adjudication of guilt for a capital felony, the court must conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment [see s. 921.141, F.S.]. In the proceeding, evidence may be presented regarding any matter that the court deems relevant to the nature of the crime and the character of the defendant. Consideration must be given to evidence regarding any aggravating or mitigating circumstances enumerated in subsections (5) and (6) of s. 921.141, F.S.

Aggravating circumstances are limited to those enumerated in s. 921.141(5), F.S., as follows:

- The capital felony was committed by a person under sentence of imprisonment or placed on community control.
- The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- The defendant knowingly created a great risk of death to many persons.
- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, aggravated child abuse, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- The capital felony was committed for pecuniary gain.
- The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function of the enforcement of laws.
- The capital felony was especially heinous, atrocious, or cruel.

- The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
- The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
- The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.
- The victim of the capital felony was a person less than 12 years of age.

Section 921.141(6), F.S., provides mitigating circumstances which include, but are not restricted to, the following:

- The defendant has no significant history of prior criminal activity.
- The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- The victim was a participant in the defendant's conduct or consented to the act.
- The defendant was an accomplice in the capital felony wmmitted by another person and his or her participation was relatively minor.
- The defendant acted under extreme duress or under the substantial domination of another person.
- The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
- The age of the defendant at the time of the crime.

After hearing all the evidence, the jury deliberates and submits an advisory sentence to the court based on whether sufficient aggravating circumstances exist, whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances, and whether, based on these considerations, the defendant should be sentenced to death or life imprisonment. The death penalty may be imposed when there are sufficient aggravating circumstances that are not outweighed by sufficient mitigating circumstances. The Florida Supreme Court has stated that death is presumed to be the proper. sentence when there is at least one aggravating circumstance, unless "overridden by one or more of the mitigating circumstances," [State v. Dixon, 283 So.2d at 9 (Fla. 1973), *cert. denied,* 416 U.S. 943 (1974)]. The court may consider mitigating factors in addition to those enumerated, but the aggravating factors that can be considered are limited to the 11 statutorily enumerated circumstances, [Purdy v. State, 343 So.2d 4 (Fla. 1977); Miller v. State, 373 So.2d 882 (Fla. 1979)]. Notwithstanding the jury's recommendation, the court, after weighing the aggravating and mitigating circumstances, will enter a sentence of death or life imprisonment.

Abuse of an Elderly Person or Disabled Adult

In 1995, the Legislature created chapter 825 to define and provide criminal penalties for abusing or neglecting elderly persons or disabled adults. It is a second degree felony for a person to knowingly, willfully, or by culpable negligence abuse or neglect an elderly person or disabled adult if such abuse or neglect causes great bodily harm, permanent disfigurement, or permanent disability. Although the offense described above contains elements similar to the offenses of "aggravated battery" and "aggravated child abuse," an offense known as "aggravated abuse of an elderly person or disabled adult" does not exist.

B. EFFECT OF PROPOSED CHANGES:

PCS/HB 207 expands the list of aggravating and mitigating circumstances that may be considered by the jury and the court when determining if a capital felon should be sentenced to death or life imprisonment. Specifically, the following *aggravating* circumstances are added to s. 941.121(5), F.S.:

- The capital felony was committed by a person on felony probation.
- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, the offense of abusing an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement.
- The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

The following *mitigating* circumstance is added to s. 941 .121(6), F.S.:

- The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

[Currently, the jury and the court may consider any mitigating factor when sentencing a capital felon – they are not restricted to the mitigating factors enumerated in s. 921.141(6), F.S. The addition of the mitigating circumstance described above simply codifies a mitigating factor that may already be considered by the jury and the court in capital felony sentencing proceedings.]

C. SECTION-BY-SECTION ANALYSIS:

Section 1 amends s. 921.141, F.S., relating to capital felony sentencing, as described above.

Section 2 provides that the act takes effect on October 1, 1996.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None anticipated.

2. Recurring Effects:

Indeterminate, see Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

None anticipated.

4. Total Revenues and Expenditures:

Indeterminate, see Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None anticipated.

2. Recurring Effects

Indeterminate, see Fiscal Comments.

3. Long Run Effects Other Than Normal Growth.

None anticipated.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None anticipated.

2. Direct Private Sector Benefits:

None anticipated.

3. Effects on Competition. Private Enterprise and Employment Markets:

None anticipated.

D. FISCAL COMMENTS:

PCS/HB 207 provides four additional aggravating circumstances that may be considered by the jury and the court when determining if a capital felon should be sentenced to death or life imprisonment. As indicated above, the Florida Supreme Court has stated that death is presumed to be the proper sentence when there is at least one aggravating circumstance, unless "overridden by one or more of the mitigating circumstances." To the extent that expanding the aggravating circumstances increases the number of capital felony prosecutions, this bill may have a fiscal impact upon state and local governments. A precise fiscal impact is indeterminate.

IV. CONSEQUENCFS OF ARTICLE VII SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill may require counties and municipalities to expend funds (see Fiscal Comments for details). However, the bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenue.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties and municipalities.

V. COMMENTS:

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The proposed committee substitute does not refer to the non-existent offense of "aggravated abuse of an elderly person or disabled adult." The bill adds the following aggravating circumstances to s. 941.121(5), F.S.:

- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, the offense of *abusing an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement* [emphasis supplied].

PCS/HB 207 also adds a *mitigating* circumstance to s. 941.121(6), F.S.

VII. SIGNATURES:

COMMITTEE ON CRIMINAL JUSTICE:
Prepared by:

Kristin S. Pingree

Staff Director:

Lynn C. Cobb

STORAGE NAME: h0207s1.cj
DATE: March 11, 1996

HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIMINAL JUSTICE
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: CS/HB 207

RELATING TO: Capital Felonies

SPONSOR(S): Committee on Criminal Justice, Representatives D. Prewitt and others

STATUTE(S) AFFECTED: s. 921.141, F.S.

COMPANION BILL(S): SB 1292 (s), Compare: HB 163, HB 385, SB 116, SB 158, and CS/SB 452

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) CRIMINAL JUSTICE YEAS 22 NAYS 0
(2) APPROPRIATIONS
(3)
(4)
(5)

I. SUMMARY:

CS/HB 207 expands the list of aggravating and mitigating circumstances that may be considered by the jury and the court when determining if a capital felon should be sentenced to death or life imprisonment. Specifically, the following aggravating circumstances are added to s. 941.121(5), F.S.:

- The capital felony was committed by a person on felony probation.
- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, the offense of abusing an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement.
- The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

The following *mitigating* circumstance is added to s. 941.121(6), F.S.:

- The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty. [The addition of this mitigating circumstance simply codifies a mitigating factor that may already be considered by the jury and the court in capital felony sentencing proceedings.).

To the extent that expanding the list of aggravating circumstances increases the number of capital felony prosecutions, this bill may have a fiscal impact upon state and local governments. A precise fiscal impact is indeterminate,

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Capital Felony Sentencing

Capital felonies in Florida include, but are not limited to, first degree murder and throwing or discharging a destructive device that results in the death of another person A capital felony is punishable by either death or life imprisonment [s. 775.082, F.S.]. In the past, capital felons sentenced to life imprisonment were required to serve a 25-year mandatory minimum period of imprisonment before becoming eligible for parole. Legislation passed in 1995 eliminated parole eligibility for offenders convicted of capital felony offenses committed on or after October 1, 1995. Any capital felon sentenced to life imprisonment for a capital felony* will die in prison [*any capital felony committed on or after October 1, 1995].

Upon a defendant's conviction or adjudication of guilt for a capital felony, the court must conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment [see s. 921.141, F.S.]. In the proceeding, evidence may be presented regarding any matter that the court deems relevant to the nature of the crime and the character of the defendant. Consideration must be given to evidence regarding any aggravating or mitigating circumstances enumerated in subsections (5) and (6) of s. 921.141, F.S.

Aggravating circumstances are limited to those enumerated in s. 921.141(5), F.S., as follows:

- The capital felony was committed by a person under sentence of imprisonment or placed on community control.
- The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- The defendant knowingly created a great risk of death to many persons.
- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, aggravated child abuse, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- The capital felony was committed for pecuniary gain.
- The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function of the enforcement of laws.
- The capital felony was especially heinous, atrocious, or cruel.

- The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
- The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
- The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.
- The victim of the capital felony was a person less than 12 years of age.

Section 921.141(6), F.S., provides mitigating circumstances which include, but are not restricted to, the following:

- The defendant has no significant history of prior criminal activity.
- The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- The victim was a participant in the defendant's conduct or consented to the act.
- The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.
- The defendant acted under extreme duress or under the substantial domination of another person.
- The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
- The age of the defendant at the time of the crime.

After hearing all the evidence, the jury deliberates and submits an advisory sentence to the court based on whether sufficient aggravating circumstances exist, whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances, and whether, based on these considerations, the defendant should be sentenced to death or life imprisonment. The death penalty may be imposed when there are sufficient aggravating circumstances that are not outweighed by sufficient mitigating circumstancea The Florida Supreme Court has stated that death is presumed to be the proper sentence when there is at least one aggravating circumstance, unless "overridden by one or more of the mitigating circumstances," [State v. Dixon, 283 So.2d at 9 (Fla. 1973), *cert. denied,* 416 U.S. 943 (1974)]. The court may consider mitigating factors in addition to those enumerated, but the aggravating factors that can be considered are limited to the 11 statutorily enumerated circumstances, [Purdy v. State, 343 So.2d 4 (Fla. 1977); Miller v. State, 373 So.2d 882 (Fla. 1979)]. Notwithstanding the jury's recommendation, the court, after weighing the aggravating and mitigating circumstances, will enter a sentence of death or life imprisonment.

Abuse of an Elderly Person or Disabled Adult

In 1995, the Legislature created chapter 825 to define and provide criminal penalties for abusing or neglecting elderly persons or disabled adults. It is a second degree felony for a person to knowingly, willfully, or by culpable negligence abuse or neglect an elderly person or disabled adult if such abuse or neglect causes great bodily harm, permanent disfigurement, or permanent disability. Although the offense described above contains elements similar to the offenses of "aggravated battery" and "aggravated child abuse," an offense known as "aggravated abuse of an elderly person or disabled adult" does not exist.

B. EFFECT OF PROPOSED CHANGES:

CS/HB 207 expands the list of aggravating and mitigating circumstances that may be considered by the jury and the court when determining if a capital felon should be sentenced to death or life imprisonment. Specifically, the following *aggravating* circumstances are added to s. 941.121(5), F.S.:

- The capital felony was committed by a person on felony probation.
- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, the offense of abusing an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement.
- The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

The following *mitigating* circumstance is added to s. 941.121(6), F.S.:

- The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

[Currently, the jury and the court may consider any mitigating factor when sentencing a capital felon – they are not restricted to the mitigating factors enumerated in s. 921.141(6), F.S. The addition of the mitigating circumstance described above simply codifies a mitigating factor that may already be considered by the jury and the court in capital felony sentencing proceedings.]

C. SECTION-BY-SECTION ANALYSIS:

Section 1 amends s. 921.141, F.S., relating to capital felony sentencing, as described above.

Section 2 provides that the act takes effect on October 1, 1996.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT.

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects

None anticipated.

2. Recurring Effects:

Indeterminate, see Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

None anticipated.

4. Total Revenues and Expenditures:

Indeterminate, see Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recunina Effects:

None anticipated.

2. Recurring Effects:

Indeterminate, see Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

None anticipated.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None anticipated.

2. Direct Private Sector Benefits:

None anticipated.

3. Effects on Competition, Private Enterprise and Emolovment Markets.

None anticipated.

D. FISCAL COMMENTS:

CS/HB 207 provides four additional aggravating circumstances that may be considered by the jury and the court when determining if a capital felon should be sentenced to death or life imprisonment. As indicated above, the Florida Supreme Court has stated that death is presumed to be the proper sentence when there is at least one aggravating circumstance, unless "overridden by one or more of the mitigating circumstances." To the extent that expanding the aggravating circumstances increases the number of capital felony prosecutions, this bill may have a fiscal impact upon state and local governments. A precise fiscal impact is indeterminate.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill may require counties or municipalities to spend funds or to take an action requiring the expenditure of funds (see *Fiscal* Comments). However, the bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities,

V. COMMENTS:

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The committee substitute does not refer to the non-existent offense of "aggravated abuse of an elderly person or disabled adult." The bill adds the following aggravating circumstance to s. 941.121(5), F.S.:

- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, the offense of *abusing an **elderly** person or disabled adult resulting in great bodily **harm,** permanent disability, or permanent disfigurement* [emphasis supplied].

CS/HB 207 also adds a mitigating circumstance to s. 941.121(6), F.S.

VII. SIGNATURES:

COMMITTEE ON CRIMINAL JUSTICE:
Prepared by:

Kristin S. Pingree

Staff Director:

Lynn C. Cobb

STORAGE NAME: h0207s1z.cj
DATE: June 4, 1996

"AS PASSED BY THE LEGISLATURE"
CHAPTER #: 96-302, Laws of Florida

HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIMINAL JUSTICE
FINAL BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: CS/HB 207

RELATING TO: Capital Felonies

SPONSOR(S): Committee on Criminal Justice, Representatives D. Prewitt and others

STATUTE(S) AFFECTED: s. 921.141, F.S.

COMPANION BILL(S): CS/SB 158 (s), SB 1292 (s), Compare: HB 163, CS/HB 385, 1st Eng., and CS/SB 452

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) CRIMINAL JUSTICE YEAS 22 NAYS 0
(2) APPROPRIATIONS (W/D)
(3) SENATE CRIMINAL JUSTICE (W/D)
(4) SENATE JUDICIARY (W/D)
(5) SENATE WAYS AND MEANS (W/D)

I. SUMMARY:

CS/HB 207 expands the list of aggravating and mitigating circumstances that may be considered by the jury and the court when determining if a capital felon should be sentenced to death or life imprisonment. Specifically, the following ***aggravating*** circumstances are added to s. 941.121(5), F.S.:

- The capital felony was committed by a person on felony probation.
- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, the offense of abusing an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement.
- The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

The following *mitigating* circumstance is added to s. 941.121(6), F.S.:

- The existence of any other factors in the defendants background that would mitigate against imposition of the death penalty. [The addition of this mitigating circumstance simply codifies a mitigating factor that may already be considered by the jury and the court in capital felony sentencing proceedings.]

To the extent that expanding the list of aggravating circumstances increases the number of capital felony prosecutions, and litigation expenses associated with those prosecutions, this bill may have a fiscal impact upon state and local governments. A precise fiscal impact is indeterminate.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Capital Felony Sentencing

Capital felonies in Florida include, but are not limited to, first degree murder and throwing or discharging a destructive device that results in the death of another person. A capital felony is punishable by either death or life imprisonment [s. 775.082, F.S.]. In the past, capital felons sentenced to life imprisonment were required to serve a 25-year mandatory minimum period of imprisonment before becoming eligible for parole. Effective May 25, 1994, parole eligibility was eliminated for offenders convicted of first degree murder or the destructive device capital felony. In 1995, the Legislature eliminated parole eligibility for offenders convicted of any other capital felony offense committed on or after October 1, 1995. An offender sentenced to life imprisonment for a capital felony offense will die in prison.

When a defendant is convicted of, or adjudicated guilty for, a capital felony, the court must conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment [see s. 921.141, F.S.]. In the proceeding, evidence may be presented regarding any matter that the court deems relevant to the nature of the crime and the character of the defendant. Consideration must be given to evidence regarding any aggravating or mitigating circumstances enumerated in subsections (5) and (6) of s. 921.141, F.S.

Aggravating circumstances are limited to those enumerated in s. 921.141(5), F.S., as follows:

- The capital felony was committed by a person under sentence of imprisonment or placed on community control.
- The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- The defendant knowingly created a great risk of death to many persons.
- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, aggravated child abuse, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- The capital felony was committed for pecuniary gain.
- The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

- The capital felony was especially heinous, atrocious, or cruet.
- The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification
- The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
- The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.
- The victim of the capital felony was a person less than 12 years of age.

Section 921.141(6), F.S., provides mitigating circumstances which include, but *are* not *restricted* to, the following:

- The defendant has no significant history of prior criminal activity.
- The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- The victim was a participant in the defendant's conduct or consented to the act.
- The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.
- The defendant acted under extreme duress or under the substantial domination of another person.
- The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
- The age of the defendant at the time of the crime.

The death penalty may be imposed when there are sufficient aggravating circumstances that are not outweighed by sufficient mitigating circumstances. The Florida Supreme Court has stated that death is presumed to be the proper sentence when there is at least one aggravating circumstance, unless "overridden by one or more of the mitigating circumstances," [State v. Dixon, 283 So.2d at 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)]. The court may consider mitigating factors in addition to those enumerated, but the aggravating factors that can be considered are limited to the 11 statutorily enumerated circumstances, [Purdy v. State, 343 So.2d 4 (Fla. 1977); Miller v. State, 373 So.2d 882 (Fla. 1979)].

After hearing all the evidence, the jury deliberates and submits an advisory sentence to the court based on whether sufficient aggravating circumstances exist, whether sufficient mitigating circumstances exist that outweigh the aggravating circumstances, and whether, based on these considerations, the defendant should be sentenced to death or life imprisonment. Notwithstanding the jury's recommendation, the court must weigh the

aggravating and mitigating circumstances and enter a sentence of death or life imprisonment. The court may override the jury's recommendation.

Abuse of an Elderly Person or Disabled Adult

In 1995, the Legislature created chapter 825, F.S., to define and provide criminal penalties for abusing or neglecting elderly persons or disabled adults. It is a second degree felony for a person to knowingly, willfully, or by culpable negligence abuse or neglect an elderly person or disabled adult if such abuse or neglect causes great bodily harm, permanent disfigurement, or permanent disability. Although the offense described above contains elements similar to the offenses of "aggravated battery" and "aggravated child abuse," an offense known as "aggravated abuse of an elderly person or disabled adult* does not exist.

B. EFFECT OF PROPOSED CHANGES:

CS/HB 207 expands the list of aggravating and mitigating circumstances that may be considered by the jury and the court when determining if a capital felon should be sentenced to death or life imprisonment. Specifically, the following *aggravating* circumstances are added to s. 941.121(5), F.S.:

- The capital felony was committed by a person on felony probation.
- The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, the offense of abusing an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement.
- The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

The following mitigating circumstance is added to s. 941.121(6), F.S.:

- The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

[Currently, the jury and the court may consider any mitigating factor when sentencing a capital felon – they are not restricted to the mitigating factors enumerated in s. 921.141(6), F.S. The addition of the mitigating circumstance described above simply codifies a mitigating factor that may already be considered by the jury and the court in capital felony sentencing proceedings.]

C. SECTION-BY-SECTION ANALYSIS:

Section 1 amends s. 921.141, F.S., relating to capital felony sentencing, as described above.

Section 2 provides that the act takes effect on October 1, 1996.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATE-

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurrina Effects:

None anticipated.

2. Recurrina Effects:

Indeterminate, see *Fiscal Comments.*

3. Long Run Effects Other Than Normal Growth:

None anticipated.

4. Total Revenues and Expenditures:

Indeterminate, *see Fiscal Comments.*

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None anticipated.

2. Recurring Effects:

Indeterminate, *see Fiscal Comments.*

3. Long Run Effects Other Than Normal Growth

None anticipated.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None anticipated.

2. Direct Private Sector Benefits:

None anticipated.

3. Effects on Competition, Private Enterprise and Employment Markets:

None anticipated.

D. FISCAL COMMENTS:

CS/HB 207 provides four additional aggravating circumstances that may be considered by the jury and the court when determining if a capital felon should be sentenced to death or life imprisonment. As indicated above, the Florida Supreme Court has stated that death is presumed to be the proper sentence when there is at least one aggravating circumstance, unless "overridden by one or more of the mitigating circumstances." The Office of the State Courts Administrator indicates that the bill will result in increased litigation until the parameters and viability of the new aggravating circumstances are established by the courts. To the extent that expanding the list of aggravating circumstances increases the number of capital felony prosecutions, and litigation expenses associated with those prosecutions, this bill may have a fiscal impact upon state and local governments. A precise fiscal impact is indeterminate.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill may require counties or municipalities to spend funds or to take an action requiring the expenditure of funds *(see Fiscal* Comments). However, the bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

The committee substitute was reported favorably by the Committee on Criminal Justice on March 6, 1996, and was referred to the Committee on Appropriations on March 18, 1996. The bill was withdrawn from the Appropriations Committee on April 2, 1996, and placed on the calendar. On April 22, 1996, CS/HB 207 was placed on the special order calendar and read the second time. The bill was read the third time on April 23, 1996, and passed the House [YEAS 116, NAYS 0].

The Senate received CS/HB 207 on April 25, 1996, and referred the bill to the Senate Committees on Criminal Justice, Judiciary, and Ways and Means. On May 3, 1996, the bill was withdrawn from the Senate committees and passed the Senate [YEAS 36, NAYS 0].

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON CRIMINAL JUSTICE:
Prepared by: Staff Director:

Kristin S. Pingree — Lynn C. Cobb

FINAL ANALYSIS PREPARED BY COMMITTEE ON CRIMINAL JUSTICE;
Prepared by: Staff Director:

Kristin S. Pingree — Lynn C. Cobb