IN THE SUPREME COURT FLORIDA

OSVALDO ALMIEDA,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 89,402
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit of Florida, In and For Broward County [Criminal Division].

ORIGINAL

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TABLE OF CONTENTS

AUTHORITIES CITED

CASES

Spencer v. State, 615 So. 2d 688
(Fla. 1993) 72

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURE

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant was the defendant and appellee the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. In this brief the parties will be referred to as they appear before this Court.

The symbol "R" will denote the Record on Appeal.

The symbol "SR" will denote the Supplemental Record on Appeal.

STATEMENT OF THE CASE

On December 16, 1993, Appellant, Osvaldo Almeida, was charged by indictment with premeditated murder R 2197-2198. Jury selection began on December 4, 1995. At the close of the state's case, and at the close of all the evidence, Appellant moved for a judgment of acquittal R 1532,1535. Appellant's motions were denied R 1533,1536. Appellant was found guilty of murder in the first degree R 2400-2401.

The jury's recommendation was 9-3 for the death penalty R 2437. On November 1, 1996, the trial court sentenced Appellant to death by electrocution for the murder conviction R 2474-2482. On November 13, 1996, the trial court filed its sentencing order R 2482-2491. Appendix. A timely notice of appeal was filed R 2497. On January 15, 1997, Appellant's conviction involving the prior violent felony was reversed. Almeida v. State, 687 So. 2d 37 (Fla. 4th DCA 1997), rev. granted, (Fla. 89,821 May 22, 1997).

STATEMENT OF THE FACTS

GUILT PHASE

The relevant facts are as follows. On October 13, 1993, the body of Chequita Counts was found outside the Days Inn at 1700 West Broward Boulevard in Broward County, Florida R 1239. A broken Guiness Stout bottle and a disposable cigarette lighter were found near the body R 1242,1282. The police found a key to room 318 in Counts' shorts R 1243. James Stull was staying in room 318 with Counts R 1282. The bottle and lighter were checked for fingerprints, but no prints of value could be obtained R 1250,1292.

Jeffrey Turk testified that he was the night auditor of the Days Inn and was doing paperwork when he heard what sounded like the backfire of a car R 1298. Turk looked out the window and saw a white sedan R 1299. It looked like there were 2 or 3 people in the car R 1300. One person was in the driver's seat, one person was in the passenger's seat and one person was in the back seat R 1302,1308. The vehicle was stationary for quite a while R 1302. The driver looked at Turk for a few seconds R 1318. The vehicle eventually moved at about 2 miles per hour, and left the lot R 1303. As the vehicle was turning away, Turk saw something out of the corner of his eye R 1303-04. Turk turned and saw a person standing R 1303-04. The person was standing at about a 45 degree angle backwards with legs staggered and one hand was holding a bottle R 1304. In slow motion the hands went over the

person's head and the person went down R 1304. Turk called 911 R 1304. The police arrived thirty seconds later R 1305.

Turk testified that he could not identify Appellant R 1306. Turk was shown a photograph but could not identify anyone R 1313. Turk was looking out the window the full time R 1305. Turk never saw anyone standing at the passenger's or driver's side of the vehicle R 1319. In an earlier statement, Turk had indicated the vehicle looked like a 4-door vehicle like an Impala R 1309. Turk testified that the reference to an Impala was merely meant to be a size reference R 1309.

Dr. Daniel Selove, an associate medical examiner, testified that on October 13, 1993, he performed an autopsy on Chiquita Counts R 1497. There was a gunshot wound to the chest R 1500. It was a close contact wound R 1501. The gun was within an inch of the skin R 1501. The bullet passed on a slightly downward trajectory and struck the heart R 1508. The gun barrel with respect to Counts was sloping slightly downward R 1521. The bullet then struck the spinal cord and passed out through the back R 1508. A person would fall immediately to the ground after receiving such injuries R 1510. Toxicology tests on Counts showed cocaine and alcohol in her blood R 1511. There was .147 grams percent alcohol which is equivalent to 5 or so beers R 1511, and there was .13 milligrams of cocaine which is the typical amount for a person to get high on R 1512. The cause of death was the gunshot wound to the heart R 1514.

The state and defense stipulated that the victim in this case was Chiquita Counts R 1531-32.

Donna Marchese, an expert in forensic serology and a DNA specialist, testified that she was provided with oral, anal and vaginal swabs taken from Counts R 1375. The oral swab tested positive for blood and seminal fluid R 1376. The vaginal and anal swabs tested negative for blood and seminal fluids R 1376. Marchese was provided with blood samples from Counts and Appellant which she compared to the oral swab and which she performed a DNA analysis R 1377. The DNA on the oral swab matched Chequita Counts R 1378. The oral swab did not match Appellant R 1384,1382,1386.

Officer Randy Mink of the city of Sunrise Police Department testified that on November 29, 1993, he came into contact with Appellant at 5:16 p.m. R 1391-92. Mink testified that he read Appellant his Miranda rights off a written form R 1393-1399.

Detective John Abrams of the Ft. Lauderdale Police Department testified that on November 29, 1993, he took a taped statement from Appellant R 1426. The taped statement was played to the jury R 1430-1457. The following facts came out of the taped statement. Appellant had been read his Miranda rights by the Sunrise Police Department R 1431. Appellant knows about the homicide at the Days Inn on West Broward Boulevard on October 14th R 1433. Appellant was hesitant to talk about it initially because he was scared and confused R 1434. Appellant was ashamed of what he did R 1434. Appellant explained that

he got off work one night and drove by a neighborhood off Broward Boulevard R 1437. Appellant saw a prostitute R 1437. She offered him a good time R 1439. Appellant asked for a blow job R 1441. They drove around R 1437. Appellant paid her $20 and she gave him oral sex R 1437. She told Appellant to pull over by a house R 1437. She got out of the car and told Appellant to wait R 1437. She talked to three men for no more than 5 minutes R 1437,1443. She then got back in the car and asked Appellant to drop her off at the hotel R 1443. Once they got to the hotel she demanded more money because she thought she deserved more R 1437,1444. Appellant told her that he did not have any more money R 1437. She started insulting him R 1437,1444. She called Appellant a cracker, a bastard and a couple of other names R 1444. She got out of the car when she realized that he was not going to give her any more money R 1446. Appellant reversed the car so that he could get ready to leave R 1446. He had taken a gun from underneath his seat and placed it in his lap R 1447. He drove the car forward and called to her R 1446. When she came to the driver's side of the car Appellant shot her R 1446,1438. She was shot from a distance of two feet R 1447. Appellant explained that he shot her because she insulted him by calling him all kinds of names R 1449. Appellant was also mad because she was not satisfied with the money he gave her R 1450. Appellant was not thinking when he shot her R 1450. Shooting was the only thing he had in his mind R 1450-51. Appellant was not planning to shoot her, it came to him "all of a sudden" R 1453. Appellant regrets what he did

R 1457. Appellant is still confused and cannot believe he could do something like that R 1457. Appellant knew he always had a drinking problem but he never R 1457. Appellant had already consumed a whole six-pack before he picked her up R 1457.

Detective Abrams testified that he did not take a statement from James Stull who was a roommate of Chequita Counts R 1461. Despite that fact that Stull was investigated as a possible suspect, a sample of his blood was never collected R 1463. Abrams testified that he performed a photo identification lineup that included Appellant to Jeffrey Turk R 1466. Turk did not identify Appellant R 1466. Abrams went back to speak with Turk due to discrepancies between Appellant's statement and what Turk saw R 1466-67.

Detective Richard Engels of the Broward County Sheriff's Office testified that on November 30, 1993, he met with Detective Mink at the city garage in Sunrise and was asked to process a white Ford LTD R 1331. There was a large, black gun bag protruding out from underneath the seat R 1335. Inside the bag was a .44 magnum Smith and Wesson revolver, State's Exhibit 21 R 1335,1339. It was fully loaded R 1336. The gun was processed for prints but there were none R 1339. The windows of the car were not tinted R 1344. Hair and fibers were collected from the car R 1344.

Dennis Grey, a firearms examiner from the Broward County Sheriff's Office, testified that he examined the projectile (State's Exhibit 1) and determined it to be a .44 magnum R 1348,1350. Based on

its rifling characteristics, it is Grey's opinion that the bullet could have been fired from either a Llama revolver or a Smith and Wesson revolver chambered for a .44 magnum R 1352. In Grey's opinion the bullet was fired from State's Exhibit 20 R 1363.

PENALTY PHASE

Detective John Abrams testified that he identified the body of a Ms. Leath on October 7, 1993 R 1734. Leath was a prostitute who had been shot one time R 1734-35. Abrams discussed the case with Appellant R 1738. Appellant confessed to the shooting R 1738. Appellant's confession was taped and played to the jury R 1739-58. In the taped statement Appellant indicated that he was driving by a bad neighborhood and he saw this good looking woman R 1743. She whistled to Appellant and he pulled his car over R 1748. She approached the car and asked Appellant if he was interested in getting some action R 1750. Appellant asked her how much and she said $10 for head R 1750. Appellant said, "Okay" and she got in the car R 1750. She told him to park at the house R 1750. She told him to cut off the engine R 1751. Appellant changed his mind because she had a very dirty physical appearance and stink breath R 1743-44. Appellant asked her to leave the car R 1744. Instead, she called her sister who had a knife R 1744. She said that her sister had a knife so he better give her his wallet R 1758. The prostitute then took the keys out of the ignition and said that if he did not give her the wallet she would walk out with the keys R 1744. Appellant did as he was told R 1744. She took all the money

and threw the wallet back in Appellant's face R 1744. She walked away R 1745. She had called him a son of a bitch R 1756. The prostitute and her sister were laughing about what had happened R 1745. Appellant was very upset R 1745. Appellant started the car and drove by her and shot her R 1755,1745. Appellant fired only one shot R 1756. Appellant then left R 1745. Appellant did not remember where this shooting occurred R 1745.

Abrams testified that Appellant was cooperative R 1763, and that without Appellant's confession this would have been a difficult case to solve R 1767.

Dr. Thomas Macaluso, an expert in the field of forensic psychiatry, testified that he was appointed to evaluate Appellant R 1772,-1773,1777. Dr. Macaluso gathered information as to Appellant's background and conducted a clinical interview with Appellant R 1778. Appellant was born in Massachusetts but moved to Brazil after his biological parents had separated R 1778. Appellant was the only child in the family taken to Brazil R 1846. A child being taken away from his mother is traumatizing R 1847. Appellant lived in Brazil from approximately the ages of 5 to 12 R 1783. There were allegations that Appellant was the victim of child abuse in Brazil R 1778. Formal charges were filed with regard to the abuse R 1778. Appellant moved back to the United States with his biological mother R 1778. Once again there was violence and family conflicts in the home R 1778.

Appellant was the victim of verbal abuse at home and ridicule at school R 1779. At one point Appellant suffered from self-inflicted stab wounds to one of the lower extremities R 1779. When Appellant became married there were marital problems which stemmed from his perception that his wife had been unfaithful to him R 1779. Appellant had been exposed to violence against and by women R 1779. Appellant had been raised where there was hiding of secrets of infidelity in the family R 1779. This carried over to his marriage where Appellant became obsessed with his wife and thought she was unfaithful R 1779. Appellant became depressed, drank heavily, and contemplated suicide R 1779. Appellant then became a workaholic and became more depressed and very lonely R 1780. Appellant sought prostitutes after work R 1780.

Dr. Macaluso concluded that Appellant was suffering from clinical depression R 1781. Dr. Macaluso came to the conclusion based on experiences in evaluating other depressed individuals R 1781. Appellant had symptoms of clinical depression such as a harsh upbringing, victimization as a child, low self-esteem in the formative years R 1781. Appellant also had other indicators supporting the diagnosis such as sleep disturbance, suicidal ideation, and consumption of alcohol R 1782.

Dr. Macaluso interviewed Appellant a second time R 1782. At the age of 6 or 7 there was a sexual exposure to Appellant's cleaning lady and Appellant may have been molested by the cleaning lady R 1783. Appellant's mother and stepfather paid for a prostitute for Appellant

as a birthday present when he was 12 years old R 1783. This event produced a lot of sexual anxiety and Appellant was unable to perform sexually R 1783. When Appellant lived in Brazil there were two episodes where he was sexually molested by a teenager R 1783. It may have involved a step sibling and anal intercourse may have been involved R 1783-84. At the age of 14 there was mutual masturbation with his stepfather in this country R 1784. In Brazil Appellant was not well nourished R 1789. Food was withheld from him in favor of the other children R 1789. Appellant was ridiculed for being skinny R 1789. In the United States Appellant was ridiculed for his thick foreign accent R 1789. This ridicule contributed to Appellant's low self-esteem R 1789.

Dr. Macaluso concluded that Appellant suffers from Dysthymic disorder -- a chronic depressive condition R 1790. This is based on the symptoms of sleep depression, low self-esteem, suicidal ideations, and alcohol abuse R 1790. There are also signs that Appellant suffered from major depression R 1790. Appellant used the words "traitorous" and "deceitful" in describing the victims R 1791. Appellant came to this conclusion due to the physical and sexual abuse by women R 1791. He was brought up believing women were deceitful R 1791. His mother carried on extramarital affairs which she tried to hide, but which his father discovered R 1791. In Brazil he was raised by his stepmother and the same sort of things occurred R 1792. When Appellant was at a formative age, prostitution was sanctioned by very important people in

his upbringing R 1792. This sowed the seeds for how Appellant views women R 1792. The sexual abuse created the link between sex and violence in Appellant's mind R 1793. When in his teens Appellant suffered from a self-inflicted stab wound R 1794. It was a form of self-punishment indicating an underlying depressive illness R 1794.

Dr. Macaluso concluded Appellant was under the influence of an extreme mental or emotional disturbance at the time of the offense R 1795-96. With regard to religion, unlike other inmates, Appellant saw himself as sinful rather than reformed R 1800. Appellant's depression is chronic in nature R 1801. However, it is treatable with antidepressant medication R 1801. The structured environment of jail helps keep someone with Appellant's condition together a little better R 1808. Alcohol would make Appellant's condition worse R 1803. The seeds of Appellant's Dysthymic Disorder go back 15 years R 1807. Any child put into Appellant's upbringing would have high potential for the depressive illness that Appellant suffers R 1805.

Dr Abbey Strauss, an expert in the field of forensic psychiatry and psychopharmacology, reviewed the materials in this case and met with Appellant three times for psychiatric interviews R 1858-60. There was a significant history of alcohol abuse and a history of physical, sexual and emotional abuse R 1863. Appellant was very lacking in relationships and comforts R 1863. He suffered from depression for many years R 1863. Appellant suffered from Dysthymia R 1864. He found a great deal of relief in religion R 1865. To understand how Appellant

got to where he is one must understand where he comes from R 1865. When he was 12 his mother brought a prostitute to him R 1866. He was physically beaten and sexually abused by his father R 1866. Appellant's father had affairs with two women who were sisters and who became pregnant R 1866. The children then came to live with Appellant and his family R 1866. Appellant's father beat him with a broomstick R 1866. There were times when Appellant was not fed and had to sleep outside R 1866. Appellant's father did not provide emotion R 1867.

At the age of 17 Appellant married a 14 year old girl -- Francis R 1869. She was not loyal to him sexually R 1870. Appellant's life was once again thrown into chaos R 1870. As a child he was skinny and other children would call him Magriello R 1870. Other children would beat him up and ridicule him because he was skinny R 1870. Appellant never had anyone to show him some good and how to deal with things properly R 1870. This turned into tremendous anger and when Appellant was with the prostitute there was a mixture of confusion and sexual relief when Appellant was doing something he believed to be morally decrepit R 1871. Appellant was a time bomb waiting to explode R 1871. There was no sense of right and wrong from instances of Appellant's family endorsing prostitution R 1872. Appellant was under the influence of an extreme mental or emotional disturbance at the time of the offense R 1872-73. The psychological baggage that Appellant carried with him plus the alcohol was like lighting a match to gasoline R 1873. Alcohol gave Appellant the courage to do things he ordinarily

would not have done otherwise R 1873. Appellant did not have the psychological makeup to overcome alcohol R 1874. Appellant's drinking a six-pack before going to the prostitute is consistent with his character R 1874. In Dr. Strauss' opinion, the alcohol impacted Appellant's capacity to appreciate the criminality of his conduct and his ability to conform to the requirements of the law R 1875. Alcohol reduced Appellant's ability to think about the ramifications of his behavior R 1875. After the alcohol wore off he could not believe what he had done R 1876. This could explain why Appellant cooperated and confessed R 1876.

Dr. Strauss testified that Appellant's interest in religion was real R 1877. While in jail Appellant was forced to examine himself R 1877. It was Dr. Strauss' opinion that Appellant told him the truth R 1882. Appellant had periods of marked impairment of ability to function in a reasonable and appropriate manner R 1897. At the time of the offense, for a very brief period, Appellant was not in control of his facilities and could not control his behaviors R 1899. Appellant suffered from the mental illness or defect of Dysthymia R 1900. Appellant did not appreciate the consequences of his actions R 1904. Appellant was insane at the time of the offense R 1899.

Dr Lee Bukstel, an expert in the fields of clinical psychology and neuropsychology, testified that he did a clinical interview and psychological and neuropsychological test of Appellant R 1955. There were 10 to 15 hours of testing R 1935. Dr. Bukstel spent between 55

and 60 hours on the case and met with Appellant approximately ten times R 1938,1972. Bukstel also reviewed the police records, medical records, school records, family background and Appellant's statements to police R 1937. Appellant suffers from an inability of brain function R 1940. Appellant has neuropsychological deficits related to a disorder in mental development R 1940. Certain parts of Appellant's brain did not develop normally R 1940. This could be from an early traumatic brain injury R 1940. Based on medical records, Appellant did have a minor head injury when he was young R 1940. There was also the possibility of infections or toxic exposures R 1941. Some performances could be influenced by environmental considerations R 1941.

Dr. Bukstel testified that cultural background must also be considered R 1941. Appellant had learning problems in school R 1942. Alcohol abuse may have played a role in boosting some neuro deficits, but this was probably a weaker factor R 1942. Appellant suffered from a mixed personality disorder with prominent paranoid features R 1943. Appellant had problems in reasoning and problem solving R 1944. There were no indications of Appellant faking during the testing R 1946. Appellant's religious commitment is sincere R 1951. Appellant was under the influence of an extreme mental or emotional disturbance at the time of the offense R 1955. Appellant has a personality disorder R 1958. At the time of the offense, Appellant may have been experiencing a more severe depression R 1958. Appellant was separated from his wife and child and was depressed, anxious and agitated that his life

was a mess R 1959. Appellant felt that he had nothing to look forward to and his life had no meaning R 1959. The stress of the family separation was elevated by his feelings of being unloved and his failure to bond with people R 1960. His wife was the first person he ever bonded with and she no longer wanted him R 1966. Appellant not only lost the person he bonded with but in returning to his family he was going back into life circumstances that as a child were chaotic, disruptive and dysfunctional R 1962. The breakup of a family has an impact on a child R 1964. Being given a prostitute at the age of 12 brings a very distorted and perverse message for a child R 1966. Appellant's family was sexually maladjusted R 1966. The allegations of abuse were so strong that they came to the attention of authorities R 1963. Appellant's religious beliefs are genuine R 1973. Appellant gave indications of remorse R 1974.

Dr. Bukstel testified that remedial things can be done to treat Appellant's neuropsychological inefficiencies R 1974. Dr. Bukstel believes that psychotherapy will help R 1976. Psychological or psychiatric help was sought for Appellant when he was very young R 1976. Someone placed in Appellant's circumstances would not have a good chance of growing up normal R 1977. Appellant's strong religious beliefs may be keeping Appellant's emotional stress from getting out of hand R 1993-94.

Deputy Lloyd Bingham of the Broward County Sheriff's Office testified that he works at the main jail and comes into contact with

Appellant because he is housed where Bingham works R 1922-23. Appellant has always been polite and is never rude R 1923. Appellant has received no disciplinary reports R 1923. Appellant does not get upset if things do not go his way R 1924. This is very uncommon among inmates R 1924.

Sergeant Isaiah Rhodes is the 7th floor supervisor and knows Appellant as a 7th floor inmate R 1916. Appellant is not known as a trouble maker or a problem individual R 1918. Appellant's name is on religious attendance lists R 1918. Appellant's conduct card is exemplary R 1920. The conduct card has nothing of a negative manner which is a rarity among inmates R 1921.

Deputy Rosilyn Ward comes into contact with inmates if they are a problem R 1925. Appellant has had no disciplinary actions R 1927. Fifty percent of the inmates have had a disciplinary action R 1927.

Sergeant David Owens works at the main jail and knows Appellant as an inmate R 1911-13. Owens does not know Appellant for violation of rules or for disciplinary reports R 1915.

Deputy Marshall Peterson works at the main jail and testified that Appellant's conduct has been very quiet R 1997. Appellant is extremely polite and reads the Bible R 1998. Appellant is courteous R 1993. Peterson has never had to issue Appellant a disciplinary report R 1993.

Sabrina Gamboa testified that she is Appellant's mother R 2004. She met Appellant's father, Osvaldo Almeida, in Brazil when she was 14

years old R 2004. She married him when she was 16 years old R 2004. She married him because her family was poor and the marriage would be good for the family R 2005. However, the marriage was not good for her family R 2006. Her husband beat her a lot and she was used as a maid to his mother R 2006. Appellant was born in 1973 as the youngest of five children R 2008. Appellant's father beat the children a lot R 2008. Appellant's father went to Brazil and took Appellant with him R 2009. Appellant was 5 years old R 2010. The other children remained in America R 2009,2019. All but one were grown up R 2009. After one year had passed, Gamboa told her husband that she wanted Appellant back R 2009. However, Appellant's father said he was not going to give Appellant back as punishment for Gamboa leaving him R 2009. Gamboa was not even allowed to talk to Appellant R 2010. After 9 years Gamboa went to Brazil and said that she wanted to see Appellant R 2010. Appellant's father would only allow this if she went to bed with him R 2010. Appellant was very skinny and sad R 2010. Appellant had scars all over his body R 2011. Appellant wanted to stay with Gamboa R 2010. Gamboa decided to hire an attorney to get Appellant R 2011. The law gave Appellant to Gamboa R 2011.

Gamboa testified that when Appellant was 12 years old she and her husband Marco decided that it was good to learn about life and about women R 2012. Appellant's uncle in Brazil had sex with Appellant while he was in Brazil R 2013. Appellant's stepmother beat him while her sister held him R 2016. Appellant was beat on the head R 2016.

Appellant complained of a lot of pain in his head R 2016. As punishment Appellant was only given leftovers from the other children's meal R 2016. Appellant was also locked in a closet R 2016.

Gamboa testified that Appellant lived with her until he was 17 years old and his wife was 15 years old R 2018. Appellant got his GED while in jail R 2021. Appellant stabbed himself with a knife when he was 13 years old R 2022.

SPENCER HEARING

Eda Muller testified that she is with the Brazilian Consulate in Miami and represents Brazil R 2118. On behalf of the country of Brazil because of the pain to Appellant's family and because of Appellant's 4 year old son who has been visiting Appellant, clemency is requested R 2119. This is the Brazilian government's position R 2120. The Brazilian government is aware of the facts of the case R 2120.

Sara Almeida Tejo is Appellant's sister and testified that Appellant was ill when the offense occurred but the family did not know he was ill R 2124. Appellant needed help but the family failed to help R 2124. Tejo believes it is not right to kill someone who is ill R 2124.

Appellant's wife, Francis Almeida, testified that Appellant is not well and that it will be difficult to tell his 4 year old son that his father died in the electric chair R 2125. Appellant has changed R 2125. Appellant turned himself in while others would have kept the killing a secret R 2126.

Appellant's stepfather, Marco Gamboa, testified that he has known Appellant since Appellant was 3 years old R 2127. Appellant was also a victim R 2128. He was born into a very confused family without love R 2128. Appellant did not act like a normal child for his age R 2128. Appellant did not act like a 13 year old when he returned from Brazil R 2128. Appellant lost his greatest love -- his wife R 2129. When his wife rejected him Appellant would have no more chance to see his baby son R 2129.

SUMMARY OF THE ARGUMENT

1. Appellant made an equivocal request for counsel during the Miranda warning process. Thus, this case does not involve the scenario covered by Davis v. United States, 512 U.S. 452 (1994) where the equivocal request was made during the substantive questioning (and not during the Miranda warning process) and did not have to be clarified. Appellant's statement should have been suppressed where the equivocal request was not clarified by police. Also, any new rule cannot be applied retrospectively.

2. Appellant was not given Miranda warnings prior to the interrogation regarding Chiquita Counts. Warnings given in a separate investigation by a separate law enforcement agency did not carry over. This is especially true where police had vitiated and diluted the Miranda warnings in the other investigation. It was error not to suppress Appellant's statement.

3. It was reversible error for the prosecutor to refer to factual situations that were not involved in this case. The error was prejudicial where the scenarios could mislead the jury and informed the jury of the exercise of prosecutorial discretion.

4. The trial court erred in ruling that the prosecutor had an absolute right to introduce evidence of a collateral murder if Appellant challenged the voluntariness of the confession due to responses during the giving of Miranda warnings. The rule of completeness does not make the evidence admissible. The evidence would also be inadmissible because its unfair prejudice would substantially outweigh its probative value.

5. The death penalty is not proportionally warranted in this case.

6. The trial court failed to exercise discretion in evaluating mitigating circumstances.

7. The sentence of death must be vacated where the offense constituting the lone aggravating circumstance has been reversed.

8. The trial court applied the law that the jury's death recommendation should be given great weight and should not be overruled "unless no reasonable basis exists for the recommendation." The trial court erred in giving undue weight to the jury recommendation.

9. The trial court failed to make the required findings that "sufficient aggravating circumstances exist" to justify the death

sentence. Thus, pursuant to § 921.141(3) the sentence of death must be vacated and a life sentence must be imposed.

10. The trial judge stated in his sentencing order that death was the presumed sentence when one or more aggravating circumstances are found unless outweighed by one or more mitigating circumstances. This "death presumption" violates the Eighth Amendment.

11. Appellant requested supplemental voir dire to determine whether an unyielding bias existed due to the evidence of the prior murder conviction. The trial court erred by denying the motion for supplemental voir dire.

12 After Appellant's offense date, the legislature changed the potential penalties for first degree murder to death and life imprisonment without parole. The trial court committed fundamental error in failing to instruct the jury on the life without parole option. This Court should follow Allen v. State, 821 P.2d 371 (Okl.Cr. 1991), and remand for resentencing.

13. The trial court erred in allowing the prosecutor to go beyond the judgment of the prior violent felony.

14. Evidence regarding the prior violent felony became a feature of the case.

15. Appellant's rights of due process and confrontation were violated by the state's introduction of hearsay evidence.

16. The trial court erred in allowing the prosecutor to elicit irrelevant evidence regarding Appellant's sanity.

17. Electrocution is cruel and unusual.

GUILT PHASE

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS.

Prior to trial, the defense filed a motion to suppress Appellant's statement given to Ft. Lauderdale Police Detective John Abrams R 2321-26. A hearing was held on the motion. Initially, Appellant was questioned by Randy Mink of the Sunrise Police Department. At police headquarters, Appellant was given his Miranda rights R 127-128. Mink decided to tape Appellant's statement. Prior to the taped statement, Appellant was given a second Miranda warning. It was during the Miranda warning that Appellant stated, "Well, what good is an attorney going to do?" SR 5, R 156. The police admitted that they did not attempt to clarify whether Appellant sought to assert his right to counsel; in fact, Mink admitted a policy of only reading people their rights one time "no matter what they say afterwards" R 159. Mink admitted that he knew that an attorney might interfere with the questioning R 157. Mink knew that there was a lot of good that could have been done for Appellant by an attorney R 171. The police discussed among themselves the import of Appellant's response and what it meant R 181. The police response to Appellant's statement was, "Okay, well you already spoke to me and you want to speak to me again

on tape?" and "we are just going to talk like we did before that is all" SR 6,156.

Appellant moved to suppress Appellant's statement on the ground that the police needed to clarify Appellant's equivocal request to ensure that Appellant had validly waived his right to counsel prior to substantive questioning R 326-344,355-364. The trial court denied Appellant's motion to suppress R 1185,2354-58. Appellant renewed the motion to suppress at trial prior to the introduction of Appellant's taped statement R 1395,1428. The trial court again denied the motion R 1395,1429. It was error to deny the motion.

A. A SUSPECT'S EQUIVOCAL OR AMBIGUOUS STATEMENT DURING THE PROCESS OF GIVING OR WAIVING MIRANDA RIGHTS MUST BE CLARIFIED AS OPPOSED TO THE SITUATION IN DAVIS V. UNITED STATES, 512 U.S. 452 (1994) AND STATE V. OWEN, 22 FLA. L. WEEKLY S246 (FLA. MAY 8, 1997) WHERE AN EQUIVOCAL STATEMENT MADE DURING SUBSTANTIVE QUESTIONING NEED NOT BE CLARIFIED.

The caselaw is now clear that under the Florida and Federal Constitutions that if a suspect, after validly waiving his Miranda rights, makes what is considered an equivocal or ambiguous request for counsel during substantive questioning the officer does not have to cease questioning to clarify the equivocal request. Davis v. United States, 512 U.S. 452 (1994); State v. Owen, 22 Fla. L. Weekly S246 (Fla. May 8, 1997). However, the issue as to what happens when a suspect makes an equivocal or ambiguous request during the process of giving or waiving Miranda rights has not been directly addressed in Davis and Owen. It is this later factual scenario that is present in

the instant case.[1] The law appears to require that once a suspect makes an equivocal request during the Miranda warnings the officer must cease any further inquiry and clarify the equivocal request. Utah v. Leyva, 906 P.2d 894 (Utah App. 1995), rev. granted 919 P.2d 909 (Utah 1996).

In Davis the United States Supreme Court wrote that an officer must explain the Miranda rights to a suspect prior to the questioning on substantive matters. As this Court made clear in Owen, Davis holds that police do not have to clarify a suspect's equivocal or ambiguous request where the suspect has already knowingly and voluntarily waived his Miranda rights and thereafter makes an equivocal or ambiguous request:

> Subsequent to our decision in Owen but before Owen's retrial, the United Stats Supreme Court announced in Davis v. United States, 512 U.S. 452 (1994), that neither Miranda nor its progeny require police officers to stop interrogation when a suspect in custody who has made a knowing and voluntary waiver of his or her Miranda rights, thereafter makes an equivocal or ambiguous request for counsel. Thus, under Davis police are under no obligation to clarify a suspect's equivocal or ambiguous request and may continue the interrogation until the suspect makes a clear assertion of the right to counsel.

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[1] In the present case Appellant's equivocal request occurred after the detective asked Appellant if he understood his Miranda rights and whether he would waive his rights to counsel (i.e. would Appellant "speak to me now without an attorney present?"). Upon reviewing Appellant's conviction involving the prior violent felony, the Fourth District Court of Appeal held that Appellant responded with an equivocal request for counsel. Almeida v. State, 687 So. 2d 37 (Fla. 4th DCA 1997), rev. granted (Fla. 89,821, May 22, 1997).

22 Fla. L. Weekly S246 (emphasis added). Likewise, this Court held that an equivocal or ambiguous request made after, and not during, the process of giving and waiving Miranda rights need not be clarified:

> Thus, we hold that police in Florida need not ask clarifying questions if a defendant who has received proper Miranda warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her Miranda rights.

22 Fla. L. Weekly S247 (emphasis added). By conditioning the holding that police do not have to clarify an equivocal request during substantive questioning unless it is after the process of giving and waiving Miranda rights, it has been made clear that police must clarify any equivocal statements that are made during the process of waiving Miranda rights. After all, how can there be a knowing and voluntary waiver of Miranda rights unless equivocal statements by a suspect are clarified? Certainly, an equivocal request for counsel cannot be considered a knowing and voluntary waiver of the right to counsel. In fact, Davis is based on the premise that the risk of overlooking a suspect's equivocal request is acceptable "in light of the protections already afforded these suspects by the Miranda warnings." Obviously, a suspect who makes an equivocal or ambiguous statement during the process of waiving Miranda rights cannot be said to have been afforded the complete protections of Miranda warnings.

One court has delineated between situations where a suspect's equivocal statement comes during the giving of Miranda warnings and where an equivocal statement comes during substantive questioning by

police. See Utah v. Leyva, 906 P.2d 894 (Utah App. 1995), rev. granted 919 P.2d 909 (Utah. 1996). In Utah v. Leyva, the court first noted that during the process of giving and waiving Miranda rights the suspect cannot waive his Miranda rights until all equivocal statements made by the suspect have been clarified. 906 P.2d at 898. The court proceeded to analyze Davis v. United States 512 U.S. 452 (1994) and noted that Davis involved an equivocal statement made during substantive questioning and not during the process of giving and waiving Miranda rights. 906 P.2d at 899.

The court held that the Davis holding applied only to equivocal statements made during substantive questioning and not to situations where equivocal statements were made during the process of giving and waiving Miranda rights. 906 P.2d at 899-901.[2] The Utah court also made it clear that policy considerations dictated that there was a difference between an equivocal statement during the giving and waiving of Miranda rights, to establish certainty as to a valid waiver, and an equivocal statement later during substantive questioning to reinvoke rights after a valid waiver:

> Finally, policy considerations persuade us that the holding in Davis applies only in scenario II post-waiver contexts. Under this reading of Davis, the state still bears the initial burden of proving that the defendant voluntarily, knowingly and clearly waived his Miranda rights before police can question the defendant. An equivocal invocation

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[2] Throughout the decision in Utah v. Leyva the situation during the process of giving and waiving Miranda rights is described as "Scenario I" and the situation after a valid waiver of Miranda rights and during substantive questioning is referred to as "Scenario II."

> of the right, or an ambiguous waiver must be clarified. However, after the state has clearly established a valid waiver, the burden shifts to the defendant to clearly reinvoke his Miranda rights. This distinction can be justified on the grounds that the defendant had a previous opportunity to freely exercise his constitutional rights which he voluntarily, knowingly and clearly waived. The Court's reasoning in Davis, however, does not extend to equivocal invocation of Miranda rights prior to a valid waiver. This would ignore the state's burden of establishing a valid voluntary, knowing and clear waiver. Accordingly, we conclude that Utah law, in a scenario I case, is unchanged by the holding in Davis.

906 P.2d at 901 (footnoted omitted).

In addition, logic and common sense dictate that equivocal statements during the process of giving and waiving Miranda rights are far different than equivocal statements made during substantive questioning. During the substantive questioning the officer's concentration is on a suspect's responses to questions and developing a line of questioning. The officer is beyond the stage of focusing on a suspect's understanding and invocation of his right. Logically, an ambiguous or equivocal statement by a suspect at this stage will not be recognized as needing clarification where the officer's focus is on the suspect's substantive admissions. Thus, it makes sense to relieve the officer of the burden of recognizing something he is not concentrating on. However, during the process of giving and waiving Miranda rights the officer is not dealing with substantive questions and answers. His sole concentration should be narrowly focused on the suspect's understanding and possible invocation of his Miranda rights. Thus, where a suspect makes an equivocal or ambiguous statement during

the process of giving and waiving Miranda rights, the officer needs to clarify the situation to ensure there is a knowing and voluntary waiver of those rights or whether there has been an invocation of those rights. It would make no sense to relieve the officer of his sole duty during the Miranda process -- informing the suspect of his rights and listening to his responses to determine if he may wish to exercise any of his rights (whether that wish is expressed equivocally or unequivocally).

The police should know that if a suspect makes an equivocal or ambiguous statement during the giving and waiving of Miranda rights, the officer must clarify the statement in order to determine if the suspect has knowingly and voluntarily waived his rights. For example, in this case Detective John Abrams testified that if he had heard Appellant's equivocal request he would have clarified the statement R 314-15. Unfortunately, in this case it was Detective Mink who had the opportunity to clarify during the process of giving and waiving Miranda rights. Mink made it clear that it was his policy never to clarify equivocal statements during the Miranda process R 154. Mink testified that unless the individual directly tells him that he wants an attorney, Mink will go right into the questioning R 154,170. Mink testified that he knew that an attorney might interfere with the questioning R 157. Mink made absolutely no effort to clarify Appellant's statement. Instead, Mink merely attempted to bully

Appellant into making the statement to the police.[3] This case illustrates the need to clarify an equivocal or ambiguous request during the process of giving and waiving Miranda rights. This is particularly true when one considers that Osvaldo Almeida was raised in Brazil during his formative years (ages 5-12) and after he immigrated to the United States he continued to be raised by people who were from Brazil. Dr. Strauss even noted that a lot of interrogation suggested that Almeida did not fully understand his rights R 378,386. Thus, due to the differences in culture and language, it would be even more important to clarify any equivocal statements made by a person such as Osvaldo Almeida to ensure that he was knowingly and voluntarily waiving his Miranda rights prior to beginning substantive questioning.

Assuming arguendo there is no distinction between an equivocal request made during Miranda rights as opposed to the time of substantive questioning, the new rule should still not be applied retroactively to the present case due to prophylactic nature of Miranda warnings. The "clear rule of law" governing the police at the time of questioning by the officer in this case was Owen v. State, 560 So. 2d 207, 211 (Fla. 1990) which required the police to clarify any equivocal request prior to questioning. Owen was the product of the prophylactic

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[3] Instead of attempting to clarify the equivocal statement, Mink informed Appellant that he had already spoken and that he wanted him to speak again R 156; SR 6. This is coercive in itself and is not any type of clarification. The police further tried to dilute the impact of Miranda warnings by deemphasizing his right to remain silent by emphasizing to Appellant that "this is an opportunity for you to tell your side of the story" R 1436.

policy of Miranda. In State v. LeCroy, 461 So. 2d 88 (Fla. 1984) this Court held that the Miranda prophylactic policies (exampled by Edwards v. Arizona, 451 U.S. 477 (1981)) were to be applied prospectively only and not to cases on direct appeal. This Court's decision was based on Miranda being prophylactic in nature and applying it retroactively or retrospectively would not serve the purpose of deterring police misconduct:

> First, neither the trial court nor the district court had the benefit of Solem v. Stumes, ___ U.S. ___, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984). Therein, the Court reasoned that retrospective application of the Edwards per se rule to collateral relief proceedings would not serve the purpose of deterring police misconduct as contemplated by the exclusionary rule. Accordingly, the Court declined to hold that Edwards was retroactive. The Court was careful to say that it was not addressing the issue of retroactive application of Edwards to cases on direct appeal, such as we have here. Nevertheless, applying the rational of Solem, we do not see how the purpose of the exclusionary rule, deterring police mis-conduct, will be solved by retroactively applying Edwards to police conduct which occurred prior to its issuance.

461 So. 2d at 92 (emphasis added). In other words, applying the new law retrospectively is counter to deterring police misconduct. The same reasoning applies to a retrospective or retroactive application of the new Owens decision to this case. The police cannot ignore clear existing law governing their conduct with the hope that a future change of law will be retrospectively applied to their situation. If the police can rely on new law being applied retrospectively, there will be little or no deterrent effect to the existing caselaw which is supposed to be governing their conduct.

As explained by the Court in Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) police must obey the law while enforcing the law:

> The abhorrence of society to the use of involuntary confessions does not turn alone on the inherent untrustwrothiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals them-selves.

79 S.Ct. at 1205-06. The new rule announced in State v. Owen, 22 Fla. L. Weekly S246 (Fla. May 8, 1997) should not be applied retrospectively over the law which governed police conduct at the time of the interrogation -- Owen v. State, 560 So. 2d 207 (Fla. 1990).[4]

B. APPELLANT'S STATEMENT "WELL, WHAT GOOD IS AN ATTORNEY GOING TO DO?" CONSTITUTES AN EQUIVOCAL REQUEST FOR COUNSEL WHICH NEEDED TO BE CLARIFIED PRIOR TO SUBSTANTIVE QUESTIONING.

As noted by the Fourth District Court of Appeal, Mr. Almeida's statement constituted an equivocal request for counsel:

> Appellant contends that the trial court erred in denying his motion to suppress his taped confession, as his comment, "Well, what good is an attorney going to do?" was an equivocal invocation of his Miranda rights to counsel.
>
> * * *
>
> We agree that under the relevant case law, the appellant made an equivocal invocation of his right to counsel. In Towne v. Dugger, 899 F.2d 1104 (11th Cir.), cert. denied,

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[4] It should be noted that at the time of Mr. Owen's interrogation the police were not governed by caselaw which clearly required clarification of an equivocal request. Thus, applying the new Owen decision to Mr. Owen is not in conflict with not applying the new Owen decision to the present case.

> 498 U.S. 991, 111 S.Ct. 536, 112 L.Ed.2d 546 (1990), the court held that a suspect's question, "Officer, what do you think about whether I should get a lawyer?" was an equivocal request for an attorney which precluded further questioning before the suspect's concerns were clarified. In United States v. Mendoza-Cecelia, 963 F.2d 1467 (11th Cir.), cert. denied, 506 U.S. 964, 113 S.Ct. 436, 121 L.Ed.2d 356 (1992), the court, quoting Towne, defined an equivocal request as "'an ambiguous statement, either in the form of an assertion or a question, communicating the possible desire to exercise [the] right to have an attorney present during questioning.'" Id. at 1472 (quoting Towne, 899 F.2d at 1109). In Mendoza-Cecelia, the accused stated, "I don't know if I need a lawyer -- maybe I should have one, but I don't know if it would do me any good at this point." This too was considered an equivocal request for an attorney.

687 So. 2d at 37-38. It should be noted that instead of clarifying the equivocal response with Appellant the police answered in a manner to tell Appellant that he did not need an attorney -- "We are just going to talk like we did before that is all" and "You already spoke to me and you want to speak to me on tape" R 156, SR 6. Detectives Mink and Allard also discussed among themselves the import of Appellant's equivocal response and what it meant R 181. They clarified the statement to conclude amongst themselves that the response was merely a comment. However, instead of clarifying the response amongst themselves -- the police should have clarified the equivocal response with Appellant. When confronted with Appellant's equivocal response, Detective Abrams testified that if he had heard it he would have clarified the response R 314-15.

Other cases also support that Appellant's statement was an equivocal request. In Martin v. State, 557 So. 2d 622 (Fla. 4th DCA 1990), the police officer was asked by Martin for his opinion as to

whether Martin needed an attorney; in such circumstances, there was no trouble finding that the language utilized constituted an equivocal request for counsel, id. at 624-625. Similarly, in State v. Sawyer, 561 So. 2d 278, 291-292 (Fla. 2d DCA 1990), the defendant's statement "I don't know if I should have a lawyer with me" constituted "dialogue definitely rais[ing] the question as to whether Sawyer was in a quandary about hiring a lawyer;" i.e., an equivocal request for counsel.

It was error to deny Appellant's motion to suppress. Appellant's statement was taken in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution. Appellant's conviction and sentence must be reversed and this cause remanded for a new trial.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS WHERE OFFICER ABRAMS FAILED TO ADVISE APPELLANT OF HIS MIRANDA RIGHTS PRIOR TO QUESTIONING ABOUT CHIQUITA COUNTS.

In addition to moving to suppress Appellant's confession in this case on the ground that police had failed to clarify Appellant's equivocal request, Appellant also moved to suppress the confession on the ground that he had not been readvised of his Miranda rights prior to the interrogation regarding Chiquita Counts R 335,340. Appellant renewed his motion to suppress at trial R 1428. The trial court denied the motion R 1429. It was error to deny the motion to suppress.

Common sense dictates that the first set of Miranda warnings on the Leath interrogation do not carry over to the second interrogation on the Chiquita Counts killing. Cf. Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) (assertion of a right during one investigation is not automatically applied to a separate and independent investigation). This is especially true where the first warning was flawed by police efforts to vitiate the protections of Miranda. In response to Appellant's question about an attorney, Detective Mink told Appellant that he had already spoken and that Mink wanted him to speak again R 156; SR 6. In essence, Mink was telling Appellant that he did not need an attorney. In Martin v. State, 557 So. 2d 622, 625 (Fla. 4th DCA 1990), the appellate court held that an officer's advice that the suspect did not need an attorney was far from a neutral stance required for Miranda warnings and warranted suppression of the subsequent confession:

> Here Martin was obviously in a quandary over whether or not he needed to obtain counsel. Not only did the Detective not explore further to determine whether Martin was requesting counsel, he fashioned his responses to Martin's questions in such a manner as to put to rest any issue of the necessity of counsel. The trial court specifically found as a matter of fact that the detective told Martin that he did not need an attorney. At the very least the Detective was required to take a neutral stance on whether Martin needed counsel. Any other conclusion would vitiate the protections which are to be supplied by Miranda.

557 So. 2d at 625 (emphasis added). Likewise, the officer's vitiation of the Miranda warnings in this case requires reversal where Appellant was not later properly advised of his Miranda rights to the second

interrogation. To make the situation worse, the police also stepped out of the neutral position on Appellant's right to remain silent by emphasizing to him that the interrogation was an "opportunity for you to tell your side of the story" R 1436. While this by itself may not make the confession inadmissible, it was a significant dilution of Miranda warnings. See State v. R.M., 22 Fla. L. Weekly D1639 (Fla. 4th DCA July 2, 1997) (upholding trial court's suppression of statement where police told suspect that anything can be used for or against you in a court of law). The cumulative effect of vitiating Miranda warnings (by in essence telling Appellant he did not need an attorney) and by further diluting Miranda warnings (by telling it was the opportunity to tell his side of the story) certainly requires reversal where Appellant was not properly advised of his Miranda rights for the second interrogation.

Even if the first Miranda warnings had been done properly, the failure to readvise Appellant of his Miranda rights prior to the second interrogation would still require reversal. It is well-settled that once Miranda warnings are given they are not accorded unlimited efficacy or perpetuity. Commonwealth v. Cruz, 373 Mass. 676, 687 (Mass. 1977). There is no per se rule that a suspect needs to be readvised of his Miranda rights. Brown v. State, 661 P.2d 1024 (Wyo. 1983). However, there is no per se rule that automatically dictates that a suspect not be readvised of his Miranda rights. United States v. Gillyard, 726 F.2d 1426, 1429 (9th Cir. 1984). Instead, a number

of factors must be analyzed in order to determine whether readvisement is required. Brown, supra, 661 P.2d at 1031. In this case an analysis of the relevant factors requires the readvisement of Miranda warnings.

The relevant factors include: whether the same officer who furnished Miranda warnings was conducting the subsequent interview; whether the interviews were part of an ongoing interrogation; whether the interview was at the suspect's request; the time interval since the suspect was advised of his rights; whether the suspect actually had the advice of counsel; whether there was broad questioning versus specific questioning; the apparent intellectual and emotional state of the accused. United States v. Gillyard, 726 F.2d 1426, 1429 (9th Cir. 1984); Ohio v. Roberts, 513 N.E.2d 720 (Ohio 1987); Brown v. State, 661 P.2d 1024, 1231 (Wyo. 1983).

In Ohio v. Roberts, 513 N.E.2d 720 (Ohio 1987), the Supreme Court of Ohio affirmed an appellate court decision which held that the accused should have been readvised of his Miranda rights prior to the second interrogation where he had been initially advised of his rights 2 hours earlier and the warnings were given by an individual other than the subsequent interrogator [the warning was given by a police officer while a probation officer performed the interrogation 2 hours later].

In United States v. Gillyard, 726 F.2d 1426 (9th Cir. 1984) the appellate court affirmed a suppression of the suspect's confession where the suspect was given Miranda warnings by a polygraph examiner and the suspect acknowledged that the understood his rights and was

waiving them. The suspect then took the polygraph test. Thirty minutes after the test the suspect was again interviewed but was not readvised of his Miranda rights. 726 F.2d at 1428. The suspect then confessed. The trial court suppressed the confession due to the failure to readvise of Miranda rights. The appellate court affirmed and specifically noted that: 1) the police had requested the interview; 2) the suspect was not represented by counsel; 3) the suspect was not informed of his Miranda rights in context with the specific offense for which he was under investigation and 4) the questioning which resulted in the confession was done by a different officer than by the person who gave Miranda warnings and there was not merely a continuation of questioning, "but a change of accusatory questioning" 726 F.2d at 1426.

As in Roberts and Gillyard, a readvisement of Miranda rights was necessary in this case. As in those cases, Miranda warnings were given by a different individual [Mink] then the individual [Abrams] who extracted the inculpatory statements regarding the killing of Chiquita Counts. As in Gillyard, Appellant was not informed of his Miranda rights in context with the specific offense under investigation and more importantly the questioning was not merely a continuation of questioning for the offense Appellant was given warnings, but was a change in accusatory questioning. In fact, Abrams made it clear that his investigation was totally separate from Mink's interrogation regarding a different offense R 309. This is particularly important,

as how can there be a voluntary and intelligent waiver when a suspect is unaware of what he will be questioned about? The waiver of rights does not occur in a vacuum, but occurs in response to a particular set of facts involving a particular offense. As in Gillyard, the questioning was not at Appellant's request, but was at police request. As in Gillyard, Appellant was not accompanied by counsel. Also, Appellant's intellectual and emotional state and understanding would weigh in favor of readvisement. This is particularly true when one considers that Appellant was raised in Brazil during his formative years (ages 5-12) and after he immigrated to the United States he continued to be raised by people who were from Brazil. Dr. Strauss even noted that a lot of interrogation suggested that Appellant did not fully understand his rights R 378,386. Thus, due to the differences in culture and language, it would be even more important to readvise Appellant of his Miranda rights.

Finally, there was a lapse of approximately 2 hours between the Miranda warnings and Appellant's statement regarding Chiquita Counts R 137,1426. This has been deemed a significant amount when combined with the other factors. Roberts, supra (lapse of 2 hours); Gillyard, supra (30 minutes between interviews); Cf. Michigan v. Mosley, 96 S.Ct. 321 (1975) (90 minutes sufficient amount of time to dissipate assertion of Miranda rights and to allow second attempt at interrogation). Under the circumstances of this case Appellant should have been readvised of

his Miranda rights before the substantive questioning on the Chiquita Counts case.

It was error to deny Appellant's motion to suppress. Appellant's statement was taken in violation of his right to counsel, his privilege not to incriminate himself, and his right to due process of law. Fifth, Sixth and Fourteenth Amendments, United States Constitution; Art. I, §§ 2, 9 and 16, Fla. Const. Appellant's conviction and sentence must be reversed and this cause remanded for a new trial.

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL.

In his closing statement the prosecutor informed the jury of two factual scenarios that would constitute second degree murder -- (1) where a husband shoots his wife in a heat of passion upon finding her in bed with another person and (2) shooting someone in the leg R 1587-88. Appellant moved for a mistrial pointing out that those factual situations are not present in this case and that by telling the jury that certain facts constitute second degree murder the prosecution was invading the province of the jury R 1589-90. The trial court denied Appellant's motion. The prosecutor's statement deprived Appellant of due process and a fair trial in violation of Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The prosecutor informing the jury of factual scenarios of second degree murder was improper as arguing facts not in evidence. E.g.

Gonzalez v. State, 588 So. 2d 314 (Fla. 3d DCA 1991) (error to imply irrelevant relationship with 16 year old where there was no evidence to support it); Bain v. State, 552 So. 2d 283 (Fla. 4th DCA 1989) (hypothetical conversation created by prosecutor); Johnson v. State, 408 So. 2d 813 (Fla. 3d DCA 1982) (informing jury that it is unheard of for person to spend more than 2 years in state hospital if found insane). Although it is proper for a prosecutor to inform the jury of what constitutes the elements of second degree murder, it is an invasion of the province of the jury to present as law that certain facts constitute second degree murder.

To exacerbate the problem, the prosecutor misstated that law by informing the jury that a husband shooting his wife in the heat of passion was a second degree murder when in fact it is a classical manslaughter. E.g. Febre v. State, 158 Fla. 853, 30 So. 2d 367 (Fla. 1947). It is improper to misstate the law to the jury. Harvey v. State, 448 So. 2d 578 (Fla. 5th DCA 1984); Taff v. State, 509 So. 2d 953 (Fla. 4th DCA 1987) (misstating manslaughter).

By offering factual scenarios not involved in this case, the prosecutor was trying to mislead the jury that second degree murder is limited to those type of situations and thus did not have to be considered in this case. In essence, it was a method of demeaning a lesser included offense which is improper. Cooper v. State, 413 So. 2d 1244 (Fla. 1st DCA 1982); Williams v. State, 593 So. 2d 1189 (Fla. 3d DCA 1992). It was especially improper where one of the factual

scenarios was actually manslaughter and not a second degree murder as the prosecutor informed the jury.

Finally, the prosecutor's statements that this case did not involve the factual scenarios as he described and thus is not a second degree murder helps tell the jury that the prosecutor considered second degree murder but ruled it out because the prosecutor believed Appellant to be guilty of first degree murder. Informing the jury of the exercise of prosecutorial discretion or that the prosecutor believed Appellant to be guilty of first degree murder is improper. Duque v. State, 460 So. 2d 416 (Fla. 2d DCA 1984); McGuire v. State, 411 So. 2d 939 (Fla. 4th DCA 1982).

Since the improper statement involved second degree murder which is but one step removed from first degree murder, the error cannot be deemed harmless. See State v. Lucas, 645 So. 2d 425 (Fla. 1994).

Appellant's conviction and sentence must be reversed and this cause remanded for a new trial.

POINT IV

THE TRIAL COURT ERRED IN RULING THAT THE STATE HAD AN ABSOLUTE RIGHT TO INTRODUCE EVIDENCE TO THE JURY OF APPELLANT'S STATEMENT REGARDING A COLLATERAL MURDER IF APPELLANT TRIED TO ELICIT EVIDENCE THAT HIS CONFESSION WAS NOT VOLUNTARY DUE TO APPELLANT'S RESPONSES DURING THE GIVING OF MIRANDA WARNINGS.

The trial court ruled that the state had an "absolute right" to introduce evidence to the jury of Appellant's statement regarding a collateral murder if Appellant tried to elicit evidence that his

confession was not voluntary due to Appellant's responses during the giving of Miranda warnings R 1420-21. This was error and denied Appellant due process and a fair trial.

Due to the trial court's ruling, Appellant did not introduce evidence of Appellant's taped responses to the giving of Miranda warnings. Thus, the issue regarding the trial court's ruling is preserved for appellate review. Edwards v. State, 530 So. 2d 936, 937-938(Fla. 4th DCA 1988) (appellant waives issue by presenting evidence after trial court's warning that introduction of such evidence would open the door to the state's presentation of objectionable evidence).

The trial court's ruling was based on the rule of completeness. However, the rule of completeness is not applicable to this situation. First, Appellant merely wanted to elicit evidence of a portion of the taped Miranda warnings and responses and did not want to introduce the contents of substantive questioning R 1415. The rule of completeness permits the state to introduce the total Miranda warnings and responses. However, the trial court's ruling went beyond the rule of completeness and would permit the state to introduce evidence on a different subject matter -- the substantive confession to a collateral murder. The rule of completeness is not a device to allow the introduction of evidence on a different subject matter. Christopher v. State, 583 So. 2d 642, 646 (Fla. 1991) (later conversation "did nothing to explain the earlier conversation"). In addition, the evidence would not be admissible under the rule of completeness if the

evidence could mislead or confuse the jury. Here, where the state was going to emphasize the confession to a collateral murder, the prejudice would substantially outweigh the probative value and would mislead the jury. The primary focus of the rule of completeness is fairness. Larzelere v. State, 676 So. 2d 394, 402 (Fla. 1996). It would be totally unfair to allow the state to elicit evidence of the collateral crime in this case. The trial court erred in holding that the state would have an absolute right to elicit such evidence. Appellant was denied due process and a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9 and 16 of the Florida Constitution due to the trial court's ruling. This cause must be remanded for a new trial.

PENALTY PHASE

POINT V

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). This Court summarized proportionality review as a consideration of the "totality of circumstances in a case," and due to the finality and uniqueness of death as a punishment "its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist." Terry v. State, 668 So. 2d 954, 956 (Fla. 1996).

Only one aggravating circumstance was present in this case -- the prior violent felony that Appellant committed less than one week earlier than the offense in this case.

As noted in McKinney v. State, 579 So. 2d 80, 81 (Fla. 1991), the death sentence will be affirmed in cases supported by one aggravating circumstance only where there is either nothing or very little in mitigation:

> Having found that two aggravating circumstances are unsupported by the record, this death sentence is now supported by just one aggravating circumstance -- that the murder was committed during the course of a violent felony. As we have previously noted, "this Court has affirmed death sentences supported by one aggravating circumstance only in cases involving 'either nothing or very little in mitigation.'" Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990) (quoting Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989)). Here, the trial court found as a statutory mitigating circumstance that McKinney had no significant history of prior criminal activity. In addition, McKinney presented substantial mitigating evidence relating to his mental deficiencies and alcohol and drug history. In light of the existence of only one valid aggravating circumstance present here, the sentence of death is disproportional when compared with other capital cases where this Court has vacated the death sentence and imposed life imprisonment. See Lloyd, 524 So. 2d at 403 (and cases cited therein).

See also Clark v. State, 609 So. 2d 513 (Fla. 1992); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Smalley v. State, 546 So. 2d 710, 723 (Fla. 1989); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Lloyd v. State, 524 So. 2d 396 (Fla. 1988).

In this case, there were significant mitigating factors present. The trial court found two important statutory mitigating factors -- (1)

the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance[5] and (2) the age of Appellant at the time of the capital felony.[6]

(1) Extreme Mental or Emotional Disturbance

Dr. Macaluso and Dr. Strauss testified that Appellant suffered from Dysthymia -- a chronic depressive condition R 1790,1864. As the trial court noted, Appellant was predisposed to become depressed as the result of his background which included physical, emotional and sexual abuse[7] as a child which in turn resulted in low self-esteem R 2484. There was testimony that any child with Appellant's background would have a high potential for the illness that Appellant suffered R 1805.

It was explained that to understand how Appellant got to where he is one must understand his background R 1865. Appellant was 17 years old when he married a 14 year old girl R 1869. There were marital problems which stemmed from Appellant's obsessive perception that his wife had been unfaithful to him[8] R 1779. Appellant became more

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[5] § 921.141(6)(b), Fla. Stat.

[6] § 921.141(6)(g), Fla. Stat.

[7] This included Appellant's parents bringing him a prostitute when he was 12 years old R 1783,1866; being molested by a cleaning lady when he was 6 years old R 1783; and two episodes of being sexually molested by a teenager R 1783.

[8] Appellant separated from his wife and child and became anxious and agitated that his life had lost meaning R 1959. The stress of the family separation was elevated by his feelings of being unloved R 1960. His wife had been the only person he bonded with and she no longer wanted him R 1966. Appellant's obsessive perception regarding his wife was related to growing up observing his family's infidelities R 1779.

depressed, drank heavily, and contemplated suicide R 1779. Appellant would ultimately turn to prostitutes due to loneliness R 1780.[9] Because of Appellant's background, when he was with a prostitute there was a mixture of confusion and sexual relief when he was doing something he believed to be wrong R 1871. Emotionally, Appellant was a "time bomb waiting to explode." R 1871. In addition, there was evidence that Appellant had been drinking before the shooting. Dr. Strauss noted that the psycho-logical baggage that Appellant carried with him plus the use of alcohol was like lighting a match to gasoline R 1872. Under these conditions, after Chiquita Counts began insulting Appellant and calling him names, Appellant's emotional problems appeared. No one had ever shown Appellant how to deal with problems R 1870. Appellant had problems in reasoning and problem solving R 1944.

In addition to this was Dr. Bukstel's testimony that Appellant had neuropsychological deficits related to some kind of disorder in his mental development R 1940. Certain parts of Appellant's brain did not develop normally R 1940.[10] Dr. Bukstel explained that at the time of

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Appellant's family was sexually and emotionally dysfunctional R 1962,1966.

[9] When Appellant was at a formative age, prostitution was sanctioned by very important people in his upbringing R 1792. This sowed the seeds of how Appellant views women R 1792.

[10] Appellant had a head injury when he was young R 1940, and there was also the possibility of infectious or toxic exposures impacting him R 1941.

the offense Appellant was experiencing a very severe depression due to the marital separation and a feeling that there was nothing to look forward to R 1959.

The experts' testimony regarding Appellant's emotional and mental background helps explain his behavior. During his confession, Appellant explained that Chiquita Counts had insulted him and called him names R 1449. Appellant's emotional and mental state and lack of coping skills helps explain his statement that he was not thinking when he shot Counts R 1450, and that he was not planning to shoot her, it came to him "all of a sudden" R 1453. Appellant explained that he regrets what he did and was confused and could not believe that he could do something like that R 1457.[11] The important mitigating circumstance that Appellant was under the influence of an extreme mental or emotional disturbance is present in this case.

(2) Age of Appellant at the time of the offense

Appellant was 19 years old at the time of the offense. Appellant also was very immature for a 19 year old. Although Appellant was married, the marriage was hardly a sign of maturity. Appellant's marriage was a failure. Appellant was separated from his wife. Instead of having the maturity to reconcile with his wife, Appellant

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[11] Appellant also indicated that he knew he had a drinking problem but he never believed that it would result in such a tragedy R 1457. Appellant had consumed a six-pack prior to the meeting with Counts R 1457.

exhibited immaturity by handling his problems by drinking and accompanying prostitutes.

The trial court also found the following mitigating circumstances: (1) capacity for rehabilitation; (2) difficult/abusive childhood; (3) good behavior while incarcerated; (4) history of alcohol abuse and alcohol abuse on the date of the incident; (5) remorse; (6) cooperation with the police; (7) confessed to the killing; (8) expressed genuine religious beliefs. These mitigating circumstances were significant under the circumstances of this case.

(1) Capacity for rehabilitation

Dr. Macaluso testified that Appellant's disorder can be treatable with an antidepressant medication R 1801, and that the structured environment of prison will help Appellant's condition R 1808. Dr. Bukstel also testified that remedial actions can be taken to treat Appellant's neuropsychological inefficiencies R 1974. This Court has held -- "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). Also, in Holsworth v. State, 522 So. 2d 348, 354-55 (Fla. 1988), while noting that "potential for rehabilitation" was a mitigating factor this Court found that the "death penalty, unique in its finality and total rejection of the possibility of rehabilitation was intended to be applied to only the most aggravated and unmitigated of most serious crimes." Indeed, evidence relating to the possibility of rehabilitation is deemed so important that exclusion of such

evidence requires a new sentencing hearing. Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982); Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987).

(2) Difficult/Abusive Childhood

The trial court found that "Based on interviews with the defendant and reviews of depositions of various family members, all three doctors testified that the defendant was physically, emotionally and sexually abused as a child. Furthermore, they testified that the abuse was a significant factor in the defendant's diagnosis of chronic depression. The Court finds that the evidence presented established this mitigating circumstance and gives it some weight" R 2489.[12]

The difficult/abusive childhood offers an insight as to what went on in Appellant's life and how it resulted in tragedy. In Hegwood v. State, 575 So. 2d 170 (Fla. 1991), this Court recognized how very significant this type of mitigation can be:

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[12] The abuse was emotional, physical and sexual. At the age of 6 or 7 there was a sexual exposure to Appellant's cleaning lady and Appellant may have been molested by the cleaning lady R 1783. Appellant's mother and stepfather paid for a prostitute for Appellant as a birthday present when he was 12 years old R 1783,1866. This event produced a lot of sexual anxiety and Appellant was unable to perform sexually R 1783. When Appellant lived in Brazil there were two episodes where he was sexually molested by a teenager R 1783. It may have involved a step sibling and anal intercourse may have been involved R 1783-84. At the age of 14 there was mutual masturbation with his stepfather in this country R 1784. Appellant was physically beaten and sexually abused by his father R 1866. In Brazil Appellant was not well nourished R 1789. Food was withheld from him in favor of the other children R 1789. Appellant was also forced to sleep outside R 1866. Appellant was ridiculed for being skinny R 1789. In the United States Appellant was ridiculed for his thick foreign accent R 1789. This ridicule contributed to Appellant's low self-esteem R 1789.

> A great part of Hegwood's ill-fated life appears to be attributable to his mother, described by witnesses as a hard-drinking, lying drug addict and convicted felon who tended to abandon her children and who turned Hegwood in and testified against him, apparently motivated by the reward money offered in this case. Based on the mental health expert's testimony the jury may have believed that Hegwood was mentally or emotionally deficient because of his upbringing.

575 So. 2d at 173.

The evidence is even more mitigating as it shows how Appellant came to lack the problem solving capabilities R 1944. Dr. Strauss testified that Appellant never had anyone to show him how to deal with things properly R 1870. Appellant's father did not provide the emotion that Appellant needed R 1867. Appellant's sense of right and wrong was decreased due to his family endorsing such wrongs as prostitution R 1872. As Dr. Macaluso testified, any child put in Appellant's upbringing would have a high potential for his illness R 1805.

(3) Good behavior while incarcerated

There was strong evidence of this mitigator. Five correctional officers were unanimous in their praise of Appellant's behavior. Appellant did not have a single disciplinary report R 1923,1927, 1915,1993. In fact, Sergeant Isaiah Rhodes described Appellant's conduct as "exemplary" R 1920. Rhodes indicated that a conduct card that has nothing of a negative manner is a rarity among inmates R 1921.

This has been noted as important mitigation in that it shows "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison." Skipper v. South Carolina, 106 S.Ct. 1669, 1671

(1986). The circumstance attains even greater weight when, as in this case, the evidence comes from jailers who owe no particular loyalty toward the defendant:

> The testimony of more disinterested witnesses -- and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges -- would quite naturally be given much greater weight by the jury. Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations.

Skipper, 106 S.Ct. at 1673 (emphasis added).

(4) History of alcohol abuse and alcohol abuse on the date of the incident

The trial court found this as a mitigating circumstance:

> "All of the doctors who examined the defendant testified that he had a two year history of alcohol abuse. The defendant admitted in his statement to the police that he had consumed a six-pack of beer prior to the murder. Consequently, the Court finds that alcohol abuse and use on the date of the incident was established as a mitigating circumstance and gives it little weight."

R 2488. Dr. Bukstel testified that alcohol abuse may have played a role in boosting some of Appellant's neuro deficits, but it was probably not the primary factor R 1942. Dr. Strauss also believed that alcohol abuse played a role by stating that combined with the psychological baggage that Appellant carried -- alcohol was like lighting a match to gasoline R 1873. This Court has also recognized alcohol abuse as a mitigating factor. See e.g. Besaraba v. State, 656 So. 2d 441, 447 (Fla. 1995).

(5) Remorse

Appellant demonstrated his remorse in his taped statement to police R 1457, and in his interview with the doctors R 1974. This Court has recognized remorse as a mitigating circumstance. E.g. Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989).

(6) Cooperation with police

Detective Abrams testified that Appellant was cooperative R 1763, and but for Appellant's cooperation with police it is unlikely that the killing of Chiquita Counts would have been solved R 1767. This Court has recognized this as a mitigating circumstance. E.g. Sinclair v. State, 657 So. 2d 1138 (Fla. 1995).

(7) Confessed to the killing

The trial court found this as a mitigating circumstance R 2488. This Court has recognized this as a mitigating circumstance. DeAngelo v. State, 616 So. 2d 440 (Fla. 1993).

(8) Appellant exhibited genuine religious beliefs

The trial court found this mitigator as follows:

> "Each of the doctors testified that the defendant developed religious beliefs following his arrest. No evidence was present to controvert this assertion. Therefore, the Court finds this mitigating factor exists but gives it little weight."

R 2489. This Court has recognized this as a mitigating circumstance. Turner v. Dugger, 614 So. 2d 1075, 1078 (Fla. 1992). There was also testimony that Appellant's strong religious beliefs may be helping Appellant deal with his emotional stresses R 1993-94.

There are also a number of other unrebutted mitigating circumstances present in this case. It is undisputed that Appellant was passed back and forth between families and never had the opportunity to be raised by a positive role model. This is a mitigating circumstance. Sinclair v. State, 657 So. 2d 1138 (Fla. 1995). There was also testimony that Appellant's death would be traumatic for his son R 2125. This has been recognized as a mitigating circumstance. State v. Stevens, 879 P.2d 162 (Ore. 1994). With the presence of two statutory mitigating circumstances (including an important mental mitigating circumstance) as well as numerous other mitigating circumstances, it cannot be said that there is either nothing or very little in mitigation so that the single aggravating circumstance qualifies this case as the most aggravated and least mitigated of cases for which the death penalty is reserved.

In fact, in cases where similar mitigating evidence is presented death has been held to be disproportionate. For example, in Robertson v. State, 22 Fla. L. Weekly S404 (Fla. July 3, 1997) despite the fact that the jury voted 11-1 for death, and the trial court gave the mitigation little weight, and there were two aggravating circumstances (HAC and during the course of a felony) this Court held that the presence of mitigation of a statutory mental mitigator and age (19) combined with Robertson's abused and deprived childhood and low intelligence made death disproportionate:

> Although the trial court found two valid aggravating circumstances, we find that death is not proportionately

> warranted in light of the substantial mitigation present in this case: 1) Robertson's age of nineteen; 2) Robertson's impaired capacity at the time of the murder due to drug and alcohol use; 3) Robertson's abused and deprived childhood; 4) Robertson's history of mental illness; and 5) his borderline intelligence. When compared to other death penalty cases, death is disproportionate under the circumstances present here. *Cf. Nibert v. State*, 574 So. 2d 1059 (Fla. 1990) (death penalty not proportionately warranted where heinous, atrocious, or cruel aggravator was offset by substantial mitigation that included abused childhood, extreme mental or emotional disturbance and impaired capacity due to alcohol abuse). For no apparent reason, Robertson strangled a young woman who he believed had befriended him. It was an unplanned, senseless murder committed by a nineteen-year-old, with a long history of mental illness, who was under the influence of alcohol and drugs at the time. This clearly is not one of the most aggravated and least mitigated murders for which the ultimate penalty is reserved.

22 Fla. L. Weekly at S406. As one can see, the case relied upon in Robertson was Nibert v. State, 574 So. 2d 1059 (Fla. 1990) which included statutory mental mitigation and an abused childhood, along with potential for rehabilitation and remorse. Likewise, this instant case also involves statutory mental mitigation (under the influence of extreme mental or emotional disturbance), an abusive and difficult childhood, potential for rehabilitation and remorse plus other mitigation that was not found either in Nibert or Robertson.[13] It should also be noted that despite the fact that both Nibert and Robertson involved one of the most significant aggravators -- HAC --

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[13] Such as Appellant showing good adaptability to prison as demonstrated by his good behavior while incarcerated and his cooperation with police along with his genuine religious beliefs. Also, in both Robertson and Nibert the trial court had given the mitigators little weight.

being present in both cases.[14] See also Penn v. State, 574 So. 2d 1079 (Fla. 1991) (reduced to life where HAC and only two mitigators -- extreme mental or emotional disturbance and no significant criminal history); Smalley v. State, 546 So. 2d 720 (Fla. 1989) (reduced to life where HAC for killing and abusing child over 8 hour period and statutory mental mitigation, abusive childhood, remorse, and no significant prior criminal history).

The death penalty has been deemed disproportionate in other cases with one aggravating circumstance where there was even less mitigation than was present in this case. E.g. DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) (CCP aggravator, statutory mitigators rejected but non-statutory mitigators of bilateral brain damage, confessed to the offense, and military service); Clark v. State, 609 So. 2d 513 (Fla. 1992)(one aggravator and no statutory mitigators but non-statutory mitigation of emotional disturbance, abusive childhood, alcohol abuse, and other mental mitigation); Klokoc v. State, 589 So. 2d 219 (Fla. 1991) (CCP aggravator and mitigators to which the trial court gave little weight -- extreme emotional distress, bipolar disorder, alcoholism, troubled family relationship, good provider); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995) (2 aggravators which merged and cooperation with police, dull normal intelligence, and raised without

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[14] See Maxwell v. State, 603 So. 2d 490 (Fla. 1992) (noting the seriousness of the HAC aggravator); Fitzpatrick v. State, 527 So. 2d 809, 812 (Fla. 1988) (finding case not one of the most aggravated indefensible of crimes even where prior violent felony present noting that HAC and CCP were "conspicuously absent").

a positive role model all of which trial court gave little weight but sentence was reduced to life).

Even in cases involving multiple aggravating circumstances the death penalty has been deemed disproportionate with less mitigation than was present in this case. Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (5 aggravating circumstances including prior violent felony and mitigating circumstances of statutory mental mitigation and low emotional age); Chaky v. State, 651 So. 2d 1169 (Fla. 1995) (2 aggravating circumstances including prior violent felony and mitigation of potential for rehabilitation, good prison record, and good work, family, and military record); Besaraba v. State, 656 So. 2d 441 (Fla. 1995) (prior violent felony aggravating circumstance and 2 statutory mitigating circumstances along with non-statutory mitigators including deprived and unstable childhood, good behavior in prison, history of alcohol and drug abuse); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (2 aggravating circumstances including prior violent felony and two mitigating circumstances -- age and unfortunate home life).

In addition, the very facts of this case take it out of the class of cases for which the death penalty is reserved. The killing in this case was during a drunken episode which culminated in an argument between Appellant and Chiquita Counts. Counts had .147 grams percent alcohol in her system R 1511. Counts also had .13 milligrams of cocaine in her system R 1512. The medical examiner testified that this was the typical amount for a person to get high on R 1512. Appellant

had consumed a 6-pack R 1457. In fact, the trial court found Appellant's alcohol abuse at the time of the incident to be a mitigating circumstance R 2488. After having oral sex, Appellant and Counts got into an argument over money R 1437,1444. Counts called Appellant a cracker, bastard, and other names R 1444. Appellant was not thinking when he shot Counts R 1450. Appellant was confused and could not believe that he could do something like that R 1457.

The drunken episode between Appellant and Counts is not the type of killing for which the death penalty is reserved. See Voorhees v. State, 22 Fla. L. Weekly S357 (Fla. June 19, 1997); Kramer v. State, 619 So. 2d 274 (Fla. 1993). For example, in Voorhees, the Court held death to be disproportionate in the situation of a drunken episode between the defendant and the victim even with the existence of 2 aggravating circumstances and mitigation of extreme mental or emotional disturbance and age (24):[15]

> The two aggravators in this case are overshadowed by the mitigation and circumstances of this murder: the murder occurred after a drunken episode between the victim and the defendant. There was direct evidence that Voorhees, Sager, and the victim were all intoxicated during the murder. This evidence came in through Voorhees' confession and statements made by Sager in which he acknowledged that the three were drinking. This is also corroborated by the victim's blood alcohol level of .24 percent. As well, there was expert testimony that Voorhees began drinking at an early age, suffered from alcoholism, and had an abnormal reaction to alcohol.

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[15] Both these statutory mitigators are present in this case. Appellant also has other mitigating circumstances.

22 Fla. L. Weekly at S362. See also Sager v. State, 22 Fla. L. Weekly at S381 (Fla. June 26, 1997) (codefendant of Voorhees); Kramer v. State, 619 So. 2d 274 (Fla. 1993) (drunken episode, Kramer had 2 aggravating circumstances -- prior violent felony and HAC and only non-statutory mitigating factors). Death would be even more disproportionate in this case than in the above-cited cases where, unlike in those cases, Appellant has but one aggravating circumstance and far more mitigation.

It could be argued that where the prior violent felony is murder the death penalty is automatically proportional. This is not true. Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Santos v. State, 629 So. 2d 838 (Fla. 1994). It is true that in Ferrell v. State, 680 So. 2d 390 (Fla. 1996) and Duncan v. State, 619 So. 2d 279 (Fla. 1993) where the prior violent felony is murder the death penalty has been held proportionate. However, unlike in the present case, both Ferrell and Duncan are cases in which no statutory mitigating circumstances were found. Also, the other mitigating circumstances in this case were more important than those in Ferrell and Duncan.

It is also important to note that neither Ferrell nor Duncan involve a close temporal proximity of the prior violent felony to the offense for which they were being sentenced. Instead, there were a number of years between the offenses and both Ferrell and Duncan had served prison sentences in between the offenses. Both men had been given the opportunity to change, but instead turned into recidivist

killers who society could not deal with. In fact, Duncan's prior murder occurred while he was in prison. These cases contrast greatly with Appellant's situation where the prior offense was only 1 week before the killing of Chiquita Counts. This was a time when Appellant was under some of the same emotional and mental stresses that he suffered from in this case. Unlike Ferrell and Duncan, Appellant was not a failed recidivist who had been given a chance to reform. Instead, Appellant's case is much more similar to cases in which the prior violent felony is a murder but death is found disproportionate. Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Santos v. State, 629 So. 2d 838 (Fla. 1994). Appellant's situation is closer to Besaraba and Santos than to Ferrell and Duncan for two reasons. First, Appellant's case involves statutory mitigating factors (including statutory mental mitigation) as in Besaraba and Santos, but which was rejected in both Ferrell and Duncan. Second, the offense in this case was within a week of the prior violent felony and thus contemporaneous or nearly contemporaneous like in Besaraba and Santos as opposed to the prior murders in Ferrell and Duncan which were years apart and represent recidivist killings following prison terms.

Under the totality of the circumstances of this case it cannot be said that this is one of the most aggravated and least mitigated cases for which the death penalty is reserved. Appellant's death sentence must be vacated.

POINT VI

THE TRIAL COURT ERRED IN FAILING TO EXERCISE DISCRETION IN EVALUATING MITIGATING CIRCUMSTANCES.

In capital cases, it is well-settled that heightened standards of due process apply that require reliability of sentencing decisions. See Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977) ("special scope of review ... in death cases"); Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982) ("Reliability in the factfinding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions"); Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 1866, 100 L.Ed.2d 384 (1988) (in reviewing death sentences even greater certainty is required to ensure that conclusions are based on proper grounds). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In the present case the trial court failed to observe the safeguards of due process by failing to exercise a reasonable discretion in weighing the mitigating circumstances. Thus, the trial court's order denied Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Untied States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

Determination of the weight to be given a mitigating circumstance is within the trial court's discretion if supported by competent substantial evidence. State v. Bolender, 503 So. 2d 1247, 1249 (Fla.

1987); Bryan v. State, 533 So. 2d 744, 749 (Fla. 1988). Of course, the power to exercise "judicial discretion" does not imply that a court may act according to mere whim or caprice. Carolina Portland Cement Co. v. Baumgartner, 99 Fla. 987, 128 So. 241, 247 (1930). As explained in Parce v. Byrd, 533 So. 2d 812 (Fla. 5th DCA) rev. denied, 542 So. 2d 988 (Fla. 1988) the valid exercise of discretion requires that there be a valid reason to support the choice between alternatives:

> [Judicial discretion] is not a naked right to choose between alternatives. There must be a sound and logical valid reason for the choice made. If a trial court's exercise of discretion is upheld whichever choice is made merely because it is not shown to be wrong, and there is no valid reason to support the choice made, then the choice made may just as well have been decided by a toss of a coin. In such case there would be no certainty in the law and no guidance to bench or bar.

533 So. 2d at 814 (emphasis added). See also Thomason v. State, 594 So. 2d 310, 317 (Fla. 4th DCA 1992) (Farmer dissenting) quashed 620 So. 2d 1234 (Fla. 1993) ("Judicial discretion is not the raw power to choose between alternatives", nor is it "unreviewable simply because the trial judge chose an alternative that was theoretically available to him").

In the present case, the trial court failed to exercise any discretion in weighing the mitigating circumstances. Instead, without giving any reasons, the trial court merely designated the mitigating circumstances to have little weight.

The trial court analyzed a number of mitigating circumstances in a manner which would logically result in a conclusion that the

mitigator is of substantial or great weight. However, in weighing the mitigator there is no evidence of the exercise of any discretion. Instead, the trial court would decide to give the mitigator little weight based on mere whim contrary to any analysis. Here are some of the following examples of a lack of exercise of discretion.

Good behavior while incarcerated.

The trial court's findings on this mitigator were as follows:

> The defendant presented the testimony of several jail guards, all of whom testified that the defendant has not caused any problems while in jail. The Court finds that this mitigating factor was established but gives it little weight.

R 2487-2488. The trial court offers no reason for giving this mitigator little weight. This has been noted as important mitigation in that is shows "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison." Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986). The circumstance attains even greater weight when, as in this case, the evidence comes from jailers who owe no particular loyalty toward the defendant:

> The testimony of more disinterested witnesses -- and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges -- would quite naturally be given much greater weight by the jury. Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations.

Skipper, 106 S.Ct. at 1673 (emphasis added).

History of alcohol abuse and alcohol abuse on the date of the incident.

The trial court found this as a mitigating circumstance:

> All of the doctors who examined the defendant testified that he had a two year history of alcohol abuse. The defendant admitted in his statement to the police that he had consumed a six-pack of beer prior to the murder. Consequently, the Court finds that alcohol abuse and use on the date of the incident was established as a mitigating circumstance and gives it little weight.

R 2488. Again, there is no showing of the exercise of any discretion in giving this little weight -- it was merely given little weight for no reason. When discretion is exercised, this mitigator is significant.

Appellant exhibited genuine religious beliefs.

The trial court found this mitigator as follows:

> "Each of the doctors testified that the defendant developed religious beliefs following his arrest. No evidence was present to controvert this assertion. Therefore, the Court finds this mitigating factor exists but gives it little weight."

R 2489. Once again, there is no exercise of discretion. The trial court merely gave this mitigator "little weight" because the state failed to rebut it.

Difficult/Abusive Childhood.

The trial court found:

> "Based on interviews with the defendant and reviews of depositions of various family members, all three doctors testified that the defendant was physically, emotionally and sexually abused as a child. Furthermore, they testified that the abuse was a significant factor in the defendant's diagnosis of chronic depression. The Court finds that the

> evidence presented established this mitigating circumstance and gives it some weight."

R 2489. Again, despite recognizing Difficult/Abusive Childhood as a mitigating factor and recognizing that it contributed to Appellant's extreme mental and emotional disturbance, the trial court only afforded it some weight. In Hegwood v. State, 575 So. 2d 170 (Fla. 1991), this Court recognized how very significant this type of mitigation can be:

> A great part of Hegwood's ill-fated life appears to be attributable to his mother, described by witnesses as a hard-drinking, lying drug addict and convicted felony who tended to abandon her children and who turned Hegwood in and testified against him, apparently motivated by the reward money offered in this case. Based on the mental health expert's testimony the jury may have believed that Hegwood was mentally or emotionally deficient because of his upbringing.

575 So. 2d at 173; see also Clark v. State, 609 So. 2d 513, 516 (Fla. 1992) (Clark was passed between parents and emotionally and sexually abused as a child -- "this evidence constitutes strong nonstatutory mitigation"); Robertson v. State, 22 Fla. L. Weekly S404 (Fla. July 3, 1997).

Defendant was under the influence of extreme mental or emotional disturbance.

The trial court outlined how all 3 experts reached the decision that Appellant was under the influence of an extreme mental or emotional disturbance at the time of the killing R 2484-85. The trial court indicated that because of the experts' testimony he was finding this mitigator and giving it little weight R 2485. It is not the exercise of discretion to give the extreme mental and emotional

disturbance little weight based on the fact that it was supported by evidence. This mitigator has been found to be extremely significant by this Court even where the trial court had failed to exercise discretion by merely giving it little weight. Sinclair v. State, 657 So. 2d 1138, 1140, 1142 (Fla. 1995) (trial court gave little weight to the mitigation, but the emotional disturbance "had substantial weight").

This Court has stressed the importance of issuing specific written findings of fact in support of mitigation in capital cases. Van Royal v. State, 497 So. 2d 625 (Fla. 1986); State v. Dixon, 283 So. 2d 1 (Fla. 1973). The sentencing order must reflect that the determination as to which mitigating circumstances apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, supra at 10. Florida law requires the judge to lay out the written reasons for finding mitigating factors, then to personally weigh each one in order to arrive at a reasoned judgment as to the appropriate sentence to impose. Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982). The record must be clear that the trial judge "fulfilled that responsibility." Id.

Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do the written findings of fact merely serve to memorialize the trial court's decision. Van Royal, supra at 628. Specific findings of fact are crucial to this Court's meaningful review of death sentences, without which adequate,

reasoned review is impossible. Unless the written findings are supported by specific facts, the Supreme Court cannot be assured that the trial court imposed the death sentence on a "well-reasoned application" of the aggravating and mitigating circumstances. Id., Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). In Ferrell v. State, 653 So. 2d 367 (Fla. 1995) this Court explained that the "weighing process must be detailed in the written sentencing order" in order for an opportunity for a meaningful review:

> Once established, the mitigator is weighed against any aggravating circumstance. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.

653 So. 2d at 371 (emphasis added).

The review of the exercise of discretion in death penalty cases is at least entitled to the formality requirements made in other areas of the law (such as civil divorce cases[16]). For example, orders granting motions for new trial must articulate reasons for so doing to allow appellate courts to fulfill their duty of reviewing by determining whether judicial discretion has been abused. Thompson v. Williams,

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[16] Exercise of discretion requires some reasonable findings upon which appellate review can be based. Kennedy v. Kennedy, 622 So. 2d 1033 (Fla. 5th DCA 1993); Wiederhold v. Wiederhold, 22 Fla. L. Weekly D1686 (Fla. 4th DCA July 9, 1997) (trial court cannot arbitrarily reject unrebutted testimony -- it must be after a reasonable explanation for doing so").

253 So. 2d 897 (Fla. 3d DCA 1971); White v. Martinez, 359 So. 2d 7 (Fla. 3d DCA 1978).

In dealing with mitigating circumstances, the trial court has found that a mitigating circumstance exists, but has arbitrarily given it little weight. This violates the principle of individual decision making that is constitutionally required in death penalty cases.

In a line of cases commencing with Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court held that a trial court may not refuse to consider, or be precluded from considering, any relevant mitigating evidence offered by a defendant in a capital case. The Lockett holding is based on the distinct peculiarity of the death penalty. An individualized decision is essential in every capital case. Lockett, 438 U.S. at 604-605. The Supreme Court has consistently reiterated the Lockett holding. See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. North Carolina, 476 U.S. 1 (1986).

While the Lockett doctrine is clearly violated by the explicit refusal to consider mitigating evidence, it is no less subverted when the same result is achieved tacitly, as in this case. By refusing to give Appellant's uncontroverted, mitigating evidence any real weight, the trial court has vaulted this state's capital jurisprudence back to the unconstitutional days prior to Hitchcock v. Dugger, 481 U.S. 393 (1987).

Prior to Hitchcock, this Court adopted a "mere presentation" standard wherein a defendant's death sentence would be upheld where the

trial court permitted the defendant to present and argue a variety of nonstatutory mitigating evidence. Hitchcock v. State, 432 So. 2d 42, 44 (Fla. 1983). The United States Supreme Court rejected this "mere presentation" standard, and held that the sentencer not only must hear, but also must not refuse to weigh or be precluded from weighing the mitigating evidence presented. Hitchcock v. Dugger, supra. Since Hitchcock, this Court has repeatedly reversed death sentences imposed under the "mere presentation" standard where the explicit evidence that consideration of mitigating factors was restricted. E.g., Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987).

Arbitrarily attaching no real weight to uncontested mitigating evidence results in a *de facto* return to the "mere presentation" practice condemned in Hitchcock v. Dugger. Appellant's trial court's refusal to exercise discretion in weighing uncontroverted mitigating evidence violates the dictates of Lockett and its progeny. By attaching little weight without exercising a reasoned discretion, trial judges can effectively accomplish an "end run" around the constitutional requirement that capital sentencings should be individualized. Appellant's trial judge has effectively failed to consider mitigating evidence within the statutory and constitutional framework.

By giving "little weight" to valid, substantial mitigation, trial judges can effectively ignore Lockett, supra, and the constitutional requirement that capital sentencings must be individualized. The trial

court's refusal to give any significant weight to valid mitigating evidence calls into question the constitutionality of Florida's death penalty scheme. Amends. V, VI, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17 Fla. Const.

POINT VII

THE SENTENCE OF DEATH MUST BE VACATED WHERE THE CONVICTION USED TO SUPPORT THE LONE AGGRAVATING CIRCUMSTANCE IN THIS CASE HAS BEEN REVERSED AND VACATED.

The lone aggravating circumstance in this case is Appellant's prior violent felony conviction for the death of Marilyn Leath R 2483. This conviction was later reversed and vacated on appeal. Almeida v. State, 687 So. 2d 37 (Fla. 4th DCA 1997), rev. granted (Fla. 89,821, May 22, 1997). A "conviction used as an aggravating circumstance, which is valid at the time of sentence but later reversed and vacated by the appellate court ... eliminates the proper use of the conviction as an aggravating factor." Thompson v. State, 647 So. 2d 824, 837 (Fla. 1994) (citing Long v. State, 529 So. 2d 286, 293 (Fla. 1988)). Due to the elimination of the sole aggravating circumstance in this case, the sentence of death must be vacated.

POINT VIII

THE TRIAL COURT ERRED BY GIVING UNDUE WEIGHT TO THE JURY'S DEATH RECOMMENDATION.

This issue involves the trial judge giving virtually complete deference to the jury's death recommendation. The death sentence in this case was imposed in violation of Florida Statute 921.141, the

Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17 of the Florida Constitution.

In the sentencing order, the trial court applied the law that the jury's death recommendation should not be overruled "unless no reasonable basis exists for the recommendation":

> The jury recommendation that this Court impose the death penalty by a majority of nine to three. A jury recommendation must be given great weight by the sentencing judge and should not be overruled unless no reasonable basis exists for the recommendation. Richardson v. State, 437 So. 2d 1091 (Fla. 1983).

R 2490 (emphasis added).[17]

This case is controlled by Ross v. State, 386 So. 2d 1191 (Fla. 1980) where this Court ordered a resentencing because the trial court gave undue weight to a death recommendation by applying a Tedder standard to a death recommendation and had thus failed to do the type of independent judgment that was required:

> It appears, however, that the trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether or not the death penalty should be imposed. This error requires that the sentence be vacated and that the cause be remanded to the trial court for reconsideration of the sentence. Citing this Court's decisions in Tedder v. State, 322 So. 2d 908 (Fla. 1975) and Thompson v. State, 328 So. 2d 1 (Fla. 1976), which held that the trial court should give great weight and serious consideration to a jury's recommendation of life, the trial court reasoned that it was bound by the jury's recommendation of death. As appears from its "Findings of Aggravating and Mitigating Circumstances" the trial court felt compelled

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[17] The trial court also constantly stated that "only under rare circumstances" would a jury recommendation be overruled R 1790,2091.

> to impose the death penalty in this case because the jury had recommended death to be the appropriate penalty. It expressly stated, "[T]his Court finds no compelling reason to override the recommendation of the jury. Therefore, the advisory sentence of the jury should be followed."

386 So. 2d at 1197. This Court reversed as the trial judge's statements that he found no "reason" to override the jury indicated that the trial judge did not perform the independent weighing of aggravating and mitigating circumstances required by Fla. Stat. 921.141 and this Court's opinion in Dixon. Here, the trial judge's comments were stronger. The trial court stated that the jury reached a death recommendation that "should not be overruled unless no reasonable basis exists for the recommendation" R 2490. He also stated that it is only under "rare circumstances" that he could impose a different sentence. These statements are stronger than in Ross, supra, and indicate a lack of the independent judgment required. Application of an incorrect legal standard, by deciding that the death recommendation cannot be overridden unless no reasonable basis for it exists, is in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Application of such a standard also improperly shifts the burden to the defense to overcome a death recommendation by proving that no reasonable basis for it exists in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This Court was recently faced with a similar issue in King v. State, 623 So. 2d 486 (Fla. 1993). This Court reversed on other grounds, so it did not have to reach the issue. Yet, it stated:

> King also argues that the trial judge deferred to the jury's death recommendation of the appropriate sentence and that the findings in support of the death sentence are not unmistakably clear. We remind the judge that, even though a jury determination is entitled to great weight, "the judge is required to make an independent determination, based on the aggravating and mitigating factors." Grossman v. State, 525 So. 2d 833, 840 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989); Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

623 So. 2d at 489 (footnote omitted).

This Court has recently stressed the uniquely important role of the trial judge in the sentencing process. In Corbett v. State, 602 So. 2d 1240 (Fla. 1992), this Court noted the:

> very special and unique factfinding responsibilities of the sentencing judge in death cases. The trial judge has the single most important responsibility in the death penalty process.

Id. at 1243. In

v. State, 615 So. 2d 688 (Fla. 1993), this Court also noted the importance of the judge:

> It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed.

615 So. 2d at 690-691. The trial court violated the principles of Ross, Dixon and Fla. Stat. 921.141. Resentencing is required.

POINT IX

THE SENTENCE OF DEATH MUST BE VACATED AND THE SENTENCE REDUCED TO LIFE WHERE THE TRIAL COURT FAILED TO MAKE THE FINDINGS REQUIRED FOR THE DEATH PENALTY.

The legislature has made it clear under § 921.141(3) of the Florida Statues that if the trial court is to sentence a defendant to death it "shall set forth in writing its findings" that (1) sufficient aggravating circumstances exist to justify the death penalty and (2) there are insufficient mitigating circumstances to outweigh the aggravating circumstances.[18] The legislature directed in § 941.141(3) that if the trial court "does not make the findings requiring the death sentence" within 30 days -- a life sentence must be imposed.[19] In this

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[18] This Court has also recognized that both of these circumstances must exist to uphold the death penalty. See Rembert v. State, 445 So. 2d 337, 340 (Fla. 1989) (sentence reduced to life even though trial court had found no mitigating circumstances and this Court upheld one aggravating circumstance); Terry v. State, 668 So. 2d 954 (Fla. 1996) (reduced to life where two aggravators were not sufficient for death even where no mitigation).

[19] § 921.141(3) reads as follows:

> **(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 be 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.

case, the trial court did file the sentencing order within 30 days, however, the order does not contain "the findings requiring death." Thus, Appellant's death sentence must be vacated.

As noted above, there are two specific findings "requiring the death sentence." One is a finding that "sufficient aggravating circumstances exist" to justify the death sentence. The trial court never made this required finding -- instead it skipped this step by use of an unconstitutional presumption that death is the proper penalty where one aggravating circumstance exists as follows:[20]

> Death is presumed to be the proper penalty when one or more aggravating circumstances are found, unless they are outweighed by one or more mitigating circumstances. White v. State, 403 So. 2d 331 (Fla. 1981). Upon carefully evaluating all of the evidence presented, it is this Court's reasoned judgment that the mitigating circumstances do not 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 within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

[20] See Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988); Henyard v. State, 689 So. 2d 239 (Fla. 1996).

R 2490.[21] The failure to make the required finding that sufficient aggravating circumstances exist requires vacating the death sentence and imposition of a life sentence. § 921.141(3).

POINT X

THE TRIAL COURT ERRONEOUSLY APPLIED A PRESUMPTION OF DEATH.

The trial court erroneously presumed that death is the proper penalty when one or more aggravating circumstances are found unless outweighed by mitigating circumstances R 3797. Allowing this presumption to influence the sentencing decision violated § 921.141, Fla. Stat., and the Florida and United States Constitutions. The imposition of the death sentence in this case violates Article I, Sections 2, 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The trial judge stated in his sentencing order:

> Death is presumed be the proper penalty when one or more aggravating circumstances are found, unless they are outweighed by one or more mitigating circumstances. White v. State, 403 So. 2d 331 (Fla. 1981).

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[21] Again it must be emphasized that the legislature did not state that one aggravating circumstance is sufficient to justify the death penalty unless rebutted by the fact that mitigating circumstances outweigh aggravating circumstances. Instead, the legislature sated that two evaluations must be made and two conditions must exist -- (1) an evaluation and finding of sufficient aggravation [one or even two aggravators may not be sufficient] and (2) the aggravation outweigh the mitigation. If the aggravating circumstances do not justify the death penalty, then the second evaluation is not important -- life is the appropriate sentence. Rembert; Terry.

R 2490. This is a misstatement of Florida law. § 921.141(3), Fla. Stat. requires the judge to find "sufficient aggravating circumstances" to justify the death penalty before he can even begin weighing the aggravating and mitigating circumstances. There is nothing in the judge's order that indicates he performed this required first step.

This Court implicitly recognized the importance of this initial step in Rembert v. State, 445 So. 2d 337 (Fla. 1989). In Rembert, this Court reduced a sentence of death to life imprisonment even though the trial court had found no mitigating circumstances and this Court had upheld one aggravating circumstance. Id. at 340. Thus, this Court implicitly recognized that the aggravation must be sufficiently weighty to justify death, regardless of the mitigation. See also Terry v. State, 668 So. 2d 954 (Fla. 1996) (death disproportionate even though two aggravators and no mitigation).

The court erred in basing its sentencing decision on the presumption of death set out in White v. State, 403 So. 2d 331, 340 (Fla. 1981). The quoted statement in White occurred in the context of a discussion of appellate review, and subsequent cases make clear that the White presumption is solely a rule of appellate review, and plays

no role in the sentencing process in the trial court.[22] See Jackson v. State, 502 So. 2d 409, 413 (Fla. 1986).

The Eleventh Circuit Court of Appeals has held the use of the death presumption employed by the judge in this case to violate the Eighth Amendment. Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). In Jackson, supra, the court struck down a presumption identical in formulation to the one utilized by the trial judge in this case. The court stated:

> In the present case, the terminology that death is presumed appropriate seeped into the sentencing instructions given by the trial judge. The jury was instructed:
>
> > When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.
>
> Jackson contends that such an instruction amounts to constitutional error. We agree....
>
> In this case, however, the *jury* was instructed that death was presumed to be the appropriate penalty. Justice McDonald of the Florida Supreme Court has astutely pointed out the problems created when such a presumption is relied upon by the sentencing authority:
>
> > I would also like to comment on the reference in the majority opinion in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973) *cert. denied*, 416 U.S. 943 [94 S.Ct. 1950, 40 L.Ed.2d 295] (1974). I do not embrace the language from that opinion recited in this majority opinion as "when one or more of the

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[22] Further, three justices of this Court have indicated that even the White appellate presumption may be unconstitutional under Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) and Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). White (Jerry) v. State, 664 So. 2d 242, 247 (Fla. 1995) (Anstead, J., dissenting; jointed by Shaw and Kogan, JJ.).

> aggravating circumstances is found death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances." If that language is restricted to the role of this Court in reviewing death sentence imposed by the trial court, it is acceptable. But I fear that it is construed by the trial judges as a directive to impose the death penalty if an aggravating factor exists that is not clearly overridden by a statutory mitigating factor. The death sentence is proper in many cases. But it is the most severe and final penalty of all and should, in my judgment, be exercised with extreme care. I am unwilling to say that a trial judge should presume death to be the proper sentence simply because a statutory aggravating factor exists that has not been overcome by a mitigating factor.
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> *Randolph v. State*, No. 54-896 (Fla. Nov. 10, 1983) (LEXIS, States Library, Fla. file) (McDonald, J., dissenting), *withdrawn*, 463 So. 2d 186 (Fla. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 6565 (1985).
>
> Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment.

837 F.2d at 1473 (emphasis supplied).

The Eleventh Circuit correctly held that when the sentencer employs such a death presumption it violates the Eighth Amendment. In the Florida scheme both the judge and jury play a constitutionally significant role in sentencing. Espinosa v. Florida, 112 S.Ct. 2926 (1992). The judge employing such erroneous presumption is also constitutional error. Thus, resentencing is required.

In Henyard v. State, 689 So. 2d 239 (Fla. 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 250. 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 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.

689 So. 2d at 249-250 (emphasis added). Unlike in Henyard, the error cannot be deemed harmless in this case. In Henyard, the comment was by a prosecutor and the jury was correctly instructed on the law. Whereas, in this case, the misstatement of law was by the trial court in his sentencing order and was used as a standard in imposing the death penalty. To compound the problems with the improper presumption, in this case the trial court also recognized a presumption of death based on the jury's death recommendation and stated the presumption could not be overcome unless "no reasonable basis exists for the recommendation" R 2490.

POINT XI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SUPPLEMENTAL VOIR DIRE.

After Appellant was found guilty, and prior to the penalty phase, Appellant requested supplemental voir dire to determine if there would be any unyielding bias caused by the prior murder that was to be used in aggravation R 1669-70. The trial court denied Appellant's motion R 1677. This was error.

If Appellant disclosed during jury selection that he had a prior murder conviction and tried to effectively voir dire prospective jurors' attitudes concerning a sentencing recommendation, the juror's knowledge of such a fact would prejudice the fairness of his guilt phase trial where the prior murder conviction was irrelevant and inadmissible in that phase. Thus, he could not disclose the prior murder conviction and preserve the fairness of the guilt phase trial. However, normally such a decision would result in ineffective voir dire on the impact a prior murder conviction would have on a prospective juror at sentencing. In order to avoid having the unfairness which would result at one or the other stage of the trial, Appellant requested supplemental voir dire after the guilt phase. The request was made to insure Appellant's right to voir dire prospective sentencing jurors concerning their attitudes and possible bias regarding the imposition of the death penalty, and at the same time, insure a guilt phase jury not exposed to this prejudicial and irrelevant prior murder conviction. With supplemental voir dire, the

jury could be questioned and empaneled without reference to the prior murder at the guilt phase, while at the penalty phase the jury could be questioned freely about the impact of that prior conviction. Supplemental voir dire would preserve the fairness and reliability of both phases of the trial.

The trial court denied this motion R 1677. As a result, defense counsel's right to voir dire the prospective jurors concerning attitudes about the death penalty was restricted. Appellant was denied his rights to effective counsel at jury selection, to due process and a fair jury trial at penalty phase and his death sentence was unconstitutionally imposed since the reliability of the bifurcated trial process was impaired. Art. I, Secs. 9, 16, 17, Fla. Const.; Amend. V, VI, VIII, XIV, U.S. Const.

Appellant's motion for supplemental voir dire has the benefits similar to choosing two juries -- one for the guilt phase and one for penalty phase. Obviously, due to the problems of dealing with two separate juries the impaneling of two separate juries may be frowned upon. The disadvantages of two juries do not exist with supplemental voir dire. Instead, a few additional questions are asked of the jurors prior to the penalty phase to ensure that the jury can fairly decide the penalty phase issues which may involve the prior murder conviction. This Court has recognized that the trial court has the authority to remove a juror for the penalty phase even after the juror reached a decision in the guilt phase. Jennings v. State, 512 So. 2d 169 (Fla.

1987). Specifically, this Court noted that the juror could be replaced by an alternate in the penalty phase due to her view of the death penalty regardless of her participation in the guilt phase:

> Finally, the fact that the alternate did not deliberate guilt with the other panel did not prevent that juror from reaching a sound decision as to the penalty. Florida Rule of Criminal Procedure 3.280 authorizes the court to substitute alternates for jurors who "become unable or disqualified to perform their duties." Had the subject juror originally stated during voir dire that she could not vote for death at the penalty phase, she would have been subject to removal for cause.

512 So. 2d at 173. Supplemental voir dire has been permitted, in fact required, in various stages of trial. See Powell v. Allstate Insurance Co., 652 So. 2d 354 (Fla.1995) (inquiry regarding open discussion about racial bias); Salas v. State, 544 So. 2d 1040 (Fla. 4th DCA 1989) (inquiry into prejudicial publicity). The supplemental voir dire was indispensable to the bifurcated trial procedure which Florida has chosen to utilize.

After Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the United States Supreme Court affirmed the facial constitutionality of capital sentencing statutes because they had adopted bifurcated trial procedures. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Court commented that one of the benefits of such a process is to allow the jury to hear information relevant to sentencing which may have been prejudicial and irrelevant to the issue of guilt. The Court wrote,

> Jury sentencing has been considered desirable in capital cases in order "to maintain a link between contemporary

> community values and the penal system -- a link without which the determination of punishment could hardly reflect `the evolving standards of decency that mark the progress of maturing society.'" But it creates special problems. Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure -- one in which the question of sentence is not considered until the determination of guilt has been made -- is the best answer....
>
> * * *
>
> When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in Furman.

428 U.S. 190-192. This Court has also recognized the importance of the bifurcated sentencing system in Florida. State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), see, also, Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

An inherent part of the bifurcated trial procedure is the selection of a jury which can fairly decide the guilt and penalty issues in the case. Prospective jurors who are unable to consider death as a possible sentencing option are not permitted to serve. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Likewise, those prospective jurors who are unable to consider life as a possible sentencing option in the case are not permitted to

serve. Ross v. Oklahoma, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988); O'Connell v. State, 480 So. 2d 1284 (Fla. 1985); Fitzpatrick v. State, 437 So. 2d 1072 (Fla. 1983); Thomas v. State, 403 So.2d 371 (Fla. 1981). This Court has held that full and adequate voir dire of prospective jurors is an important right to aid in the selection of an unbiased jury. See, e.g., Davis v. State, 461 So.2d 67 (Fla. 1985); Lewis v. State, 377 SO.2d 640 (Fla. 1980). In a capital case, a defendant has the right to examine prospective jurors regarding their ability to recommend a life sentence. E.g., Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983); Thomas v. State, 403 So.2d 371 (Fla. 1981); Poole v. State, 194 So.2d 903 (Fla. 1967). Moreover, a defendant has the right to ask prospective jurors if particular facts or circumstances would trigger a bias rendering them unable to fairly consider a life sentence recommendation in view of that fact. Ibid. Unfortunately, in this case, the selection of a single jury without supplemental voir dire could not accomplish the goal of obtaining jury fairly selected to try both phases of the case. The trial court's decision denying the motion for supplemental voir dire effectively denied Appellant of this important right to question prospective jurors. Counsel was restricted in his ability to ask the question which was the pivotal issue in the penalty phase of the case. A prior conviction for a murder is a significant aggravating factor. Appellant was entitled to have a penalty phase jury selected with that issue fully explored during voir dire. In order to adequately voir dire the prospective

jurors on penalty issues, defense counsel would have had to disclose the irrelevant to guilt phase fact of a prior conviction. This, however, would have negated one of the primary benefits the bifurcated procedure was designed to accomplish -- keeping prejudicial facts which are relevant to sentencing from being injected into the guilt determining process. Gregg v. Georgia, supra.

Appellant was denied his right to a fair penalty phase trial with a fairly selected jury. He asks this Court to reverse his sentence for a new penalty phase trial with a new jury.

POINT XII

THE TRIAL COURT ERRED IN FAILING TO CONSIDER LIFE WITHOUT PAROLE AS A SENTENCING OPTION AND FAILING TO INSTRUCT THE JURY ON THIS OPTION

The trial court erred in failing to consider life without parole as a sentencing option and in failing to instruct the jury that this is an option. This denied Appellant due process of law pursuant to Article I, Sections 2, 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. This subjected him to cruel and/or unusual punishment pursuant to the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution, and Florida Statute 921.141. Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).

The jury was instructed in this case that the penalties it could consider are death and life without the eligibility for parole for twenty-five (25) years. Life without parole was never considered as a possible sentence. It was error to fail to consider the option of life without parole.

The offense in this case took place on October 13, 1993. The Legislature amended Florida Statute 775.082(1) effective May 25, 1994 to make life without parole a penalty for first degree murder. In Re: Standard Jury Instructions In Criminal Cases, 678 So. 2d 1224 (Fla. 1996). Guilt and penalty phase in this case took place in December of 1995 and January of 1996. Sentence was imposed on November 1, 1996 R 2474-2482. The trial court committed fundamental error in failing to instruct the jury on the life with no parole option and in failing to consider this option.[23]

The Oklahoma Court of Criminal Appeals faced a similar issue. Oklahoma had a system where the two penalties for first degree murder were death and life in prison with the possibility of parole. The Oklahoma Legislature changed the penalties to add the option of life without parole. It was held to be reversible error to fail to consider the life with no parole option in trials and penalty phases conducted after the effective date of the statute, even though the offense was committed prior to the effective date of the statute:

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[23] Appellant made no request for the life without parole option.

> There is no question that in this case consideration of the life without parole sentence is a retroactive application of a punitive statute. However, our analysis may not stop here. In order to affirm the trial court's refusal to consider this punishment, we must also find that imposition of the sentence could have disadvantaged Appellant by subjecting him to a harsher punishment than was available at the time he committed his crimes. While we will not speculate as to the comparative drawbacks between a life in prison without chance of parole and the actual imposition of the death penalty, we believe that any possibility of a sentence which avoids the death penalty cannot be said to be disadvantageous to the offender.
>
> Accordingly, we find that the trial court's refusal to consider the possibility of imposing a sentence of life without parole provision under the provisions of 21 O.S. Supp. 1987, § 701.10 was error.

Allen v. State, 821 P.2d 371, 376 (Okl.Cr. 1991). See also Wade v. State, 825 P.2d 1357, 1363 (Okl.Cr. 1992).

This rule has been applied to retrials and resentencings. McCarty v. State, 904 P.2d. 110 (Okl.Cr. 1995).

The refusal to instruct the jury and consider the life without parole option has been consistently held to be fundamental error and mandates reversal even in the absence of an objection. Salazar v. State, 852 P.2d 729, 741 n.9 (Okl.Cr. 1993); Hain v. State, 852 P.2d 744, 752-753 (Okl.Cr. 1993); Humphrey v. State, 864 P.2d 343, 344 (Okl.Cr. 1993); Fontenot v. State, 881 P.2d 69, 74 n.2 (Okl.Cr. 1994); Parker v. State, 887 P.2d 290, 299 (Okl.Cr. 1994); Cheatam v. State, 900 P.2d 414, 428-430 (Okl.Crim. 1995).

This error has been consistently held to be harmful and mandates reversal regardless of the aggravating and mitigating circumstances in

a given case. Salazar; Wade; Allen; Hain. The Court explained why this error is fundamental and always requires reversal:

> The trial court's failure to provide proper sentencing instructions to a jury in a capital case is of critical importance. The death penalty is different from all other penalties in its severity and finality. See Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S.Ct. 2633, 2639, 86 L.Ed.231 (1985). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). Further, in Beck v. Alabama, 447 U.S. 625, 637, 100 S.Ct. 2382, 2389, 65 L.Ed.2d 392 (1980), quoting Gardner v. Florida, 430 U.S. 349, 357-358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977), the Supreme Court stated "'the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose death be, and appear to be, based on reason rather than caprice or emotion.'" Because this Court lacks the power to grant relief to a man or woman who has been wrongfully executed, this Court, like all courts grappling with the difficult issues raised in capital cases, must act prudently and with the utmost fairness....
>
> The Oklahoma Legislature, as representatives of the citizens of this State, has determined in some cases, life without the possibility of parole can accomplish the societal goals of retribution and deterrence, without resorting to the death penalty. Gregg v. Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859 (1975) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders"). The sentence of life without the possibility of parole offers the jury a more severe sanction than life imprisonment, but a less harsh penalty than death. A jury could well conclude that life without parole is the appropriate sanction in certain cases in which the State is seeking the death penalty.
>
> The gravity of the death penalty and the legislature's clear determination that life without parole should be considered

> in sentencing a defendant who has been convicted of First Degree Murder warrant remand of this conviction for resentencing.

Salazar, supra at 739.

The conclusion of the Oklahoma Court of Criminal Appeals that a defendant who is tried and sentenced after the effective date of the life without parole option must receive consideration of this option and that this error is fundamental and always mandates reversal are supported by the decisions of the United States Supreme Court, this Court, and the courts of other jurisdictions.

In Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) the United States Supreme Court struck down an Alabama statute that prohibited the giving of lesser offenses in a capital case. The Court held that the Due Process Clause required this in a capital case because of the unwarranted risk of conviction. 447 U.S. at 638-639. The Court relied, in part, on the unique need for reliability in a capital case. The same unwarranted risk is at work here. The jury and/or judge could vote to impose death in order to avoid the possibility of release, rather than because it is the required penalty.

The reasoning of the Oklahoma Court of Criminal Appeals is also supported by the decision of the United States Supreme Court in Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct 2187, 129 L.Ed.2d 133 (1994). In Simmons, the defendant would be sentenced to life without parole as an habitual offender, if he did not receive the death penalty. The jury was instructed that he would receive a life sentence and counsel

was prohibited from arguing that he was ineligible for parole. The United States Supreme Court held this to be a violation of Due Process:

> It is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.

114 S.Ct. at 2194. The Court also noted a recent South Carolina study in which:

> More than 75 percent of those surveyed indicated that if they were called upon to make a capital-sentencing decision as jurors, the amount of time the convicted murderer would have to spend in prison would be an "extremely important" or a "very important" factor in choosing between life and death.

114 S.Ct. at 2191. The Simmons opinion supports the holding that the failure to give the life with no parole option is always harmful. Data from the University of South Carolina poll cited with approval in Simmons are supported by numerous other surveys.[24]

The importance of the alternative penalty to jurors has been noted by this Court in Jones v. State, 569 So. 2d 1234 (Fla. 1990). In Jones, the defendant was prevented from arguing that he could be

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[24] Theodore Eisenberg & Martin T. Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 Cornell L. Rev. 1 (Nov. 1993) (from survey of 114 capital jurors it was concluded that jurors who believe the alternative to death is a relatively short time in prison tend to sentence to death, while "[j]urors who believe the alternative treatment is longer tend to sentence to life."); William J. Bowers, Capital Punishment & Contemporary Values: People's Misgivings and the Court's Misperceptions, 27 Law & Soc. Rev. 157 (1993) (same results from post-trial jurors in Florida, California and South Carolina).

sentenced to a fifty (50) year mandatory minimum. Id. at 1239. This Court held this to be error:

> Jones contends that the trial court improperly prevented him from arguing that he could be sentenced to two consecutive minimum twenty-five-year prison terms on the murder charges should the jury recommend life sentences. The state argues that this claim was speculative because the actual sentencing decision is purely within the province of the court, not the jury.
>
> The standard for admitting evidence of mitigation was announced in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The sentencer may not be precluded from considering as a mitigating factor, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 605, 98 S.Ct. at 2965. Indeed, the Court has recognized that the state may not narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." McClesky v. Kemp, 481 U.S. 279, 304, 107 S.Ct. 1773, 95 L.Ed.2d 262 (1987) (emphasis in original; footnote omitted). Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.

569 So. 2d at 1239-1240.[25]

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[25] The decisions of other courts have emphasized the importance of the length of the alternative sentence to a jury in a capital case. State v. Henderson, 789 P.2d 603 (N.M. 1990), overruled on other grounds in Clark v. Tansy, 882 P.2d 527 (N.M. 1994) (error not to inform the jury in a capital case that a life sentence involved ineligibility for parole for thirty (30) years); Turner v. State, 573 So. 2d 657, 673-675 (Miss. 1990) (trial court required to conduct habitual offender hearing prior to capital sentencing and required to inform capital juror that defendant is ineligible for parole if found to be an habitual offender); Taylor v. State, 672 So. 2d 1246 (Miss. 1996) (explaining why the principle of Turner, supra, cannot be applied prospectively only).

Assuming arguendo that this error can be harmless, it was harmful in the current case. There was substantial mitigating evidence introduced. The trial judge only found one aggravating circumstance, while finding two statutory mitigating circumstances and eight non-statutory mitigating circumstances. The jury's and judge's consideration of the life without parole option could well have changed the result. The trial judge specifically found the defendant's capacity for rehabilitation as a mitigating circumstance. There was testimony presented that the defendant could function well in a structured environment, such as a prison setting. The failure to instruct on this option and consider it is fundamental error.

POINT XIII

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE THE DETAILS OF PRIOR VIOLENT FELONY CONVICTIONS.

The trial court allowed the prosecution to introduce the details of the prior violent felony, over defense objection, that only the judgment and conviction could be introduced R 1691. The trial court overruled Appellant's objection R 1693. This was error and denied Appellant's rights pursuant to Article I, Sections 2, 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Appellant recognizes that this Court has previously held that the prosecution can introduce evidence regarding a prior violent felony beyond the judgment itself. However, in recent years this rule has

proven to be unworkable. It has spawned tremendous litigation over the extent, nature, and source of evidence concerning prior violent felonies. Trawick v. State, 473 So. 2d 1235 (Fla. 1985); Stano v. State, 473 So. 2d 1282 (Fla. 1985); Tompkins v. State, 502 So. 2d 415 (Fla 1986); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Freeman v. State, 563 So. 2d 73 (Fla. 1990); Duncan v. State, 619 So. 2d 279 (Fla. 1993); Finney v. State, 660 So. 2d 674 (Fla. 1995).

This Court's frequent discussions of this issue have left litigants with a case by case quandry regarding the admissibility of evidence concerning a prior violent felony. There is little or no firm guidance to trial judges or litigants as to when this testimony is admissible.

A better rule is outlined by the Oklahoma Court of Criminal Appeals in Brewer v. State, 650 P.2d 54 (Okl.Cr. 1982). The Court held that defendant must be given an opportunity to stipulate to the validity of his prior violent felony convictions. Id. The prosecution is then limited to the introduction of the judgment and sentence on the prior felonies. Id. The Court in Brewer went on to place strict limits on the introduction of evidence concerning the prior felony even in cases where the defendant refuses to stipulate:

> If the defendant refuses to so stipulate, the State shall be permitted to produce evidence sufficient to prove that the prior felonies did involve the use or threat of violence to the person. We emphasize that prosecutors and trial courts should exercise informed discretion in permitting only the minimal amount of evidence to support the aggravating circumstances. We do not today authorize the State to

re-try defendants for past crimes during the sentencing stage of capital cases.

Id. at 63. Such a procedure is far preferable to the current ill-defined limits. It sets out a bright line rule for everyone to follow as opposed to the current imprecise balancing test. This procedure also satisfies all of the concerns of the capital sentencing process.

The only arguable rationale for allowing evidence beyond the judgment in a case is to determine the weight to be given the prior violent felony. However, this purpose can be achieved by the judgement itself. A judge and jury can clearly determine what weight is to be given to the prior offense from the nature of the conviction. It is relatively easy to determine the seriousness of a prior offense from the nature of the conviction.

The idea that the seriousness of a prior offense can be determined by the judgment itself is consistent with the approach taken by the sentencing guidelines. Fla.R.Crim.P. 3.701-3.703. The guidelines assign a numerical weight to each prior offense based on the seriousness of the prior conviction. Thus, all prior offenses of one type are weighed equally. This is a far more objective system than introducing testimony about the prior conviction within some ill-defined limits.

The current practice in capital sentencing of allowing evidence beyond the judgment has had several negative affects. It has resulted in persistent and increasing litigation over the precise limits of such testimony. The current procedure also increases the arbitrariness in capital sentencing. There will be extreme variation from case to case

in the availability of witnesses from prior violent felonies, in the emotional nature of their testimony and in the extent to which prosecutors and judge observe the ill-defined limits on such testimony. There will inevitably be cases where the limits are exceeded. Trawick, supra; Rhodes, supra; Freeman, supra; Duncan, supra. There will be other cases in which the evidence is used for improper purposes. Finney, supra. Finally, there will be cases in which evidence is taken to the "outermost limits of propriety." Stano, supra at p.1289. All of this will lead judges and juries to different results based on an identical prior record.

POINT XIV

THE TRIAL COURT ERRED IN ALLOWING THE EVIDENCE CONCERNING THE PRIOR VIOLENT FELONY TO BECOME A FEATURE OF THE CASE.

Appellant has separately argued that this Court should limit evidence of prior violent felonies to the judgment. Assuming arguendo, this Court rejects this argument the trial court improperly allowed the evidence of prior violent felony to become a feature of the case. Appellant made specific objections to the presentation of the details of the prior violent felony conviction R 1692. The error violated Appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 17 and 22 of the Florida Constitution.

All of the state's penalty phase evidence presented by the prosecution in the penalty phase concerned the details of the prior

violent felony R 1734-1769. None of the prosecution evidence in the penalty phase dealt with the present case.

This Court has repeatedly held that the details of prior violent felonies must not be to the point where they became the feature of the penalty phase. Finney v. State, 660 So. 2d 674 (Fla. 1995); Duncan v. State, 619 So. 2d 279, 282 (Fla. 1993). This is precisely what occurred in the present case. The prosecution's presentation concerning the prior violent felony was lengthier than that concerning the homicide itself. When the prosecution's evidence concerning prior violent felony is more extensive than that concerning the offense itself, it can only be described as a feature of the case. See Long v. State, 610 So. 2d 1276, 1280-1281 (Fla. 1993); Bell v. State, 650 So. 2d 1032, 1035 (Fla. 5th DCA 1995). The error was highly prejudicial, given the extensive mitigation in this case.

POINT XV

ALLOWING DETECTIVE ABRAMS TO TESTIFY TO WHAT UNIDENTIFIED WITNESSES HAD TOLD HIM DURING HIS INVESTIGATION IS HEARSAY AND VIOLATED APPELLANT'S RIGHTS UNDER THE CONFRONTATION CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Over Appellant's objection R 1768, the prosecution was permitted to present hearsay testimony during the penalty phase. This was error and denied Appellant's rights to due process and confrontation as guaranteed under the United States and Florida Constitutions.

During the penalty phase Detective Abrams testified to the results of his investigation of the prior violent felony. Specifi-

cally, Abrams testified that two witnesses had seen Appellant with the victim prior to the offense R 1768. The out-of-court statements are clearly hearsay which violates the Confrontation Clause.

The Confrontation Clause applies to capital sentencing proceedings. See Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) and Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (Specht applies to capital sentencing proceedings). Rulings of the United States Supreme Court[26] make clear that the use of hearsay testimony violates the Confrontation Clause. Thus, the use of hearsay in capital sentencing proceedings violates the Confrontation Clause and the Due Process Clause under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida Constitution. Appellant's sentence must be reversed and this cause remanded for resentencing.

POINT XVI

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ELICIT EVIDENCE REGARDING APPELLANT'S SANITY.

Over Appellant's objection the prosecutor was allowed to cross-examine Dr. Strauss as to whether Appellant was sane at the time of the offense R 1896-1904. It was error to allow the introduction of such evidence which was irrelevant. Appellant was denied due process and a fair and reliable sentencing. Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Const.; Art. I, §§ 2, 9, 16, 17 and 22, Fla. Const.

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[26] Idaho v. Wright, 110 S.Ct. 3139 (1990) and Dever v. Ohio, 111 S.Ct. 575 (1990).

Appellant never raised the insanity defense in this case. While Appellant did raise the issue of statutory mental mitigating circumstances, it is well-settled that sanity is not relevant to those mitigating circumstances. See Campbell v. State, 571 So. 2d 415, 418-19 (Fla. 1990) (court improperly used "sanity" standard in rejecting "impaired capacity" as a mitigator); Ferguson v. State, 417 So. 2d 639, 644-45 (Fla. 1982) (trial court concluded Ferguson has "absolute understanding of events and consequences"; it was error to reject impaired capacity by use of wrong standard). Appellant's sentence must be reversed and this cause remanded for resentencing.

POINT XVII

ELECTROCUTION IS CRUEL AND UNUSUAL.

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

a malfunctioning chair could cause the inmate enormous pain increases the mental anguish. Appellant's objection was overruled R 1681,1683.

This unnecessary pain and anguish shows that electrocution violates the Eight Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977). A punishment which was constitutionally permissible in the past becomes unconstitutionally cruel when less painful methods of execution are developed. Furman v. Georgia, 408 U.S. 238, 279 (Brennan, J., concurring), 342 (Marshall, J., concurring), 430 (Powell, J., dissenting). Electrocution violates the Eighth Amendment and the Florida Constitution, for it has no become nothing more than the purposeless and needless imposition of pain and suffering. Coker, 433 U.S. at 592.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 8th day of January, 1997.

Jeffrey L. Anderson
Of Counsel

IN THE SUPREME COURT OF FLORIDA

OSVALDO ALMEIDA,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 89,402
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

A P P E N D I X

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT, IN AND
FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

OSVALDO ALMEIDA,

Defendant.
_____/

CASE NO.: 93-21249CF10A

JUDGE BACKMAN

SENTENCE

On December 12, 1995, the defendant, Osvaldo Almeida, was tried and found guilty by a jury of his peers of Murder in the First Degree. On January 8 and 9, 1996, a separate sentencing proceeding was conducted by the trial jury for the purpose of advising this Court whether the defendant should be sentenced to death or to life imprisonment without possibility of parole for twenty-five (25) years. Assistant State Attorney Tim Donnelly urged the jury to recommend the death penalty, and Defense Attorney Hilliard Moldof argued for a recommendation of life imprisonment. Following receipt of the appropriate jury instructions applicable to penalty proceedings, the jury deliberated and rendered an advisory sentence recommending by a vote of nine (9) to three (3) that this court impose the death penalty.

The Court, after rendition of the jury recommendation, set a sentencing hearing for April 19, 1996. At that time, the state and the defense had the opportunity to present additional matters for the Court's consideration. The Court heard from five (5) additional witnesses for the defendant. The defendant was then asked if he wished to exercise his right of elocution. The Court requested, and subsequently received and reviewed, sentencing memoranda from counsel for the state on May 17, 1996 and counsel for the defendant on

May 23, 1996. The Court ordered, received and reviewed a Presentence Investigation, and considered only those matters contained within said document that related specifically to the issue of mitigation. Nothing else contained therein was considered by this Court on the issue of sentence. Additionally, the Court received and reviewed numerous letters written on behalf of the family and friends of the deceased and the defendant, which were not relied upon for purposes of this sentencing.

The proper discharge of a judge's responsibility requires considerable thought, anguish and toil. A judge must pronounce an opinion which is believed to be both factually and legally correct, without regard to public opinion or pressure. A decision involving the potential imposition of a death penalty is the greatest decision and responsibility known to civilized mankind. Accordingly, this Court, having heard the evidence presented at both the guilt and penalty phases, having had the benefit of legal memoranda and further argument of counsel in favor of and in opposition to the death penalty, and in accordance with Florida Statute, Section 921.141, giving great weight to the jury's sentencing recommendation, finds as follows:

A. AGGRAVATING FACTORS

1. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. F.S. 921.141(5)(b).

The defendant was convicted on November 16, 1995 of Murder in the First Degree in case number 93-22047CF10A involving the death of Marilyn Leath. The state introduced a certified copy of the defendant's judgment in that case. Detective John Abrams of the Fort Lauderdale Police Department investigated that murder and testified at the sentencing hearing regarding the facts of the crime. He testified that on October 7, 1993, Marilyn Leath was shot one time with a Magnum 44 Black Talon bullet. He described how the defendant was ultimately arrested for the murder and gave a sworn taped statement. The taped statement

was played before the jury at the sentencing hearing. In it, the defendant described how he killed Ms. Leath. Accordingly, the Court finds this aggravating circumstance was proven to exist beyond and to the exclusion of every reasonable doubt.

None of the other aggravating factors enumerated by statute are applicable to this case, and none was considered by this Court. Nothing except as previously indicated in paragraph 1 above was considered in aggravation.

B. MITIGATING FACTORS

Counsel for the defendant offered evidence in support of three (3) statutory mitigating factors:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. F.S. 921.141 (6)(b).

The standard required to establish this factor is less than insanity but more than the emotions of an average man, however inflamed. State v. Dixon, 283 So.2d 1 (Fla. 1983). The mental disturbance must be one which "interferes with but does not obviate the defendant's knowledge of right and wrong." Duncan v. State, 619 SO.2d 279 (Fla. 1993).

According to the testimony of Dr. Thomas Macaluso, a clinical psychiatrist, the defendant suffered from a chronic form of depression known as dysthymia. He further testified that the defendant was predisposed to becoming depressed as a result of his background, which included alleged physical, emotional and sexual abuse as a child, which in turn resulted in low self esteem. Dr. Macaluso also stated that the defendant admitted to sleep disturbances and heavy alcohol consumption, which would aggravate his depressive illness. He concluded that the defendant suffered from this depression for the last fifteen (15) years and, consequently, was under the influence of extreme mental or emotional disturbance at the time of the homicide. It was also his opinion that the defendant was sane at the time of the offense. He therefore knew right from wrong and the understood the consequences

of his actions.

Similar testimony was offered by Dr. Abbey Strauss, a defense expert in forensic psychiatry and psychopharmacology, who conducted his examination of the defendant two(2) years after the incident. He found it difficult to diagnose a specific disease regarding the defendant's mental condition. He concurred in the diagnosis of dysthymia. Additionally Dr. Strauss found Dysfunction, Post Traumatic Stress Disorder, Neuroplasticity and Alcohol Abuse. He stated that the combination of childhood abuse, the breakup of his marriage, and alcoholism caused the defendant extreme mental or emotional disturbance consistent with the statutory mitigating factor. The only evidence that Dr. Strauss considered regarding the defendant's use of alcohol at the time of the incident was the defendant's own statement made during an interview.

Finally, Dr. Lee Bukstel, a clinical neuropsychologist, testified as to the results of various psychological tests which he administered to the defendant. The results indicated neuropsychological deficits related to a disorder in the defendant's mental development. Despite the foregoing, however, Dr. Bukstel determined that any mental or emotional disturbance derived from his family history rather than from any psychological deficit. Specifically, he noted that the defendant's history of physical, sexual and emotional abuse, coupled with feelings of not being loved either by his family or his ex-wife, could have risen to the level of extreme emotional disturbance. Based upon his interviews with the defendant, he believed that depression, and not alcohol, was the factor which contributed to the defendant's extreme mental or emotional disturbance. It was his conclusion that although none of the particular circumstances of his childhood would be sufficient to establish the statutory mitigator in question, the cumulative effect of his history could certainly establish it. Based on the evidence presented, the Court finds that this mitigator exists and gives it little weight.

2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. F.S. 921.141(6)(f) ___

This circumstance applies when the defendant is not legally insane, but has mental problems that limit his capacity to conform his conduct to the requirements of law. Ferguson v. State, 417 So.2d 631 (Fla. 1982). None of the examining experts found the defendant to be insane; however, Dr. Strauss held the opinion that the defendant met the criteria for this mitigator. He relied on the fact that the defendant's psychological deficits, coupled with alcohol abuse, resulted in a degree of emotional impulsivity that made him incapable of conforming his conduct to the requirements of law. He was of the opinion that the defendant's use of alcohol at the time of the incident acted as a "rocket booster" which substantially impaired the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Dr. Strauss' only information regarding alcohol use came from his interviews with the defendant. He had not read any of the reports or statements regarding the incident until after he had made his conclusion. There is no evidence other than the defendant's statements that alcohol consumption contributed to this murder.

Nevertheless, both Dr. Macaluso and Dr. Bukstel agreed that the defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law and to know right from wrong was unimpaired at the time he committed the murder. Dr. Macaluso specifically noted that his interviews with the defendant revealed that the defendant was able to appreciate his criminal wrongdoing.

This was the second murder the defendant had committed within a week. There is no evidence of a mental disturbance that interfered with the defendant's knowledge of right and wrong. The actions of the defendant the week prior to the murder and the night of the

murder, coupled with the testimony of Doctors Macaluso and Bukstel, undermine and negate the opinion of Dr. Strauss. The Court finds that the evidence presented fails to establish, by a greater weight of the evidence, that the defendant did not appreciate the criminality of his conduct or was incapable of conforming his conduct to the requirements of law. Accordingly, the Court further finds that this statutory mitigating factor does not exist.

3. The age of the defendant at the time of the crime. F.S. 921.141 (6) (g)

The defendant was nineteen years old when the murder was committed. Not only was he no longer a minor at that time, but he was a married man, albeit separated from his wife, as well as a father. He lived on his own and was self-supporting, maintaining steady employment at two jobs. There is no evidence to suggest that the defendant's mental or emotional age did not match his chronological age. Therefore, while the Court finds this mitigator to exist, it gives it little weight.

The defendant also presented the following non-statutory mitigating circumstances:

1. The defendant's capacity for rehabilitation.

Dr. Macaluso and Dr. Bukstel testified that the defendant's depression would be difficult but not impossible to treat. However, Dr. Bukstel also stated on the record that the defendant's problems are long-standing and that he would always have certain neuropsychological deficiencies. While the defendant's prospects for complete recovery remain a question, there was evidence that rehabilitation could occur once he had been examined and a treatment plan addressed. The Court finds this mitigator to exist, but gives it very little weight.

2. The defendant's good behavior while incarcerated.

The defendant presented the testimony of several jail guards, all of whom testified that the defendant has not caused any problems while in jail. The Court finds that this mitigating

factor was established but gives it little weight.

3. The defendant cooperated with the police after his arrest.

The evidence presented by the testifying officers indicates that the defendant initially denied any knowledge of the crime. He later confessed and gave the police a taped statement. During the taped interview, the defendant apologized for giving the detectives a "hard time". In addition, he misled the interviewing detectives by claiming that he had never been with a prostitute before, even though he previously admitted to the murder of Marilyn Leath who was also a prostitute. The Court finds that the defendant's cooperation was at best inconsistent. Therefore, although the mitigating factor was established, the Court gives it little weight.

4. The defendant gave up his right to remain silent and voluntarily made statements following his arrest.

This factor is based upon the same circumstances that give rise to the previous mitigator. Therefore, although the Court finds that the circumstance exists, it gives it little weight.

5. The defendant's use and abuse of alcohol as well as the use of alcohol on the date of the incident.

All of the doctors who examined the defendant testified that he had a two year history of alcohol abuse. The defendant admitted in his statement to the police that he had consumed a six-pack of beer prior to the murder. Consequently, the Court finds that alcohol abuse and use on the date of the incident was established as a mitigating circumstance and gives it little weight.

6. The defendant had a difficult childhood or was physically abused.

Based on interviews with the defendant and reviews of depositions of various family

members, all three doctors testified that the defendant was physically, emotionally and sexually abused as a child. Furthermore, they testified that the abuse was a significant factor in the defendant's diagnosis of chronic depression. The Court finds that the evidence presented established this mitigating circumstance and gives it some weight.

7. The defendant has shown remorse.

The doctors testified that the defendant expressed remorse which they believe to be genuine. Nevertheless, his conviction for the murder of Chiquita Counts represents the second time in a week that the defendant committed a first degree murder. Accordingly, the Court finds that the mitigating circumstance exists but gives it little weight.

8. The defendant has exhibited genuine religious beliefs.

Each of the doctors testified that the defendant developed religious beliefs following his arrest. No evidence was presented to controvert this assertion. Therefore, the Court finds this mitigating factor exists but gives it little weight.

9. Any other aspect of the defendant's character or record, and any other circumstance of the offense.

These matters have been reviewed by the Court, and no other mitigating circumstances have been found.

In summary, the Court finds that one aggravating circumstance was presented, and it is applicable. The Court further finds the aggravator established by the evidence is significant. As to the mitigating circumstances, the Court finds two statutory and eight nonstatutory mitigating circumstances have been established, considered, and weighed. In evaluating aggravating and mitigating circumstances, this Court does not engage in a mere counting procedure of so many aggravating and so many mitigating circumstances. After independently evaluating all of the evidence presented, the Court must make a reasoned

judgment as to what factual situations require the imposition of the death penalty, and which can be satisfied by life imprisonment, in light of the totality of the circumstances. Floyd v. State, 569 So.2d 1225 (Fla. 1990).

The jury recommended that this Court impose the death penalty by a majority of nine to three. A jury recommendation must be given great weight by the sentencing judge and should not be overruled unless no reasonable basis exists for the recommendation. Richardson v. State, 437 So.2d 1091 (Fla. 1983). The ultimate decision as to whether the death penalty should be imposed, however, rests with the trial judge. Hoy v. State, 353 So.2d 826 (Fla. 1977). Death is presumed to be the proper penalty when one or more aggravating circumstances are found, unless they are outweighed by one or more mitigating circumstances. White v. State, 403 So.2d 331 (Fla. 1981). Upon carefully evaluating all of the evidence presented, it is this Court's reasoned judgment that the mitigating circumstances do not outweigh the aggravating circumstances.

It is, therefore, the sentence of this Court that you, OSVALDO ALMEIDA, be sentenced to death for the murder of Chiquita Counts. The sentence shall be served consecutively to the sentence in case number 93-22047CF10A.

It is further ordered that you, OSVALDO ALMEIDA, be confined by the Department of Corrections and be kept in close confinement until the day of your execution, and that on that day you be put to death by electrocution, which is the manner prescribed by law.

You are hereby advised that you have thirty (30) days from the date herein in which to appeal the sentence, judgment and conviction of this Court. The judgment of conviction and the sentence of death are subject to automatic review by the Supreme Court of Florida. The Office of the Public Defender is hereby appointed to assist you as counsel in the filing and preparation of your appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Suite 300, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 8th day of August, 1997.

Jeffrey Y. Anderson

Of Counsel