IN THE SUPREME COURT OF FLORIDA

OSVALDO ALMEIDA,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 89,432
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
______________________	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit of Florida.

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STATEMENT OF THE CASE

A. A grand jury indicted Osvaldo Almeida, appellant, for first degree murder in the death of Frank Ingargiola R 1. Appellant entered a plea of not guilty and later filed a notice of intent to rely on the insanity defense R 169. At trial, the jury found him guilty as charged R 206. Pursuant to the jury's recommendation of a death sentence by a vote of 7 to 5, R 239, the court sentenced him to death on November 1, 1996, finding two aggravating circumstances,[1] three statutory mitigating circumstances[2] and eight non-statutory mitigating circumstances.[3] R 282-94. Appellant timely filed his notice of appeal on November 8, 1996, R 358, and this appeal follows.

B. The state's evidence showed that around 12:25 a.m. on November 15, 1993, Louis Salmon, a cook at a restaurant (Regas Grill) which employed Mr. Almeida, went with Almeida in Almeida's car to meet some friends at Higgy's (a bar and restaurant referred to at various times as "Higgy's Goal Line Cafe" and "Higgy's Restaurant") T 1362-63. Sitting at a table in the saloon, they ordered a pitcher of beer T

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[1] That Mr. Almeida had previously been convicted of (two) capital felonies, and that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification R 283-84.

[2] The age of the defendant (20), that he committed the murder while under the influence of extreme mental or emotional disturbance, and that his ability to appreciate the criminality of conduct or to conform his conduct to the requirements of law was substantially impaired R 287-89.

[3] Capacity for rehabilitation, good behavior while incarcerated, co-operation with the police, surrender of right to remain silent and voluntarily making statements, use and abuse of alcohol including on the date of the offense, difficult childhood and physical abuse, genuine religious beliefs R 289-92.

1363. As Almeida started to drink, the manager (Mr. Ingargiola) "came over, you know, and slapped the beer out of his hand, you know." T 1363 (testimony of Salmon). The glass fell to the floor, and beer spilled on the table, and Ingargiola asked Almeida for identification T 1364.[4] Almeida said he had it in his car T 1365. Seeing there was going to be a problem, Salmon told Mr. Almeida that they should go T 1365-66. Almeida was "upset to the point where he wanted to kick the guy's ass". T 1366. After Salmon spent some time telling him to let it go, they went to Regas and picked up two co-workers, Sergio Hoggro and Eddie Cooper T 1371. Almeida then gave rides home to all three men.

Salmon kept trying to calm Mr. Almeida, talking with him about for one and one-half hours outside the car when Almeida dropped him off T 1373-74. When Salmon last saw him, around 2:30 a.m., Almeida was reacting positively and seemed calm T 1375-76.

Eddie Cooper confirmed that Salmon spent about one and one-half hours trying to calm Mr. Almeida T 1446. Cooper heard Salmon telling him, "don't go back and do nothing crazy, because it ain't worth it", and Almeida agreed. Id. Almeida then took Cooper home. At Cooper's house, Cooper asked if he was all right, and he said yes T 1447.

Mr. Hoggro testified that Almeida was mad and upset T 1468. On the way to Salmon's house, he said he was going to go back and shoot the guy T 1469. After letting Cooper and Salmon off, there was total silence in the car as Almeida drove Hoggro home T 1470-71.

Around 6:00 that morning, Mr. Ingargiola's body was found in

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[4] Salmon testified that, two weeks before, Ingargiola had told appellant and Sergio Hoggro that they could not sit in the saloon because they were under age T 1360.

Higgy's parking lot, which was in a shopping center T 1333-35. A gas station attendant working at the shopping center, and a paramedic who lived in the area, testified to hearing a gunshot in that area around 4:30 a.m., although neither reported the matter to the police T 1326, 1351-52. Death occurred between two and four hours before 9:00 a.m. T 1276. Ingargiola died of a gunshot to the chest from a distance of one to three feet T 1279-88. Two bartenders left the bar at 4:30 after drinking beer with Mr. Ingargiola, and he stayed behind to lock up T 1304-1305,1316. When they left in their cars; at that time the only car in the parking lot was Ingargiola's BMW T 1305,1320-21.

Salmon, Cooper, and Hoggro testified that Mr. Almeida told them that he killed Ingargiola: Around 10:00 a.m. of the morning of the shooting, he called Salmon at work, and said that he had killed the guy T 1377. That evening, he told Cooper that he killed the manager at Higgy's T 1448. One day after the shooting, Hoggro said he knew he did it, and Almeida said yeah T 1472. Cooper said that two or three days later, when there was a newspaper clipping about the shooting, Mr. Almeida was happy that it said there were no witnesses T 1449. Mr. Almeida was acting crazy when reading the clipping T 1459.

On November 29, officers arrested Mr. Almeida as he got out of his car. They testified that appellant reached down to get something from his car, then froze T 1500-01,1505-1507. In his car was a black zippered gun pouch containing the murder weapon T 1508, 1580.

The bullet that killed Mr. Ingargiola was a Winchester .44 caliber Black Talon -- the same type as found in appellant's car T 1573,1578. Over objection, Salmon testified that Almeida had told him

at some time[5] that such ammunition "makes a small hole when it enters the body, makes a big hole when it comes out, you know." T 1383-98.

Det. Randy Mink played a taped statement in which Mr. Almeida said: "And uh, he threatened to kick my ass the next time I come back, you know. So, I was uh, very upset after that. And uh, I got drunk later on, came back, shot him." T 1530. Before shooting him, he got a good look at his face T 1531. After firing, he drove off in a hurry T 1535-36. Asked if he was "pissed" and embarrassed, he replied: "No, he did make me look bad and he did piss me off, but that still was no reason for me to kill a man because I am not that type of person that would just kill somebody for a simple thing like that. You know, I always thought that the only reason I shall kill somebody is somebody threaten my life or somebody broke into my house and tried to harm me, you know, but them beer, you know, I kind of had a lot of beer that night." T 1537. As he drove off, Ingargiola was screaming in pain T 1538. Asked what kind of shirt he was wearing, Almeida replied that he did not remember because he was very drunk T 1544. Asked if there was anything else he wanted to say, he replied: "Yeah. Besides being there, biggest mistake of my life, I regret killing him because I found out later that his wife is pregnant." T 1544. After further expressions of regret and remorse, the tape ended T 1544-45.

Also during its case, the state presented testimony from Mr.

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[5] The testimony resulted from questions whether appellant "ever" discussed the effect of the ammunition T 1383 (question prompting objection), 1393 (question after objection overruled).

Almeida's boss that at some time[6] he had a discussion with Almeida about killing someone: "He told me he had had visions of doing that before and felt no remorse or guilt for that, that he could think about killing someone and go to bed at night and not even think twice about it." T 1490. The court denied defense counsel's motion for mistrial regarding this testimony T 1492-93.

C. The defense case began with testimony of Severna Gamboa,[7] Mr. Almeida's mother. She and Mr. Almeida's father were from Brazil, but Osvaldo[8] was born in Boston. When Osvaldo was four or five years old, his father took him to Brazil, and his mother did not see him again until he was 12 T 1592. When she saw him then, he was very skinny, and it was as though "pieces was taken from his body," as a result of beatings from his stepmother T 1592-93. After a lengthy legal struggle in Brazil, Ms. Gamboa obtained custody of Osvaldo because the father had beaten him, and she returned with Osvaldo to the United States T 1594-96. Upon his return, he "was very sad, he was scared and in fear of everything." T 1597. He was not normal; at age 14 he wanted to commit suicide, stabbing his leg with a knife T 1598. He hid in closets and under bed T 1601. Because of language problems, he learned little in school T 1608. The family moved to Florida when he was almost 16 T 1610. When he was 17, he married 15-year-old

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[6] Again, the state asked the witness if there "ever" was such a discussion.

[7] The court reporter also spells the first name "Sabrina" in the transcript T 1736.

[8] During discussion of the testimony about appellant's family, this brief will refer to him as Osvaldo to differentiate him from his father.

Francis Santana T 1602. A year later, he moved back with his mother T 1611. While living with his mother in Florida before his marriage, he "was sad at all times, he would never comment on anything that, anything that would happen or not happen to his day or anything." T 1610. On his twentieth birthday, eight days before the shooting of Mr. Ingargiola, Osvaldo "was very depressed, looked like he didn't want to leave.... He didn't want to change clothes, he didn't want to clean himself." T 1605. Around that time, he "was always very depressed, he used to lay down, like he didn't want to leave anymore." T 1606.

Sara Tejo, a sister 16 years older than Osvaldo, testified that, after his childhood stay in Brazil: "To me, it seemed like he was, he had been through the war, like it reminded me of like one of the children in the concentration camp.... He wasn't clothed right, he was malnourished, he was skinny, he looked like a skeleton bones, I just couldn't understand that he was even him in there." T 1638. After speaking to his ex-wife on the telephone on his birthday (seven days before the death of Mr. Ingargiola), Osvaldo came to live with Sara, staying with her from November 14 until his arrest on November 19 T 1639-40,1643. He was very down, not acting himself, depressed; he "appeared very strange, like he didn't seem like he was well in the head, like something was wrong with his mind." T 1640. He didn't take showers even though it was hot T 1640-41. "He appeared depressed, didn't talk very much." T 1641. His room "was dirty, filthy. It looked like he, you know, hasn't been cleaned, it was trash all over, it was just, it didn't look like a clean room.... His appearance was like, like he was already dead, you know, like he didn't talk to me or my other two children." T 1642. At some earlier time, when he did take

showers, she would hear him talking to himself in shower, like there was someone in shower with him. Id. Even before he came to stay with her, he looked "like a dead person" walking down the street T 1643.

Francis Almeida, the ex-wife, testified that during their marriage Osvaldo was "very paranoid.... He thought everyone was out to get him." T 1623. He kept his gun wherever he went; he felt safe with the gun, it was like protecting him, it was like a part of him T 1624. During their marriage he was like a child, could not make decisions T 1628. He also wanted to control every aspect of her life T 1620. Although she obtained a restraining order against him during the summer of 1993,[9] it did not stop him from seeing her -- he would show up everywhere T 1621-22. On his birthday shortly before the killing, she got call from him. Id. "He was very disconnected, I knew something was wrong with him." T 1625. Because of "his whole tone of voice, I didn't want to get involved, I didn't want to ask him what was wrong." T 1625-26. He was very paranoid T 1626. Asked to explain, she testified: "You would have to know Ozzie to understand how he was acting. But he was very different, he was always quiet, but he was more than quiet, his voice was very calm, without any emotion, but he kept repeating Francis, do you want to get back together? Do you care for me anymore?" T 1626. Asked to compare his behavior on November 8 with his behavior two months before, she testified: "He was worse, he was disturbed. He was acting crazy." T 1635.

In addition to the foregoing, Salmon and Hoggro testified during

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[9] He would beat her up, and once put a gun to her head while they "were just talking" and he said this would happen to you if you ever cheat on me T 1630, 1634.

the state's case about Mr. Almeida's strange behavior around the time of the homicide. Salmon testified that he was very sensitive to "simple stuff", such as being bumped while working in the kitchen at Regas Grill T 1410. He was not capable of letting such small matters go T 1411. Over defense objection,[10] Salmon testified that it was his impression that Almeida had been a bad boy so it was time for him to pay his dues T 1434. Over the same objection, he testified that he thought Almeida was prepared to face the consequences T 1434-35. Hoggro testified that he thought that, "in a sense", Mr. Almeida was mentally unstable, and kind of crazy T 1480.

The defense also presented the testimony of two mental health experts that the defendant was legally insane at the time of the shooting.

Dr. Abbey Strauss, a psychiatrist, testified that he saw Mr. Almeida four times, spending a total of eight to nine hours with him T 1655. In addition, he read a copy of Almeida's statement as well as depositions of family members and friends, a report by Dr. Lee Bukstel,[11] some police report and a police department narrative T 1658. Dr. Strauss testified that Mr. Almeida suffered from "post traumatic disorder, with an acute exacerbation, with concurrent alcohol intoxication, and probably also on the mixed personality traits and ... dysthymia." T 1697. Almeida also suffered from post traumatic stress disorder resulting from childhood abuse and trauma T 1670-72. His

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[10] "Objection, with regard to what Mr. Salmon thought." T 1434.

[11] A neuropsychologist, Dr. Bukstel testified during the sentencing phase. Experts for both sides during the guilt phase reviewed his findings.

"entire life had been one of violence. He had been basically abused violently by his parents. They had never taught him to stop and think things through." T 1660. "He also was extremely sensitive to loss. He had undergone physical and psychological and sexual abuse by many people over the course of his childhood." T 1661. In Brazil, his father made him sleep outside the house, they would not give him any food: both the father and the (step)mother beat him. Id. His biological mother in the United States caused him a great deal of abuse; she was very open about her promiscuity, and when he was about 12, she got him a prostitute, and he thought that was normal T 1662. The family was very dysfunctional, "and there was nothing good in his life. There was no validation, there were no people being nice to him." T 1663. Things got worse and worse T 1663. Kids made fun of him for being skinny, and he decided to become very macho, strong tough T 1664. After he and his wife separated, "things started to really tumble in a really rapid manner." There were cycles of "drinking and just rampaging and desperation and no meaningfulness and wandering around and looking for some connection where ever he could get it, and it culminated in the shooting." T 1666. Dr. Bukstel, who obtained a similar history of Mr. Almeida's childhood, thought he had some sort of residual soft brain damage T 1666-67. When the brain is under a great deal of stress, its ability to operate is impaired, and the individual becomes unusually sensitive to drugs or alcohol T 1667. Alcohol impairs the ability to think things through and consider ramifications of behavior T 1668-69. Almeida could not understand the consequences of his action at the time of the shooting, and was legally insane T 1659, 1676-77. His problems with his wife, coupled with the

incident at Higgy's triggered a process that began "escalating, it's reaching a critical level, he then go to drink, then it reaches a hyper critical level, that's when I am saying he becomes insane, because that's when he cannot determine what is right from wrong." T 1706.

Dr. M. Ross Seligson, a psychologist, also met with Mr. Almeida four times T 1733. He conducted a mental status exam, a clinical interview, and an "extensive background history to verify and make sure that what I had heard from his was corroborat[ed] with the information that I had obtained from interviewing several family members, as well as ... information with the depositions and the police statements that I had also reviewed." T 1734. He reviewed statements by Almeida, Cooper, Salmon, Divani Almeida (the defendant's sister-in-law), Maria Almeida (his stepmother), Racquel Almeida (his sister), Tony Almeida (his brother), Phyllis Bernstein (who knew the family quite well in Boston), Dr. Henry Cho (who treated him for a broken hand), Denora Gannon (a family friend in Boston), Natasha Garcia (a niece), Amarildo Marques (his brother-in-law), Maria Dulce Valentim (who went with the mother to Brazil to get him) T 1734-36. The interviews included a fiance of a sister, Dave Umversal, Sara Tejo, Sabrina Gamboa, and Francis Almeida T 1736. He reviewed two police offense reports, a complaint affidavit, and Dr. Bukstel's psychological report and raw test data T 1736-37. He reviewed school records from Massachusetts and Florida, including a special program that through which Almeida obtained his high school diploma, the depositions of Drs. Strauss and Bukstel, and a Brazilian indictment of Osvaldo's father and stepmother on charges of child abuse committed on Osvaldo T 1737-38. He gave the Minnesota Multiphasic Personality Inventory (MMPI), incomplete

sentences, and inkblot tests T 1747.[12] "What I found was we had an individual who was throughout his life withdrawn, an individual who throughout his life was a frightened individual. He was distrustful of other people, was an individual who people described as being strange, peculiar, as an individual who other people grew to be frightened of because he seemed unpredictable." T 1740-41. When first interviewed, Mr. Almeida was polite but removed and distanced, "there was almost a robotic-like quality to him, that there was a sense of vacancy within him, that he wasn't really connecting." He had a blank stare, and poor eye contact T 1742. He seemed anxious and very depressed, even beyond depressed. T 1742-43. Dr. Seligson had some real concerns whether he was dealing with someone psychotic, out of touch with reality or going in and out of contact with reality; as Seligson began to establish a rapport with him, Almeida was cooperative, although shut down emotionally T 1743.

Mr. Almeida's history revealed that he was starved in Brazil and suffered extensive beatings T 1751. His stepmother and her sister "would take and strip Osvaldo and they would beat him. And there were times when broomsticks were broken and he would be thrown outside without food. The father would come home and beat him." Id. Even before he went to Brazil, his mother and father were both having affairs T 1752. The mother told the children that if they told the

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[12] Regarding the MMPI, "it was almost as though the test indicated he was trying to actually fake looking healthier than he is." T 1748. The test results were indicative of someone experiencing paranoid thinking T 1747. As to the incomplete sentences test: "Almost, if not all of these responses had what I consider to be delusional religious themes." Id. Responses to the inkblot test were indicative of schizophrenia. Id.

father about her affairs, then she would have him beat them. Id. "So, it was sort of like a double-edged sword. Not only did they have to be loyal to mom, but they had the fear of father, who in some ways they had to deal with the fear of him beating them. But on the other side, they had to deal with all of these feelings about betraying their father because they saw men coming and going in and out of the house. One of them is the man that Osvaldo's mother is married to now." Id. When he was four, he was taken from his mother and family to Portugal to live with his grandmother T 1753. "They were there for about a year. There were times when the father left him with the grandmother there so he was left with a stranger. There was a lot of things that were inappropriate going on at the grandmother's house. She had a maid who exposed herself to Osvaldo. He had touched her genitalia and had a lot of negative thoughts about what this was in terms of he started talking about things of textures and smells and things like this which were very upsetting to him as a young child. There was also a lot of sexual involvement with other little boys that lived in the neighborhood." Id. In Brazil, a relative of his stepmother "raped Osvaldo on at least one or two occasions, penetrated him anally when he was about 7 years old. There was also a maintenance worker who lived in the area that they lived. I think it was an apartment house or some kind of maintenance guy. He also sexually molested this individual. Nothing was done. And in the meantime he was being beaten and starved." T 1754. At age 13 he "was staying with his mother and stepfather and arrangements were made for him to meet with a prostitute ... . And the mother and stepfather were in the living room watching TV while he was in the bedroom with this prostitute at 13". Back in the United States,

he and his stepfather would masturbate together watching pornographic films, and his stepfather once masturbated him T 1755-56. Summing up Mr. Almeida's family background, he said: "I mean, lack of boundaries in the family in terms of sexuality, in terms of physical abuse, in terms of getting back to keeping the secret of the mother having affairs, and lots of violations of boundary issues, and certainly no example of any kind of impulse control. It's sort of like if you have the feeling in this family you just act on it. I mean, I could go on and on." T 1756.

Almeida's behavior at his sister's house in the week before the shooting revealed someone in a psychotic process T 1765. He suffered from a long term mental disorder T 1765-66. After the split with his wife, "he was emotionally devastated, that he also had increased his alcohol consumption considerably, and he was on a crash course" T 1766. After Ingargiola slapped the beer away, he felt attacked and humiliated, and he snapped T 1761.

Dr. Seligson diagnosed him as suffering from schizophrenia and alcohol abuse T 1745. He concluded that in November 1993 he "was suffering from a mental defect to the point that he was not able to determine right from wrong at that time." T 1739.

On cross of Dr. Seligson, the state asked him what information he had that Mr. Almeida thought that people were out to get him T 1828. Seligson named several sources, and ended: "I think there was also reference made when I spoke with one of the family members that he had also been the target of a gang that was beating him up when he was an adolescent." T 1828-29. The state then asked: "He was in a gang though? A: I don't know if he was or not." T 1829. The defense

objected, moved to strike, and moved for a mistrial as to the allegation that the defendant was a member of a gang, arguing that it was irrelevant to the issue of delusional thinking and "nothing more than a statement to prejudice his right to a fair trial" T 1829-30. The court denied the motion to strike and for mistrial T 1830-32.

D. The state's rebuttal case consisted of the testimony of two mental health experts that Mr. Almeida suffered from mental illness but was legally sane at the time of the killing.[13]

Dr. Trudy Block-Garfield based her conclusion of two hours spent with Mr. Almeida on May 13, 1995, during which she administered the MMPI test, and review of the probable cause affidavit T 1875,1894.[14] She saw no need to talk to other persons such as friends or relatives or persons who observed him around the time of the incident T 1901. She concluded that Almeida showed some difficulties regarding substance abuse, and showed behavior patterns and character patterns suggesting a mixed personality disorder T 1878. The MMPI showed an elevation on the "psychopathic deviate" scale, showing beliefs not consistent with the norm T 1882-83. Despite these difficulties, he was not unable to

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[13] Thus in discussing the testimony of the defense and state witnesses, the state said to the jury in final argument: "Yes, he may have had a mental disease, infirmity or defect, all the doctors tell you about one, but we have to get through then to the second part of that equation." T 2053.

[14] Although Dr. Block-Garfield "glanced at" Dr. Bukstel's report and findings a week or two before testifying, "I did not read it thoroughly. Dr. Bukstel's report is primarily more of a psychological nature. I am not a neuropsychologist, and many of things that he talks about in terms of brain functioning and so forth I didn't really understand them anyway." T 1903. She is not trained in neuropsychology and did not see his deposition. Id. Having not read his report, she did not know if Almeida had neuropsychological deficits T 1938.

distinguish right from wrong T 1884. Block-Garfield was unaware of any evidence that he ever had a psychotic episode T 1884-85. He reported no hallucinations to her T 1887. The consumption of alcohol "may have clouded his judgment, but he was still able to drive. And when a person has so much to drink that their judgment is so impaired that they can't tell right from wrong, they're also not able to drive." T 1942. She based this conclusion on her belief that "the first thing that really goes [when one is drinking] is the motor, the motor capability when you're driving. Decision making and so forth also goes." T 1943. "The motor portion goes first when you're drinking and you're reaching the point of intoxication. As your blood alcohol level increases, the first thing that goes is motor function. The second that goes is cognitive capacity, thinking, judgment, and then you enter a stupor and can't do anything. So, he still had enough motor function to be able to draw a gun and shoot." T 1947. She did not know what neurological deficit Mr. Almeida had, and therefore could not say how it may have interacted with alcohol or affected his thinking T 1947-48.

Dr. Thomas Macaluso, a psychiatrist, interviewed Mr. Almeida twice and read depositions of family members and family friends for background information T 1954,1957. He did not read or listen to Mr. Almeida's statement to the police T 1976. His review of the case with Dr. Bukstel showed that Mr. Almeida has an IQ of 82, has difficulty with complex perceptual problem solving, and is a very stereotype, concrete thinker T 1987. His testing could not rule out schizophrenia T 1988. Dr. Macaluso saw no evidence that Almeida was faking symptoms or making things up T 1989. His background revealed separation from his mother at an early age, emotional, physical, and sexual abuse, and

abuse of alcohol around the time of the shooting T 1960.

Dr. Macaluso concluded that Mr. Almeida suffered from "dysthymic disorder, which is a chronic depressive condition" T 1957. "The individual who suffers from dysthymic disorder is depressed everyday or nearly everyday for a period of more than a year. They will have other symptoms of depression such as sleep disorder, either insomnia or hypersomnia, which is too much sleep. They can have a disturbance of appetite, either too much or too little. They might be suicidal at times. They will have problems with self esteem, helplessness and hopelessness." T 1958-59. He noted that Almeida's emotional, physical, and sexual abuse as a child would predispose someone to develop a depressive illness in adult life T 1960. At no time in his life did Almeida function well from a psychiatric standpoint T 1965. His alcohol abuse around the time of the shooting could aggravate an already existing depressive condition, causing a clinical depression T 1960-61. He "may have been suffering from major depression superimposed on the dysthymic disorder." T 1969. His mental illness satisfied the "mental defect" element of the insanity defense T 1971.

Dr. Macaluso concluded that Mr. Almeida knew what he was doing at the time of the offense, and knew the consequences of his actions and that his behavior was wrong T 1967. He testified that knowledge of other symptoms could have led to a diagnosis of major depression: "If he had those things, that would certainly add to my diagnosis of major depression. I don't have evidence to support that diagnosis, but it's certainly a possibility that he had them and he just doesn't recall that. Again, I'm being put in the position of making a diagnosis of somebody two years ago and only talking to them now. He's certainly

at risk for major depression based on the presence of his dysthymic disorder." T 1972-73. Solid information that Almeida had lost touch with reality could change his whole diagnosis T 1994-95. He did not review the depositions of persons who were with the defendant on the night in question T 1995-96.

During deliberations, the jury wrote a question to the judge: "Whether premeditation is referring to a statement made or whether one actually has to plan the act." R 208,T 2182. The court replied that premeditation was defined in the instructions already given T 2186.

E. At the penalty phase, the state presented evidence of Mr. Almeida's convictions of the first degree murders of two prostitutes (Marilyn Leath and Chiquita Counts) which occurred within a few weeks of the death of Mr. Ingargiola T 2213-15 (admission of conviction documents). Detective John Abrams, who investigated those murders, played for the jury Mr. Almeida's taped confessions to those murders over defense objection T 2221,2245-46.

As to the Leath murder, Almeida said that, after picking her up, he changed his mind because of her dirty physical appearance and "stink breath". When he asked her to get out of the car, she called to her sister, who was nearby and had a knife, and took his key from the ignition T 2226-27. After removing the key, Ms. Leath was halfway out of the car when she said she would not return the key unless Almeida gave her his wallet; when he gave her the wallet, she took a $20 bill and threw the wallet back in his face; as she walked away, she and her sister were laughing; very upset, Almeida shot her and drove off T 2227. Before he picked her up, she had whistled at him T 2229. The "stink breath" was so strong that it almost made him faint T 2230. She

called him a son of a bitch and he drove away T 2238.

As to the Counts murder, he said he was scared and ashamed of what he did T 2250. Ms. Counts gave him oral sex for $20 T 2253. She then got out of the car, talked to some guys, got back in, asked him to take her to a hotel T 2254. She asked for more money and began arguing when he refused; when she got out, he called her back and shot her. Id. She had called him cracker, bastard, other names T 2261. He shot her because she had insulted him, called him all kinds of names T 2226. He was also mad about her asking for more money T 2267. He apologized for giving the officers hard time, and wanted to know if he was arrested for rest of life T 2272-73. He admitted to a drinking problem, and had a lot to drink that night, a six-pack T 2273-74.

In mitigation, the defense presented evidence respecting Mr. Almeida's background and mental illness.

Dr. Lee Bukstel, the neuropsychologist, gave Almeida a neuropsychological test battery, and a comprehensive exam T 2288-89. He reviewed medical reports, incident and police reports, and a large body of depositions T 2289. He saw Almeida 10 times T 2290. The total interview, test, and scoring time was 44 hours T 2290-91. Personality testing revealed both normal abilities and deficits T 2291. Intelligence testing scored "low average", the range below the average range. Id. Deficits included: complex abstract reasoning, problem solving, complex motor problem solving, verbal learning and memory, spatial memory, tension [attention?] and concentration on visual things, receptive vocabulary T 2292. Almeida reported learning problems in school, language problems, inattention, hyperactivity T 2293. There was an inference of birth trauma by a hematoma on the head and

irregularity in one of his fontanelles T 2293. There was a record of emergency room treatment for a minor head injury, and there was some period of alcohol abuse. Id. Neuropsychological test findings principally related to "long standing inefficiency of the brain functions ... related to disorders in the development of the nervous system" T 2293-94. The pattern of results was consistent with "a long standing pattern of inefficiency." T 2294. Testing showed "[i]mpairment of adaptive abilities, dependent upon brain functioning. So yes, we're talking about somebody who not globally, but in selected areas of his brain functioning, again, probably largely on the basis of what we'll call, broadly speaking, disorder of mental development. He has areas where he is deficient and probably always has been." T 2294-95.

Personality testing revealed "a lot of personality problems. Broadly speaking, it was my clinical opinion that the findings supported the view that he has a mixed personality disorder with prominent, what we call paranoid features. In other words, undue suspiciousness and distrust. Findings did not allow me to entirely rule out a more serious psychological condition, such as schizophrenia, but I did not believe the findings supported such a diagnosis." T 2295. After discussing Almeida's childhood traumas, T 2301-03,[15] he concluded

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[15] He was frightened of his parents and seemed to be a child that lived in a world that was not real R 2301. He was not like other children, did not bond with anyone and did "crazy things". Id. He was inappropriately and abusively exposed to sex at a very young age. Id. One of his parents arranged for him having sex at a young age and he had sex with a 20 year old babysitter when he was 13. Id. He was verbally demeaned by his stepfather. Id. Foot was hid from him, he was locked outside and had to sleep in the yard, he was hit with a broom and locked in the closet and treated differently than other kids T 2303. His mother would teach some of the kids to steal from stores, he was basically rejected by his parents and family members. Id.

that it was his "very strong and compelling impression ... that it was an unhealthy and threatening and abusive and unloving kind of family and home situation to grow up in." T 2303. "[Y]ou have an individual who's intellectually and neuropsychologically has some limitations. You put [a] young person in a chaotic family situation, where he never, he did not remain in a stable family unit at any point, shifted back and forth, not only between family members, but different countries." T 2304. Dr. Bukstel testified that Almeida's neuropsychological impairment was "early acquired and longstanding, largely." T 2305.

Dr. Bukstel concluded that Mr. Almeida committed the murder while under the influence of extreme mental or emotional disturbance T 2306-07. He was depressed, obsessed with his wife, and suffering a deep emptiness and void in his heart, very miserable T 2307. He was in a serious depression T 2307-08. As to Almeida's potential for rehabilitation, he testified that his sincere embrace of Christianity provides some potential for positive things to happen, and he had more of a commitment to his family T 2309-10.

On cross-examination, the state asked Dr. Bukstel about Almeida's sanity at the time of the offense. At a bench conference, the court sustained defense objection, ruling that insanity is a separate issue from the mental mitigating circumstance, but the court then over objection let the state elicit testimony that Mr. Almeida knew what he was doing at the time T 2339-45.

Deputy Marshall Peterson, a jailer, testified that Almeida was in his area in the jail for 14 to 16 months T 2354. Almeida spends his time reading religious material, is not disruptive and is very respectful to jail staff T 2355-56.

Raquel Marques, Mr. Almeida's sister, testified that she was 14 when he was born T 2359. When he was 5, he and his father left for Brazil. T 2360. Osvaldo was a beautiful baby, but not smiley T 2361. In 1986, she went to see Osvaldo and her father and mother-in-law in Brazil. Osvaldo was very thin and had holes in clothes, even though the mother-in-law's children were "very well groomed". Id. He came back from Brazil around age 12 T 2362. He was "[v]ery thin, extremely thin, almost anorexic. He never smiled, never spoke." He could not relate well with adults, did age-inappropriate, silly things. Id. He would make very strange drawings, with sexual scenes in all kinds of positions T 2363. Maria Dulsey, who helped the mother rescue Osvaldo from the abusive situation in Brazil, told Raquel that Osvaldo had marks on his body, was thin and bruised, and that his ears were cut in Brazil T 2364-65. Osvaldo told about being punished by being locked in a closet, and that they never bought clothing for hm, and beat him with broomsticks T 2366. He would be held down while the stepmother beat him, and it got worse for him when a baby came. Id. He was forced to have sex with his stepsister's brother T 2367. At age 13, he had sex with his 30-yr-old nanny T 2368. He said if he returned to Brazil he would kill the stepmother. Id. Osvaldo's mother had one manic-depressive sister, and two others who were schizophrenic; the mother herself was diagnosed schizophrenic but never got help T 2369.

Osvaldo's older brother, Tony, testified that he went to see him in Brazil in 1983, when Tony was 17 and Osvaldo was around 10 T 2374. He saw the stepmother hit Osvaldo over the back with a broomstick because he did not want to be locked up in a room or closet as punishment T 2375-76. Back in America, Osvaldo was very tall and very

skinny T 2376. He did not appear normal, seemed goofy, doing goofy, strange things, and he persistently asked Tony to get him dirty movies or magazines T 2377. When Tony took him to play softball with friends, they were upset by his abnormal behavior T 2377-78. Tony heard that Osvaldo was sexually abused by the stepmother's brother T 2379.

Deputy Lloyd Bingham, a jailer, testified that he had daily contact with Mr. Almeida from October 1995 T 2387. He was always respectful to the deputies, kept to himself, was not a problem. He went to classes and read the Bible T 2388-89.

Deputy Esalyn Ward, another jailer, had daily contact with Mr. Almeida since October 1995, and testified that he was extremely quiet, very much unto himself, and had never been a problem T 2392-93.

Deputy Karen Jackson, a jailer, had daily contact with Mr. Almeida for one-and-a-half years up to her reassignment in October 1995 T 2402-04. "He was very, very, very quiet. He was basically, the whole eight hours that I was at work, he would stay in his room and read the Bible all day basically, and until it was time to eat or for cell inspections, when you had to come out." T 2403. He was very easy going, never had a problem. Id.

Severna Gamboa, Osvaldo's mother, testified that he was five years old when he went to Brazil T 2405. When she went there to get him back, it took one year to get him out of Brazil T 2406. He had a lot of scars and marks on his body, on the backside of his butt, on the legs, and had to get medical treatment T 2407. Ms. Gamboa's other children were happy, but Osvaldo was always sad, he didn't look good at all after getting back from Brazil T 2407-08. When he was 12 or 13, at his request, Ms. Gamboa bought him a prostitute for Christmas T

2408. (This was the idea of Marco Gamboa, the stepfather; Ms. Gamboa thought it was a bad idea T 2409.) Osvaldo was never violent, but he hid himself in closet or under the bed T 2410. Since his incarceration, he is a completely different person T 2413-14.

Dr. Macaluso, the psychiatrist who had testified for the state at the guilt phase, testified for the defense that Mr. Almeida suffered from a dysthymic disorder and alcoholism in an active phase in November 1993 T 2419. There were superimposed acute stressors that were severe, and may have been severe enough to justify diagnosis of an acute major depressive episode T 2420. A secondary diagnosis of major depression involved situations such as the break up of his marriage T 2421. Because of neglect and mistreatment by his mother and stepmother, he perhaps saw women as deceitful, traitorous T 2421-22. As he became more paranoid and suspicious of his wife, which served as basis for significant emotional breakdown, he became lonely and despondent, seeking out prostitutes T 2422. His psychiatric condition fit the definition of being under the influence of an extreme mental or emotional disturbance T 2423. Although suspicious of inmates talking about religion, Dr. Macaluso concluded that Almeida's religious beliefs are genuine and not a case of jail house religion T 2426.

Francis Almeida, Osvaldo's ex-wife, testified that since Mr. Almeida's arrest, they have talked over phone and had contact visits; he is a different person now, a Christian T 2435.

Dr. Strauss, the psychiatrist, testified again for the defense. Mr. Almeida had dysthymia, post traumatic stress disorder with some mixed personality problems and alcohol related problems T 2447. His life was an "unfortunate accumulation of just a life long series of one

trauma after the next, and a very -- Just not the typical sort of childhood abuse, not the typical sort of dysfunctional family, but certainly dysfunctional in the extreme sense." T 2447-48. He lacked the emotional maturity and development and skills to deal with stresses, suffered from an overload of emotions, and was not able to control his behaviors T 2448. At the time of the offense, he was under the influence of extreme mental disturbance, and his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired T 2449. He was unable to conform to the law and understand the ramifications of his behavior; it was an impulsive, emotionally driven event out of his control T 2450. Dr. Strauss was initially skeptical about Almeida's religiosity, but it is now a very valid part of his life T 2450-51.

In argument to the jury, the prosecutor contended that Mr. Almeida's other homicide convictions supported the coldness circumstance T 2478-79. He also argued to the jury without objection:

> But now, ask yourself even if that's true, what does that have to do with the murder, with the killing of Frank Ingargiola? Does the fact that he went through a difficult time at that age of 12 have anything to do with why he was killed?
>
> We know the doctors told us that during this period of time that the incident happened that he was suffering from depression because he was separated from his wife. Because of his early childhood and background he had some disorders that they told us about, and certainly being separated from his wife may have contributed to those disorders. But there is nothing that indicates that this childhood, this background is the thing that is responsible for this murder, that this should be considered in mitigation because I lived a difficult childhood. I killed this man, therefore consider my childhood.

T 2483-84. He also argued: "Mr. Almeida is going to be sentenced as

a punishment, a punishment for killing Frank Ingargiola, not for rehabilitation." T 2491.

F. At a subsequent hearing, Eda Muller, representing the Brazilian government, asked for clemency for Mr. Almeida T 2545-49.

Sara Almeida Tejo, Osvaldo's sister, testified that he was not well when this happened. He needed psychiatric help T 2551.

Francis Almeida, Osvaldo's ex-wife testified that although what he did was wrong, he was not very well T 2552. She said he would have to live with remorse, and asked for mercy T 2553. She said that a normal person would not have confessed T 2553.

Marco Gamboa, Osvaldo's step-father, testified that he did not think that Osvaldo had been a normal baby -- he would sit on floor without saying a word, without smiling T 2555. When he returned from Brazil, he did not act like a 13 year old boy. Id. He was a victim before he committed these crimes T 2556. He felt he was rejected by his wife T 2556.

Osvaldo's mother also asked for mercy T 2558. The defense also introduced into evidence translations of statements made by witnesses in Brazil T 2558-60.

SUMMARY OF THE ARGUMENT

1. The state improperly argued to the jury that the defense had to prove insanity beyond a reasonable doubt. By overruling defense objection, the court communicated to the jury that the prosecutor's assertion as to the burden of proof was correct. Since both the prosecutor and the court thought that the standard instruction supported the prosecutor's argument, the jury would also think the standard instruction required that the defense establish insanity

beyond a reasonable doubt.

2. The state presented irrelevant and prejudicial evidence that appellant threatened his friend with a knife, that he had dreamt about killing murder without remorse, and that his bullets had an devastating effect. It also put before the jury that appellant was a gang member. These errors were harmful both as to guilt and as to penalty.

3. The state presented improper lay opinion evidence from appellant's friend that appellant was bad and deserved to be punished. This evidence was harmful both as to guilt and penalty.

4. It was error to let the state put into evidence an autopsy photograph showing the victim's body with internal organs removed. The exhibit was not essential, and its use produced a disturbance in the courtroom evoking sympathy for the victim's family. The error was harmful both as to guilt and penalty.

5. The court erred in denying the motion to suppress appellant's statements. His waiver of Miranda rights was invalid because the police failed to clarify, and overrode, his question about his right to counsel during the reading of his rights.

6. When the victim's family's emotional reactions occurred in the presence of the jury, the trial court erred in denying a mistrial without fully informing itself as to the circumstances and the effect on the jurors.

7. The evidence did not support the coldness circumstance. Appellant did not act with the calm, cool deliberation required by the circumstance and had a pretense of moral or legal justification. The evidence of appellant's mental disturbance, accepted by the court, negated the circumstance. It was error to instruct the jury on and to

find the circumstance. Without this circumstance, the death sentence is disproportionate.

8. The death sentence is disproportionate where there were three important statutory mitigating circumstances and eight non-statutory mitigating circumstances. This is not one of the most aggravated and least mitigated of first degree murders.

9. The court failed to exercise its discretion properly in the weighing of mitigating circumstances, arbitrarily assigning little weight to important mitigating factors. The effect was to deny the importance of the case for mitigation.

10. The state improperly told the jury to ignore valid, important mitigation in violation of the constitutional requirement that the sentencer must consider all mitigating evidence. The court's failure to instruct the jury of its duty to consider all mitigating evidence compounded the error.

11. It was error to let the state present penalty phase evidence that appellant met the standard for legal insanity. This evidence confused the jury's consideration of appellant's mental mitigating evidence.

12. The court gave appellant erroneous advice about his right to address the jury, tainting his waiver of that right.

13. The court erroneously gave excess weight to the jury's penalty recommendation, ruling that it could override the death recommendation only if no reasonable person could agree with it.

14. The court erred in employing a presumption of death where one or more aggravating circumstances applied.

15. The court erred in refusing to allow consideration of life

imprisonment without parole as a sentencing option.

ARGUMENT

1. WHETHER THE COURT ERRED IN OVERRULING DEFENSE OBJECTION TO THE STATE'S MISLEADING FINAL ARGUMENT REGARDING THE BURDEN OF PROOF ON INSANITY?

In final argument, the state said to the jury: "All persons are presumed to be sane. However, if the evidence causes you to have a reasonable doubt concerning the defendant's sanity, then the presumption of sanity vanishes and the State, I must prove beyond a reasonable doubt that the defendant was sane. He is presumed to be sane. What evidence did you hear that led you to believe beyond a reasonable doubt that he is not sane?" T 2041. The court overruled defense objection that the state had misstated the standard, T 2041-42, and the state continued: "The testimony of Dr. Abbey Strauss and Dr. Ross Seligson was presented. If he is probably insane from what these doctors say, he is still presumed sane, still presumed sane. We're going to analyze their testimony in a couple of minutes. If evidence is presented beyond a reasonable doubt that leads you to believe that he is not sane, then that presumption vanishes." T 2042. Defense made the same objection and approached the bench; during argument at the bench the defense noted that the state had argued that the defense had to prove insanity beyond a reasonable doubt, and the state replied: "Before the presumption vanishes, that's exactly what the law says." T 2043. The state then read the standard instruction to the jury T 2044.

The court erred in approving the state's burden-shifting argument. The presumption of sanity bursts when there is testimony sufficient to present a reasonable doubt of sanity. Yohn v. State, 476

So. 2d 123, 126 (Fla. 1985) (citing cases). Thereafter the state has the burden to prove sanity beyond a reasonable doubt. Id. Hence, the state was wrong to argue that the defendant is presumed sane even if he was probably insane and that the jury should presume the defendant insane unless the evidence showed insanity beyond a reasonable doubt. Compounding the error was the court's approval of the state's argument. See Wheeler v. State, 425 So. 2d 109, 111 (Fla. 1st DCA 1982) (golden rule argument; "The court's overruling of the objection compounded the prejudice."), Eagle-Picher Industries, Inc. v. Cox, 481 So. 2d 517, 530 (Fla. 3rd DCA 1985) (improper argument; "The trial court not only failed to admonish counsel for such prejudicial remarks, he overruled objections thereto and allowed plaintiff's counsel to repeat the commends which compounded the prejudicial effect."), Carrol v. Dodsworth, 565 So. 2d 346, 348-49 (Fla. 1st DCA 1990) (improper voir dire questioning; "The damage was compounded by the trial court's overruling of plaintiffs' timely objection and allowing defense counsel to repeat his improper question ...."), Rollins v. Div. of Administration, 373 So. 2d 386, 388 (Fla. 4th DCA 1979) (improper argument; "Had the trial court sustained the objection, we would have no difficulty in affirming the judgment. But in overruling the objection the trial court placed its imprimatur on counsel's argument").

The discussion at the bench shows that the court and the prosecutor thought the standard instruction supported the state's improper, burden-shifting argument. Since these two officials, learned in the law, thoroughly misunderstood the burden of proof, we have reason to believe that the jury also thought that the standard instruction, as interpreted by the state with the judge's approval,

required rejection of the insanity defense even if the defendant was probably insane. Hence, although the jury received the standard instruction on insanity, it may reasonably have taken the instruction as supporting the state's erroneous view of the burden of proof.

It is a violation of due process to relieve the state of its burden of proof. Yohn v. State; Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). This Court should reverse the conviction and sentence and order a new trial. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const.

2. WHETHER THE STATE PRESENTED IRRELEVANT OR PREJUDICIAL EVIDENCE TO THE JURY?

The state presented irrelevant, prejudicial matters to the jury requiring reversal of the conviction. Louis Salmon testified that appellant had threatened him with a knife; his boss testified that appellant had told him that he could kill without remorse; Salmon testified that appellant had told him that Black Talon bullets make a big exit wound; and the state intimated that he was a gang member.

A. The state presented testimony from Louis Salmon, who was with appellant on the night of the killing. On redirect examination of Salmon, the state brought out Salmon's opinion that appellant was paranoid T 1434. On recross, the defense elicited from Salmon testimony that appellant had become paranoid after the shooting T 1436. Then, on further redirect examination, the state elicited testimony over objection as follows:

> Q. (By Mr. Donnelly) the paranoia you talked about, you said that was after this incident?
>
> A Yeah.

Q Is that when you were threatened?

A Yeah.

Q Was that the incident with the knife you are talking about with Mr. Almeida?

A No, that was before.

Q That was before?

A Yeah.

MR. MOLDOF: Objection, a motion to make with regard to that as well.

Q. (By Mr. Donnelly) So this is another incident afterwards where he threatened you?

A Yeah.

T 1437-38. The defense then moved for a mistrial based on the testimony about a knife incident T 1438-39. The defense objection was that no knife incident had been brought up before, and it had nothing to do with anything asked on recross T 1438. Counsel further argued that the evidence about the knife threat constituted improper evidence of another crime, violated the Williams rule, and was "prejudicing the jury without any probative effect at all." T 1439.[16]

B. Also in its case-in-chief, the state called Mike Turner (appellant's boss) to testify that, after talking with Salmon, he made an anonymous tip to the police about Ingargiola's death T 1488-89. The state asked Mr. Turner if he and appellant ever discussed killing, and

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[16] Although the transcript shows counsel on the previous page saying that the state "could have asked Mr. Salmon about the knife incident on direct", T 1438, this was either an erroneous transcription or a way of emphasizing that it was improper to bring the matter up on a second redirect examination, since on the very next page (T 1439), counsel voiced relevancy and prejudicial impact objections.

he replied: "He told me he had had visions of doing that before and felt no remorse or guilt for that, that he could think about killing someone and go to bed at night and not even think twice about it." T 1490. After a brief cross, the defense moved for a mistrial, arguing:

> ... I don't think that was in any way responsive or relevant to his having called in a tip, if you will, for Mr. Almeida's arrest as a result of this incident. And eliciting that in front of the jury is just an attempt to poison their minds. It was nothing to relevant about this case, this dream, time frame was completely out of scope of this case. It had nothing to do with this case, and as well, it's just a comment by Mr. Almeida really without any reference.
>
> THE COURT: Mr. Donnelly [prosecutor], do you care to comment?
>
> MR. DONNELLY: No, sir.
>
> THE COURT: Motion for mistrial is denied.

T 1492-93.

C. On direct examination of Mr. Salmon, the following occurred:

> Q Did Mr. Almeida ever have any discussion with you about the type of ammunition he uses in that gun, or that he used in that gun?
>
> A Yeah.
>
> MR. MOLDOF: Objection to relevance and time and place.
>
> THE COURT: Could we be a little bit more specific?
>
> Q. (By Mr. Donnelly) Did Mr. Almeida tell you the type and make of ammunition he had in the gun when he shot the manager at Higgy's?
>
> A No, he didn't, no.
>
> Q Did you ever have a discussion about Black Talon ammunition?

T 1383-84. Counsel again objected, and there was extensive argument

outside the jury's presence T 1384-88. The defense argued a discussion about the ammunition would be irrelevant T 1384-86. The state argued that the evidence showed premeditation - that appellant knew that Black Talon bullets make large exit wounds T 1386-87. The court overruled the objection T 1388. After discussion of other issues, T 1388-98, the state elicited Salmon's testimony appellant at some unspecified time[17] told him that such ammunition "makes a small hole when it enters the body, makes a big hole when it comes out, you know." T 1398.

D. On cross-examination of Dr. Seligson, the state asked what information he had that Mr. Almeida thought people were out to get him T 1828. Seligson named several sources, and ended: "I think there was also reference made when I spoke with one of the family members that he had also been the target of a gang that was beating him up when he was an adolescent." T 1828-29. The state asked: "He was in a gang though? A: I don't know if he was or not." T 1829. The defense objected, moved to strike and for a mistrial as to the claim that appellant was a gang member, arguing it was irrelevant to the issue of delusional thinking and "nothing more than a statement to prejudice his right to a fair trial" T 1829-30. The court made the startling suggestion the defendant's victimization may have shown that he himself was a gang member:

> THE COURT: Wait a minute, the doctor makes reference to the fact that the defendant got beaten up by a gang. Don't you think that leaves an impression in the minds of the fact finder, that being the jury, that he may have, in fact, been a victim of random violence when, in fact, if he was a member of a gang, and I have no idea whether he is or isn't,

[17] The questioning was whether such a conversation "ever" occurred between them T 1398.

> that portrays a different level that a fact finder could make a determination as to whether it is or isn't, and I don't know whether he is or isn't?

T 1830-31. The court denied the motion to strike and for mistrial T 1830-32.

E. The court erred in these rulings. The testimony that appellant threatened the witness with a knife had no relevance to any fact in issue, and was improper under sections 90.401, 90.403, and 90.404, Florida Statutes. The testimony that at some time appellant told his boss that he would not be remorseful if he killed someone was not relevant to prove any material fact in issue. It was grossly improper for the state to put before the jury that appellant was a gang member. See Simmons v. Wainwright, 271 So. 2d 464 (Fla. 1st DCA 1973) (prosecutor's final argument referring to defendant as member of gang), People v. Arrington, 843 P.2d 62 (Colo. App. 1992) (improper for prosecutor solicit testimony that witness had described defendant to police as being "all cripped out" on night of incident, since testimony implying affiliation with street gang, appeared to have been solicited for sole purpose of injecting irrelevant and probably prejudicial matter before jury) Poindexter v. State, 942 S.W.2d 577 (Tex. Ct. Crim. App. 1996) (holding irrelevant evidence that defendant was member of gang), State v. Stone, 802 P.2d 668 (Ore. 1990) (same), State v. Hart, 544 So. 2d 206 (S.D. 1996).

"Relevant evidence is evidence tending to prove or disprove a material fact." § 90.401, Fla.Stat. Under section 90.403, even relevant evidence is "inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

issues, misleading the jury, or needless presentation of cumulative evidence. Evidence of the defendant's collateral bad acts is generally admissible except in limited circumstances and even then only after ten days advance notice in writing. § 90.404, Fla.Stat. It may not be used where it is relevant only to criminal propensity. Id. The evidence that appellant threatened Mr. Salmon with a knife did nothing to prove that he killed Mr. Ingargiola, went only to criminal propensity, and its prejudicial effect outweighed its probative value. The evidence concerning appellant's dream that he dreamt of killing someone without remorse likewise did nothing to prove any fact in issue and served only to establish criminal propensity. The evidence that, at some unspecified time, appellant discussed the effect of Black Talon ammunition had no bearing on his state of mind at the time of the shooting. The suggestion about gang activity during cross-examination of the defense witness had no relevance to the state's case or the defense of insanity. It was the state that introduced this matter into the case. The state asked the witness what evidence there was that the defendant had delusions of persecution. The witness replied, quite properly, to this open-ended question that various persons corroborated the defendant's feelings that persons were after him, including that there was a reference that he had been the target of gang violence T 1828-29. It was grossly improper to go from that to asserting that appellant was a gang member.

"The admission of improper collateral crime evidence is 'presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.' Straight v. State, 397 So. 2d 903, 908

(Fla.1981)." Peek v. State, 488 So. 2d 52, 56 (Fla.1986). The state deliberately injected irrelevant matters into the case in order to divert the jury from its task at hand. Manifestly, the state did so with a purpose to advance its case and to overcome the defense.

When addressing a claim that evidence has a prejudicial impact, the court "must weigh the proffered evidence against the other facts in the record and balance it against the strength of the reason for exclusion." Steverson v. State, 695 So. 2d 687, 688 (Fla.1997). In Sexton v. State, 22 Fla. L. Weekly S469 (Fla. July 17, 1997), this Court wrote:

> Even after determining that evidence is relevant, a trial court in every case must also consider section 90.403. Section 90.403 states in pertinent part:
>
> > Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.
>
> Section 90.403 does not bar the introduction of all evidence that is prejudicial or damaging to the party against whom it is being offered; indeed, as a practical matter, almost all evidence introduced during a criminal prosecution is prejudicial to a defendant. Amoros v. State, 531 So. 2d 1256, 1258 (Fla.1988). In reviewing testimony about a collateral bad act that is admitted over an objection based upon section 90.403, a trial judge must balance the import of the evidence with respect to the case of the party offering it against the danger of unfair prejudice. Only when the unfair prejudice substantially outweighs the probative value of the evidence should it be excluded. Id.

The court at bar did not undertake this required analysis. Assuming arguendo that there was some relevance to the matters discussed above, it was so insubstantial as to be outweighed by the prejudicial impact of claiming that appellant dreamt of conscienceless killings, was in

a gang, and had threatened his friend with a knife.

The jury had a substantial question about the proof of premeditation sufficient to support a first degree murder question. T 2182-86. The improper evidence could reasonably have contributed to its resolution of this issue against appellant. This Court should reverse for a new trial.

Further, in view of the slim margin in the vote for death and strong case for mitigation, these errors were independently prejudicial as to sentencing. See Castro v. State, 547 So. 2d 111, 115-16 (Fla.1989) (irrelevant evidence harmless as to guilt, but harmful as to penalty). Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const.

3. WHETHER THE STATE PRESENTED IMPROPER OPINION TESTIMONY ABOUT APPELLANT?

Over defense objection, the state presented on direct examination of Louis Salmon his improper lay opinion that appellant was a bad boy so that it was time for him to pay the consequences and that he was prepared to face the consequences at T 1433-34:[18]

Q Now, you said this was a crazy thing, an irrational act, is that what you said on cross examination?

A Yes.

Q I think you said he was paranoid?

A Yeah.

Q Wasn't it your impression that Mr. Almeida knew that what he had done was wrong?

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[18] On cross-examination, the defense had questioned the witness as to whether he had considered the defendant's behavior was "crazy" and "very irrational" T 1414-15.

A Yeah.

Q In fact, in your words, he was a bad boy, so it's time for him to pay his dues?

MR. MOLDOF: I am going to object to that opinion.

THE COURT: It's overruled.

Q. (By Mr. Donnelly) In fact, it was your impression from him that he had been a bad boy, so it's time for him to pay his dues?

A Yeah.

MR. MOLDOF: Objection, with regard to what Mr. Salmon thought.

THE COURT: It's overruled.

MR. MOLDOF: Motion to make.

Q. (By Mr. Donnelly) Is that not correct, Mr. Salmon?

A Yeah.

Q It was also your impression that he was prepared to face the consequences?

A Yeah.

MR. MOLDOF: Same objection.

Q. (By Mr. Donnelly) Is that not correct?

THE COURT: It's overruled.

THE WITNESS: Yeah.

While the state may present lay opinion evidence of sanity in some cases, and may inquire on redirect about matters raised on cross, the questioning at bar went beyond those bounds.

Lay witnesses "generally are not permitted to offer opinions or inferences, and this inference should have been left for the jury to

draw on its own." Caruso v. State, 645 So. 2d 389, 395 (Fla.1994). Fino v. Nodine, 646 So. 2d 746, 748-749 (Fla. 4th DCA 1994) sets out the governing law (footnote omitted):

> Initially, it should be noted that the decision of whether or not to allow lay witness opinion testimony is within the discretion of the trial court. Hughes v. Canal Ins. Co., 308 So. 2d 552 (Fla. 3d DCA 1975).
>
> "Generally, a lay witness may not testify in terms of an inference or opinion, because it usurps the function of the jury. The jury's function is to determine the credibility and weight of such testimony." Floyd v. State, 569 So. 2d 1225, 1231-32 (Fla.1990) (citation omitted), cert. denied, 501 U.S. 1259, 111 S.Ct. 2912, 115 L.Ed.2d 1075 (1991). However, a lay witness is permitted to testify in the form of an opinion or inference as to what he perceived if two conditions are met:
>
> > (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
> >
> > (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.
>
> § 90.701, Fla.Stat. (1991). "Lay witness opinion testimony is admissible if it is within the ken of an intelligent person with a degree of experience." Floyd, 569 So. 2d at 1232.
>
> Opinion testimony of a lay witness is only permitted if it is based on what the witness has personally perceived. § 90.701, Fla.Stat. (1991); Nationwide Mut. Fire Ins. Co. v. Vosburgh, 480 So. 2d 140 (Fla. 4th DCA 1985). Acceptable lay opinion testimony typically involves matters such as distance, time, size, weight, form and identity. Vosburgh, 480 So. 2d at 143. Before lay opinion testimony can be properly admitted, a predicate must be laid in which the witness testifies as to the facts or perceptions upon which the opinion is based. Beck v. Gross, 499 So. 2d 886, 889 (Fla. 2d DCA 1986), rev. dismissed by 503 So. 2d 327 (Fla.1987). "[B]efore one can render an opinion he must have had

sufficient opportunity to observe the subject matter about which his opinion is rendered." Albers v. Dasho, 355 So. 2d 150, 153 (Fla. 4th DCA), cert. denied, 361 So. 2d 831 (Fla.1978).

A lay witness may give opinions based on impressions of the defendant's behavior, but cannot testify as to whether the defendant knew the consequences of an act. Hansen v. State, 585 So. 2d 1056, 1058 (Fla. 1st DCA 1991), The Florida Bar v. Clement, 662 So. 2d 690, 697 (Fla.1995) (citing Hansen with favor).

The court erred in permitting the objected-to lay opinion testimony. The state made no showing that the witness could not "readily, and with equal accuracy and adequacy communicate what he ... perceived to the trier of fact without testifying in terms of inferences or opinions" as required by the statute. No basis was given for the conclusions contained in the objected-to testimony.

Given that there was a substantial defense presented, and that the jury's question shows doubt about premeditation, it cannot be shown that it would have found appellant guilty but for this error. This Court should order a new trial.

The opinion evidence was also prejudicial as to penalty, given the close penalty vote and the strong case for life. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const.

4. WHETHER THE COURT ERRED BY ALLOWING USE OF A PHOTOGRAPH SHOWING THE VICTIM'S BODY AFTER HIS INTERNAL ORGANS HAD BEEN REMOVED?

After the jury was sworn, the judge conducted a hearing out of its presence to consider appellant's objection to autopsy photographs. T 1210-20. Among these was exhibit J. Asked what exhibit J showed and how it was relevant to his testimony, the pathologist testified:

> A trajectory included striking the backbone as I mentioned and the spine that was at that site. This photograph shows the organs removed, lungs, liver, heart. It shows an opened aorta behind which is a bulge, around the bulge, the backbone running vertically in the back of the body cavity and it shows the bullets crossing through from the right side of the backbone through the backbone and emerging behind the aorta on the other side of the backbone and then exiting out the left rib area ultimately to where I recovered the bullet under the skin of the left back.
>
> The reason this photograph is helpful for me in describing the trajectory and the effect of this trajectory to the jury is that in striking the backbone here, which is clearly depicted, it causes instant paralysis or loss of use of the legs and helps me explain that the victim is shot at the site where he falls on the ground and is ultimately discovered that this caused him to instantly fall when the bullet struck his backbone and spine at that level.

T 1213-14. He testified he could explain his testimony with a diagram "but I believe I'll be better understood if the jury can see the picture and the damage which I'm attempting to describe to them." T 1216. The court overruled defense objection to exhibit J. T 1219.[19]

During the pathologist's testimony before the jury, the state introduced exhibit J into evidence over objection as exhibit 10 T 1278. Exhibit 10 was exhibited during his testimony at pages T 1284-86.[20] At page T 1288, defense counsel approached the bench and brought to the court's attention that the victim's mother had begun sobbing and that

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[19] The court did exclude another photograph (exhibit K), which showed "the very same area depicted but with the aorta lifted up removed off the backbone." T 1215,1219-20.

[20] At line 1 of T 1285 the exhibit is referred to as exhibit 12 ("Exhibit No. 12 is a photograph of this area of the chest cavities with organs removed."), but this is surely an error: the context of the questioning at pages 1284-86 concerns exhibit 10. The witness did not testify about exhibit 12 (a photograph used in conjunction with an x-ray showing the path of the bullet) until page T 1292.

for "maybe ten to 30 seconds" a man was holding her, and that a juror was looking in her direction T 1288-89. He added that the man and the mother then left the courtroom T 1289. Counsel moved for a mistrial, which the court denied. Id. The prosecutor said that he did not hear any weeping, but saw her leaving the courtroom when defense counsel rose to speak T 1290. The court concluded the bench conference: "I did not see her weeping. I certainly didn't hear her sobbing and I didn't notice any of the jurors. That doesn't mean it didn't happen. They have been removed at this point from the courtroom." T 1291.

The court erred in overruling the defense objection to exhibit J. Thompson v. State, 619 So. 2d 261, 266 (Fla.1993), Hoffert v. State, 559 So. 2d 1246, 1249 (Fla. 4th DCA 1990).

In Thompson, this Court wrote:

> In his fourth claim, Thompson alleges that the trial court improperly admitted, at the penalty phase, the photographs of the victim's body taken during the autopsy. Thompson alleges that the trial court's admission of the autopsy photographs into evidence improperly inflamed the jury. In our view, the autopsy photographs in this instance were not essential, given the other photographs introduced. The other photographs introduced more than adequately support the claim that the murder was heinous, atrocious, or cruel. Accordingly, we find it was error to admit the autopsy photographs, but the error was harmless given the testimony of the eyewitness, the medical examiner, and the appellant himself, and the other photographs admitted into evidence.

In Hoffert, the court wrote:

> Finally, appellant contends the trial court erred when it permitted the introduction of an autopsy photograph of the victim's head. The photograph depicted the internal portion of the victim's head after an incision had been made from behind the ears to the top of the head, with the scalp rolled away revealing the flesh which underlies the hair and overlies the skull. The state argues that it introduced the photograph to show that in addition to the other injuries

> sustained by the victim, he had suffered a separate blow to the left side of his head, and that he received the worst of the fight. The record contains other evidence which showed that the victim had broken fingers, bruises above the nose and lacerations on the back of the head. The medical examiner could have testified that the victim had a bruise on the left side of his head and a hemorrhage to the temporalis muscle without reference to the photograph. The danger of unfair prejudice to appellant far outweighed the probative value of the photograph and the state has failed to show the necessity for its admission.

From the foregoing, use of the autopsy photograph showing the body with internal organs removed was improper. As in Hoffert, it "was not essential" in view of other exhibits showing the path of the bullet: exhibits 6 and 7 (photographs of the bullet wound), T 1279-80, exhibit 9 (a photograph showing the victim's back where the bullet was recovered), T 1286, exhibit 11 (an x-ray showing bullet's path), T 1291-92, and exhibit 12 (a photograph used in conjunction with exhibit 11), T 1291-92. Additionally, the witness testified extensively about the course of the bullet through the body before displaying exhibit 10, T 1283-84, and did so again using exhibit 11 T 1291-92.

The cause of death was undisputed, and the pathologist testified that the primary use of exhibit 10 was to establish that the victim would have fallen where he was shot because of the injury to the spine T 1214. The x-ray was adequate to establish this fact, T 1291-92, which in any even was not relevant to any material fact in issue.

Likewise, the exhibit was inadmissible under Hoffert. The pathologist could (and did) establish the injury "without reference to the photograph." 559 So. 2d at 1249. Hence, as in Hoffert, "[t]he danger of unfair prejudice to appellant far outweighed the probative value of the photograph and the state has failed to show the necessity

for its admission." Id.

Although the court found the error harmless in Thompson, there is prejudice here. The exhibit would inflame the jury and divert it from determining appellant's mental state at the time of the shooting. The victim's mother's reaction underscores the disturbing nature of such exhibits on lay persons. In State v. Smith, 573 So. 2d 306, 313 (Fla.1990), this Court wrote:

> Another claim regarding Estes' testimony focuses on the trial court's decision to allow the state to show her autopsy photographs of Cascio's body, which caused her to become upset and sob out loud. When Estes broke into tears, Smith moved for a mistrial, but the motion was denied. Smith claims this was error because Cascio's body already had been identified, so the only reason for showing Estes the photographs was to upset the witness and inflame the jury. Again we are compelled to agree that the trial court erred.
>
> Before Estes testified, an associate medical examiner identified Cascio for the jury by referring to those autopsy photographs. Nonetheless, the prosecutor showed those photos to Estes, contending that his sole purpose was to have her identify Cascio. Yet we can find in this record no valid reason for showing the gruesome photographs to Estes once the body had been identified, especially when the only issue contested at trial was Smith's reason for killing Cascio. The evidence also was cumulative and unfairly prejudicial. § 90.403, Fla.Stat. (1985).

The photograph at bar had a like effect. While the state did not show the exhibit to the mother at the stand, her emotional reaction and exit were visible to the attorneys and the court. Defense counsel saw at least one juror watching her reaction. Given the substantial defense case and the question about premeditation, it cannot be said that the error did not contribute to the verdict.

Admission of the photograph was prejudicial at penalty given the

close vote for death and the compelling mitigation. It may have affected one or more juror to focus on the brutality of the victim's death, resulting in an improper death recommendation. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const.

5. WHETHER THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS APPELLANT'S STATEMENTS TO THE POLICE?

The court erred in denying the motion to suppress appellant's statements. His waiver of Miranda rights was invalid because the police failed to clarify, and overrode, his question about his right to counsel during the reading of his rights.

A hearing on appellant's pre-trial motions to suppress his statements to the police revealed that: At police headquarters, appellant was given his Miranda rights after his arrest R 127-129. Det. Mink told him they were investigating a homicide at Higgy's, and would not arrest anyone without probable cause T 137. Appellant replied that he "fucking killed him." Id. Mink decided to tape appellant's statement. At the start of the tape, he was given a second Miranda warning. During the Miranda warning he stated, "Well, what good is an attorney going to do?" T 1527,157.[21] Mink admitted that they did not attempt to clarify whether appellant sought to assert his right to counsel; in fact, he admitted a policy of only reading people their rights one time "no matter what they say afterwards", T 159, and admitted that he knew that an attorney might interfere with the questioning T 157. Mink knew that an attorney could have done a lot

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[21] Although the tape was played at the motion to suppress hearing, it was not transcribed by the court reporter at that time. The transcript appears at transcript pages 1524-45, where it was played for the jury during trial.

of good for appellant T 171. Det. Allard testified that he and Mink discussed among themselves the import of appellant's response and what it meant T 181. Their response to appellant's question 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" T 1527,156. This statement was immediately followed by statements to the Fort Lauderdale Police about the other two murders T 222-28.

Appellant moved to suppress the statements on the ground that the police needed to clarify his question about an attorney to ensure that he had validly waived his right to counsel before substantive questioning T 324-342. The court denied the motion to suppress R 190-94. Appellant renewed the motion to suppress at trial prior to the introduction of appellant's taped statement T 1523. The court again denied the motion. Id. He also renewed it when the state at penalty introduced the other two taped statements T 2221,2245-46. It was error to deny the motion and admit the taped statements at the guilt phase and in penalty proceedings.

A. A QUESTION, OR EQUIVOCAL OR AMBIGUOUS STATEMENT, DURING THE GIVING OR WAIVING OF 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.

Under the state and federal constitutions, if a suspect, after waiving Miranda rights, makes 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). But those cases do not address the issue as to what happens when a suspect makes an equivocal or ambiguous request during the process of giving or waiving Miranda rights. This later scenario is present at bar.[22] Once a suspect makes an equivocal request during Miranda warnings the officer must cease 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 Court wrote that an officer must explain Miranda rights to a suspect prior to questioning on substantive matters. As this Court made clear in Owen, Davis holds that police need not clarify an equivocal or ambiguous request where the suspect has already knowingly and voluntarily waived Miranda rights and thereafter makes an equivocal or ambiguous request. 22 Fla. L. Weekly S246 (e.s.). Likewise, this Court held that an equivocal or ambiguous request made after, and not during, the giving and waiving Miranda rights need not be clarified. Id. S247. By conditioning the holding that police need not clarify an equivocal request during substantive questioning unless it is after the giving and waiving Miranda rights, it has been made clear that police must clarify questions or misunderstandings arising during the waiving of Miranda rights. How can there be a knowing and voluntary waiver of Miranda rights unless a suspect's questions, misunderstandings and equivocal statements are clarified? An equivocal request for counsel or a question about counsel cannot be a knowing and

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[22] Appellant's question at bar occurred after the detective asked if he understood his rights and whether he would waive his rights to counsel (i.e. would he "speak to me now without an attorney present?").

voluntary waiver of the right to counsel. Davis is based on the premise that the risk of overlooking an equivocal request is acceptable "in light of the protections already afforded these suspects by the Miranda warnings." A suspect who makes an equivocal or ambiguous statement during the 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. 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 analyzed Davis and noted that Davis involved an equivocal statement made during substantive questioning and not during the process of giving and waiving Miranda rights. Id. 899.

The court held that Davis applied only to equivocal statements made during substantive questioning and not to situations where equivocal statements were made during the giving and waiving of Miranda rights. 906 P.2d at 899-901.[23] It made clear that policy considerations dictated that there be a difference between equivocal statements during the giving and waiving of Miranda rights, to establish certainty as to a valid waiver, and equivocal statements later during substantive

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[23] 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."

questioning to reinvoke rights after a valid waiver. Id. 901.

Logic and common sense dictate that questions and equivocal statements during the giving and waiving Miranda rights are different from such statements during substantive questioning. In substantive questioning the concentration is on a suspect's responses, and to developing a line of questioning. The officer is no longer focused on a suspect's understanding and invocation of his right. An ambiguous or equivocal statement by a suspect at this stage will not be recognized as needing clarification where the 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 giving and waiving Miranda rights the officer is not dealing with substantive questions and answers. His sole concentration should focus narrowly on the suspect's understanding and possible invocation of Miranda rights. Thus, where a suspect makes an equivocal or ambiguous statement during the giving and waiving Miranda rights, the officer needs to clarify the situation to ensure there is a knowing and voluntary waiver or whether there has been an invocation of 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 equivocal or not).

The police should know that if a suspect poses a question or makes an equivocal or ambiguous statement during the giving and waiving of Miranda rights, they must clarify the matter to determine if he has knowingly and voluntarily waived his rights. At bar, Det. John Abrams testified that if he had heard appellant's equivocal request he would

have clarified the statement. T 312-13. Unfortunately, it was Det. Mink who had the opportunity to clarify during the process of giving and waiving Miranda rights. Mink made clear that it was his policy never to clarify equivocal statements during the Miranda process. T 154. Unless the individual directly says he wants an attorney, Mink will go right into the questioning T 154,170. He testified that he knew that an attorney might interfere with the questioning, but made no effort to answer appellant's question. Instead, he tried to bully him into making the statement.[24] This case shows the need to clarify questions or requests during the giving and waiving of Miranda rights. This is especially true since Almeida was raised in Brazil in his formative years and after he immigrated to the United States he continued to be raised by people from Brazil. Dr. Strauss testified on the motion to suppress that Almeida did not fully understand his rights T 374-75, 382-85. Due to differences in culture and language, it was even more important to clarify his concern to ensure that he knowingly and voluntarily waived his rights.

Assuming <u>arguendo</u> there is no distinction between an equivocal request made during Miranda rights and one during substantive questioning, <u>State v. Owen</u>'s new rule should still not be applied retroactively at bar due to the 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 <u>Owen v. State</u>, 560 So. 2d

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[24] Instead of attempting to clarify the equivocal statement, Mink informed appellant that he had already spoken and that he wanted him to speak again T 1527,156. This is coercive in itself and is not any type of clarification.

207, 211 (Fla. 1990) which required the police to clarify any equivocal request before questioning. Owen was the product of the prophylactic 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. Id. 92. Thus, applying the new law retrospectively is counter to deterring police misconduct. The same applies to retrospective or retroactive application of the new State v. Owen decision at bar. The police cannot ignore clear existing law governing their conduct with the hope that a future change of law will apply retrospectively to their situation. If the police can rely on retrospective application of new law, there will be little or no deterrent effect to existing caselaw which is supposed to govern 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 new rule announced in State v. Owen, 22 Fla. L. Weekly S246 (Fla. May 8, 1997) should not apply retrospectively over the law governing police conduct at the time of the interrogation -- Owen v. State, 560 So. 2d 207 (Fla. 1990).[25]

B. APPELLANT'S STATEMENT "WELL, WHAT GOOD IS AN ATTORNEY

[25] It should be noted that at the time of Owen's interrogation the police were not governed by cases clearly requiring 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 at bar.

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, 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. Instead of clarifying the equivocal response with appellant the police replied in a manner to tell him 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". T 1527. Dets. Mink and Allard also discussed among themselves the import of his response and what it meant. They clarified the statement to conclude among themselves that the response was merely a

comment. But instead of clarifying the response amongst themselves, they should have clarified the equivocal response with appellant. When confronted with this equivocal response, Det. Abrams testified that if he had heard it he would have clarified the response.

Other cases support that appellant's statement was an equivocal request. In Martin v. State, 557 So. 2d 622, 624-25 (Fla. 4th DCA 1990), the police officer was asked by Martin for his opinion whether Martin needed an attorney; in such circumstances, there was no trouble finding that the language used constituted an equivocal request for counsel. See also State v. Sawyer, 561 So. 2d 278, 291-292 (Fla. 2d DCA 1990) ("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;").

It was error to deny the motion to suppress. The statement was taken in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution. The conviction and sentence must be reversed and this cause remanded for a new trial. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const.

6. WHETHER THE VICTIM'S FAMILY'S EMOTIONAL REACTIONS REQUIRE A NEW TRIAL?

When the victim's family's emotional reactions occurred in the jury's presence, the court erred in denying a mistrial without fully informing itself as to the circumstances and the effect on the jurors.

At a pre-trial hearing, defense counsel brought to the court's attention that a woman with the victim's wife "said to Ozzie, you should fry you bastard or something like that." T 322-23. The court's

only response was: "He can deal with her. She was apparently pretty volatile." T 323. The court did not undertake to ensure that such incidents would arise at trial.

During the pathologist's testimony to the jury, defense counsel approached the bench and noted that the victim's mother had begun crying and had been comforted by a man in the view of one or more jurors. T 1288-89. Noting the expression on the face of one of the jurors on seeing this, he moved for a mistrial and suggested that the court inquire into the matter, which the court summarily denied, offering instead to make a curative instruction T 1288-89. Counsel related that juror Virga was "obviously upset"; the court simply noted that it had seen nothing, although "That doesn't mean it didn't happen. They have been removed at this point from the courtroom." T 1291.

During defense cross-examination of Dr. Macaluso, defense counsel again approached the bench to report another such incident in which someone in the audience had made sarcastic remarks, and suggested that the court ask them what they said, and moved for a mistrial T 1985-86. When the bailiff said that she did not, the court told her to tell the family to refrain from comments, and denied the mistrial T 1986-87.

In a capital case, the court must ensure that emotional influences from the victim's family do not affect the trial. Hence the rule against identification of the decedent by a family member in murder cases. "The basis for this rule is to assure the defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt." Welty v. State, 402 So. 2d 1159, 1162 (Fla.1981). Thus this Court write in Randolph v. State, 463 So. 2d 186, 189-90 (Fla.1984) (e.s.): "While it is true that the

court must guard against the possibility that sympathy will be injected in the trial, and that is why, normally, a family member should not be called to identify the victim, such evidence is admissible if other witnesses could not perform that function as well." See generally Rodriguez v. State, 433 So. 2d 1273 (Fla. 3d DCA 1983) (victim's widow's emotional outbursts on stand necessarily engendered sympathy for her plight and antagonism for defendant depriving defendant of fair trial). Like principles apply where the jury is exposed to outbursts from family members even when not on the witness stand. Chaney v. State, 267 So. 2d 65 (Fla.1972) (outburst in jury's presence in hall; mistrial not warranted under facts); Bauta v. State, 22 Fla. L. Weekly D 1020 (Fla. 3d DCA April 23, 1997) (outburst by member of venire).

In such cases, the court's discretion to deny a motion for mistrial will be upheld if it undertook strong measures to assure that the outburst did not affect the jury. Bertone v. State, 224 So. 2d 400 (Fla. 3d DCA 1969), Bauta. At bar, of course, the court showed little interest in the effect of these outbursts on the jury.

This case is a far cry from Torres-Arboledo v. State, 524 So. 2d 403, 409 (1988). There this Court held that, by failing to move for a mistrial, the defendant failed to preserve for review a claim concerning an emotional outburst, writing (e.s.): "In a case such as this, this Court cannot glean from the record how intense the outburst was nor the degree to which it may have affected the jury. Therefore, these determinations must first be made by the trial court. See Justus v. State, 438 So. 2d 358, 366 (Fla.1983), cert. denied, 465 U.S. 1052, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984). However, because there was no motion for a mistrial, there is no record determination by the trial

court as to whether this outburst was so prejudicial as to require one. Under the circumstances, we agree with the state that this claim has not been properly preserved for our review." See also Arbelaez v. State, 626 So. 2d 169, 176 (Fla.1993).

Here, by contrast, counsel preserved the matter by moving for a mistrial, and suggested that the court inquire of the jurors and of the family members. The court had no interest in developing the matter and denied the mistrial without informing itself on the record. A court cannot exercise discretion except after fulling informing itself. U.S. v. Simtob, 901 F.2d 799, 804 (9th Cir.1990).[26] Here, the matter is preserved for appeal. As the record now stands, we have counsel's good-faith representations that at least one juror was upset. The court failed to develop a record showing absence of prejudice, and this Court should order a new trial. See also DeLap v. State, 350 So. 2d 462 (Fla.1977) (reversing where record insufficient to afford appellate review of issue).

These incidents were also prejudicial as to penalty. There was a compelling case for mitigation, and the jury vote for death was only 7-5. Any juror voting for death might have been influenced by these emotional incidents. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const.

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[26] In Simtob, the court denied a motion to re-open evidence to introduce a tape recording to establish perjury of government witness without first hearing the tape. The Ninth Circuit wrote: "The trial judge, in effect, declined to exercise his discretion at all; his determination of the tape's cumulative nature, or, alternatively, of its value to the defense, was therefore made without a proper 'consideration of relevant factors,' and constituted an abuse of discretion."

7. WHETHER THE COURT ERRED BY APPLYING THE COLD, CALCULATED, AND PREMEDITATED CIRCUMSTANCE?

The court found that appellant committed the murder while under the influence of extreme mental or emotional disturbance, and while his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired R 287-89. These findings rested securely on unrebutted evidence of his abused, disordered childhood, lifelong mental illness, and acute anger and depression at the time of the murder. Nevertheless, the court found in aggravation that appellant committed the murder in a cold, calculated and premeditated manner with no pretense of moral or legal justification R 284. It was error to instruct the jury on the circumstance and to apply it at bar. The record does not establish that appellant acted with the calm deliberation required by the circumstance. It did not establish that he acted without even a "pretense" or moral or legal justification.

A. It was error to find the circumstance where the evidence did not support it. "[T]he trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla.1983), cert. denied, 467 U.S. 1210 (1984)." Robertson v. State, 611 So. 2d 1228 (Fla.1993). At bar, the uncontested evidence was that appellant was seriously disturbed. Thus, the court found that at the time of the killing he was under the influence of extreme mental or emotional disturbance, and that his ability to appreciate the criminality of conduct or to conform his conduct to the requirements of law was substantially impaired R 287-89. Such a profound distur-

bance is contrary to a finding that he acted in a calm, reflective manner. And the finding, R 289-90, that he was so disturbed that he had little likelihood of rehabilitation refutes the circumstance.

Mental mitigating circumstances "weigh against the formulating of a careful plan to kill". Besaraba v. State, 656 So. 2d 441, 445 (Fla.1995).[27] See also Spencer v. State, 645 So. 2d 377, 384 (Fla.1994) ("Although there is evidence that Spencer contemplated this murder in advance, we find that the evidence offered in support of the mental mitigating circumstances also negates the cold component of the CCP aggravator.").[28] "[A] heat-of-passion killing ... by definition cannot fulfill the 'coldness' requirement of the factor." Hamilton v. State, 678 So. 2d 1228, 1231 (Fla.1993).[29]

Cannady v. State, 620 So. 2d 165, 170 (Fla.1993)[30] disapproved application of the circumstance even where the defendant apparently contemplated the murder for a period of months. The evidence there was that Douglas Cannady thought that Gerald Boisvert had raped his wife. After brooding over the matter for several months, he shot his wife and then had his son Christopher drive him to Boisvert's house.

On the way, Cannady told Christopher that he was going to

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[27] In Besaraba, the trial court found only one of the two statutory mental mitigating circumstances.

[28] In Spencer, the trial court found neither statutory mental mitigating circumstance.

[29] In Hamilton, the court found neither statutory mental mitigating circumstance.

[30] In Cannady, the trial court found only a "prima facie" showing as to one of the statutory mental mitigating circumstances (extreme disturbance), and specifically rejected the other (substantial impairment).

kill Boisvert as he loaded his gun. When they arrived, Boisvert was standing in his front yard with another man and his two children. Cannady asked Boisvert for a beer to lure him to his truck. When Boisvert approached the truck, Cannady shot him in the head several times. Cannady then reloaded his gun, got out of his truck, and shot Boisvert again. In all, Cannady shot Boisvert seven times.

> As Cannady drove away, he asked Christopher to reload his gun. Christopher refused. Cannady then drove to where Steve Russ lived. During the trip, Cannady told Christopher that he was going to kill Russ because of the problems he had caused at his bar. When Cannady got to Russ's house, he asked Russ for a beer but Russ did not have any. Cannady then shot at but missed Russ, who was standing in his front doorway. Russ fled through the house and Cannady ran after him and shot again, missing him. Russ was able to escape. As Cannady and Christopher returned home, Cannady placed the gun and bullets under the truck seat. Before doing so, he told Christopher that he knew he was going to prison. A police car followed Cannady home, where he was arrested.

Id. 167. This Court rejected the trial court's finding of the circumstance, writing at page 170:

> With regard to the aggravating factor of "cold, calculated, and premeditated" as applied to the murder of Gerald Boisvert, it is uncontroverted that Cannady believed Boisvert had raped his wife. For this aggravating factor to apply to Boisvert's murder, the murder must have been "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." § 921.141(5)(i), Fla.Stat. (1989). Under the circumstances, the murder of Boisvert was not "cold," although it may have been "calculated." On the facts of this case, "[t]here was no deliberate plan formed through calm and cool reflection, only mad acts prompted by wild emotion." Santos v. State, 591 So. 2d 160, 163 (Fla.1991) (citation omitted). The emotional distress apparent from this record mounted over a two- month period, during which time Cannady continued to believe that Boisvert had raped his wife, causing her physical and emotional pain. It reached a pinnacle after Cannady killed his wife and set out to kill the apparent cause of her suffering. The trial court's findings that Cannady was under the influence of mental or emotional disturbance at the time of the murders and that he was an alcoholic suffering from brain atrophy were supported by

> expert testimony and further support the conclusion that Boisvert's murder was not the result of "cold" deliberation. Consequently, we conclude that this aggravating factor was not established for Boisvert's murder.

In Santos, after threatening to kill her two days before, Carlos Santos purchased a gun and took it to Irma Torres' home. Seeing her and her children, he chased them down and shot them. This Court struck the CCP circumstance, reasoning that, although Santos "acquired a gun in advance and had made death threats -- facts that sometimes may support the State's argument for cold, calculated premeditation", the shooting was the product of the defendant's emotional turmoil arising from his domestic relationship with Torres. Id. 162. This Court so ruled even though the trial judge rejected both statutory mental mitigating circumstances.

From the foregoing, it was error to find the circumstance since there was substantial unrebutted evidence of appellant's disturbed mental state which established both statutory mental mitigating circumstances and refuted the "cold" element of the circumstance.

The state also did not prove beyond a reasonable doubt the absence of a "pretense of justification" under Banda v. State, 536 So. 2d 221, 224 (Fla.1988) ("The state must prove this last element beyond a reasonable doubt, in addition to the other elements of this particular aggravating factor."). A "'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." Id. 225. "Pretense" means "something alleged or believed on slight grounds: an unwarranted assumption." Id. n.2.

The judge's order reflects that he did not really consider whether there was a "pretense" of moral or legal justification. He simply concluded that there was no actual justification:

> The defendant told Dr. Macaluso, one of the examining psychiatrists, that he felt Mr. Ingargiola deserved to be shot. He also bragged to several co-workers at Regas' about committing the killing and how he and an underage co-worker could now drink beer at Higgy's. Yet in his statement to the police, the defendant claimed there was no reason for killing Mr. Ingargiola. <u>None of these statements comports with a moral or legal justification for the crime</u>, particularly when this was the third homicide the Defendant committed within a six week period. Therefore, the Court finds no claim of justification or excuse that would rebut the otherwise cold and calculating nature of this homicide. <u>Banda</u> [cit.]

R 286-87 (e.s.). The reference to the police statement is apparently to appellant's response when asked if he killed the man because he was "pissed" or embarrassed: "No, he did make me look bad and he did piss me off, but that still was no reason for me to kill a man because I am not that type of person that would just kill somebody for a simple thing like that. You know, I always thought that the only reason I shall kill somebody is somebody threaten my life or somebody broke into my house and tried to harm me, you know, but them beer, you know, I kind of had a lot of beer that night." T 1537. Appellant was certainly correct in saying that it was not a "reason" to commit murder, but this statement does not refute that he felt a "pretense" of a justification at the time of the murder.

It was also wrong to rely on the other murders to establish the circumstance. R 286 ("None of [appellant's] statements comports with a moral or legal justification for the crime, particularly when this was the third homicide the Defendant committed within a six week

period."). In Wuornos v. State, 676 So. 2d 966 (Fla.1995), this Court held that the circumstance cannot rest on collateral crimes.

Without this circumstance the death sentence is disproportionate, and the sentence should be reduced to life imprisonment. Songer v. State, 544 So.2d 1010 (Fla.1989).

B. For the same reason it was error to overrule defense objection and instruct the jury on the circumstance. At sentencing, the defense raised its motion attacking the coldness circumstance as unconstitutional and unsupported by the evidence T 2198-2200, R 111. The state contended that the other murders supported the circumstance T 2202-2204. Defense counsel argued that the other murders could not be used to justify the circumstance T 2202. The judge rejected the state's argument that it could use the prior homicides to support the CCP circumstance: "Well, if I were to buy your reasoning and logic right now, then by virtue of that argument, I would be required to give a Castro instruction, telling the jury they wouldn't be permitted to consider both. That would effectively be a double, you can't use one aggravator to establish another aggravator. The aggravator in a capital homicide must be established by the independent evidence that comes in during the course of trial." T 2201. Defense counsel argued that the other murders could not support the circumstance T 2202. The court noted: "Every argument that you [the state] have made to me so far on why pretense of moral or legal justification would apply is all predicated on the two prior homicides which you want to use as an aggravator." T 2204. It noted that the state's own expert had testified that appellant had felt justification for what he had done, and that if the circumstance were later found inapplicable, "this

penalty phase comes back to a new jury automatically" T 2205. Ultimately, however, the court instructed the jury on the circumstance R 242. This was error. Further, since the state presented an incorrect version of the circumstance to the jury -- that the other murders could support it, T 2478-79 -- the jury may have applied it even though the evidence did not support it. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const.

8. WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE AT BAR?

State v. Dixon, 283 So. 2d 1, 7 (Fla.1973), cert. denied 416 U.S. 943 (1974) held that the death penalty statute provides the capital defendant "concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient." The "concrete safeguards" include proportionality review:

> Review of a sentence of death by this Court, provided by Fla.Stat. s 921.141, F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes. Surely such a desire cannot create a violation of the Constitution.

Accordingly: "Our law reserves the death penalty only for the most aggravated and least mitigated murders". Kramer v. State, 619 So. 2d 274, 278 (Fla.1993). Accord Robertson v. State, 22 Fla. Law Weekly S 404 (Fla. July 3, 1997).

> Our proportionality review requires us to "consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla.1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). In reaching this decision, we are also mindful that "[d]eath

is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation." State v. Dixon, 283 So. 2d 1, 7 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. Id.; Kramer v. State, 619 So. 2d 274, 278 (Fla.1993). We conclude that this homicide, though deplorable, does not place it in the category of the most aggravated and least mitigated for which the death penalty is appropriate.

Terry v. State, 668 So. 2d 954, 965 (Fla. 1996).

In Robertson, the facts were as follows:

.... On Monday, September 2, 1991, the nude, badly decomposed body of Carmella Fuce was found in the bedroom of her Tallahassee apartment. Ms. Fuce was found on her back. A pair of pants were tied around her head and a brassiere was stuffed in her mouth. A teddy bear was between her legs, and an electrical cord was around her neck. The victim's hands were tied behind her back with a piece of cloth and an electrical cord. According to the medical examiner, the cause of death was strangulation asphyxia. The medical examiner further testified that the victim's brassiere had been stuffed down her throat with such force that if she had not been strangled, the gag could have caused her death.

Written on the bedroom wall were the words "Saten sic, Nigger, Fuck, FSU, FAMU, KKK, ANM." The handwriting on the wall matched samples later submitted by Robertson. Ms. Fuce's car was found in the apartment complex parking lot, with the driver's door unlocked. A single key was in the ignition and the anti- theft device on the steering wheel was unlocked.

22 Fla. L. Weekly S 404.

This Court found the death penalty disproportionate, writing:

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 and 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. See Kramer v. State, 619 So. 2d 274, 278 (Fla.1993).

Id. S 406.

In Fitzpatrick v. State, 527 So. 2d 809, 812 (Fla.1988), a case involving five aggravating circumstances, this Court also reduced the sentence to life imprisonment, writing:

> Thus, the trial judge's findings of the mitigating circumstances of extreme emotional or mental disturbance, substantially impaired capacity to conform conduct, and low emotional age were supported by sufficient evidence. In contrast, the aggravating circumstances of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent. Fitzpatrick's actions were those of a seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer. We do not believe that this is the sort of "unmitigated" case contemplated by this Court in Dixon. Indeed, the mitigation in this case is substantial.

As in Robertson, there were only two aggravating circumstances at bar. Also, appellant has much more mitigation than Robertson did.

The trial court found three important statutory mitigating factors -- (1) the capital felony was committed while appellant was under the influence of extreme mental or emotional disturbance; (2) appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially

impaired, and (3) his age at the time of the capital felony.

(1) Extreme Mental or Emotional Disturbance and Substantial Impairment. Drs. Macaluso and Strauss found that appellant suffered from a chronic depressive condition along with alcohol-related problems T 2419, 2447. He was predisposed to become depressed as the result of his background which included physical, emotional and sexual abuse[31] as a child which in turn resulted in low self-esteem.

Appellant was 17 when he married a 15 year old girl T 1602. There were marital problems which stemming from his obsessive perception that she was unfaithful.[32] He suffered from serious depression T 2307-08. His family was sexually and emotionally dysfunctional in the extreme sense T 2448. In addition, there was evidence that Appellant had been drinking before the shooting. He had a chaotic, tense, disruptive, dysfunctional early family life T 2299.

Dr. Bukstel testified that appellant had deficits in complex abstract reasoning, problem solving, complex motor problem solving,

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[31] This included his parents bringing him a prostitute when he was still very young, T 1662,1775,2408; being molested by a cleaning lady when he was younger still, T 1753; and other acts of sexual molestation when he was in Brazil T 1754.

[32] Appellant separated from his wife and child and became anxious and agitated that his life had lost meaning. The stress of the family separation was elevated by his feelings of being unloved. He became more paranoid, suspicious of his wife, which served as the basis for a significant emotional breakdown as he became lonely and despondent. T 2422. Once he broke up with his wife, "things started to really tumble in a really rapid manner." There were cycles of "drinking and just rampaging and desperation and no meaningfulness and wandering around and looking for some connection where ever he could get it, and it culminated in the shooting." T 1666. He was depressed, obsessed with wife, suffering a deep emptiness and void in his heart, very miserable T 2307.

verbal learning and memory, spatial memory, attention and concentration to visual things, and receptive vocabulary T 2292. He had learning problems in school, language problems, inattentiveness, hyperactivity, T 2293, a long standing inefficiency in mental functioning and "impairment of adaptive abilities", disorder of brain development and mixed personality disorders with paranoid features; Bukstel could not rule out a more serious diagnosis like schizophrenia T 2294-95.

(2) Age of Appellant at the time of the offense. Appellant had turned 20 years old within eight days of the offense. He was very immature for his age. While he had been married, the marriage was no sign of maturity. The marriage was a failure, and his behavior within it was marked by extreme immaturity -- even infantile behavior.[33] He was separated from his wife. Instead of having the maturity to reconcile with his wife, he exhibited immaturity by handling his problems by drinking and accompanying prostitutes.

The court also found the following 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 circumstances were significant under the facts of this case.

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[33] "[H]e was very, he acted like a child. I sort of helped him make his decisions and took care of him." T 1628 (testimony of ex-wife). "And the sense of his emotional desperation, that's a good way to put it, is that he would describe how when they were in bed, she would lay on top of him, they would just hold each other for long periods of time, like he was holding a child, or she was holding a child, and that's what he remembered, and how warm and cozy and safe, one of the very few times in his life that he had a feeling of connection with people." T 1665 (testimony of Dr. Strauss).

(1) Capacity for rehabilitation. "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). At bar, there was substantial totally unrebutted testimony from jailers about appellant's good behavior, indicating a substantial ability to live well in prison.

(2) Difficult/Abusive Childhood. There is an irrefutable record that appellant suffered emotional, physical and sexual abuse throughout his life. This included his parents bringing him a prostitute when he was still very young, T 1662, 1775, 2408; being molested by a cleaning lady when he was younger still, T 1753; and sexual molestation when he was in Brazil T 1754. He was brutally beaten and starved in Brazil. The stepmother and her sister would strip and beat him, break broomsticks on him, and throw him out without food T 1751,2366. His brother saw the stepmother hit him with a broomstick over his back because he didn't want to be locked up in a room or closet T 2375. When he returned from Brazil, he was very tall and skinny, and did not appear normal, seemed goofy, doing strange things; he kept asking for dirty movies and magazines T 2376-77. He had a lot of scars and marks

on his body, his behind, and his legs T 2407. His mother testified he "was very sad, he was scared and in fear of everything." T 1597. He was not normal -- he wanted to commit suicide and stabbed his leg with a knife at age 14 T 1598. His sister testified that when he returned from Brazil: "To me, it seemed like he was, he had been through the war, like it reminded me of like one of the children in the concentration camp.... He wasn't clothed right, he was malnourished, he was skinny, he looked like a skeleton bones, I just couldn't understand that he was even him in there." T 1638. Kids made fun of him for being skinny T 1664. According to Dr. Seligson: "What I found was we had an individual who was throughout his life withdrawn, an individual who throughout his life was a frightened individual. He was distrustful of other people, was an individual who people described as being strange, peculiar, as an individual who other people grew to be frightened of because he seemed unpredictable." T 1740-41.

The state obtained testimony from his mother that he learned little in school, had language problems, T 1608, and he "was sad at all times, he would never comment on anything that, anything that would happen or not happen to his day or anything." T 1610.

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:

> 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 problem solving capabilities. He never had anyone to show him how to deal with things properly. His father did not provide the emotion that he needed. His sense of right and wrong was decreased due to his family endorsing such wrongs as prostitution. As Dr. Macaluso testified, any child put in Appellant's upbringing would have a high potential for his illness T 2429.

(3) Good behavior while incarcerated. Four jailers were unanimous in praising appellant's behavior. He was "never" a problem, was always respectful, and went to school and studies the Bible T 2352-57,2387-89,2390-93,2402-2404.

This is an important mitigator showing "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). It attains even greater weight when, as here, the evidence comes from jailers owing 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. As found in the sentencing order: "All of the experts

who examined the defendant testified that he had a history of alcohol abuse. They testified that the alcohol abuse increased the degree of his mental or emotional disturbance, which ultimately led the defendant to murder the victim in this case." R 291. Alcohol abuse is a mitigating factor. See e.g. Besaraba v. State, 656 So. 2d 441, 447 (Fla. 1995). It is especially important in proportionality analysis. See Voorhees v. State, 22 Fla. L. Weekly S 357 (Fla. June 19, 1997).

(5) Remorse. Appellant showed remorse in his taped statements, and in his interviews with the doctors. Remorse as a mitigating circumstance. E.g. Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989).

(6) Cooperation with police. The state's evidence shows that appellant co-operated fully with the police after his arrest. This is a mitigator. E.g. Sinclair v. State, 657 So. 2d 1138 (Fla. 1995).

(7) Confessed to the killing. The court found this as a mitigating circumstance. R 290. It is a mitigating circumstance. DeAngelo v. State, 616 So. 2d 440 (Fla. 1993).

(8) Appellant exhibited genuine religious beliefs. The court found this mitigator R 292. It is valid mitigation. Turner v. Dugger, 614 So. 2d 1075, 1078 (Fla. 1992). There was also testimony that strong religious beliefs may be helping him deal with emotional stress.

There are also a number of other unrebutted mitigating circumstances present. It is undisputed that appellant was passed back and forth between families with no opportunity to be raised by a positive role model. This is a mitigator. Sinclair v. State, 657 So. 2d 1138

(Fla. 1995). His death would be traumatic for his son. See State v. Stevens, 879 P.2d 162 (Ore. 1994). With the presence of three statutory mitigators (including both mental mitigating circumstance) and eight other mitigators, it cannot be said that there is one of the most aggravated and least mitigated of cases for which the death penalty is reserved.

In cases with similar mitigation death has been held disproportionate. Even in cases with multiple aggravating circumstances the death penalty has been disproportionate with less mitigation than at bar. Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (five aggravators including prior violent felony and mitigating circumstances of statutory mental mitigation and low emotional age); Chaky v. State, 651 So. 2d 1169 (Fla. 1995) (two aggravators including prior violent felony and mitigation of potential for rehabilitation, good prison record, and good work, family, and military record); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (two aggravators including prior violent felony and two mitigating circumstances -- age and unfortunate home life).

It may be argued that, where the prior violent felony is murder, death 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. But 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.

Neither Ferrell nor Duncan involve close temporal proximity of the prior murder to the offense for which they were being sentenced. Instead, there were years between the murders, and Ferrell and Duncan had served prison sentences in between the offenses. Both had received the chance to change, but instead became recidivist killers. In fact, Duncan's prior murder occurred in prison. These cases contrast with appellant's situation where the prior offenses shortly preceded the murder at bar and were part of the same psychological crisis. This was a time when he was under the same emotional and mental stresses that he suffered from in this case. Unlike Ferrell and Duncan, he was not a failed recidivist who had been given a chance to reform. Instead, his case is more like cases in which the prior violent felony is a murder but death is found disproportionate. It is closer to Besaraba and Santos than to Ferrell and Duncan for two reasons. First, this case involves statutory mental mitigators as in Besaraba and Santos, but which were rejected in both Ferrell and Duncan. Second, the offense at bar was within a short period of the two prior violent felonies 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.

This case is one of the most aggravated and least mitigated cases for which the death penalty is reserved. The death sentence must be vacated. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const.

9. WHETHER THE COURT ERRED IN FAILING TO EXERCISE DISCRETION IN EVALUATING MITIGATING CIRCUMSTANCES?

Heightened standards of due process and reliability apply to death sentencing. See Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982); Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). At bar the court failed to observe due process by failing to exercise reasonable discretion in weighing the mitigators. The 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 given a mitigating circumstance is within the 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). But the power to exercise discretion does not imply that a court may act according to whim or caprice. Carolina Portland Cement Co. v. Baumgartner, 99 Fla. 987, 128 So. 241, 247 (1930). As held in Parce v. Byrd, 533 So. 2d 812 (Fla. 5th DCA) rev. denied, 542 So. 2d 988 (Fla. 1988) exercise of discretion requires 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 (e.s.). 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").

At bar, the court failed to use discretion in weighing the mitigation. Instead, without giving reasons, it merely gave various mitigating circumstances little weight. Viewed as a whole, although the extensive mitigation here is virtually identical to the mitigation considered "significant" in Songer v. State, 544 So. 2d 1010, 1011 (Fla.1989),[34] the trial court treated them as of little weight.

The court analyzed mitigating circumstances in a manner which would logically result in substantial or great weight. But, in weighing the mitigator there was no evidence of the exercise of discretion. Instead, the court gave mitigators little weight based on mere whim contrary to any analysis. Here are some examples:

1. Extreme mental or emotional disturbance, and substantial impairment of capacity to appreciate the criminality of conduct or to

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[34] The mitigating circumstances in Songer were: the two statutory mental mitigating circumstances, age, remorse, drug dependency which caused significant mood swings, adaption to prison life and self-improvement, positive change in character attributes, emotionally impoverished upbringing, positive influence on family despite his incarceration, and development of strong spiritual and religious standards.

conform to requirements of law. The court outlined how the evidence irrefutably showed that appellant was under the influence of an extreme mental or emotional disturbance at the time of the killing, and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired R 287-89. As to the extreme disturbance circumstance, it concluded: "Based on the substantial testimony presented on this issue, the Court finds that this mitigating factor exists and gives it little weight." R 288. As to the substantial impairment circumstance, it concluded: "Based on the expert testimony presented, the Court finds that this mitigating factor exists and gives it little weight." R 289. The arbitrary conclusion of "little weight" is not a proper exercise of discretion.

This Court has "consistently characterized mental mitigation as one of the 'weightiest mitigating factors.' Santos v. State, 629 So. 2d 838, 840 (Fla.1994); see also Hildwin v. Dugger, 654 So. 2d 107 (Fla.), cert. denied, - U.S. -, 116 S.Ct. 420, 133 L.Ed.2d 337 (1995)." White v. State, 664 So. 2d 242, 247, n.7 (Fla.1995) (Anstead, J., dissenting). Thus they are extremely significant 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 this Court wrote that emotional disturbance "had substantial weight").

2. Age. The court wrote at record page 287:

> The defendant was born on November 8, 1973. He was twenty years old on November 15, 1993 when this murder occurred. Not only was he no longer a minor at that time, but he lived on his own as a self-supporting individual. Despite being separated from his wife, he was a married man as well as a father. There is no evidence to suggest that the Defen-

> dant'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 court was incorrect in writing that there was "no evidence" that appellant's mental or emotional age did not match his chronological age. The evidence was that he had only childlike coping skills, and a low level of intelligence. In the marriage "he acted like a child. I sort of helped him make his decisions and took care of him." T 1628 (testimony of ex-wife). "And the sense of his emotional desperation, that's a good way to put it, is that he would describe how when they were in bed, she would lay on top of him, they would just hold each other for long periods of time, like he was holding a child, or she was holding a child, and that's what he remembered, and how warm and cozy and safe, one of the very few times in his life that he had a feeling of connection with people." T 1665 (testimony of Dr. Strauss). All the evidence was that appellant was extremely immature.

3. Capacity for rehabilitation. "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla.1988). Included in the issue of rehabilitation is ability to conform to prison if sentenced to life. Id. (citing Skipper, Fead v. State, 512 So. 2d 176 (Fla.1987), and McCampbell v. State, 421 So. 2d 1072 (Fla.1982)).

Despite these principles, the trial court took a crabbed view of rehabilitation, limiting it to psychological rehabilitation. Also, it arbitrarily gave appellant's potential for rehabilitation very little weight. The entire findings on this mitigator were:

> Dr. Bukstel testified[35] that the defendant's depression would be difficult but not impossible to treat based on his finding that the defendant suffered from personality disorder with prominent paranoia and severe depression. He also stated that the defendant's recent embrace of religion provides additional potential for rehabilitation. There was no other testimony presented to the Court, however, indicating the defendant's psychiatric and/or emotional problems are amenable to treatment. The Court concludes that the defendant's capacity for rehabilitation exists as a mitigating factor and gives it very little weight.

R 289-90. This was an unconstitutionally narrow view of rehabilitation

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[35] Apparently the reference is to the following testimony by Dr. Bukstel in response to a question about rehabilitation:

> Well, two things need to be considered. First of all, when it comes to characterlogical difficulties, those tend to be more resistant to treatment, <u>but nonetheless are among the disorders that psychologists and psychiatrists treat all the time</u>. Okay.
>
> So, but with that in mind, certainly given his youth, and given the fact that other than the one instance when he was a child when, I guess he had an evaluation and/or treatment, <u>there is certainly always the possibility for changes in behavior to occur. Although again, within the framework he has, those kind of changes are more difficult with people with personal disorders</u>.
>
> However, you were also asking the question about the Christian religious beliefs. Although again, I really have to say that there is in part, and I have mentioned this in my report, that the embracing of the beliefs probably in part may be functioning to keep him whole and integrated and together. I nonetheless believe that for him, they represent sincere embracing of Christian doctrine, <u>to that extent provides some potential for some positive things to happen</u>.
>
> I also believe that, it's been my impression that there's been more of a commitment to family; in other words, his little family, his wife and child. <u>So there is some possibility</u>.

T 2309-10 (e.s.).

in the context of capital sentencing. As already noted, this issue includes such matters as likelihood that the defendant will be able to conform to prison if sentenced to life. The evidence on this point was clear: appellant has conformed very well to jail. Good behavior in jail shows amenability to rehabilitation. In Holsworth v. State, 522 So. 2d 348, 353 (Fla.1988), this Court reversed an override death sentence where the jury could have based its life verdict on evidence of Holsworth's "capacity for rehabilitation as demonstrated by his good prison conduct before and after the offense and his completion of several educational courses while in prison." See also Maxwell v. State, 603 So. 2d 490, 492 (Fla.1992). The court erred in failing to consider the effect of appellant's post-arrest conduct, including model behavior as an inmate, sincere religiosity, remorse, and co-operation with police, as it affected the "significant factor" or rehabilitation under Cooper.

Further, Dr. Bukstel's testimony focussed on appellant's mental state at the time of the killing -- whether he acted under the influence of extreme disturbance. The testimony, quoted in the above footnote, was that, as with any person with characterological difficulties, such difficulties would tend to be resistant to treatment, "but nonetheless are among the disorders that psychologists and psychiatrists treat all the time." T 2309. Thus, his testimony did not refute the potential for rehabilitation. The overall picture (largely ignored by the court) was that appellant has severe problems with which he is coping by makes substantial efforts at rehabilitation.

Also, the findings on rehabilitation are directly at odds with the arbitrary decision to give little weight to the statutory mental

mitigating circumstances: if, as the judge found, appellant's mental problems are so great as to allow little chance of correction, the statutory mental mitigating circumstances must receive great weight. Likewise, the finding refutes the cold, calculated, and premeditated aggravating circumstance. See Besaraba v. State, 656 So. 2d 441, 445 (Fla.1995) and Spencer v. State, 645 So. 2d 377, 384 (Fla.1994).

4. 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 290. The court gave no reason for giving this mitigator little weight. This is important mitigation in that is shows "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison." Skipper, 476 U.S. at 7. It has even greater weight when, as in this case, the evidence comes from jailers who owe no particular loyalty toward the defendant. Id. 8.

5. Appellant exhibited genuine remorse.

> The uncontroverted evidence reveals that the defendant expressed remorse to each of the examining experts, and they all testified that it appeared to be genuine. Consequently, the Court finds this mitigating factor exists but gives it little weight.

R 292. Again, the arbitrary statement of "little weight" shows no exercise of discretion. Remorse plays "an important role in the court's determination of the rehabilitative potential of the defendant." State v. Howry, 896 P.2d 1002, 1004 (Idaho 1995).

6. 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. There were unproven charges of abuse filed against his father and stepmother in Brazil. There was testimony presented that the defendant was beaten with a broom handle, not properly fed, locked in a closet, and allowed to be sexually abused by family members. Generally, the defendant's family life was described [as] "unhealthy and threatening". The experts further testified that the abuse was a significant factor in the defendant's resultant emotional problems. The Court finds that this mitigating factors [sic] exists and gives it some weight.

R 292. Despite recognizing Difficult/Abusive Childhood as a mitigator and recognizing that it contributed to appellant's extreme mental and emotional disturbance, the court only gave it some weight. In <u>Hegwood v. State</u>, 575 So. 2d 170 (Fla. 1991), this Court wrote:

> 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; <u>see</u> <u>Clark v. State</u>, 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"); <u>Robertson v. State</u>, 22 Fla. L. Weekly S404 (Fla. July 3, 1997).

This Court has stressed the importance of specific written findings of fact in support of mitigation in capital cases. <u>Van Royal v. State</u>, 497 So. 2d 625 (Fla. 1986); <u>State v. Dixon</u>. The sentencing order must reflect that the determination of mitigation is the result of "a reasoned judgment". <u>State v. Dixon</u>, 283 So. 2d at 10. The judge

must give written reasons for finding mitigating factors, then personally weigh each one to arrive at a reasoned judgment as to the sentence. Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982). The record must be clear that the judge "fulfilled that responsibility." Id.

Weighing the aggravating and mitigating circumstances is not a matter of merely listing conclusions. Nor do written findings merely serve to memorialize the trial court's decision. Van Royal, 497 So. 2d at 628. Specific findings are crucial to this Court's meaningful review, without which adequate, reasoned review is impossible. Unless the written findings are supported by specific facts, this Court cannot be assured that the court imposed the sentence on a "well-reasoned application" of the circumstances. Id., Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). In Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995) this Court explained (e.s.):

> 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.

Review of the exercise of discretion in death penalty cases is at least entitled to the formality requirements made in such areas of the law as civil divorce cases[36]. For example, orders granting new trials

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[36] 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 explana-

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

The court found that mitigators existed, but arbitrarily gave them little or some weight, violating the principle of individualized sentencing constitutionally required in death penalty cases.

The sentencer may not refuse to consider, or be precluded from considering, any relevant mitigating evidence. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). An individualized decision is essential in every capital case. Id. , 438 U.S. at 604-605. Accord Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Skipper.

Lockett is no less subverted when the same result is achieved tacitly. By refusing to give the uncontroverted, mitigation any real weight, the court vaulted this state's capital jurisprudence back to the unconstitutional days prior to Hitchcock. Before Hitchcock, Florida had a "mere presentation" standard wherein a defendant's death sentence would be upheld where the trial court permitted the defendant to present and argue nonstatutory mitigation. The Supreme Court rejected this "mere presentation" rule, and held that the sentencer not only must hear, but also must not refuse to weigh or be precluded from weighing mitigation in Hitchcock. Since then, this Court has repeatedly reversed death sentences imposed under the "mere presentation" standard where the explicit evidence that consideration of

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tion for doing so").

mitigation 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 mitigation results in return to the "mere presentation" practice. The refusal of the court to exercise discretion in weighing uncontroverted mitigation violates Lockett. By giving little weight without reasoned discretion, trial judges make an "end run" around the requirement of individualized sentencing. Appellant's trial judge in effect failed to consider mitigation within the statutory and constitutional framework. The refusal to give any significant weight to valid mitigation calls into question the constitutionality of Florida's death penalty scheme.

10. WHETHER FUNDAMENTAL ERROR OCCURRED WHERE THE STATE URGED THE JURY NOT TO CONSIDER IMPORTANT MITIGATION AND THE COURT'S INSTRUCTION ON MITIGATION WAS THAT THE JURY HAD DISCRETION TO DISREGARD MITIGATION?

The state urged the jury to disregard valid mitigation and the judge's instruction to the jury allowed the jury to disregard mitigation in violation of the Cruel or Unusual Punishment Clause of the state constitution, the eighth amendment, and section 921.141, Florida Statutes. The argument and instruction tainted or materially affected the verdict so as to constitute fundamental error.

In penalty argument to the jury, the state contended (T 2483-84):

> But now, ask yourself even if that's true, what does that have to do with the murder, with the killing of Frank Ingargiola? Does the fact that he went through a difficult time at that age of 12 have anything to do with why he was killed?
>
> We know the doctors told us that during this period of time that the incident happened that he was suffering from depression because he was separated from his wife. Because of his early childhood and background he had some disorders

> that they told us about, and certainly being separated from his wife may have contributed to those disorders. But there is nothing that indicates that this childhood, this background is the thing that is responsible for this murder, that this should be considered in mitigation because I lived a difficult childhood. I killed this man, therefore consider my childhood.

It also argued: "Mr. Almeida is going to be sentenced as a punishment, a punishment for killing Frank Ingargiola, not for rehabilitation." T 2491. The court instructed the jury that it "may consider" mitigating circumstances supported by the evidence, T 243, but did not inform the jury that it had a duty to consider all mitigating evidence.

Respecting a claim of fundamental error in a penalty argument, this Court wrote in Wyatt v. State, 641 So. 2d 355, 360 (Fla.1994):

> Wyatt also argues that the trial court committed error in allowing the prosecutor to make several improper comments during the penalty phase closing argument. There were no objections to the comments in question. After carefully reviewing the prosecutor's comments in the context of the argument as a whole, we conclude that these comments were not so prejudicial as to taint the jury's recommendation of death. Because the remarks do not constitute fundamental error, we find that the defense counsel's failure to preserve the issue for appeal precludes review. See, e.g., Mason v. State, 438 So. 2d 374 (Fla.1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1330, 79 L.Ed.2d 725 (1984).

In Mason, this Court wrote at page 377:

> Appellant next argues that certain comments made by the prosecutor during both the guilt and penalty phases of his trial constituted fundamental error. In closing argument at the guilt phase, the prosecutor warned the jury that if appellant were turned loose "he is going to do two days later ... just what he did two days after March the 1-8th"--[i.e. rob and rape]. In closing argument during the penalty phase of the trial, the prosecutor stated that appellant "has established a very, very clear pattern of criminality" and "absolutely cannot be rehabilitated." The comments were so prejudicial, claims appellant, that he is entitled to a new trial.

> In Blair v. State, 406 So. 2d 1103 (Fla.1981), citing several other cases, we refused to order a new trial despite allegedly improper remarks by a prosecutor. The remarks were not "of such a nature so as to poison the minds of the jurors or to prejudice them so that a fair and impartial verdict could not be rendered," did not "materially contribute" to the conviction, were not "so harmful or fundamentally tainted so as to require a new trial," and were not so inflammatory as to "have influenced the jury to reach a more severe verdict of guilt than it would have otherwise." 406 So. 2d at 1107 (citations omitted).
>
> The observations in Blair, lead us to conclude that although the comments of which appellant complains might warrant reversal in some cases, they do not here. Compelling evidence of appellant's guilt was presented during his trial, and the aggravating factors found applicable at sentencing significantly outweighed those in mitigation. We do not believe that the statements contributed materially to the verdict or the recommended sentence.

Under these standards, fundamental error occurred at bar. The argument and instruction tainted and materially affected the decision by informing jurors that they were could disregard important mitigation. "[N]either may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (refusal to consider evidence of defendant's childhood); Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (refusal to consider good behavior in jail showing amenability to rehabilitation).

The case at bar may be compared with Mason. In Mason, the argument was of a speculative and emotional nature which the jury could easily disregard. It was not argument (backed by a flawed instruction) that the jury could rest its decision on a flawed legal theory. Here, in view of the 7-5 vote for death and the strong case for life, the argument and instruction tainted and materially contributed to the

penalty recommendation, requiring resentencing. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const.

11. WHETHER THE COURT ERRED IN LETTING THE STATE ASK THE DEFENSE EXPERT IN MITIGATION WHETHER THE DEFENDANT MET THE STANDARD FOR LEGAL INSANITY?

At penalty-phase, the state began to cross-examine Dr. Bukstel him about the insanity defense. T 2339. The defense objected, noting that it had called him only for purpose, and had limited direct to that issue, adding that the cross was outside the scope of direct, prejudicial and irrelevant. T 2340. The court said that insanity was irrelevant to mitigation. T 2341-42. Counsel maintained that the matter was outside the scope of direct, was irrelevant, and its prejudicial impact would be to negate the mental mitigation, to which the prosecutor replied: "If he talks about whether or not the defendant knew what he was doing after he talked about all these mental deficits that this person is suffering from, but that's going to negate everything that he's already talked about, I would like to put it in perspective." T 2343. The court continued to rule that the insanity standard was irrelevant, and cautioned the state to be careful. T 2343-44. Nevertheless, the state then ended cross as follows (T 2345):

> Q In spite of this [appellant's severe depression, T 2344-45], you indicated that he was in your opinion under the influence of extreme mental or emotional disturbance. In spite of being under the influence of this extreme mental or emotional disturbance, would Mr. Almeida know what he is doing at the time during this period?
>
> MR. MOLDOF: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes.

It is error to confuse the insanity standard of knowing what one is doing with the mental mitigating circumstances. State v. Dixon, 283 So. 2d at 10 (mental mitigating circumstances involve lesser disturbance than insanity). Even judges make the mistake of confusing the two standards. Morgan v. State, 639 So. 2d 6, 13 (Fla.1994), Knowles v. State, 632 So. 2d 62, 67 (Fla.1993). It was error to allow the testimony at bar, essentially turning the defense witness against appellant. The questioning was unrelated to matters raised on direct, and its prejudicial impact (confusing the standard for consideration of mitigating evidence) outweighed its probative value (none).

The state acknowledged that the purpose of the inquiry was to negate everything the witness had talked about on direct T 2343. Given the 7-5 vote for death and the strong case for life, the state cannot show that its tactic was harmless, since it directly affected the constitutional and statutory duty of the sentencer to consider mitigation. This Court should order resentencing. Art. I, §§ 9, 16, 17, 21, 22, Fla. Const.; amend. V, VI, VIII, and XIV, U.S. Const.

12. WHETHER THE COURT GAVE APPELLANT ERRONEOUS ADVICE REGARDING HIS RIGHT TO ADDRESS THE JURY, TAINTING THE WAIVER OF THAT RIGHT?

At the end of the evidence in the jury sentencing proceeding, counsel said that, against his advice, appellant wished to address the jury T 2451. The court then sua sponte engaged in a colloquy with appellant, saying that "by taking the stand and testifying you are subjecting yourself to cross examination by the State as it relates to the aspects of any matter" T 2452. The court told him that "by taking the stand and testifying, in the event that this Court's rulings with

regard to the motions to suppress, dealing with the statements that you gave to the police, if that were to be reversed by ... any tribunals that may address these issues depending upon the ultimate sentence that's given in this case, that what you say from this stand at a subsequent trial could be used against you" T 2452-53. After counsel said he did not think the state's cross could go outside the scope of direct, the court replied: "You have put, by virtue of the doctors that have testified in this case, his mental state, his emotional state into issue. I think the State certainly has the opportunity and right to cross examine the defendant in the event he takes the stand on any of those issues that go towards mitigation." T 2453-55. Counsel said he agreed, but again said the state would be limited to evidence about the homicide at bar. Id. The state maintained that it would be able to cross about the other two homicides T 2456-57. After a break, counsel said: "Judge, I believe Mr. Almeida is inclined to not testify at this point. We had some discussion about that, I think one of the motivations was perhaps to make some apology. And I just believe that his intent now is not to testify, given the information that I have." T 2457. The court replied that appellant had the "opportunity at a Spencer hearing to voice whatever he would like to say to the Court and to anyone else that might be present." T 2457. It said that, if he testified: "He waives his Fifth Amendment privilege, he is subject to cross examination and in relationship to the scope of the State's ability to cross, as long as their cross goes towards the issues raised in mitigation, I think they can do that." T 2457-58. It said that the state would be able to cross about "the mitigation that deals with this homicide", and that it could not tell whether the state would be able

to cross about the two other homicides T 2458. After counsel said that appellant would not testify, the court again sua sponte questioned him, and he said he would not testify T 2459-60.

The court misadvised appellant on this matter, making invalid his waiver of his right to allocution with the sentencing jury. The state and federal Due Process Clauses ensure the right to address the sentencer in a capital case. Ball v. United States, 140 U.S. 118, 129-30, 11 S.Ct. 761, 35 L.Ed. 377 (1891), Green v. United States, 365 U.S. 301, 304, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961), Keech v. State, 15 Fla. 591, 609 (1876). The federal Cruel and Unusual Punishment Clause and the state Cruel or Unusual Punishment Clause, as well as section 921.141, ensure the right to present mitigation. The judge and jury share the sentencing function, so that an error affecting either may cause reversal. Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) (jury consideration of invalid aggravator). A defendant's testimony at one phase of a proceeding made to vindicate one constitutional right does waive his Fifth Amendment privilege. In Simmons v. United States, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), the Court held that testimony on a motion to suppress was not admissible at trial. It rejected the notion that a defendant's testimony on a motion to suppress was voluntary so that its use at trial did not violated the Fifth Amendment, writing (fns. deleted):

> ... the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in

> legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

In State v. Dixon, 283 So. 2d at 7, this Court held that section 921.141 provides the defendant "concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient." Among these "concrete safeguards" is the right to testify at sentencing, about which this Court wrote at pages 7-8:

> Another advantage to the defendant in a post-conviction proceeding, is his right to appear and argue for mitigation. The State can cross-examine the defendant on those matters which the defendant has raised, to get to the truth of the alleged mitigating factors, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the State. A defendant is protected from self-incrimination through the Constitutions of Florida and of the United States. Fla. Const., art. I, s 9, F.S.A., and U.S.Const., Amend. V. In no event, is the defendant forced to testify. However, if he does, he is protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extend to matters concerning possible aggravating circumstances.

The Fifth Amendment privilege applies to capital sentencing. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

The court gave erroneous advice tainting appellant's waiver of his right to address the sentencing jury. His testimony at sentencing would waive his Fifth Amendment rights and would not waive his challenge to any of the statements used against him in this cause. Further, the state's cross would be strictly limited to matters raised on direct. Cross even on matters of mitigation outside the scope of

direct would be improper. The court improperly minimized the magnitude of his right to address the jury, indicating that he could apologize to the court later. This minimization is harmful given that the court placed overwhelming reliance on the jury's sentencing recommendation. The judge's improper advice tainted appellant's decision not to address the jury so that resentencing is required.

13. WHETHER THE COURT ERRED BY GIVING UNDUE WEIGHT TO THE JURY'S DEATH RECOMMENDATION?

The judge gave virtually complete deference to the jury's death recommendation. The sentence in this case was imposed in violation of Florida Statute 921.141, the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution and Article I, Sections 2, 9, 16 and 17 of the state constitution.

In the sentencing order, the court wrote (R 293)[37]:

> The jury recommended that this Court impose the death penalty by a majority of seven (7) to five (5). 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 court erred in relying on Richardson, which involved a life override sentence. This case is controlled by Ross v. State, 386 So. 2d 1191, 1197 (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 make the type of independent judgment that was required:

It appears, however, that the trial court gave undue weight

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[37] This is in keeping with the court's statements that "only under rare circumstances" would a jury recommendation be overruled.

> 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 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."

This Court reversed as the judge's statements that he found no "reason" to override the jury indicated that he did not perform the independent weighing of circumstances under section 921.141 and Dixon. Here, the comments were stronger, stating that the death recommendation "should not be overruled unless no reasonable basis exists for the recommendation" R 293. It also stated elsewhere that is only under "rare circumstances" could it impose a different sentence. These statements are stronger than in Ross and indicate a lack of the independent judgment.

"[E]ven 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.'" King v. State, 623 So. 2d 486, 489 (Fla. 1993). "The trial judge has the single most important responsibility in the death penalty process." Corbett v. State, 602 So. 2d 1240, 1243 (Fla. 1992). See also Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993) ("It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed.") Resentencing is required.

14. WHETHER THE COURT ERRED BY EMPLOYING A PRESUMPTION IN FAVOR OF THE DEATH PENALTY IN ITS SENTENCING ORDER?

The court presumed that death is the proper penalty when one or more aggravators are found unless outweighed by mitigators R 293. This presumption violated section 921.141, and Article I, Sections 2, 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution.

The trial judge stated in his sentencing order (R 293):

> 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. <u>White v. State</u>, 403 So. 2d 331 (Fla. 1981).

Section 921.141(3) requires the judge to find "sufficient aggravating circumstances" to justify the death penalty before he can even begin weighing the circumstances. There is nothing in the judge's order that indicates he performed this required first step.

<u>Rembert v. State</u>, 445 So. 2d 337 (Fla. 1989) implicitly recognized the importance of this initial step, reducing a death sentence to life even though the trial court had found no mitigation and this Court upheld one aggravating circumstance. Thus, this Court recognized that the aggravation must be sufficient to justify death, regardless of the mitigation. <u>See also</u> <u>Terry v. State</u>, 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 <u>White v. State</u>, 403 So. 2d 331, 340 (Fla. 1981). The statement in <u>White</u> occurred during discussion of appellate review. Later cases make clear that it is a rule of

appellate review, with no role in the trial court sentencing process.[38] Three justices have indicated that even the White appellate presumption may be unconstitutional. White v. State, 664 So. 2d 242, 247 (Fla. 1995) (Anstead, J., dissenting; jointed by Shaw and Kogan, JJ.).

The Eleventh Circuit has held use of the death presumption at the level of sentencing violates the Eighth Amendment. Jackson v. Dugger, 837 F.2d 1469, 1473-74 (11th Cir. 1988) struck down a jury instruction on a presumption identical to the presumption used by the judge at bar. Both the judge and jury play constitutionally significant roles in sentencing. Espinosa v. Florida, 112 S.Ct. 2926 (1992). The judge's use of the presumption was constitutional error.

Henyard v. State, 689 So. 2d 239, 249-50 (Fla. 1996) addressed a similar complaint about a prosecutor's statement to the jury during voir dire that the law required a death sentence if the aggravators outweighed mitigation. This Court held the statement was error, but harmless because it was an isolated one at the beginning of the trial.

The error is harmless at bar. In Henyard, the comment was by the state and the jury was correctly instructed. At bar, the misstatement was by the court in imposing the death penalty. To compound the problems with the improper presumption, the court also recognized at the same page of the sentencing order a presumption of death based on the jury's recommendation and stated the presumption could not be overcome unless "no reasonable basis exists for the recommendation".

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[38] In White v. State, 446 So. 2d 1031, 1037 (Fla. 1984), and Cooper v. State, 492 So. 2d 1059, 1063 (Fla. 1986), this Court employed the presumption in affirming death sentences after striking aggravating circumstances, and in Jackson v. State, 502 So. 2d 409, 413 (Fla. 1986), this Court used it as part of its proportionality review.

15. WHETHER THE COURT ERRED IN REFUSING TO ALLOW LIFE WITHOUT PAROLE AS A SENTENCING OPTION?

At the penalty charge conference, the following occurred:

> MR. MOLDOF: ... I was thinking, Judge, I wonder whether the Court can fashion an instruction that advises the jury again, with a waiver from the defense, that it would be a life sentence without the language of the possibility of parole for 25 years.
>
> THE COURT: I don't know how I can do that when it's not the law.
>
> MR. MOLDOF: I think we can. I think we can put a waiver on the record about the possibility of parole.
>
> THE COURT: I don't think that you can. The law in November of 1993 provided for one of two penalties. One was life, 25 years minimum mandatory before the possibility of parole, or death by electrocution. I haven't seen any case, if you want to find case law for me that indicates that the defendant has a right to waive the 25 year minimum mandatory and accept a sentence of life with no eligibility for parole, I think you will be hard pressed to find it.
>
> I think it's tantamount to an illegal sentence from the Court. I don't think the defendant can waive a fundamental right.

T 2440-41.

The 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, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States 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 that the penalties it could consider are

death and life without the eligibility for parole for 25 years. Life without parole was never considered as a possible sentence. It was error to refuse consideration of the option of life without parole.

The crime at bar occurred in November 1993. The Legislature amended Florida Statute 775.082(1) effective May 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). The trial in this case was in 1996. Sentence was imposed on November 1, 1996. R 294. The trial court erred in refusing to permit waiver of ex post facto objections to use of the life without parole statute.

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. Allen v. State, 821 P.2d 371, 376 (Okl.Cr. 1991). See also Wade v. State, 825 P.2d 1357, 1363 (Okl.Cr. 1992); McCarty v. State, 904 P.2d. 110 (Okl.Cr. 1995) (applying rule to resentencings).

The refusal to instruct on and consider life without parole is fundamental error mandating reversal without 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 is harmful and mandates reversal regardless of the aggravating and mitigating circumstances in a given case. Salazar, 852 P.2d at 739. The conclusion of the Oklahoma Court of Criminal Appeals that one tried and sentenced after the effective date of the statute must receive consideration of this option and that this error is fundamental reversible error is supported by other decisions:

Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) struck down a state law barring the giving of lesser offenses in a capital case. The Court held that due process so required in a capital case because of the unwarranted risk of conviction. 447 U.S. at 638-639. It relied on the unique need for reliability in a capital case. The same unwarranted risk is at work here. The jury and/or judge could impose death to avoid the possibility of release, rather than because it is the required penalty.

In Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct 2187, 129 L.Ed.2d 133 (1994), the defendant would have been sentenced to life without parole, 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. 114 S.Ct. at 2194. It noted a recent South Carolina study showing that 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. Id. 2191. Simmons supports the holding that failure to give the life with no parole option is always harmful. Data from the poll cited in Simmons are supported by many

other surveys.[39]

In Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990), the defendant was barred from arguing that he could be sentenced to a fifty (50) year mandatory minimum. This Court held this to be error.[40]

Assuming that this error can be harmless, there was prejudice here. There was substantial mitigation, and only two aggravators. The vote for death was 7-5. The jury's and judge's consideration of the life without parole option could have changed the result. The judge found appellant's capacity for rehabilitation in mitigation. There was testimony presented that he could function well in a structured environment. The refusal to instruct on, or consider, this option requires resentencing.

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[39] 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).

[40] See also State v. Henderson, 789 P.2d 603 (N.M. 1990), overruled on other grounds 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 cannot be applied prospectively only).

CONCLUSION

This Court should vacate the judgments and sentences and remand with such instructions as the Court deems appropriate.

Respectfully submitted,

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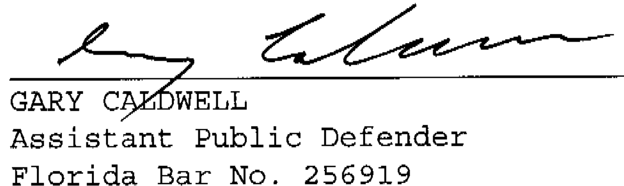

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Georgina Jimenez-Orosa, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401, by courier September 5, 1997.

Of Counsel