IN THE SUPREME COURT OF FLORIDA

RYAN J. URBIN,

Appellant,

v.

CASE NO. 89,433

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE[1]

On October 5, 1995, the Duval County Grand Jury indicted appellant, RYAN J. URBIN, for first-degree murder and armed robbery in the shooting death of Jason Hicks on September 1, 1995. R 1-3.

Urbin was tried by jury before Judge William A. Wilkes on July 29-August 1, 1996, and found guilty as charged. R 276-277, T 961-962.

The penalty phase was held August 30, 1996. The jury returned with an advisory verdict recommending the death sentence

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[1]References to Volumes I-III of the record on appeal, containing pleadings and transcripts of trial proceedings, are designated in this brief by the letter "R," followed by the page number. References to Volumes IV-X, containing transcripts of trial proceedings, are designated by the letter "T," followed by the page number.

by a vote of 11 to 1. R 279, T 1169.

A sentencing hearing was held September 27, 1996, R 473-486, and on October 11, 1996, the court imposed sentence. For the first-degree murder of Jason Hicks, the court sentenced Urbin to death, finding three aggravating circumstances (prior violent felony; robbery merged with pecuniary gain; avoid arrest), outweighed the two statutory and five nonstatutory mitigating circumstances (age of 17; impaired capacity; absent father; history of drug and alcohol abuse; mother in prison for cocaine dealing; learning disability; employment history). Urbin was sentenced to 26.64 years on the robbery. R 316-330, 492-503.[2]

Notice of appeal was timely filed November 8, 1996. R 349.

STATEMENT OF FACTS

Guilt Phase

This case involves a robbery "gone bad." Jason Hicks, 22, was shot three times in the parking lot of Harley's Rack and Cue around 2:45 a.m. on September 1, 1995. Two weeks later, Ryan Urbin, 17, Craig Flatebo, 18, and Jason Ambrose, 18, were arrested for Hicks' murder.

Flatebo and Ambrose agreed to testify against Ryan in

[2]The trial judge's sentencing order is attached as Appendix A.

exchange for guilty pleas to second-degree murder and a waiver of the sentencing guidelines. T 574-577, 603, 619-620, 643. Flatebo pled guilty to an unrelated home robbery and agreed to testify against Ryan in that case as well. T 574-577, 603.

According to Flatebo, he, Ryan, and Ambrose were at a party at Steve Devore's when Ambrose proposed they commit a robbery. They went to Harley's because the patrons gambled and were likely to have cash. The plan was for Ryan to rob the first person who walked out the door. T 579-581. Ambrose was the driver and Flatebo, who rode in the back, was there just "to be along." T 583. Ryan had several guns in a book bag, which they placed in the trunk. The first person who walked out of Harley's got in his car before they could rob him. They followed him for a while in their car, but when he pulled up behind a police car, they drove by and on back to Harley's. T 584. Ryan went inside for a few minutes. After Ryan came back out, Ambrose retrieved the guns from the trunk and gave them to Ryan. T 586-588. Flatebo and Ambrose told Ryan they would meet him at a friend's house behind Harley's. T 589. The victim, Jason Hicks, came out of Harley's, and Ryan followed him, carrying a .357.

Ambrose and Flatebo drove around the block and were starting to park when they heard three shots. They drove off and spotted

Ryan running through the Burger King parking lot behind Harley's. T 590-591. Ryan jumped in the car and told them to drive. He kept saying the guy "shouldn't have bucked," meaning should not have resisted. T 592. He said he followed the guy to his car and told him to remove his jewelry. After the guy removed his jewelry, Ryan put him on the ground and grabbed his pocket. Then the guy turned over and started kicking, trying to kick Ryan's legs out from under him. The guy was bucking and saw his face so he had to shoot him. T 593-594. They drove to Shana Smith's apartment afterwards. Ryan told them to keep quiet, that no one had seen him. T 598.

On cross-examination, Flatebo said he was 6'2", 190 pounds. He had tatoos on his leg, arm, back, and stomach, but they would not have shown that night. He denied agreeing with Ambose to blame the shooting on Ryan. He denied shooting Hicks himself. T 608-609. He told detectives he did not know anything about the Hicks' murder when first arrested. He did not tell them about it until the following day. T 613. Flatebo admitted he was the one who got Hicks' jewelry, a gold Gucci necklace, a bulldog charm, and a diamond horseshoe ring. T 606. He admitted calling Michelle Bennett and asking her to get rid of the gun. T 617.

Ambrose told the same basic story as Flatebo, T 623-633,

except Ambrose said both Flatebo and Ryan had guns. T 638. Ambrose said he lied on September 11 when he said he was at home the night Hicks was shot. He told the truth when he was arrested September 18, same as today. T 634-635.

On cross-examination, Ambrose said he was 5'9", 155 pounds, and had tatoos on each ankle and one on his hand. T 636. He denied getting together with Flatebo to pin the murder on Ryan.

Steven Mann also testified against Ryan, in exchange for a maximum sentence of 16.75 months for two burglaries. T 665-667. Mann said he was Ryan's best friend. Mann was at Steve Devore's party before the robbery and heard Ryan, Ambrose, and Flatebo talking about going to rob someone. T 671. Later that weekend, Mann went with Steve Devore, Larry Motley, and Ryan to Ft. Myers. Mann asked Ryan what happened at Harley's. Ryan said he put Hicks on the ground with a gun, grabbed his pockets, and felt a wad of money. When he reached for the money, Hicks raised his hand up and Ryan shot him once in the head and twice in the chest. He did not take the money because there was no time. He did not mention taking any jewelry. He said he shot Hicks because he bucked, or resisted. T 673-575.

Raymond Graham was inside Harley's when he heard gunshots. He looked out the glass doors and saw a white man running across

the parking lot. T 523. The man was about two car lengths away. The lighting outside was real bright. Graham had not been drinking. T 526, 529. Graham saw the man for no more than 3-4 seconds and only from the side view. The man he saw was 5'7"-5'8", slim build, real thin face, and sandy blond hair cut short on the sides. T 524-525. Graham identified Ryan in court as the man he saw running across the parking lot. T 526. Graham had picked Ryan out of a photo lineup on September 19, but only after looking at the pictures several times. T 531, 537. Graham did not remember telling Officer Lemon at the scene that the man he saw was 5'11"-6'0", weighed 185-190 pounds, was wearing a green shirt, and had light hair. T 533. Graham remembered saying the man weighed at least 140-145 pounds. T 534.

Jason Hicks sustained two fatal gunshot wounds to his chest. One shot pierced his left palm, then his chest; the other shot went directly into his chest. A third nonfatal shot entered his right shoulder. All the wounds were consistent with having been made while his back was pressed onto a hard surface, like an asphalt parking lot. T 563-569.

Detective Bolena interviewed Ryan on September 18. T 649. At first, Ryan denied going to Harley's that night. T 655. Bolena then told Ryan that Harley's daughter had seen him there

at 2:30 a.m. and the video camera had filmed him around that time. This was a trick to get Ryan to confess. Ryan said he remembered going to Harley's for about five minutes but did not see anything. T 657-658. When arrested, Ryan was 5'7", 135 pounds. T 659.

Ryan testified in his own defense. He said he had lived most of his life in Jacksonville with his mother, Helene Urbin. He had visited his natural father in Wyoming only once for a few months. T 714-715. He dropped out of high school in eighth grade and took up a trade at Southside Skills Center. His brother, Mark Wirth, was 26. His mother was presently incarcerated at Florida State Prison. T 716. His mother had been in prison previously for drug trafficking beginning in 1989 for 22 months. T 771, 722. Ryan had used drugs himself, including cocaine, marijuana, L.S.D., barbiturates, and alcohol. T 722. While his mother was in prison, Ryan lived in her house with his brother and his mother's boyfriend. He was a first-degree welder and did a number of welding jobs for his mother. He also had worked at fast food restaurants and done projects for his school. T 717. He had three felony convictions. T 718.

At the time of the shooting, Ryan was renting a room from George Anthony in Arlington. T 719. He had known Steve Mann for

three or four years, Craig Flatebo for six months to a year, and Jason Ambrose for a day or two. T 718, 720. Ryan had been going to Harley's for about a year and knew the owner, Mr. Harley, and his daughter. He had seen Jason Hicks a few times. T 721.

The night of the shooting, Ryan left Steve Devore's house around 1 a.m. with Flatebo and Ambrose. Flatebo had numerous weapons in a back pack, which may have been put in the trunk. T 724. Ambrose drove, Flatebo sat up front, Ryan was in the back. They parked in front of Harley's. T 725. Ryan went inside to buy marijuana but did not see the person he was looking for. T 727-728. He used the bathroom, walked back outside, and got into the back seat of Ambrose's car. T 728. Ambrose got the backpack out of the trunk and gave it to Flatebo, who pulled out a black .357 with orange cites on it. They were talking about robbing the next person out the door and wanted Ryan to drive the car. Ryan told them he could not drive a stick shift. T 731. A man came out of Harley's but got to his car too quickly for Flatebo to rob him. They drove after him for a while, then drove back to Harley's. On the way back, they put the guns back in the trunk. T 732-733. Ambrose got the guns out again after they parked. Ambrose gave Flatebo the .357 with orange cites on it and kept a small .38, or revolver, caliber gun for himself. They asked Ryan

again if he could drive, and he said no. They drove to the Burger King and parked. T 735-736. They told him to wait in the car. They walked through the parking lot and climbed a little brick wall into the back yard of Harley's. Four or five minutes later, Ryan heard three gunshots. Ambrose came running back to the car, with Flatebo behind him. They both had pistols in their hands. Flatebo had the black pistol. They were very anxious and paranoid. T 738-739.

Ambrose drove to Shana and Misty's house. Ambrose went right inside. Flatebo and Ryan sat in the parking lot and talked. Flatebo said he robbed someone and the guy bucked and he had shot and killed him. T 740. He had a necklace with a lion or bulldog charm, a horseshoe ring, and a wedding band. He handed Ryan the victim's wallet but Ryan did not look at it. T 741. Flatebo said he did not get any money because he was in the process of getting it when the guy bucked and he shot him. T 742.

Ryan and Flatebo spent the night at Shana's. Flatebo's girlfriend, Jennifer Jewel, picked them up in the morning and took them to Flatebo's house. Ryan walked around the corner to his house. Ryan saw the necklace and bulldog on Flatebo many times after that. T 743.

A day or two later, Ryan went with Steve Devore, Steve Mann, and Larry Motley to Ft. Myers. He took two guns, a pure black .357 with a wood grain handle and a .38 Smith and Wesson. The .38 was in the car the night of the shooting. Ryan sold the .357 to a friend of Steve Devore's in Ft. Myers. T 745-746.

Ryan said he did not shoot Jason Hicks. Nor did he tell anyone he had shot Hicks. Flatebo's and Ambrose's testimony that he was the shooter was "a bold face lie." Although Mann kept asking him "what happened, what happened," Ryan told him he did not know anything. T 747-748.

On cross-examination, Ryan admitted he was very intoxicated the night of the shooting. T 752, 755, 757. He denied blaming the shooting on Flatebo to retaliate against Flatebo for testifying against him in the home robbery case. T 759. He denied asking Joey Koller, Steve Roberts, and Darren Adams to lie for him. He said Roberts told him he knew Flatebo was lying. He denied telling Koller and Adams his story at trial was going to be what he had said today except he was going to say he gave Flatebo the .357 before the shooting. He denied telling Roberts he was going to kill Flatebo for ratting on him. T 763-765.

Detective Lemmon testified he interviewed Raymond Graham immediately after the shooting. Graham told Lemmon the man he

saw in the parking lot was 5'11"-6'0", 185-190 pounds. T 769.

Detective Bolena said he recovered the .357 Ryan sold in Ft. Myers, but the murder weapon was never recovered. T 775-776.

In rebuttal, Detective Bolena said Raymond Graham described the man he saw as 5'8"-5'10", slender build, thin face, hair thick on top, thin on the sides, and sandy blond. Graham told Bolena he would probably recognize the man if he saw him again. Jason Ambrose had a close, flat top when he was arrested. T 781-782.

Raymond Graham took the stand, and Ambrose and Flatebo were brought into the courtroom. Graham said Ambrose's face was different from that of the man in the parking lot. Flatebo was taller and darker and his face did not match. The man Graham saw did not have a flat top. Graham admitted he did not pick Urbin out of the picture showup until the second or third viewing. T 831-833.

Steve Roberts, Darren Adams, and Joey Koller testified that Ryan had asked them to lie and to say Flatebo confessed to shooting Hicks. They told this lie to Ryan's attorney.

Steve Roberts was in jail for dealing in stolen property. Roberts testified that everything he told Ryan's defense attorney regarding Flatebo's confession was a lie. Roberts also said Ryan

had said he wanted to kill Flatebo because Flatebo was going to testify against him. T 783-786. On cross-examination, Roberts admitted he drove Flatebo to Jason Hicks' grave and, at the grave site, told Flatebo he wanted him to see where "the guy he put away" was resting. Roberts denied telling Flatebo, "Why don't you take the pool table, you took his life?", referring to the miniature pool table on Hicks' grave. Roberts said Flatebo gave his girlfriend Hicks' jewelry. T 796-797. Roberts said he lied to Ryan's attorney because Flatebo had tstified against his friend Jodi Dameron in the home robbery case. T 790.

On redirect, Roberts said Ryan told him he would not be facing the electric chair but for Ambrose and Flatebo. Roberts asked Ryan how he ended up with Ambrose and Flatebo and asked Ryan if he did it. Then he stopped and said, "Don't tell me." T 802-803.

Darren Adams was in jail for dealing in stolen property and burglary. He and Ryan had been friends for four years. Adams testified that Ryan asked him to lie by saying Flatebo had confessed. Ryan told Adams what his testimony would be. T 804-806.

Joey Koller and Ryan had been friends for five years. Koller was in jail for dealing in stolen property. He had pled

guilty and agreed to testify against Ryan in exchange for a maximum sentence of 10 years. T 814. In May or June, Ryan told Koller Flatebo was going to testify against him and asked Koller to help by saying Flatebo had admitted being the triggerman. Ryan told Koller what his testimony would be. T 815. Koller said he changed his mind about testifying when his lawyer told him he could get another 30 years if he got caught on a perjury charge. T 717-718. Koller told Ryan he was not going to testify because he was afraid he could not pass a lie detector test. Ryan said not to worry about it, he could not pass one either. Koller responded "that means Flatebo did not shoot Jason," and Ryan just said, "you take it from there." T 819-820.

Penalty Phase

Assistant state attorney Tatiana Radi testified that Ryan was convicted of armed robbery, armed burglary, and armed kidnapping on April 24, 1996, in connection with a home robbery committed September 13, 1995, two weeks after Jason Hicks was shot. The evidence at trial showed that Ryan, Craig Flatebo, and Jody Dameron drove to a home in the Arlington section of Jacksonville. Flatebo waited in the car while Ryan and Dameron went to the door with guns drawn and knocked. Bonnie Sue Hilton opened the door, and Ryan put a gun to her face and his hands

over her eyes and pushed her inside. They tied her up, then ransacked the house, taking jewelry, guns, and food. Ryan told her they would kill her if she called the police. T 985-989.

Five victim impact statements were read to the jury. Belinda and Russell Smith, long-time friends and neighbors of Jason Hicks, read their own statements. Belinda told the jury Jason was "unique," hard-working, "a sensitive, giving person." She spoke of his determination to be a professional pool player and travel the world, his love of music, and how protective and giving he was with his sister, Becky, who had been hit by a drunk driver in 1992 and suffered brain damage as a result. She told the jury Jason's mother had suffered a nervous breakdown and was on antidepressants and that "Jason is missed by everyone and his death is a great loss in the community." T 993-994.

Russell Smith told the jury that in the 20 years he had known Jason, not once had he ever intentionally hurt anyone. He described Jason Hicks as "my brother," "kind, patient, passive, humorous, and generous." He and Jason had planned a fishing trip with their fathers, and "two weeks later he was gone." Russell spoke to Jason: "If you are listening Jason, we all love you dearly and we will never stop." T 995-996.

The prosecutor told the jury Russell Smith would read

Imogene Carter's statement because Carter was "emotionally unable to read it." T 997. Carter was Jason Hicks' great aunt. Her statement described how happy the family was the day Jason was born, his love of racing bikes and pool and his dream of becoming a professional pool player. Now that Jason was gone, his parents had no one who could care for Becky if something should happen to them. T 997-998.

The prosecutor then asked Russell Smith to read Becky Smith's statement because Becky was "unable to read it for emotional reasons." Becky's statement described how caring Jason was when she was in the hospital after her accident, how he taught her to play pool, and how much she missed him. T 998-999.

The prosecutor then asked Mr. Smith to read Penny Hicks' statement because she, too, was "unable to read her statement for emotional reasons." Penny Hicks was Jason's mother. Her statement told the jury about Jason's love of all sports, bike racing, and pool. He worked for the family asphalt business and was an exceptionally hard worker. With Jason's death, they no longer had anyone to carry the family name and would never have grandchildren. Mrs. Hicks's statement described the last time she and her husband saw Jason alive. The murder had devastated the entire family and she had to take double doses of medication

just to get through the day. She missed her son telling her he loved her. T 999-1001.

Dr. Ernest Miller, a psychiatrist, testified he had examined Ryan and reviewed a lengthy letter authored by Ryan's mother desribing some of Ryan's problems. T 1004-1005, R 292-302. Dr. Miller was particularly struck by the dysfunction of Ryan's background. Ryan had been abandoned by his father, and there was no father surrogate or male role model for him. His mother frequently was absent, and Ryan was left to roam the streets with little or no guidance. Consequently, his role models were dissocial, criminal peers. T 1005.

Ryan suffered from anxiety, depression, and substance abuse disorder. He was addicted to both drugs, particularly to powder cocaine and LSD, and alcohol. T 1006. In Dr. Miller's opinion, the abandonment, neglect, and abuse Ryan suffered were the source of his anxiety and depression, which he then tried to ameliorate with drugs. T 1007. He took drugs to relieve his pain and change his mood from melancholy or depression to elation. The price he paid was hampered judgment, the inability to make reasonable decisions, and loss of self-control. Miller testified that drug addiction results in impulsivity. That is, the drug addict does only what he must do to perpetuate and maintain

access to the drug supply. This became the driving and dominant feature of Ryan's behavior. T 1007-1009.

In Dr. Miller's opinion, Ryan's drug addiction was treatable, and absent drugs and alcohol, Ryan was not likely to revert to criminal behavior. T 1009-1010.

Dr. Miller also testified that Ryan was adjusting well to jail. T 1010. He was of average intelligence and knew right from wrong when he committed the offense. T 1012. Given the plan to rob and its purposeful execution, Ryan was not insane at the time of the murder, nor was he incapable of premeditation. T 1015. Drugs and alcohol would have diminished his ability to conform his behavior to the requirements of the law, however. T 1013. For example, the use of drugs and alcohol the night of the homicide would have impaired Ryan's thought processes in reacting to the victim's resistance to the robbery. T 1016, 1017. Dr. Miller based his opinion on his interview with Ryan and Helene Urbin's letter detailing a pattern of drug abuse from and early age which led her to put Ryan in Charter for drug treatment. T 1017. In Dr. Miller's opinion "in best medical probability, [] the [murder] would not have occurred absent the influence of some clandestine substance or alcohol in his system, which affected his thinking and behavior." T 1020.

Patrick Grant, age 27, testified he had known Ryan since Ryan was about twelve years old. Grant tried to be an older brother to Ryan. Grant had counseled him to stay away from drugs and alcohol and continue his education, but Ryan was addicted. When not drinking, Ryan was nice and respectful. T 1021-1017.

Jacqueline Biorn had known Ryan and his mother for about eight years when they lived at University Park. During that time, she saw Ryan about once a week. Ryan did chores, mowed the grass, took out the garbage, cleaned the house. He loved animals and was a caring person. His mother had talked about Ryan's drug problem, but Ms. Biorn had never seen that side of Ryan. 1029-1032. Since Ryan's arrest, Ms. Biorn had spoken with Ryan's teachers and learned that Ryan had confided to them he was having trouble and had done some bad things. When asked why they never reported this or sought help for Ryan, the teachers said they were afraid of a lawsuit or that they would not be believed. T 1033, 1037-1038.

Amber Steadman, age 16, met Urbin at the Westside Skills Center about a year before his arrest. She dated him briefly, then they became good friends. When he was not using drugs or alcohol, Ryan was considerate and gentle. When he did drugs, he was a different person. T 1040-1050.

Helene Urbin, Ryan's mother, said she left Ryan's father, her second husband, because he drank, smoked pot, and was physically and verbally abusive. Ryan was six months old. At first, they moved in with Helene's first husband in Jacksonville and Helene's older son and two stepdaughters. Helene's first husband did not want to raise children, though, so Helene and the children moved into a house she bought with her mother's help. T 1058-1060.

Helene worked constantly, selling souvenirs and t-shirts at speed races, cleaning houses. Her father-in-law was good to Ryan. He died when Ryan was eight. Ryan's father never even acknowledged Ryan with a birthday card or phone call. T 1061.

Ryan was "slow" in school. He could not read and got frustrated. As a teenager, he was diagnosed with dyslexia, a neurological disorder. When Helene went to prison, Ryan fell behind. He was teased and harassed by "nice" kids, so he took up with "dysfunctional kids, where he could relate." T 1063-1064.

Helene went to prison in 1989 for trafficking in cocaine. She had been smoking pot for years. She turned to selling when she lost her job. T 1065, 1092. She was away for two years. She left Ryan's older brother and a friend in charge of Ryan, but Ryan's brother got married and left, and the friend was drinking

and doing drugs. Ryan was left alone. Helene's mother came from California. By that time, the situation was a "disaster." Ryan "was so emotionally disturbed that he was just devastated. He was a mess." T 1065-1066.

Helene called Ryan's father and sent Ryan to Wyoming. Ryan's father was drinking, working, and on his third wife. He sent Ryan back three months later. T 1066-1067.

Helene tried to help Ryan when she got out of prison but he was angry at her because she had left him. He was "very emotional" and Steve Mann "kept luring him away." Steve Mann gave Ryan and other young kids drugs. He got Ryan high and taught him how to steal, how to break into houses, and about guns. T 1067-1068.

Helene currently was serving a 2-1/2 year sentence for tampering with a witness in Ryan's other case, the home robbery. T 1068, 1084. She denied tampering, explaining, "I scolded a gentleman and I was very upset with him and asked him why did he set up his girlfriend's parents." T 1069. She said Joey Maguire had set up the robbery of his girlfriend's parents' home, that Joey knew where the guns were and had access to the home, and Ryan and "the other boys" were covering up for Joey. T 1082.

Ryan started using drugs excessively when he met Steve Mann.

Ryan had gotten depressed when his stepsister got shot by her husband. Ryan started smoking pot when she was in prison, then turned to acid and other drugs. He "started mixing everything together, and . . . lost all control. He didn't know where he was at. He would go crazy." T 1069-1072. She sent him to Charter by the Sea for treatment while in work release. T 1072. She got out of prison in 1992. T 1088.

Ryan had been living with a family in Arlington for about six months before the homicide. Helene paid the rent with Ryan's child support money. T 1078.

Ryan testified on his own behalf. He said his first memory was when he was 10 or 11. T 1102. His home life was "okay" until his mom went to prison. After that, he was on his own. His grandmother came down briefly. His mother's boyfriend, who was supposed to take care of him, did not care what he did and did drugs and drank. T 1104. His brother got married and left. His stepfather was concerned but "had his own life." T 1606.

Ryan was placed in a Safe Program for dysfunctional children who had gotten in trouble with the law, then he "got straight" and learned welding at the Southside Skills Center. T 1103. He also went to Charter for drug treatment when his mother was on work release. He was outpatient for three months and inpatient

for three weeks. T 1606. He left his mother's house about six months before his arrest. T 1107. On the night of the homicide, he was drinking and snorting cocaine. T 1108. He again denied shooting Hicks but said he was "very sorry this happened," could not "even imagine what [] the victim's family is going through right now," and was "deeply sorry that I had anything to do with this. And if I could have done anything to change what happened, I would do it." T 1110.

SUMMARY OF ARGUMENT

Point I. The prosecutor's closing argument during the penalty phase was filled with inflammatory and improper comment, which tainted the jury's recommendation and rendered the entire proceeding fundamentally unfair.

Point II. The trial court erred in finding as an aggravating circumstance that the dominant or sole motive for the murder was to avoid arrest. The great weight of the evidence showed the primary motive for the shooting was the victim's resistance to the robbery.

Point III. The death sentence is disproportionate for this felony murder. Ryan Urbin was only seventeen years old and impaired by alcohol and drugs at the time of the offense. The extreme rarity of juvenile executions in Florida dictates that the death penalty be reserved for extreme cases. This is not an extreme case. The aggravating circumstances were neither numerous nor compelling, and the mitigating circumstances were substantial. In addition, the jury's recommendation was tainted by improper prosecutorial argument. Urbin's death sentence should be vacated and remanded for imposition of a life sentence.

ARGUMENT

Point I

THE PROSECUTOR'S PENALTY-PHASE ARGUMENT WAS FILLED WITH IMPROPER AND INFLAMMATORY REMARKS, WHICH TAINTED THE JURY'S RECOMMENDATION AND RENDERED THE ENTIRE SENTENCING PROCEEDING FUNDAMENTALLY UNFAIR.[3]

It is axiomatic that a prosecutor may not make statements calculated only to arouse passions and prejudice. Vierick v. United States, 318 U.S. 236, 247, 63 S.Ct. 561, 566, 87 L.Ed.2d 734 (1943). As the United States Supreme Court stated long ago:

> [W]hile [the prosecuting attorney] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

The Supreme Court's admonition applies with particular force in a capital sentencing proceeding: "Because of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices." Lesko v. Lehman, 925

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[3]Appellant makes this argument under the fifth, sixth, eighth, and fourteenth amendments of the United States Constitution, and Article 1, sections 9, 16, and 17, of the Florida Constitution.

F.2d 1527, 1541 (3d Cir.), cert. denied, 502 U.S. 898, 112 S.Ct. 273, 116 L.Ed.2d 226 (1991); see also Hall, 733 F.2d 766 (11th Cir. 1984)("it is of critical importance that a prosecutor not play on the passions of a jury with a person's life at stake"), cert. denied, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). As this Court repeatedly has stated, closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985); see also Garron v. State, 528 So. 2d 353, 359 (Fla. 1988)(when "comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument").

In the present case, the prosecutor's penalty-phase argument was filled with improper and prejudicial remarks.[4] Indeed, the prosecutor's argument ran the gamut of misconduct from using inflammatory rhetoric and mischaracterizing the evidence and the law to improperly arguing lack of remorse, implying a higher

[4]The prosecutor's entire penalty-phase closing argument is attached as Appendix B.

authority had already determined death was appropriate, suggesting the jury would be shirking its duty if it recommended life, implying a life sentence could result in Urbin's release one day, urging the jury to show Urbin the same mercy he showed the victim, and distracting the jury from its task of impartially weighing the aggravators and mitigators by comparing the victim's character with Ryan Urbin's request for a life sentence.

Urbin concedes his counsel made no objection to the state's closing argument. This Court has long recognized, however, that "there are situations where the comments of the prosecutor so deeply implant seeds of prejudice or confusion" that reversal is required despite the defendant's failure to object at trial. Pait v. State, 112 So. 2d 380 (Fla. 1959); see also Grant v. State, 194 So. 2d 612 (Fla. 1967); Wilson v. State, 294 So. 2d 327 (Fla. 1974); see also Garron (reversing for prosecutorial misconduct during penalty phase, notwithstanding curative instructions).[5]

Here, the prosecutor's improper remarks were so egregious

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[5]This Court has applied the same standard of review when a trial court has overruled defense objections to prosecutorial misconduct during closing argument. See Bertolotti; State v. Murray, 443 So. 2d 955, 956 (Fla. 1984)(standard of review for prosecutorial argument is whether "the error committed was so prejudicial as to vitiate the entire trial"); Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984).

and pervasive that "neither rebuke nor retraction [would] destroy their influence." Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988); see also Wilson, 294 So. 2d at 328-29; Pait, 112 So. 2d at 385. There can be little doubt the prosecutor's argument prejudiced Urbin. The evidence in favor of death was not so compelling that the Court can say the improper and inflammatory argument did not influence the jury's sentencing recommendation. The prosecutor's actions rendered the sentencing proceeding fundamentally unfair and denied Urbin due process of law.

A. The Improprieties

1. **Inflammatory, Vengence-Provoking Rhetoric**

The prosecutor's closing argument was filled with inflammatory rhetoric. The prosecutor described the crime as an "execution"; characterized the killing as "brutal" and "vicious;" and described Ryan Urbin as "vicious," "brutal," "ruthless," and "cold-blooded":

> "[Jason Hicks was] shot like a rabid dog" (T 1120)
>
> "that defendant executed 22-year-old Jason Hicks" (T 1120)
>
> "executing him in that parking lot" (T 1122)
>
> "[you're here to consider what punishment] the defendant should get for executing Jason Hicks" (T 1123)
>
> "that defendant gunned down in cold blood Jason

Hicks. . . he ambushed and robbed and executed Jason Hicks. He's showing you what his true violent and brutal and vicious character is . . . brutal murder of Jason Hicks . . . he gunned down and executed a defenseless young man who had been, I submit to you, pleading for his life" (T 1129)

"That's true violence. That's violent character. I submit to you that's deep-seeded [sic] violence. It's vicious violence. It's brutal violence. . . Brutal violence, vicious violence, deep-seeded violence. I submit to you it's the coldest violence most people have ever encountered. Hard violence. I submit to you that defendant is violent to the core, violent in every atom of his body" (T 1130)

"the defendant's character is one of deep-seeded violence" (T 1134)

"the defendant executed him" (T 1135)

"the defendant believed he had just executed the only witness to that robbery" (T 1135)

"he's a cold-blooded killer. He's a ruthless killer" (T 1136)

"after he executed Jason" (T 1142)

"the way he executed Jason Hicks" (T 1147)

The emotional rhetoric did not consist of a few isolated comments; rather, it was used throughout the argument, almost as a refrain. Not only were inflammatory terms used excessively,[6]

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[6]Cf. United States v. Chaimson, 760 F.2d 798 (7th Cir. 1985)("A prosecutor may characterize defendant as a liar, but where terms "fabricated" and "lies" are used repeatedly to the point of excessiveness, line between undignified and intemperate and the hard or harsh but fair may be crossed, with resultant impairment of the calm and detached search for truth to which

the evidence did not justify such terms. This was not a "uniquely vicious" crime, cf. Darden v. State, 329 So. 2d 287 (Fla. 1976), nor was it an execution-type killing.[7] The state's own witnesses testified the shooting occurred during a scuffle in response to the victim's resistance to the robbery. The prosecutor's persistent portrayal of this homicide as a cold-blooded, execution-style slaying was misleading, manipulative, and highly prejudicial.

2. **Mischaracterization of Evidence**

The prosecutor inflamed the jury and mischaracterized the evidence by telling the jury Jason Hicks was shot while "pleading for his life." T 1129. The prosecutor described Jason's death as follows:

> "While on the ground, Jason turned to the defendant and he raised his left hand. And when he raised that left hand, I submit to you that was a futile, pitiful gesture of defense. It was a statement by Jason Hicks, that raised left hand was a statement by Jason Hicks as loud as any word ever came out of his mouth, "Don't hurt me. Take my money, take my jewelry. Don't hurt me." And the defendant fired that bullet right through

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a criminal trial should aspire.").

[7]Neither the CCP (cold, calculated, and premeditated) nor the HAC (heinous, atrocious, and cruel) aggravating circumstances were applicable, nor did the prosecutor request jury instructions on these aggravators.

> that left hand, right through the left palm. The bullet tore into Jason's chest. It burned through his heart, through his lungs. . . . Jason fell to the pavement. He was dying at that point. Life and blood quickly drained from his body as he fell to the pavement." (T 1121).

This description was, at worst, contrary to the evidence, and, at best, pure speculation. Certainly, that Hicks begged for his life before he was shot cannot reasonably be inferred from the evidence. Although one of the bullets went through Hicks's hand, there was no evidence Hicks was pleading for his life or that he raised his hand in a defensive gesture. The evidence showed only that Hicks turned over and tried to kick his attacker's legs out from under him. This argument, obviously meant to create sympathy, was improper.

3. Trivializing Jury's Responsibility

The prosecutor told the jury:

> "[Determining the sentence] [i]s not a difficult process." (T 1123)

Arguments that trivialize the task of a capital sentencing jury are improper. McGauth v. California, 402 U.S. 183, 208, 91 S.Ct. 1454, 1467, 28 L.Ed.2d 711 (1971); see also Tucker v. Kemp, 762 F.2d 1480, 1485 (11th Cir.)(essential that jurors recognize "the truly awesome responsibility of decreeing death for a fellow

human [so that they] will act with due regard for the consequences of their decision"), vacated on other grounds, 474 U.S. 1001, 106 S.Ct. 517, 88 L.Ed.2d 452 (1985). This argument was improper.

4. Higher Authority Argument

The prosecutor improperly implied to the jury that this case, above others, warranted the death penalty:

> "Now, the state doesn't seek the death penalty in all first-degree murders. It's not always proper. . . . But where there are facts surrounding a murder that demand -- demand the death penalty, the state has an obligation and a duty to seek the death penalty. And I submit to you this is one of those cases." (T 1123-1124).

It is wrong for the prosecutor to undermine the jury's discretion in determining the proper punishment by implying that he, or another high authority, has already made the careful decision required. Pait, 112 So. 2d at 384; Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985)(en banc), reversed on other grounds, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986); Tucker v. Kemp, 762 F.2d at 1484.

This argument also was disingenuous, given that before trial, the prosecutor had offered a sentence of life imprisonment in exchange for a guilty plea. R 314, T 484-486.

5. Misstatement of Law Regarding Mercy

The prosecutor misstated the law when he told the jury,

> "if sufficient aggravating factors are proved beyond a reasonable doubt, you must recommend a sentence of death, unless the mitigating circumstances outweigh the aggravating circumstances." (T 1125)(Emphasis supplied)

A jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors. Henyard v. State, 689 So. 2d 239, 250 (Fla. 1996), petition for cert. filed, (June 9, 1997)(No. 96-9391). This is so because a jury can always dispense mercy, even in a case deserving of the death penalty. Id. As another court has explained:

> "[t]he ultimate power of the jury to impose life, no matter how egregious the crime or dangerous the defendant, is a trubute to the system's recognition of mercy as an acceptable sentencing rationale . . . . Thus, the suggestion that mercy is inappropriate was not only a misrepresentation of the law but it withdrew from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life."

Lesko, 925 F.2d at 1543 (citation omitted).

6. Misleading Jury Regarding Merged Aggravators

The prosecutor told the jury:

> "[T]hese two [aggravators], that is, the felony murder and the financial gain, merge under the law, because they're kind of

> fastened to the same factor. That is-- we're relying on a robbery here -- to show financial gain, of a robbery here to show the felony murder. . . . these two merge. I submit to you that this cluster here, speaking to this, is especially heavy because of that merger." (T 1136-1137).

Merged aggravators can be considered as only one aggravator in favor of death. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976)(where several aggravating circumstances refer to same aspect of defendant's crime, those aggravators constitute only one factor in the weighing process), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Accordingly, the weight to be given merged factors must be based on something other than the mere fact they are merged.

Here, the prosecutor himself recognized the robbery and pecuniary gain were based on the same aspect of the offense. It was thus highly improper and misleading for the prosecutor to tell the jury these two aggravators were "especially heavy because of that merger." T 1137.

7. Denigration of Legitimate Mitigating Circumstances

The prosecutor improperly characterized all of Urbin's proposed mitigating circumstances as "excuses." Referring to Urbin's age as a mitigator, the prosecutor said:

> "It just doesn't apply. This mitigating

circumstance would apply to a 16-year-old. It might apply to a 16-year-old who had no record. But we don't have that in this case. The defendant was a mature 17-year-old veteran of violent crime. I submit to you this is nothing but an excuse. It's an excuse by that defendant to escape full responsibility, full accountability for this vicious murder." (T 1140)

Referring to impaired capacity, the prosecutor said:

"That mitigating circumstance just does not apply. It is another excuse, excuse by that defendant to escape full accountability, full responsibility to the maximum extent of the law.

. . . .

. . . The doctor told you he wasn't insane. That defendant knew perfectly well what he was doing at the time of that murder. He knew it was wrong. He was not insane. He had full control of his faculties. That mitigating circumstance is just not supportive. It's another excuse that does not apply in this case." (T 1141-1143)

Referring to the nonstatutory mitigation, the prosecutor said:

"those are all excuses" (1143)

"the defendant is trying to manipulate you to swallow their excuses and to help this defendant evade full responsibility, full accountability for this murder" (T 1143)

"that's the excuse that this defendant wants to rely on to try to get out from full responsibility for this murder." (T 1144)

Summing up, the prosecutor told the jury:

> "[N]one of these mitigators apply, none of them apply, . . . those are just weak excuses to avoid full responsibility and accountability." (T 1148)

Telling the jury Urbin's legitimate mitigating circumstances were "nothing but excuses" was improper. See Garron, 528 So. 2d at 357 (prosecutor's repeated criticism of legitimate and lawful defense was reversible error); Riley v. State, 560 So. 2d 279, 280 (Fla. 3d DCA 1990)(prosecutor "may not ridicule a defendant or his theory of defense"); Rosso v. State, 505 So. 2d 611, 613 (Fla. 3d DCA 1987)(same). This argument incorrectly conveyed to the jury that Urbin's legitimate mitigating circumstances were legally irrelevant because they cannot "excuse" a murder. It was also improper to suggest to the jury that a defendant's impaired capacity at the time of the offense cannot be a mitigating factor unless it rises to the level of insanity. See Cheshire v. State, 568 So. 2d 908 (1990). Although it would have been proper for the prosecutor to argue the mitigation was entitled to little weight, it was patently wrong to invite the jury to ignore valid mitigating circumstances established by competent,

uncontroverted evidence.[8]

8. Improper Attack on Defense Witness

The prosecutor improperly denigrated the testimony and character of Ryan's mother:

> Helene Urbin, I submit to you Helene Urbin is the mistress of excuses. The mistress of excuses. She'll do anything she can to avoid responsibility. Blames her mother for what happened to her. She does blame herself for what happened to the defendant. She's a mother. She's doing what she can to help her son . . .
>
> . . . she never once tried to express [her] concern, that remorse, that sorrow to the family of Jason Hicks. She just didn't have a chance between September and December when she was arrested for tampering with witnesses in her son's case. The mistress of excuses. (T 1145-1146)

The prosecutor's attack on Ryan's mother was improper and inflammatory. Furthermore, whether Helene's mother felt remorse for her son's conduct, or had expressed sympathy to the victim's family, was totally irrelevant, as it is error to consider lack of remorse for any purpose in capital sentencing. Trawick v. State, 473 So. 2d 1235 (Fla. 1985), cert. denied, 476 U.S. 1143, 106 S.Ct. 2254, 90 L.Ed.2d 699 (1986). This argument was

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[8]The state presented no evidence to contradict Urbin's proposed mitigating circumstances. The trial court found and gave weight to all of them. R 326-329.

plainly calculated to distract the jury from its proper task of impartially weighing aggravating and mitigating factors.

9. Arguing Ryan's Lack of Remorse

The prosecutor also told the jury Ryan felt no remorse:

> "[t]he defendant . . . is hard, a man of hard violence, not an ounce of remorse. No acknowledgement that he's done wrong. Those aren't aggravating circumstances and I'm not trying to argue those are aggravating circumstances. But part of your responsibility is to analyze that defendant's character. And I submit to you that those comments accurately reflect his character, and it is shown from the evidence that you've heard through the course of this trial. That is a cold, hardened killer. There is no remorse." (T 1146-1147)

This argument was patently improper. Trawick; Pope v. State, 441 So. 2d 1073 (Fla. 1983). Furthermore, because Urbin testified he was deeply sorry for his involvement in the crime, this argument could only have been interpreted by the jury as an expression of the prosecutor's personal opinion, which is highly improper.

10. Implying Life Sentence Could Result in Urbin's Release

The prosecutor told the jury:

> "[T]he defense lawyer is . . . going to argue that life without parole is what you ought to recommend. And I submit to you today now that is the state of the law, life without parole. We all know in the past laws have

changed. And we all know that in the future laws can change." (T 1147)

This type of argument--implying that if the defendant is sentenced to life in prison, he might nonetheless be released one day--has long been condemned. See, e.g., Singer v. State, 109 So. 2d 7 (Fla. 1959); Newlon v. Armontrout, 693 F. Supp. 799, 807 (W.D. Mo. 1988), aff'd, 885 F.2d 1328 (8th Cir. 1989), cert. denied, 497 U.S. 1038, 110 S.Ct. 3301, 111 L.Ed.2d 810 (1990). Such arguments were held improper even when parole was a possibility. Singer. In the present case, parole is not even a possibility. Moreover, Urbin's release due to a change in the law would probably be unconstitutional under article 10, section 9, of the Florida Constitution. See Watts v. State, 558 So. 2d 994 (Fla. 1990). This was a scare tactic, deliberately calculated to appeal to the jurors' fears.

11. Implying Life Recommendation Would be Irresponsible

Next, the prosecutor improperly suggested the jurors would be shirking their duty if they voted for life:

> "I have a concern in this case. And my concern is that some of you may be tempted to take the easy way out, to not weigh the aggravating circumstances and the mitigating circumstances and not want to fully carry out your responsibility and just vote for life." (T 1151).

Telling the jury it has a duty to decide one way or the other is patently improper. See United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)(error to exhort jury to "do its job"; that kind of pressure has no place in administration of criminal justice); United States v. Mandelbaum, 803 F.2d 42, 44 (1st Cir. 1986)("There should be no suggestion that jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality"); Redish v. State, 525 So. 2d 928 (Fla. 1st DCA 1988)(reversible error for prosecutor to argue jury would be "in violation of your oath as jurors" if they "succumbed to the defense argument").

12. Inflammatory Victim Impact Argument

Although the Eighth Amendment erects no per se bar to victim impact evidence, "evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation." Payne v. Tennessee, 501 U.S. 808, 836, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)(Souter, J., concurring). Also forbidden are "opinions of the victim's family about the crime, defendant, and appropriate sentence." Id. at 833.

Here, the prosecutor's argument predicated on the victim impact evidence was unduly inflammatory. The prosecutor began his closing argument by eulogizing the victim:

> "Jason Hicks is dead. On September 1, 1995, he was a living, breathing, young man in the prime of his life. He was 22 years old. He had a mother. He had a father. He had a sister. He had an aunt. He had friends. He had people that loved him. He worked with his parents in their asphalt business. I'm not trying to convince you that Jason Hicks was a great leader of men, but he was a hard-working young man who loved to shoot pool and he liked to listen to music. He was loved and he gave it. He didn't do anything to deserve to be shot like a rabid dog on the parking lot of Harley's." (T 1119-1120)

> "We'll never know, we will never know what kind of man Jason Hicks was going to grow into. The defendant took care of that by riddling his chest with bullets.
>
> Jason Hicks can no longer experience the love and comfort of his family." (T 1121)

The prosecutor then held out the victim's good character for comparison with the defense request for a life sentence:

> "That defendant didn't care that Jason Hicks was just starting out in life. He didn't care that he had a mother, didn't care he had a father, didn't care he had a sister, didn't care he had a family, didn't care that he had friends that deeply cared and loved him, cared for him. He didn't care. He ambushed him and he robbed him and then he made sure he didn't live to tell about it. And now, now that defendant -- that defendant right there, he wants you to care

> for him. He wants you to recommend a life sentence for him." (T 1122)
>
> "This defendant and his lawyers want you to only hear about the defendant. They want you to focus on his family, his problems, his troubled life, his troubled childhood. They don't want you to think about Jason Hicks: his mother, his father, sister, aunt, friends. The people who knew Jason Hicks to be a loving, giving, generous son, brother, nephew, friend. You've got a right to know that, to know that Jason Hicks was more than that lifeless photograph, to know that he was a living, breathing human being with real blood flowing through his veins. He was loved and he gave love." (T 1149)

Finally, the prosecutor asked the jury to give justice to the victim's family and friends:

> "Jason's parents, Mr. Hicks, Mrs. Hicks, his sister, Becky, they have got to live with the pain caused by Jason's murder for the rest of their lives. And that's part of this tragedy. It's clear from what you heard today and during the trial that the family and the friends of Jason Hicks are asking themselves, "What kind of justice is going to be done in this case?" With your recommendation to Judge Wilkes, you can help answer their questions." (T 1150-1151)

Although Payne permits some evidence showing the harm a defendant has caused, it was improper for the prosecutor to make the victim's character a recurring theme of his argument; to hold up the victim's good character and aspirations against Urbin's request for a life sentence; and to ask the jury to give

justice to the victim's family. These arguments, intended to inflame the jury and induce it to base its sentencing decision on the good character of the victim and not on the background, character, and culpability of Ryan Urbin, were impermissible under Payne.

13. Asking Jury to Show Defendant Same Mercy Shown Victim

Finally, the prosecutor told the jury:

> "I'm going to ask you not to be swayed by pity or sympathy. I'm going to ask you what pity, what sympathy, what mercy did the defendant show Jason Hicks. . . . If you are tempted to show this defendant mercy, if you are tempted to show him pity, I'm going to ask you to do this, to show him the same amount of mercy, the same amount of pity that he showed Jason Hicks on September 1, 1995, and that was none." (T 1151-1152)

The prosecutor previously had told the jury:

> "[A]ny life sentence that that defendant gets, any life sentence, is going to give him more breathing time than he gave Jason Hicks." T 1147.

This Court repeatedly has condemned these types of appeals to jury sympathy. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992); Rhodes v. State, 547 So. 2d 1201, 1205 (Fla. 1989); see also Lesko, 925 F.2d at 1545.

B. The Prejudice

Courts have recognized that "the prosecutorial mantle of

authority can intensify the effect on the jury of any misconduct." Brooks, 762 F.2d at 1399. This is because the average jury believes that a prosecutor, while an advocate, is also a public servant "whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger, 295 U.S. at 88. Consequently, "improper suggestions, insinuations, and especially assertions of personal knowledge, are apt to carry much weight against the accused when they should properly carry none." Id.

In the present case, there can be no doubt the prosecutor's misconduct actually influenced the jury. The improper remarks were numerous and egregious. The majority of the prosecutor's closing argument was calculated to inflame the jury and remove reason from the sentencing process. Cf. Newlon; Lesko; Garron.

Furthermore, the prosecutor's remarks were not neutralized by the trial judge or the defense attorney. Defense counsel made no objections, and the trial judge issue no curative instructions. The improper, misleading, and inflammatory argument therefore continued unabated, apparently sanctioned by the trial judge. Cf. Lesko. The defense attorney did almost nothing to rebut the improper remarks in his own closing argument. In fact, defense counsel began his own summation by

telling the jury, "I'll try and keep what he may not have covered in my argument within ten minutes." T 1152. True to his work, defense counsel "did it in ten minutes." T 1161.

Finally, given the substantial mitigation in this case, the evidence in favor of death was not so compelling that such egregrious errors could be deemed harmless. See Point III.

A penalty phase proceeding should not become a legal lynching. When the sovereign takes the life of one of its citizens, it is vital that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Here, the prosecutor's improper argument tainted the jury's recommendation and rendered Urbin's sentencing proceeding fundamentally unfair. This Court should reverse for a new sentencing proceeding before a newly empaneled jury.

Point II

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE DOMINANT MOTIVE FOR THE MURDER WAS TO AVOID ARREST.

In order for this aggravating factor to be sustained when the victim is not a law enforcement officer, the evidence must show beyond a reasonable doubt that "the dominant or only motive for the murder was the elimination of the [] witness." Bates v. State, 465 So. 2d 490 (Fla. 1985); see also Jackson v. State, 575 So. 2d 181 (Fla. 1991); Livingston v. State, 525 So. 2d 1288 (Fla. 1988); Perry v. State, 522 So. 2d 817 (Fla. 1988); Amazon v. State, 487 So. 2d 8 (Fla. 1986). In the present case, the evidence showed the primary motive for the shooting was the victim's resistance to the robbery. Accordingly, this aggravating circumstance cannot be sustained.

In finding this aggravator, the trial court wrote:

> After the Defendant completed the robbery and killing of Jason Hicks he returned to the car driven by Jason Ambrose and occupied by Craig Flatebo. During the trial Craig Flatebo testified that the Defendant said to him immediately upon returning to the car after the robbery, that he had slipped up behind the victim, Jason Hicks, and removed the jewelry and forced him to the ground on his stomach so he could not identify him. After the defendant attempted to remove the wallet or money from the victim's pocket, the victim turned around and

> saw the Defendant's face, and that was the reason he shot the victim. The Court finds that this aggravating circumstance was proven beyond a reasonable doubt.

R 325-326.

The trial court's findings are erroneous and incomplete. First, contrary to the court's findings, there was no evidence Hicks was put on the ground so that he could not identify his attacker. Second, the trial court did not consider[9] that Hicks was shot only after he attempted to kick his attacker's legs out from under him. The evidence thus demonstrates two possible motives for the shooting, first, Hicks' resistance and the ensuing scuffle between Hicks and his attacker, and second, that Hicks saw his attacker's face. The evidence further shows Hicks' resistance was the primary impetus for the shooting.

Craig Flatebo testified the shots were fired within two minutes after Ryan exited the car to commit the robbery. After the shooting, "[Ryan] was awful excited. . . . he just kept telling us the guy shouldn't have bucked, he shouldn't have bucked," meaning resisted the robbery:

> "He told us when he got out of the car and followed the white guy to his truck that he

[9]The trial court did recognize in its discussion of the robbery aggravator that "there was some scuffle between the victim and the Defendant" prior to the shooting. R 325.

> went up behind him at his truck and he put a gun to his head and told him to take his jewelry off and, the guy took the jewelry off and gave it to him. He said then he put him down on the ground with the gun and continued to keep trying to rob him. He told us that when he went to grab the guy's pocket he realized that the guy had a fat pocket. A fat pocket, full. That's when the guy bucked and turned over and started kicking his legs out trying to kick his legs from under him, and he said that's when he shot him. . . . He told us -- well, for one that he was bucking and, two, that he seen his face so he had to shoot him."

T 592-593.

The other co-defendant, Jason Ambrose, did not testify that Ryan said the victim saw his face, only that "[Ryan] said that the victim bucked him," T 630, and "[Ryan] seen a lot of money in his pocket and when he went to go get it the victim kicked him in the leg and that's when he shot him and that's when he ran." T 631.

Steve Mann testified that Ryan said he shot the victim "because he bucked." T 675.

In order to sustain this aggravating factor, the state's evidence that witness elimination was the dominant motive must be "very strong." Riley v. State, 366 So. 2d 19 (Fla. 1978); Hannon v. State, 638 So. 2d 39, 44 (Fla. 1994), cert. denied, 513 U.S. 1158, 115 S.Ct. 1118, 130 L.Ed.2d 1081 (1995). In Livingston,

for example, the Court found the evidence insufficient even though the defendant shot and killed a convenience store clerk during a robbery, then said, "now I'm going to get the one in the back [of the store]," and shot at another person. 565 So. 2d at 1292-93.

Here, the evidence that Hicks' resistance was the primary motive for the shooting was very strong: Flatebo, Ambrose, and Mann all testified Ryan said he shot the victim "because he bucked." Although Flatebo testified Ryan said he shot the victim because he bucked and because he saw his face--the evidence suggests this latter fact was at most a corollary, or secondary motive, not the dominant one. The entire episode, from the time Ryan began following Hicks to his truck to the shooting itself, took less than two minutes. Urbin's after-the-fact statement that Hicks had seen his face is insufficient to establish witness elimination as the dominant motive for this shooting.

The state failed to prove this aggravating circumstance beyond a reasonable doubt, and it thus was error for the trial court to consider this aggravating factor as a reason for imposing the death sentence. Because only two valid aggravating circumstances were properly found in this case, the trial court's consideration of the invalid aggravator cannot be considered

harmless. Nor can it be said that death is necessarily the appropriate penalty. Accordingly, this Court should reverse Urbin's death sentence and reverse for resentencing.

Point III

THE IMPOSITION OF THE DEATH PENALTY IS DISPROPORTIONATE FOR THIS FELONY MURDER WHERE RYAN URBIN WAS SEVENTEEN YEARS OLD AT THE TIME OF THE OFFENSE, THE AGGRAVATING CIRCUMSTANCES ARE NEITHER NUMEROUS NOR COMPELLING, AND THE MITIGATING CIRCUMSTANCES ARE SUBSTANTIAL.

This case is a textbook felony murder, a simple robbery "gone bad"--committed by a drug addicted juvenile who had never been convicted of a crime before. The aggravating circumstances are neither numerous nor particularly compelling, and the mitigating circumstances are substantial. Under the doctrine of proportionality, the ultimate penalty of death is not warranted.

The purpose of this Court's proportionality review is to prevent the imposition of "unusual" punishments.[10] In determining whether the death penalty is unusual in this sense, the Court considers several factors:

> 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

[10]Proportionality review arises from several sources in the Florida Constitution: Article I, section 17, which prohibits "cruel or unusual" punishment; Article I, section 9, which guarantees that no person shall be deprived of life without due process of law; and Article V, section 3(b)(1), which gives the Florida Supreme Court exclusive jurisdiction over death appeals. Tillman v. State, 591 So. 2d 167 (Fla. 1991).

> 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).

Terry v. State, 668 So. 2d 954, 965 (Fla. 1996); see also Sager v. State, 22 Fla. L. Weekly S381 (Fla. June 26, 1997); Voorhees v. State, 22 Fla. L. Weekly S357 (Fla. June 19, 1997).

Application of these considerations mandates a reduction of Ryan Urbin's death sentence to life imprisonment. First, the facts of the murder itself do not call for the most severe punishment available. The circumstances of this crime do not set it apart from other felony murders which this Court has determined did not warrant the death penalty. See, e.g., Terry (store clerk robbed and shot); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995)(cab driver robbed and shot); Thompson v. State, 647 So. 2d 824 (Fla. 1994)(subway shop attendant shot in head during robbery); Jackson v. State, 575 So. 2d 181 (Fla. 1991)(store clerk shot during robbery); Livingston v. State, 565 So. 2d 1288

(Fla. 1988)(defendant shot store clerk during robbery, then shot at another person).

Second, the aggravating circumstances are not especially compelling. Although the trial court found three aggravating circumstances, only two of them are valid. See Point II. One of these aggravators, felony murder, is necessarily present in every felony murder case and has been treated by this Court as a relatively weak aggravator. See Rembert v. State, 445 So. 2d 337 (Fla. 1984)(reducing death sentence to life where underlying felony was only aggravator, even though there was no mitigation and jury recommended death).

The other valid aggravator, prior violent felony, though serious, must be viewed under the particular circumstances of this case. As this Court observed in Terry,

> "The Florida sentencing scheme is not founded on `mere tabulation' of the aggravating and mitigating factors, but relies instead on the weight of the underlying facts."

668 So. 2d at 965 (quoting Francis v. Dugger, 908 F.2d 696, 705 (11th Cir. 1990), cert. denied, 500 U.S. 910, 111 S.Ct. 1696, 114 L.Ed.2d 90 (1991)). In the present case, the offense used to establish the prior violent felony aggravator was a home robbery committed two weeks after the homicide. The prior violent felony

aggravator therefore does not involve a return to violent crime after a period of incarceration. Ryan Urbin had shown no violent criminal propensities prior to the Hicks shooting and had never been in prison.[11] Furthermore, although the home robbery qualifies as a violent offense, the victim, though bound and threatened, was otherwise left unharmed.

Third, the mitigating circumstances in this case are substantial. Ryan was abandoned by his father when he was a baby. He grew up with his mother, Helene Urbin, in Jacksonville. Although Ryan lived in a nice area of town in a nice house (apparently purchased by Helene's mother), Helene frequently was absent, leaving Ryan alone to roam the streets with little or no guidance. Although Ryan struggled in school from an early age, his learning disability (dyslexia) was not identified until he was a teenager. Helene worked at a number of odd jobs and eventually turned to drug dealing and prostitution. When Ryan was eleven, his mother was sent to prison for two years for trafficking in cocaine. Ryan was left in the care of his stepbrother, who within a few months got married and left the

[11]This is not to say that Ryan was an angel. The Presentence Investigation Report shows Ryan was arrested for throwing rocks at a car (adjudication withheld); was adjudicated three times for technical violations; and was committed to a youth facility for burglary (Ryan and three others kicked in a door and stole money from a car).

home, and Helene's boyfriend, who drank, did drugs, and may have sexually molested Ryan. R 299. Although Helene's mother cared for Ryan for some undetermined period of time, she apparently exerted little influence over him. Ryan therefore was essentially without adult supervision during the critical years of his early adolescence.

Not surprisingly, Ryan himself turned to drugs and alcohol and became addicted. In 1992, when he was 14, Ryan spent three months at Charter Hospital, a drug treatment facility. According to hospital records, he was already showing signs of chemical dependency. The records also indicate that although Ryan was not psychotic, he showed a "schizophrenic-like feature" as a result of his dysfunctional family life.

Dr. Miller diagnosed Ryan as suffering from anxiety, depression, and addiction to cocaine, LSD, and alcohol. According to Dr. Miller, Ryan's addiction resulted in poor judgment and impulsivity and diminished his ability to conform his behavior to the requirements of the law. Dr. Miller testified the use of drugs or alcohol the night of the homicide "most emphatically" would have impaired Ryan's thought processes in reacting to the victim's resistance to the robbery. In Dr. Miller's opinion, the murder "would not have occurred absent the

influence of some clandestine substance or alcohol in [Ryan's] system, which affected his thinking and behavior." In Dr. Miller's opinion, Ryan's drug addiction was treatable, and absent drugs and alcohol, Ryan was not likely to revert to criminal behavior.

Despite a learning disability, the absence of functional parents, and drug and alcohol addiction, Ryan managed to complete the tenth grade, earn a degree in welding, and hold several jobs.

The trial court found and gave some weight to two statutory mitigators, Urbin's age of 17 and his impaired capacity at the time of the offense due to alcohol and drugs. The trial court also found and gave some weight to four nonstatutory mitigators: (1) Urbin's history of drug and alcohol abuse, (2) maternal neglect, (3) learning disability, and (4) employment history. The trial court found but gave little weight to Urbin's abandonment by his natural father. R 323-330; Appendix A.

In addition to the mitigating circumstances found by the trial court, this Court should consider as mitigating Ryan's potential for rehabilitation and his remorse. See Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993)("mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted"). Ryan's

employment history also demonstrates potential for rehabiliation and productivity within the prison system. See Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982).

The presence of such substantial mitigation in the record removes this case from the category of being the most aggravated and least mitigated of capital murders. Because of the significant mitigation, the death penalty is unwarranted as a matter of law. See, e.g., Kramer v. State, 619 So. 2d 274 (Fla. 1993); Penn v. State; 574 So. 2d 1079 (Fla. 1991); Nibert v. State; 574 So. 2d 1059 (Fla. 1990); Farinas v. State; 569 So. 2d 425 (Fla. 1990); Livingston. Moreover, the cluster of mitigating factors showing Ryan's capacity for rehabilitation specifically militates against the death penalty, a punishment unique "in its total rejection of the possibility of rehabilitation." See Dixon, 283 So. 2d at 7.

This Court's decisions in Terry and Livingston, which involved the same two aggravating circumstances and a death recommendation from the jury, support a life sentence. The mitigating circumstances in the present case are much more extensive than in Terry, which involved a 21-year-old defendant and "minimal nonstatutory mitigation," and are as strong as those

in Livingston, which included the defendant's age of 17, his marginal intelligence, childhood abuse, and a history of cocaine and marijuana use.

Additionally, Ryan's youth should be given overwhelming weight. In Eddings v. Oklahoma, 455 U.S. 104, 116 S.Ct. 869, 71 L.Ed.2d 1 (1982), the United States Supreme Court held "the chronological age of a minor is itself a relevant mitigating factor of great weight." Subsequently, in Thompson v. Oklahoma, 487 U.S. at 815, 835, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) the Court expressly endorsed the proposition that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." Because adolescents "are more vulnerable, more impulsive, and less self-disciplined than adults," Thompson, 487 U.S. at 834 (citations omitted), they cannot be held to the same level of culpability:

> "Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults."

Id. (citations omitted).

Juveniles also are less culpable than adults because they have not yet had the opportunity to outgrow the effects of a bad

childhood over which they had little control:

> "[Y]outh crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth."

Id. As one commentator has stated:

> The habits and capacities of the young are the product of a physical and social environment over whch they have had no control. In childhood, each of us is a hostage to fortune, good or ill, of the immediate family and neighborhood into which nature's lottery has cast us. This commonplace truth is crucially relevant to how juvenile offenders should be treated by the criminal justice system. Our laws, civil as well as criminal, reflect the truth that children are less responsible for their circumstances and hence for their conduct than are adults.

Bedau, *Forward* to V. Streib, Death Penalty for Juveniles at vii-viii (1987).

Ryan Urbin is no exception to these basic truths about adolescence. Despite the trial court's finding that Ryan was "mature for his age," there is nothing in the record to suggest Ryan was more mature or responsible than his peers. The only reason the trial judge gave for this finding was that Ryan "had worked and lived on his own for some time prior to the crime." R 326. These facts do not show maturity beyond his years. Many

teens work. Furthermore, although Ryan was not living at home anymore, his mother paid his rent. There simply is nothing in the record demonstrating Ryan had the "experience, perspective, or judgment" expected of persons older than he.

Finally, although the United States Supreme Court and this Court have declined to hold the execution of a seventeen-year-old "unusual" in a constitutional sense, see Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989); LeCroy v. State, 533 So. 2d 757 (Fla. 1988), cert. denied, 492 U.S. 925, 109 S.Ct. 3262, 106 L.Ed.2d 607 (1989), imposition of the death penalty on adolescents has been rare, both in absolute and relative terms.

In three and a half centuries, only about 350 (1.8%) of the 19,000 persons executed nationally were juveniles.[12] Only nine of these juvenile executions were imposed during the current era. (1973-1997). These nine recent executions of juvenile offenders are only 3% of the total of about 350 executions nationally through May 1997. V. Streib, The Juvenile Death Penalty in the United States and Worldwide at 8 (1997)(forthcoming article in Loyola University's Poverty Law Journal)(attached as Appendix C).

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[12]The term "juvenile" or "juvenile offender" in this brief means someone who was under age eighteen at the time of the offense.

Juvenile offenders make up only a small proportion of the current death row population. A total of 155 juvenile death sentences were imposed from 1973 through early 1997, only 2.6% of the total of the over 6,000 death sentences imposed for offenders of all ages during this time period. Of these 155 juvenile death sentences, only 58 remain currently in force. As noted above, nine have resulted in execution (all seventeen-year-olds), and 88 have been reversed. Thus, for the ninety-seven juvenile death sentences finally resolved, the reversal rate is 91%. Id. at 6.

The imposition of the death penalty on juveniles in Florida has been even rarer. The State of Florida has executed only twelve juvenile offenders, the last two being in 1954. V. Streib, Death Penalty for Juveniles at 63, 193.

Juvenile offenders also make up only a small proportion of Florida's current death row population. Although a number of juveniles have been sentenced to death in the current era, the commutation rate for teenagers on death row has been very high. A total of 27 juvenile death sentences have been imposed on 22 defendants since 1973, only 2.8% of the total of over 961 death sentences imposed for offenders of all ages. Of these 27 Florida juvenile death sentences, all but six have been reversed and none has resulted in execution. Four of the six juveniles currently

on death row have not yet had their sentences reviewed by this Court. Letter from Professor Michael Radelet, Department of Sociology, University of Florida (July 14, 1997)(attached as Appendix D). Excluding the four death sentences that have not yet been reviewed, the reversal rate for juvenile death sentences finally resolved in Florida is 93%.

These figures indicate that while the death penalty for juveniles is not categorically unacceptable nationally, or in Florida, death sentences rarely are imposed on juvenile offenders and even more rarely carried out. At the very least, Florida's standards of decency have evolved to forbid the execution of juvenile offenders except in extreme cases.[13]

The present case is not an extreme case. The aggravating factors are neither numerous nor compelling, and the case for mitigation is substantial. The death penalty is not the appropriate punishment for this felony murder by a drug-impaired 17-year-old from a dsyfunctional family background. Unlike hardened adult criminals, Ryan has not yet had the opportunity to "age out" of the effects of his dysfunctional childhood.

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[13]The only two juvenile death sentences that have been affirmed by this Court and still remain in force were for a contract murder, Bonifay v. State, 680 So. 2d 413 (Fla. 1996), and for a double murder, LeCroy, both by seventeen-year-old defendants. See also Appendix D.

Furthermore, the 11-1 death recommendation and resulting sentence are faulty because the jury's recommendation was tainted by improper prosecutorial argument. See Point I. This Court should reverse Ryan Urbin's death sentence and remand for imposition of life imprisonment with no possibility of parole.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Point I, reverse for a new penalty proceeding; Point II, remand for resentencing; Point III, vacate appellant's death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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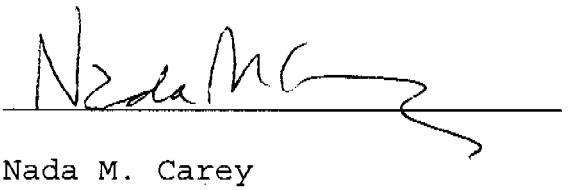
CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished to Richard B. Martell, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to appellant, RYAN J. URBIN, #136597, Florida State Prison, Post Office Box 181, Starke, Florida 32091, on this 22nd day of July, 1997.



Nada M. Carey