IN THE SUPREME COURT OF FLORIDA

PAUL ANTHONY BROWN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 89,537
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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_____/

PRELIMINARY STATEMENT

The record on appeal consists of thirteen volumes, 1,676 pages consisting of various pretrial motions, Appellant's murder trial by jury commencing October 19, 1996, subsequent post- trial hearings, and proceedings on the underlying felonies. Appellant will refer to this portion of the record using the symbol (T). The portion of the record containing the pleadings consists of one volume and 141 pages. Appellant will refer to this portion of the record using the symbol (R). The record also contains a supplemental record (one volume, ten pages), which will be referred to using the symbol (SR).

Counsel will refer to Paul Anthony Brown as "Appellant", "Brown", or "Paul". Appellant will refer to the State of Florida as the "State" or the "prosecution".

STATEMENT OF THE CASE

On April 6, 1993, the Fall Term Grand Jury in and for Volusia County, Florida returned an indictment charging Paul Anthony Brown with first-degree murder. (R4) The indictment alleged that Appellant and a co-defendant, Scott Jason McGuire, murdered Roger Hensley on November 5, 1992. On July 31, 1996, Appellant was transported to Volusia County from the federal penitentiary at Allenwood, Pennsylvania. (R5) At the first appearance held on that date, the Office of the Public Defender, Seventh Judicial Circuit was appointed to represent Appellant. That office filed a motion to withdraw and as grounds cited the prior representation of the co-defendant and Appellant's desire to dispose of the murder charge pursuant to a demand under the Interstate Agreement on Detainers. (R6-7) Counsel from outside of the Public Defender's Office was appointed to represent Appellant on August 5, 1996. (R9)

Appellant filed a motion to suppress certain statements he made to members of the Federal Bureau of Investigation after his arrest on November 9, 1992. (R40) At a hearing held on October 10, 1996, the trial court denied the motion, finding that the statements were voluntary. (T88-90, 93, 97) Other pre-trial motions were filed by the Appellant. Only some of these are pertinent to this appeal and will be addressed individually in the argument portion of the brief.

On October 14, 1996, the case was tried by a jury before the Honorable R. Michael Hutcheson, Circuit Judge. (T157-1317) The jury returned a verdict of guilty of First Degree Premeditated Murder and First Degree Felony Murder on October 18, 1996. (R77; T1310)

The case proceeded to a penalty phase on October 23, 1996. (T1318) During these proceedings the State presented testimony of a brother and a sister of Mr. Hensley's. (T1360,1364) Appellant called his uncle and his grandmother as witnesses. (T1373,1375)

Appellant objected to the instruction on heinous, atrocious, and cruel and the instruction on cold, calculated, and premeditated. (T1391) Following deliberations, the jury returned with a recommendation of death by a vote of 12-0. (R83; T1448)

The trial court sentenced Paul Anthony Brown to die by electrocution. (R116) The court filed findings of fact in support of the imposition of the death penalty. The trial court found four aggravating circumstances: (1) prior violent felony conviction; (2) felony murder merged with pecuniary gain; (3) especially heinous, atrocious, or cruel; (4) heightened premeditation. (R108-112)

On October 8, 1996, the State of Florida filed an information in this matter charging Appellant with the additional offenses of Armed Robbery with a Deadly Weapon and Armed Burglary. (R49) The next day, the prosecution filed a motion to consolidate the new charges with the offense of First Degree Murder alleged in the indictment. (R51) The trial court orally denied the State's motion to consolidate at a hearing held on October 10, 1996. (T135) Subsequent to the completion of the trial on first-degree murder, Appellant filed a motion to dismiss the new charges alleging a double jeopardy bar. (R117) After the court denied the motion to dismiss, Appellant entered a plea of no contest to both the robbery and the burglary charges, reserving his right to appeal the trial court's ruling on the motion to dismiss. (T1659, 1661) He was sentenced to two terms of 17 years as a habitual offender in the State of Florida Department of Corrections. The sentences were to be concurrent with each other and concurrent to the sentence of death previously imposed. (R 121-131; T1673)

Appellant filed a timely notice of appeal on December 9, 1996. This brief follows.

STATEMENT OF THE FACTS

In November of 1992, Roger Hensley was a cement finisher and mechanic employed by Gemstone Concrete Coatings, a company based in Largo, Florida. He was assigned to do a job in Ormond Beach, Florida, resurfacing walkways at a timeshare resort known as Plantation Island. While he was performing that task, he also resided at the resort in room # 223. (T702-704) On the evening of November 5, 1992, Mr. Hensley encountered Appellant and Scott McGuire outside of a bar in the Main Street area of Daytona Beach, Florida. (T859, 1117) The trio drove around in Hensley's white Nissan truck for a short while then proceeded to Mr. Hensley's temporary residence at the Plantation Island. (T862, 1117) After arriving at Hensley's residence, the three drank beer, smoked marijuana, and discussed the possibility of Appellant and Mr. McGuire working for Mr. Hensley. There was also some discussion of each other's sexual orientation. (T864, 1119)

The following morning at approximately 10:00, Mr. Hensley's body was discovered on the floor of the unit's bedroom. (T659) Officer James Gogarty and Detective Henry Ostercamp of the Ormond Beach Police Department responded to the scene of the homicide. (T676, 800) They were joined at the scene by Steve Miller and Leroy Parker of the Florida Department of Law Enforcement. Two knives were found in the apartment. A knife located in the open area of the living room appeared to be clean. The second knife, which had a red substance on it was discovered underneath a cushion on the couch located in the same area. (T803, 809-810) A green leafy substance in a plastic baggy, several Budweiser beer bottles, and a drinking glass were also located in the living room area of room 223. (T686, 1002) The employees of the Florida Department of Law Enforcement photographed bloody shoe prints, took photographs of blood spatters, and collected fingerprints from the crime scene. (T997, 1022)

After leaving Plantation Island in the early morning hours of November 5, Appellant and McGuire departed the Daytona Beach area and headed north. (T875, 124) They stopped at a Texaco convenience store in Morrow, Georgia and put approximately $11.00 of gas in Hensley's truck. Appellant went into the store and told Audrey Hudson, the clerk, that they did not have the money to pay for the gas, but would return shortly with the money. (T708) Appellant left McGuire's Florida identification card with the clerk. Ms. Hudson then called the local police department. When David A. Erickson of the City of Morrow Police Department arrived, Hudson turned McGuire's identification over to the officer. (T713)

McGuire and Appellant continued their northerly trek until they reached Macon County, Tennessee. McGuire left the area the next day and had no further contact with Appellant until the trial of this matter. (T877, 1126) Within the next day or two, Appellant was arrested on unrelated charges by Tennessee law enforcement authorities and agents of the Federal Bureau of Investigation. In the area of Appellant's arrest, a white Nissan truck and a wage statement of Roger Hensley were located. (T742) The FBI contacted Gemstone Concrete and were informed that the truck had been in the Hensley's possession prior to his murder in Daytona Beach, Florida. (T746)

While in the custody of the FBI agents, Appellant informed the agents that he and an individual named "Scott" had killed a white male in Daytona Beach. (T758-763,790-793) Mr. Brown told the agents that in October of 1992, he had traveled to Daytona Beach from Murfreesboro, Tennessee. He had met "Scott" and they had stayed together for a couple of weeks at motel in the Daytona area. Brown and Scott discussed Brown's desire to leave Daytona Beach. Brown's problem was a lack of transportation. Additionally, Brown had no valid proof of identification. Scott suggested that they go to a gay bar, meet someone and kill him

for his vehicle. Pursuant to this plan, the duo located a man who drove them in his white truck to his "expensive" motel room. After smoking some "crack" cocaine, the man went into his bedroom and laid down. At Scott's insistence, he and Appellant each got a knife out of the kitchen and walked into the man's bedroom. The man then asked Brown to lay down with him and "do some things". Brown declined and then stabbed the man two or three times in the chest and once in the back. When the man rolled onto the floor, Scott reached down and slit his throat. Brown noticed that Scott tried to wipe his fingerprints off of the knives and other items in the motel room. After Appellant removed $20.00 from the dead man's wallet, they found the keys to the truck and left town heading north. (T759-763)

Brown further related that they stopped near Atlanta at a Texaco station and put gas in the truck. They did not pay for the gas but Appellant left Scott's Florida identification card as a show of good faith. After arriving at a farmhouse in Lafayette, Tennessee, the two had an argument and Scott left the morning of November 7. Brown gave the FBI a description of Scott. (T764-766) He also stated that he thought Scott's last name began with an "M". (T759)

Mr. Brown initialed and signed a statement prepared by an FBI agent which summarized the account he gave at the time of his arrest. Some personal items, including a pair of basketball shoes were taken from Brown when he was arrested. (T751) At the time the shoes were seized, Mr. Brown stated that he had worn the shoes for a "long time". (T793)

In January of 1993, Agent Miller and Detective Osterkamp located Scott Jason McGuire at the Volusia County Branch Jail. (T822) Initially, McGuire told the officers that he had never gone to a motel room where someone was killed. After being "scared" by the interrogating officers, McGuire gave a different account of the first week of November, 1992. (T878) In return, Mr. McGuire was allowed to enter a plea to the reduced charge of second-degree murder,

was sentenced to a term of forty years in the State of Florida Department of Corrections, and agreed to testify at Appellant's trial. (T879)

According to McGuire, he and Appellant became acquainted sometime in October of 1992. During the time they spent together in the Daytona Beach area, the two consumed large amounts of alcohol and did "crack" cocaine on a daily basis. (T856, 884) At sometime during this friendship, Brown purchased McGuire's Florida identification card from McGuire. (T874) They had discussions about Appellant returning to Tennessee, including Appellant's offer to pay McGuire $1,000.00 to drive him there. (T857-8) On November 4th or 5th, McGuire and Brown were walking around the Main Street section of Daytona "looking for a car". (T858) Appellant motioned McGuire over to a white pick-up truck, where he was talking to another man. An invitation was extended to go to this man's apartment to drink some beer. (T860)

After arriving at the apartment, the group drank beer, smoked marijuana, and discussed possible employment. The man informed McGuire and Brown that he was homosexual. They in turn responded that they were bisexual. The individual invited Brown to sleep with him and walked into the bedroom. Brown then signaled McGuire to the unit's balcony. He told McGuire that he was going to shoot the man and steal his truck. McGuire disapproved, stating that the gun would make too much noise and besides, he just wanted to leave. (T865-6) When they returned to the living room, Brown went into the kitchen and came out carrying two knives. He tried to hand one to McGuire who threw it to the floor. Brown indicated that he would handle things and proceeded into the bedroom. McGuire heard what he discerned to be stabbing sounds and something to the effect of "no". (T868-9) He looked into the bedroom and saw the man's bloodied body on the floor. Brown found the keys to the truck and a $20.00 bill before the two left town in the truck. McGuire tried to wipe all of his fingerprints off any items in the

apartment before leaving. (T870-71)

Appellant's trial testimony provided a somewhat different version of the events leading to the death of Roger Hensley. Mr. Brown came to Daytona Beach in the fall of 1992 for a vacation. He and Mr. McGuire became friends and spent most of their time drinking, doing "crack" cocaine, and going to strip clubs. (T1112, 1115) On the day they met Roger Hensley, they had gone to get McGuire's van at the house of a friend of McGuire. After they were told that the van had been towed away, they picked up some beer and whiskey McGuire had left at the house and departed. From there they took a bus to the Main Street area. Mr. McGuire struck up a conversation with an individual who was offering him a job. All three then proceeded to this man's motel room. (T1116-1117) Appellant was very intoxicated and went to sleep on the couch in the living room. He was awakened by McGuire shaking Brown's arm. McGuire was standing next to the couch with a blood-covered knife in his hand. Brown got up and walked into the adjacent room where he saw that McGuire had stabbed the man in the back. (T1120-1121) McGuire then lifted the man by his hair and tried to cut his throat.

Brown left the room and was walking down the sidewalk away from the motel when McGuire pulled alongside and told Brown to get into the truck. As they drove out of town, McGuire told Appellant that if Appellant ever told anyone what had happened at the motel room, McGuire would frame Brown for the murder. (T1123-4)

On the trip north, they stopped at a gas station and McGuire filled the truck with gas. Appellant went inside and threw McGuire's Florida identification card at the attendant. (T1125) The two drove away without paying and continued north until they reached Macon County, Tennessee. When they reached Tennessee they met an uncle of Appellant. That night they went into Nashville and did cocaine and drank beer. (T1125-1126) Appellant and McGuire split up

within the next day or two.

Mr. Brown testified that he did not make the statements attributed to him by the FBI agents who arrested him. (T1131) He stated that the initials on the statements prepared by the FBI are his initials but he did not remember putting them on the statement. (T1134)

PENALTY PHASE

Paul Brown's mother, Peggy Lee Brown, was not married when Appellant was born. Mr. Brown's father refused to marry Ms. Brown so her son lived initially with his maternal grandmother, Ora Lee Moore. Because she did not feel that her daughter could raise Appellant, Mrs. Moore tried to convince her daughter to allow her to adopt him. (T1376) Though unsuccessful in this effort, she tried to keep Appellant at her home, hoping to provide some stability for the child during his formative stages. Throughout his childhood, Paul lived alternately with his grandmother or the man with whom Brown's mother was cohabiting at the time.

Despite the frequent changes in residence, Brown was well behaved as a child and considered to be a "pretty nice kid" by his uncle, Donald Terrill Brown. (T1374) However, both Donald Brown and Ms. Moore noticed a change in Appellant after his mother married an individual named Beaufort Adams. (T1374, 1379) They noticed that after Mr. Adams came into Appellant's life, Appellant began to get into trouble and was led astray by Mr. Adams. (T1375, 1379)

Mr. Adams was absent periodically from the household due to obligations owed to the Tennessee penal system. (T1379) Due to Mr. Adams' periodic trips to the prison system and his otherwise irresponsible lifestyle, frequently it would be necessary for Mrs. Moore to retrieve her abandoned grandson from a former residence. (T1379) On other occasions, Brown's mother and Mr. Adams would sneak over to Mrs. Moore's house, snatch Appellant and disappear with the

child. (T1378)

Unfortunately, when Mr. Adams was with Paul Brown's mother, there was frequent fighting. As a result, Adams "kept her eyes black". (T1379) During this time, Paul's mother abused alcohol and used illicit drugs. Later, these problems culminated in the commission of murder which sent her to the Tennessee prison system. (T1380)

SUMMARY OF THE ARGUMENT

Appellant contests the applicability of the HAC and CCP aggravating factors. The trial court's conclusions regarding how the victim died is based on mere speculation. There was no eyewitness to the murder. Appellant attacked the victim as he lay in bed. The victim may have even been asleep. The stabbing was quick and unexpected. The victim had no defensive wounds and probably died in a matter of minutes. The victim may have been unconscious even before then. The victim did not endure the requisite prolonged suffering. The victim had been drinking and using drugs. Additionally, Appellant lacked the requisite intent to torture the victim. Instructing the jury on this inapplicable aggravating factor (as well as the inappropriate CCP instruction) tainted the jury's recommendation.

In his attack on the "heightened premeditation" (CCP) aggravating factor, Appellant points out that the evidence supports the planning of a robbery, but not a murder. Discussion of killing Hensley began after the two co-defendants arrived at Hensley's apartment. The weapon used in the murder was obtained from the apartment's kitchen. The murder was a crime of opportunity and was not the product of a cool, calm reflection. Additionally, Appellant's mind was clouded with drink and drug.

Striking the two invalid aggravators (HAC and CCP) leaves only two valid aggravating factors. Appellant committed the murder for pecuniary gain and during the commission of a felony (which the trial court appropriately merged into one circumstance to avoid improper doubling). Appellant's prior violent felony conviction is for the crime of "assault with intent to commit armed robbery." When compared to the substantial prior records of the average capital defendant, Appellant's criminal history pales in comparison. The remaining valid aggravating factor is present in almost every capital murder considered by this Court. The two valid

aggravating factors in this case are not compelling.

Additionally, Appellant was a young man at the time of the murder. He came from a dysfunctional family and had an extremely troubled youth. He had a history of alcohol and drug abuse. There is also the possibility that Scott McGuire, the co-defendant in this case, was the actual "bad actor". Nevertheless, Appellant's crime is not the most aggravated, least mitigated first-degree murder. Death is disproportionate in this case.

Appellant also attacks the standard jury instruction regarding the jury's proper role in rendering its verdict at the penalty phase. Finally, Appellant also attacks the constitutionality of Florida's sentencing scheme.

ARGUMENT

Paul Anthony Brown discusses below the reasons which, he respectfully submits, compel the reversal of his convictions and death sentence. Each issue is predicated on Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, and 22 of the Florida Constitution, and such other authority as is set forth.

POINT I

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

A. Introduction.

In finding that the murder was especially heinous, atrocious, or cruel, the trial court wrote:

> The victim was stabbed multiple times and had his throat cut and bled to death. The victim was stabbed three times near the heart, two times in the shoulder area, two times in the stomach area, two times in the back, had his throat slashed, and had other cuts, lacerations, and abrasions. The victim was alive and conscious during the infliction of these knife wounds and it took two or three minutes for all of the wounds to be inflicted on the victim and after the last wound was inflicted, the victim lived another couple of minutes. The victim was laying in his bed when first attacked and the victim got off the bed in an attempt to avoid the attack and moved around the bedroom attempting to get away from the defendant. This aggravating circumstance was proved beyond a reasonable doubt.

(R109)

The state must prove two separate and distinct elements in order to uphold this particular aggravating factor:

(1) the defendant must have deliberately inflicted or chosen a method of death with the

intent to cause extraordinary mental or physical pain to the victim; and

(2) the victim must have actually, consciously suffered such pain for more than a brief period of time.

See, e.g., Richardson v. State, 604 So.2d 1107 (Fla. 1992). The constitutional validity of this factor depends on judicially imposed limitations and applications. Espinosa v. Florida, 505 U.S. 1079 (1992). As with all aggravating circumstances, the state must prove each and every element beyond and to the exclusion of every reasonable doubt with competent, substantial evidence. Martin v. State, 420 So.2d 583 (Fla. 1982); State v. Dixon, 283 So.2d 1 (Fla. 1973). The state failed to meet its burden of proof in this case.

B. The Trial Court's Finding is Based on Mere Speculation Where There Was No Eyewitness.

This Court should bear in mind that there was no eyewitness to the murder. The evidence presents three scenarios of the murder, all of which conflict with one another. For purposes of this argument, Appellant accepts the evidence in the light most favorable to the state. [1] Appellant does not dispute the trial court's recitation of the number of stab wounds nor their locations. However, Appellant strongly disputes the balance of the trial court's conclusions regarding this particular aggravating factor. At the very least, the state failed to prove beyond a reasonable doubt that the murder occurred in the manner recited in great detail by the trial court.

At trial, Appellant's plea-bargaining co-defendant, Scott McGuire provided the most damaging evidence. After arriving at the apartment, the trio drank beer, smoked marijuana, and discussed consensual homosexual activity with one another. Roger Hensley, the victim, then invited Appellant to "sleep" with him and walked into the bedroom and remained out of

[1] See, e.g., Johnson v. State, 660 So.2d 637, 642 (Fla. 1995).

McGuire's view.. McGuire claimed that Brown then proposed a plan to shoot Hensley and steal his truck. McGuire claimed that he disapproved of the plan[2] and suggested that they leave. (T865-66) McGuire testified that Brown armed himself with a knife from the kitchen and entered the bedroom where Hensley was lying in bed and may have even dozed off. McGuire testified that he **heard** what he **discerned** to be stabbing sounds. McGuire also claimed that he heard something to the effect of "no." (T868-69) **Only then** did McGuire look into the bedroom where he saw Hensley's body on the floor. It is clear that Hensley was dead at that point.

It is clear from McGuire's testimony that he did not even see the attack on Hensley. McGuire "heard" stabbing sounds. He also "heard" something to the effect of "no." (T868-69) From this "eyewitness" testimony, the trial court postulated that the victim got off the bed in an attempt to avoid the attack and "moved around the bedroom attempting to get away from the defendant". (R109) The trial court's conclusion in this regard is imaginative, but is not supported by the evidence. The absence of an eyewitness that results in uncertainty as to details of the murder may result in the invalidation of an aggravating factor. See, e.g., Thompson v. State, 647 So.2d 824 (Fla. 1994) [CCP stricken where only witness saw defendant enter store and converse with clerk - witness looked away, heard a "pop", looked up, and saw defendant standing over victim].

The medical examiner's testimony adds little if anything to the state's case. The victim was stabbed multiple times and had his throat cut. However, there is no evidence that he was chased around the room with the defendant in hot pursuit, cutting and slashing the entire time. In fact,

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[2] McGuire specifically objected to using a gun pointing out that it would make too much noise. (T865-66)

the medical examiner admitted that the movement of the victim during the attack was "probably" of very short duration. (T1088) The medical examiner conceded that the victim suffered no defensive wounds. (T1087) His body was found right next to the bed. The body's location, in and of itself, refutes the trial court's fanciful theory. The evidence completely fails to support the trial court's version of the attack as set forth in the findings of fact. The state failed to prove that version beyond and to the exclusion of every reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973).

C. The Victim Did Not Endure Prolonged Suffering.

Even considering the evidence in the light most favorable to the state, it is abundantly clear that the victim had no advanced warning of the attack nor of his demise. He was asleep (or resting) on a bed when the attack began. (T1087) The attack came quickly and was completely unexpected by the victim. The HAC factor is unjustifiably found where the victim was killed without ever knowing that he was about to die. See, e.g., Maggard v. State, 399 So.2d 973 (Fla. 1981) [execution-style murder not HAC where victim was killed without ever knowing he was about to die]; and Robinson v. State, 574 So.2d 108 (Fla. 1991) [HAC disapproved where victim was kidnapped, raped, and robbed before being shot because co-defendant assured the victim during the ordeal that she would not be killed]. The attack in the instant case was sudden. Hensley's death was quick. This was not a case where the victim was bound, gagged, and **then** stabbed numerous times. See, Finney v. State, 660 So.2d 674 (Fla. 1995) [Medical examiner said with certainty that the victim was alive throughout the attack and ultimately died from drowning in her own blood - victim was **conscious** and felt at least the first few stab wounds]. In contrast, Hensley may have even been asleep at the time of the attack. Additionally, his mind was clouded

from alcohol and drug use. The intoxication of the victim is a proper consideration in the inapplicability of this particular aggravating factor. See, e.g. Herzog v. State, 439 So.2d 1372 (Fla. 1983).

Prolonged suffering is necessary in order to support a finding of this aggravating factor. The entire attack in this case was completed in a matter of two or three minutes. The victim was stabbed three times in the heart, any one of which would have been fatal. The victim's throat was also cut. The medical examiner testified that, at most, the victim lived only two or three minutes after any one of these fatal wounds. Unconsciousness undoubtedly came even earlier.

The trial court's written finding seems to portray the murder as a protracted affair. Closer scrutiny reveals that even the trial court recognized that the attack took "two or three minutes for all the wounds to be inflicted ... and after the last wound was inflicted, the victim lived another couple of minutes." (R109) What the trial court fails to recognize is the order in which the wounds were inflicted. The victim could have lived only a couple of minutes after being stabbed in the heart or having his throat cut. The substantial, competent evidence indicates that, in all likelihood, the victim was dead within three minutes of the commencement of the attack. He was probably unconscious even before then. The state failed to prove the requisite **prolonged** suffering mandated by this particular aggravating circumstance.

D. Appellant Did Not **Deliberately Intend** to Cause Extraordinary Suffering.

A trial court's finding of this aggravating factor is justified only if the defendant deliberately intended to inflict a high degree of pain. See, Santos v. State, 591 So.2d 160 (Fla. 1991). In other words, the crime must be **both** conscienceless or pitiless **and** unnecessarily torturous to the victim. Richardson v. State, 604 So.2d 1107 (Fla. 1992). In Cheshire v. State,

568 So. 2d 908 (Fla. 1990), this Court said:

> ...The factor of heinous, atrocious or cruel is proper only in torturous murders - those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

It is abundantly clear that Appellant did not **intend** to inflict a high degree of pain and suffering. Appellant wanted to kill the victim quickly and expeditiously, so that he could steal the victim's truck and flee the state. Appellant did not want the victim to suffer, he wanted him to die. This is not the classic torture-murder. As in Shere v. State, 579 So.2d 86, 96 (Fla. 1991), four of the wounds were potentially fatal. The Shere court recognized that this in an indication that the defendants tried to **kill** the victim, not **torture** him.

Another fact this Court should consider, which the trial court did not, is Appellant's mental state at the time of the crime. Scott McGuire testified that he and the Appellant consumed large amounts of alcohol and smoked crack cocaine on a daily basis during the weeks before the murder. (T856, 884) That night at the apartment, Appellant, McGuire, and Hensley all drank beer and smoked marijuana. (T865-66) Police found physical evidence that corroborated the group's drug and alcohol use that night. (T686, 1002) Additionally, unlike the jury, the trial court had the benefit of a psychological evaluation indicating that Appellant's intellectual performance was in the "borderline" classification. (R94) Appellant's borderline intellectual functioning coupled with daily use of crack cocaine, consumption of mass quantities of alcohol, and marijuana would dramatically decrease Appellant's ability to form the requisite intent that his victim should suffer. See, e..g., Holsworth v. State, 522 So.2d. 348 (Fla. 1988) and Ross v. State, 474 So.2d 1170 (Fla. 1985) [heinousness resulted from the defendant's drug or alcohol

intoxication].

Another telling factor is the absence of defensive wounds. The medical examiner conceded that none of the wounds were defensive. (T1087) This is an important factor recognized by this Court in cases where the victim was stabbed. See, e.g., Campbell v. State, 571 So.2d 415, 418 (Fla. 1990) [circumstance established with proof that two victims stabbed together, and the decedent was stabbed twenty-three times over the course of several minutes and **had defensive wounds**]; Nibert v. State, 574 So.2d 1059, 1061 (Fla. 1990) [circumstance established with evidence that victim had seventeen stab wounds, **some of which were defensive wounds**, and the victim remained conscious throughout the stabbing]. Additionally, the State could not prove the order in which the wounds were inflicted. Bonifay v. State, 626 So.2d 1310, 1313 (Fla. 1993). [Medical examiner could offer no information about the sequence of the wounds and stated both that the victim could have remained conscious for a short time or rapidly gone into shock.]

Appellant's case is analogous to those where the defendant shot the victim many times with the intent to kill him. See, Kearse v. State, 662 So.2d 667, 686 (Fla. 1995) [victims sustained extensive injuries from numerous gunshot wounds, but no evidence that Kearse intended unnecessary and prolonged suffering]. Shere v. State, 579 So.2d 86, 95-96 (Fla. 1991) [HAC improperly found where victim killed by rapid succession of multiple gunshots from two weapons - four of the wounds were potentially fatal]. The fact that Appellant chose a knife in this particular case is of little import. As in the multiple gunshot cases, Appellant intended to dispatch his victim quickly without any prolonged, unnecessary, torturous suffering. He succeeded. The victim was dead in a matter of minutes and was probably unconscious even before then. While

multiple stab wounds frequently qualify a murder as HAC, such wounds do not necessarily render a homicide especially heinous, atrocious, or cruel. Demps v. State, 395 So.2d 501 (Fla. 1981) The state has failed to meet its burden of proof to establish this aggravating circumstance.

E. Giving the HAC Instruction Over Objection Tainted the Jury's Sentencing Recommendation.

At the charge conference during the penalty phase, defense counsel objected to the trial court's reading of the instruction on this particular aggravating factor. Defense counsel argued to the court, and later to the jury, that the evidence did not support the instruction. (T1391-94) The trial court rejected Appellant's argument and ultimately instructed the jury on the applicability of the circumstance. By doing so, the jury's unanimous death recommendation was tainted. The jury knew nothing of the large body of case law from this Court refining which first-degree murders meet this particular aggravating circumstance. To the average layman, i.e. these jurors, every murder is especially heinous, atrocious, or cruel. The trial court's reading of the instruction over timely and specific defense objection, guaranteed that the jury would conclude (erroneously) that the aggravating factor applied. Their resulting recommendation that Brown die for his crime was tainted by the instruction that they never should have even considered. Amend. VIII, U.S. Const.

A judge may properly instruct on all of the statutory aggravating circumstances, not withstanding evidentiary support. Straight v. Wainwright, 422 So.2d 827, 830 (Fla. 1982). The note to the judge contained in the Standard Jury Instructions in Criminal Cases, Second Ed. expressly states, "Give only those aggravating circumstances for which evidence has been presented", p.80 (emphasis added). In the instant case, the trial court did not instruct on all of the aggravating circumstances. The trial court elected to instruct on only those aggravating

circumstances which he believed were supported by the evidence. Therefore, Appellant contends that the trial court erred in instructing the jury on the aggravating circumstance of especially heinous, atrocious, or cruel where a timely objection was made and where there was no evidentiary support whatsoever for the instruction.

Under the Eighth Amendment, the trial court's error in weighing a factually unsupported aggravating factor, requires this Court to reweigh the valid aggravating and mitigating factors or to conduct harmless error review. Sochor v. Florida, 504 U.S. 527, 532, 539-40 (Fla. 1992). Constitutional harmless error review places the burden on the state, as the beneficiary of the error, to demonstrate beyond a reasonable doubt, that the error did not contribute to the conviction. Chapman v. California, 386 U.S. 18, 23-24 (1965); State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). In a case involving the weighing of an invalid aggravating circumstance, this Court must determine that the error did not contribute to the death sentence to find that the error was harmless beyond a reasonable doubt. Socher, 504 U.S. at 540.

In Bonifay v. State, 626 So. 2d 1310 (Fla. 1993), this Court held that it could not determine what effect the error in finding the factually unsupported HAC factor had in the sentencing process where factor was extensively argued to the jury. This Court vacated the death sentence and directed that a new sentencing proceeding be held with a new jury empaneled. Bonifay 626 at 1313. Similarly, Appellant's prosecutor extensively argued the factually unsupported HAC factor to the jury.

It is expressly submitted that giving the unsupported instruction over objection violated the Eighth Amendment, and that the presence of that legally improper instruction was confusing and misleading to the jury. It was nothing more than speculation that the victim died as the trial

court theorized. The trial court erred in detailing the events that led to the victim's death (as if the trial court were there) where there was no evidence introduced to support this version of events. The erroneous presence of this particular instruction lead the jurors to conclude, and reasonably so, that they were entitled to consider whether in their opinion this murder was especially heinous, atrocious, or cruel. The jury's death recommendation was based on this erroneous consideration. A lay person would inevitably, and erroneously, conclude that this murder was especially heinous, atrocious, or cruel. The trial court's instruction, over objection, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments. The resulting confusion and misapplication by the jury distorted the reasoned sentencing procedure required by the Eighth Amendment. As a result, the recommendation of the jury is unreliable and flawed. Therefore, this Court must vacate Appellant's death sentence with directions to hold a new sentencing proceeding with a newly empaneled jury.

POINT II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

In finding that the "heightened premeditation" aggravating factor applied, the trial court wrote:

> The defendant, prior to meeting the victim, decided to steal a motor vehicle to get to Tennessee. The defendant, while armed with a firearm, met the victim at or near a bar and went with the victim in the victim's truck to the victim's apartment full well intending to rob the victim and steal his truck. While at the victim's apartment, and after the victim went into his bedroom to go to bed, the defendant and co-defendant discussed in the balcony area robbing the victim of his motor vehicle and money. The defendant discussed with his co-defendant if the defendant should shoot the victim with the firearm the defendant brought with him, but decided the firearm would make too much noise. The defendant then went into the victim's kitchen and got two knives from the kitchen. The defendant then made a cutting or stabbing gesture to his co-defendant indicating that the defendant intended to kill the victim with the kitchen knives. The defendant then told the co-defendant to position himself so that if the victim tried to escape from the bedroom while the defendant was trying to kill him, that the victim could not get past the co-defendant to the outside door. The defendant then entered the victim's bedroom and stabbed him multiple times. After stabbing the victim, the defendant looked through the apartment and took cash from the victim's wallet and also obtained the victim's truck keys and then proceeded to steal the truck and travel to Tennessee. This aggravating circumstance was proved beyond a reasonable doubt.

(R109-10)

To avoid arbitrary and capricious imposition of the death penalty, a statutory aggravating factor "must genuinely narrow the class of persons eligible for the death penalty and must

reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983) (footnote omitted).

> Since premeditation already is an element of capital murder in Florida, Section 921.141 (5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder. Therefore, Section 921.141 (5)(i) must apply to murders more cold blooded, more ruthless, and more plotting than the ordinary reprehensible crime of premeditated first-degree murder.

Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990) (footnotes omitted)(emphasis added).

In Thompson v. State, 565 So.2d 1311, 1317-18 (Fla. 1990), this Court clarified the application of the cold, calculated, and premeditated murder aggravating factor:

> Thompson challenges the court's finding that the aggravating circumstance of cold, calculated, and premeditated murder is supported by the facts in this case. We agree with Thompson. Many times this Court has said that section 921.141 (5)(I) of the Florida Statutes (1987), requires proof beyond a reasonable doubt of "heightened premeditation." We adopted the phrase to distinguish this aggravating circumstance from the premeditation of first-degree murder. See, e.g., Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Heightened premeditation can be demonstrated by the manner of the killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or prearranged to commit **murder** before the crime began.

(emphasis added)

More recently, this Court has clarified that this particular aggravating circumstance has four elements.

> Under Jackson,[648 so.2d 85 (Fla. 1994)] there are four elements that must exist to establish cold, calculated premeditation. The first is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage."...

> Second, Jackson requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident."..... Third, Jackson requires "heightened premeditation" which is to say, premeditation over and above what is required for unaggravated first-degree murder... Finally, Jackson states that the murder must have "no pretense of moral or legal justification."... Our cases on this point generally establish that a pretense of moral or legal justification is any colorable claim based at least in part on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide....

Walls v. State, 641 So.2d 381, 387-88 (Fla. 1994).

The evidence presented by the state in Appellant's case is woefully inadequate to establish that Brown planned to murder Hensley before the crime began. The trial court's order wholly fails to articulate any credible evidentiary support for the conclusory finding of this aggravating factor. In fact, closer scrutiny of the trial court's written finding clearly demonstrates the **lack** of the requisite "heightened premeditation" to support a finding of this circumstance.

> The defendant, prior to meeting the victim decided to steal a motor vehicle [not to kill the victim] to get to Tennessee. The defendant, while armed with a firearm [not the murder weapon] met the victim at or near a bar and went with the victim.....full well intending to **rob** [not kill] the victim and steal his truck. While at the victim's apartment, and after the victim went into his bedroom to go to bed, the defendant and co-defendant discussed in the balcony area **robbing the victim of his motor vehicle and money**.....

(R109)(emphasis and editorial comments added). The discussion of killing Hensley began only after the two co-defendants had spent the better part of the evening with Hensley. Talk of murder began only minutes before the homicide, and after the trio had spent several hours continuing to drink and imbibe in marijuana.

Appellant does not contest the fact that he and McGuire fully intended to commit a

premeditated **robbery** of Roger Hensley. However, once they arrived at the apartment, they further clouded their minds with drink and drug. Appellant then armed himself with a knife he found **at the apartment.**[3] Yes, he decided to kill Hensley. But this decision was made literally minutes before the *fait accompli*. A plan to rob cannot satisfy the CCP requirement that the **murder** be planned in advance. See, Vining v. State, 637 So.2d 921 (Fla. 1994) [Although there is evidence that Vining calculated to unlawfully obtain the diamonds from Caruso, there is insufficient evidence of heightened premeditation to kill Caruso.]; Thompson v. State, 456 So. 2d 444, 446 (Fla. 1984)["No evidence was produced to set the murder apart from the usual hold-up murder in which the assailant becomes frightened or for reasons unknown shoots the victim either before or during an attempt to make good his escape."]; Gorham v. State, 454 So. 2d 556, 559 (Fla. 1984)["The record bears evidence that the robbery was premeditated in a cold and calculated manner, but that premeditation cannot automatically be transferred to the murder itself."]; Maxwell v. State, 443 So.2d 967, 971 (Fla. 1983) ["Here the evidence showed that Appellant killed Donald Klein intentionally and deliberately, but there was no showing of any additional factor to establish that the murder was committed in a 'single cold, calculated, and premeditated manner without any pretense of moral or legal justification' "].

> We cannot agree that the facts support that this murder was cold, calculated and premeditated. This aggravating factor requires a degree of premeditation exceeding that necessary to support a finding of premeditated first-degree murder. [citations omitted]. The only evidence presented or argued as to this factor was that Hardwick intended to rob the victim and that once he began to choke and smother her, it would have taken more than a minute for

[3] See, Geralds v. State, 601 So.2d 1157, 1164 (Fla. 1992), in which one factor cited in striking the CCP factor was that "the knife [used in the homicide] was a weapon of opportunity from the kitchen rather than one brought to the scene."

> her to die. The premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. What is required is that the murderer fully contemplate effecting the victim's death. The fact that a robbery may have been planned is irrelevant to this issue. Gorham v. State, 427 So.2d 723 (Fla. 1983) (fact that victim was shot five times does not support finding that murder exhibited heightened premeditation). On the facts presented here, we cannot say this factor was proved beyond a reasonable doubt.

Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984).

In considering the applicability of this particular aggravating factor, Castro v. State, 644 So.2d 987 (Fla. 1994) is particularly helpful.

> The relevant facts of this case are that Castro came to Ocala and drank heavily for several days. He decided to leave town and concluded that he needed to steal a car to do so. When Castro saw Scott [Castro's victim, not Appellant's co-defendant] coming out of an apartment, he introduced himself and the two drank together in the apartment. Castro left on the pretext of getting ten dollars. Instead, he retreived a steak knife from a neighboring apartment. When Castro returned, he saw Scott leaving the apartment, but convinced him to return. The two drank a beer, then Scott again decided to leave. Castro grabbed Scott by the throat and squeezed so hard that blood came out of Scott's mouth. Scott struggled and scratched, but Castro told him, "Hey, man, you've lost. Dig it?" Castro got the steak knife and stabbed Scott between five and fifteen times. The medical examiner testified that she did not know in what sequence the chest wounds were inflicted or whether Scott lost consciousness after the strangulation.

Castro, 644 So.2d at 989. This Court agreed with Castro that the trial court erred in finding CCP.

> ...While the record reflects that Castro planned to rob Scott, it does not show the careful design and heightened premeditation necessary to find that the murder was committed in a cold, calculated and premeditated manner...

Castro, 644 So.2d at 991. The facts in Appellant's case are practically identical. Like Castro,

Appellant needed to steal a car to leave a town where he had been drinking heavily for several days. Castro accompanied a stranger into his apartment where they drank together, as did Appellant and Hensley. Unlike Appellant, who armed himself with a kitchen knife in the victim's apartment, Castro even left to retrieve a steak knife from a neighboring apartment. If anything, Castro's premeditation exceeded Appellant's, especially in light of the fact that Castro strangled his victim prior to administering the multiple stabbing. See, also, Wyatt v. State, 631 So.2d 1336 (Fla. 1994) [CCP stricken even though Wyatt robbed pizza restaurant, put two victims in the bathroom, raped female victim, subsequently shot all three employees after they begged for their lives - And even warned final victim to "listen real close to hear the bullet coming" from the gun placed at his head.]

The evidence here suggests only that an armed robbery was planned by Brown and McGuire. The premeditation to commit the **robbery** was clearly a "heightened premeditation." The premeditation to kill was not. Talk of murder began **minutes** before the killing. When compared to other capital murders where this aggravating factor clearly applies, this Court must recognize that Appellant's crime is not the type for which this factor is reserved.

Hensley's murder was not the product of calm, cool reflection. Certainly, the robbery which McGuire and the Appellant began to plan earlier that day was the product of cool and calm reflection. However, the murder was a "spur of the moment" idea that the pair began discussing only minutes before the crime. This discussion began following a full day of drug and alcohol abuse which came on the heels of **weeks** of daily consumption of crack cocaine and alcohol. The drugs obviously had an effect on Appellant's "borderline" intellect. (R94) This Court has recognized that a defendant who engages in excessive use of drugs or alcohol may be deemed

incapable of forming the degree of premeditation required for this particular factor. See, e.g., White v. State, 616 So.2d 21 (Fla. 1993); See also, Penn v. State, 574 So.2d 1079 (Fla. 1991).

Appellant's crime is clearly not the product of a careful plan or prearranged design to **murder**. Counsel has already explained that McGuire and Appellant had a plan (although not a very "careful" one) to rob the victim. However, the decision to kill Hensley was not "careful" or "prearranged". The fact that the robbery may have been fully planned ahead of time does not qualify the crime for the CCP factor, if the plan did not also include the commission of the murder. See, e.g., Lawrence v. State, 614 So.2d 1092 (Fla. 1993). Hensley's murder was not accompanied by additional facts that rendered the homicide to be "execution style." See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) [extensive plan included murder of robbery victim]; Routly v. State, 440 So.2d 1257 (Fla. 1983) [burglary victim bound and transported to remote area before he was killed]; and Hill v. State, 422 So.2d 816 (Fla. 1982) [defendant made the decision to rape and murder the victim before he picked her up].

The state also failed to prove the requisite "heightened premeditation." The evidence clearly reflects that Hensley's death occurred in a matter of minutes, if not less than one minute. Multiple wounds do not prove this particular element. Blanco v. State, 452 So.2d 520 (Fla. 1984) [victim shot seven times]. A beating death with multiple wounds is also not necessarily CCP. See, e.g., King v. State, 436 So.2d 50 (Fla. 1983). Additionally, strangulation and asphyxiation without a prior plan to kill does not qualify. Hardwick v. State, 461 So.2d 79 (Fla. 1984).

The state has failed to meet its burden of proving this particular aggravating factor beyond and to the exclusion of every reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). The

killing was an impulsive act. The pair had a haphazard plan to rob Hensley, but not to kill him. The plan to kill Hensley originated after the pair had arrived at the apartment where the pair had further anesthetized their minds into a drunken stupor. The trial court's finding of this aggravating factor cannot stand.

Additionally, this Court must order a new penalty phase where the jury is not permitted to consider a clearly inapplicable aggravating circumstance. See, e.g., Bonifay v. State, 626 So.2d 1310 (Fla. 1993) and Omelus v. State, 584 So.2d 563 (Fla. 1991). See also, White v. State, 616 So.2d 21, 25 (Fla. 1993), in which this Court found that CCP "was not established beyond a reasonable doubt and that the jury should not have been instructed that it could consider this aggravating factor in recommending the imposition of the death penalty." Such a result is also dictated by Espinosa v. Florida, 505 U.S. 1079 (1992), in which the United States Supreme Court held that "if a weighing State [such as Florida] decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." Appellant's jury was permitted to weigh the inapplicable aggravating circumstance of CCP, and Appellant must therefore receive a new penalty trial. Amend. V, VI, VIII, and XIV U.S. Const.

POINT III

DEATH IS A DISPROPORTIONATE SENTENCE IN THIS PARTICULAR CASE.

When this Court reviews death sentences, it compares the case at hand with others involving similar facts.

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate, proportionality review 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) (citations omitted). Later, in Kramer v. State, 619 So.2d 274, 277 (Fla. 1993), this Court expanded on the quality of proportionality review that it conducts:

> While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional... we nevertheless are required to weigh the nature and quality of those factors as compared to other similar and reported death appeals.

The trial court found four aggravating circumstances, i.e., (1) prior violent felony [assault with intent to commit armed robbery]; (2) pecuniary gain; (3) HAC; (4) CCP. (R108-10) The evidence does not support the trial court's finding of HAC or CCP. See Points I and II. Therefore, only two valid aggravating factors remain. Appellant does have a prior violent felony conviction, and the murder was committed for financial gain. However, Appellant's prior conviction is the crime of "Assault With Intent to Commit Armed Robbery." (R108) Although Appellant's prior conviction is serious, it is not a major, significant offense in the realm of prior records of most capital murderers. Certainly, Appellant's prior record is not even close to that of

most capital defendants whose cases this Court routinely reviews. Appellant has no prior murder convictions in any degree nor any attempted homicides. Appellant committed no aggravated batteries. Appellant's prior record **pales** in comparison to other capital defendants.

The remaining valid aggravating factor (pecuniary gain) is not very compelling either. This factor is present in the vast majority of capital murders. In fact, this factor is probably present in most crimes committed against society. While Appellant's crime is not quite the level of "a robbery gone bad", it is not far from it.

This Court must weigh these two generic aggravating factors found in almost every garden-variety, felony murder against substantial, valid mitigation. Appellant and his co-defendant had been drinking and using cocaine prior to meeting up with Hensley that night. After going to Hensley's apartment, both admitted they drank more beer and the trio smoked marijuana. (R109) While investigating the crime scene, police found cannabis and empty beer bottles in the living room area of the apartment. (T686, 1002)

The trial court rejected the statutory mitigating factor that Appellant's capacity to appreciate the criminality of his conduct or to perform his conduct to the requirements of law was substantially impaired. (R110-11) The trial court based his conclusion on Appellant's actions before, during, and following the murder. The undersigned counsel submits that Appellant's actions belie the trial court's conclusion rather than support it. Undoubtedly, Roger Hensley's murder was another senseless crime committed during a drug and alcohol stupor. A sober, straight-thinking criminal defendant (with no significant prior, violent criminal history) would not have acted as Appellant did.

Paul Anthony Brown was twenty-five years old at the time of the crime. The trial court

rejected Appellant's age as a valid mitigating factor. The trial court concluded that Appellant was of normal intelligence, without any mental defect, and of average emotional maturity. (R111) The trial court does not appear to recognize that he has the discretion to find Appellant's age as mitigating, in spite of Appellant's "normalness." Although Appellant was not a juvenile at the time of the offense, he was still a young man who had a very troubled youth. A glance at Appellant's pre-sentence investigation report, reveals that Mr. Brown never really had a chance to mature.

The trial court also dismisses the co-defendant's role as minimal, placing the entire blame for the murder on the Appellant. (R110-12) Appellant submits that this Court should be extremely careful in the consideration of proportionate punishment where co-defendants are involved. All too often, capital cases are a race to the courthouse where the first co-defendant to plead receives the benefit of a wonderful bargain. Too often and often too late, subsequent investigation reveals that the death-sentenced co-defendant was telling the truth and the actual "bad actor" has been paroled. Appellant points out the problems and pitfalls involved in these type of cases only to emphasize the care and caution this Court should exercise in deciding who lives and who dies. The concept of equal punishment for equal culpability in capital cases is an important one. See, e.g., Slater v. State, 316 So.2d 539, 542 (Fla. 1975). Although the trial court accepted the version of the facts exonerating Appellant's co-defendant, the issue is not so clear cut. This Court should exercise more caution in accepting without question the plea-bargaining co-defendant's version of the crime.

The trial court gives short shrift to the valid, nonstatutory mitigating evidence. (R112-13) Without explanation, the trial court "[a]ddress[es] both family background and the defendant's

use of alcohol and drug abuse ....." (R112) After dismissing the three proposed statutory mitigating factors, the trial court appears to consider (as one mitigating factor) the "catch-all" mitigating circumstance:

> Any other aspect of the defendant's character or record, and any other circumstance of the offense.
>
> The defendant has asked the Court to consider as non statutory mitigating factors, family background; defendant's alcohol and drug abuse; and the state's treatment of the co-defendant, who plead and testified against the defendant.
>
> Addressing both family background and the defendant's use of alcohol and drug abuse, the testimony presented to the jury during the penalty phase indicated that the defendant was born out of wedlock, lived with an alcohol addicted mother, and lived with his mother and her series of boyfriends, who were physically abusive to the defendant's mother, but not to the defendant. Also one of the mother's boyfriends was a criminal and that boyfriend got the started on petty crimes when he was a juvenile. It is also found that the defendant abused alcohol and drugs prior to the commission of this murder. This Court finds these non statutory mitigating factors to exist and the Court has given them weight in consideration of the defendant's sentence.

(R111-12) It is clear that the trial court is minimizing Appellant's poor childhood in pointing out that Appellant's mother's series of boyfriends were physically abusive to the mother, "but not to the defendant." (R112) In minimizing this important evidence in mitigation, the trial court appears to be making the same mistake as the trial court in Campbell v. State, 571 So.2d 415 (Fla. 1990). The Campbell judge belittled evidence of Campbell's abusive upbringing, since it occurred "so many years ago." This Court correctly pointed out the long-term effects of an abusive childhood which plagues an individual for the rest of his life. The trial court's treatment of the substantial, valid mitigation in Appellant's case violates this Court's pronouncements in Campbell,

supra, and Crump v. State, 22 Fla.L.Weekly S481 (Fla.S.Ct. July 17, 1997) [" By characterizing this evidence in broad generalizations - 'a few positive character traits' and 'mental impairment' - the trial judge violated Campbell."]

Although Appellant's crime certainly justifies a sentence of life in prison without possibility of parole, a death sentence is disproportionate when applied to this case. Appellant's crime is not among the most aggravated and most unmitigated of first-degree murders. Hensley's murder is one that "hardly lies beyond the norm of hundreds of capital felonies this Court has reviewed since the 1970s." Kramer v. State, 619 So.2d 274 (Fla. 1993).

It is helpful to look at other, similar cases where this Court has reduced the death sentence to life imprisonment. In Terry v. State, 668 So.2d 954 (Fla. 1996), this Court reduced Terry's sentence to life despite two aggravating factors (prior violent felony conviction and felony murder/pecuniary gain [identical to Appellant's valid aggravators]) and very little mitigation. In fact, the trial court found no statutory mitigation and rejected Terry's minimal non-statutory mitigation. This Court concluded, in its proportionality review "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." Although the murder took place during the course of a robbery, the circumstances surrounding the actual shooting were unclear. See also, Robertson v. State, 22 Fla.L. Weekly S404 (Fla.S.Ct. July 3, 1997) [two valid aggravators - felony murder and HAC, yet death was disproportionate because of defendant's age, impaired capacity, abused childhood, mental illness, and borderline intelligence.]; Sinclair v. State, 657 So.2d 1138 (Fla. 1995) [where appellant robbed and fatally shot a cab driver twice in the head - only one valid aggravator, no statutory mitigators, and minimal nonstatutory mitigation, this Court vacated the death sentence.];

Thompson v. State, 647 So.2d 824, 827 (Fla. 1994) [appellant walked into a sandwich shop, fatally shot attendant through the head and robbed the establishment - this Court vacated the death sentence finding only one valid aggravator (during the commission of a robbery) and "significant" non-statutory mitigation.]; Wilson v. State, 493 So.2d 1019 (Fla. 1986) [death penalty disproportionate even though stabbing death was HAC, Wilson had prior conviction for a violent felony, and the jury recommended death.]; McKinney v. State, 579 So.2d 80 (Fla. 1991) [HAC and CCP aggravators unsupported by the evidence leaving only felony murder in aggravation; death disprportionate where defendant had no significant history of prior criminal activity, mental deficiences, and a history of alcohol and drug abuse.]; 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]; and Proffitt v. State, 510 So.2d 896 (Fla. 1987) [during the commission of a burglary, defendant stabbed victim while lying in bed - this Court reduced sentence, pointing out that *inter alia*, "Proffitt had been drinking and probably obtained the knife on the premises"].

To be sure, the instant case is not the most aggravated and least mitigated murder to come before this Court. Only two valid aggravating circumstances exist. Neither is very compelling. Appellant's prior record is insubstantial when compared to other capital defendants that appear before this Court. Appellant had been drinking and smoking crack cocaine during the weeks prior to the murder. He was drinking and drugging the night of the murder. Appellant came from an extremely dysfunctional family. The precise circumstances of the murder come down to a swearing match between two culpable co-defendants. In view of all of these circumstances, the sentence of death in this case is disproportionate when compared with other capital cases. This

Court should vacate Paul Brown's sentence of death and remand for the imposition of life imprisonment without possibility of parole.

POINT IV

THE JURY INSTRUCTIONS IMPROPERLY DENIGRATED THE JURY'S TRUE ROLE IN SENTENCING PAUL BROWN TO DEATH IN CONTRAVENTION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The trial court's preliminary instructions at the beginning of the penalty phase informed the jury that:

> The final decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant.

(T1352-1353)(emphasis supplied). After hearing evidence and argument at the penalty phase, the trial court instructed the jury, inter alia:

> Ladies and Gentlemen of the Jury: It is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence .....

(T1434)(emphasis supplied).

The standard instruction is an inaccurate and misleading characterization of Florida law, because nothing in the ordinary meaning of the words "advisory" or "recommendation" suggests that the advice or recommendation in question must be given "great weight." Rather, the common and ordinary meaning of these words would lead jurors to believe that, although the trial

judge may consider their "advice" or "recommendation", the judge is free to disregard it. The trial judge, however, is not free to disregard the jury's recommendation "unless the facts suggesting a [contrary sentence are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); see also Grossman v. State, 525 So.2d 833, 839 n.1. (Fla. 1988).

The repeated, misleading characterization of the jury' s verdict as only advisory or a recommendation has the concrete effect of diminishing jurors' sense of responsibility. Empirical studies of capital jurors have found that "most jurors tended to remember vividly the portions of the judge's instructions that indicated the jury's decision was only a 'recommendation' " and that jurors often seized on this aspect of the instructions during deliberations to alleviate their own sense of responsibility and to persuade other jurors to vote for the death penalty. Joseph L. Hoffman, *Where the Buck? - Juror Misperceptions of Sentencing Responsibility in Death Penalty Cases* 70 Ind.L.J. 1137, 1147, 1150 (1995). The standard instructions therefore improperly diminished the jury's responsibility for its sentencing decision in violation of Caldwell v. Mississippi, 472 U.S. 320 (1995). See also Mann v. Dugger, 844 F.2d 1446, 1458 (11th Cir. 1988) (en banc). [4]

[4]Although this Court has held repeatedly that the standard instructions do not violate Caldwell, Appellant respectively submits that those decisions should be reconsidered. See, e.g., Johnson v. State, 660 So.2d. 637, 647 (Fla. 1995); Sochor v. State, 619 So.2d 285, 291 (Fla. 1993); Combs v. State, 525 So. 2d 853, 857-58 (Fla. 1988).

POINT V

SECTION 921.141, FLORIDA STATUTES IS UNCONSTITUTIONAL UNDER BOTH THE FLORIDA AND THE UNITED STATES CONSTITUTIONS.

1. The Jury

a. Standard Jury Instructions

The jury plays a crucial role in capital sentencing. Its penalty verdict carries great weight. Nevertheless, the jury instructions are such as to assure arbitrariness and to maximize discretion in reaching the penalty verdict.

I. Heinous, Atrocious, or Cruel

The instruction does not limit and define the "heinous, atrocious, or cruel" circumstance. This assures its arbitrary application in violation of the dictates of Maynard v. Cartwright, 486 U.S. 356 (1988); Shell v. Mississippi, 498 U.S. 1 (1990); and Espinosa v. Florida, 505 U.S. 1079 (1992). The "new" instruction in the present case (R80) violates the Eighth Amendment and Due Process. The HAC circumstance is constitutional where limited to only the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Espinosa, supra. Instructions defining "heinous," "atrocious," or "cruel" in terms of the instruction given in this case are unconstitutionally vague. Shell, supra. While the instruction given in this case states that the "conscienceless or pitiless crime which is unnecessarily torturous" is "intended to be included," it does not limit the circumstance only to such crimes. Thus, there is the likelihood that juries, given little discretion by the instruction, will apply this factor arbitrarily and freakishly.

The instruction also violates Due Process. The instruction relieves the state of its burden

of proving the elements of the circumstances as developed in the case law.[5]

ii. Felony Murder

This circumstance fails to narrow the discretion of the sentencer and therefore violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. Hence, the instruction violates the Cruel and Unusual Punishment and Due Process Clauses of the state and federal constitutions. See, Blanco v. State, 22 Fla.L.Weekly S575 (Fla. September 18, 1997) (Anstead, J., concurring).

b. Florida Allows an Element of the Crime to be Found by a Majority of the Jury.

Our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. See State v. Dixon, 283 So.2d 1 (Fla. 1973). The lack of unanimous verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the state constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution. See Adamson v. Rickets, 865 F.2d 1011 (9th Cir. 1988) (en banc); contra Hildwin v. Florida, 490 U.S. 638 (1989).

c. Advisory Role

The standard instructions do not inform the jury of the great importance of its penalty verdict. The jury is told that their recommendation is given "great weight." But in violation of the teachings of Caldwell v. Mississippi, 472 U.S. 320 (1985) the jury is told that its "recommendation" is just "advisory." See Point IV.

2. Counsel

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[5] For example, the instruction fails to inform the jury that torturous intent is required. See McKinney v. State, 579 So.2d 80, 84 (Fla. 1991) ("The evidence in the record does not show that the defendant intended to torture the victim").

Almost every capital defendant has a court-appointed attorney. The choice of the attorney is the judge's -- the defendant has no say in the matter. The defendant becomes the victim of the ever-defaulting capital defense attorney.

Ignorance of the law and ineffectiveness have been the hallmarks of counsel in Florida capital cases from the 1970's through the present. See, e.g., Elledge v. State, 346 So.2d 998 (Fla. 1977) (no objection to evidence of nonstatutory aggravating circumstance). Failure of the courts to supply adequate counsel in capital cases, and use of judge-created inadequacy of counsel as a procedural bar to review the merits of capital claims, cause freakish and uneven application of the death penalty. Notwithstanding this history, our law makes no provision assuring adequate counsel in capital cases. The failure to provide adequate counsel assures uneven application of the death penalty in violation of the Constitution.

3. The Trial Judge

The trial court has an ambiguous role in our capital punishment system. On the one hand, it is largely bound by the jury's penalty verdict under, e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975). On the other, it has at times been considered the ultimate sentencer so that constitutional errors in reaching the penalty verdict can be ignored. This ambiguity and like problems prevent evenhanded application of the death penalty.

4. The Florida Judicial System

The sentencer was selected by a system designed to exclude African-Americans from participation as circuit judges, contrary to the Equal Protection of the laws, the right to vote, Due Process of law, the prohibition against slavery, and the prohibition against cruel and unusual

punishment.[6] Because Appellant was sentenced by a judge selected by a racially discriminatory system this Court must declare this system unconstitutional and vacate the penalty. When the decision maker in a criminal trial is purposefully selected on racial grounds, the right to a fair trial, Due Process and Equal Protection require that the conviction be reversed and the sentence vacated. See State v. Neil, 457 So.2d 481 (Fla. 1984); Batson v. Kentucky, 476 U.S. 79 (1986); Swain v. Alabama, 380 U.S. 202 (1965). When racial discrimination entrenches on the right to vote, it violates the Fifteenth Amendment as well.[7]

The election of circuit judges in circuit-wide races was first instituted in Florida in 1942.[8] Prior to that time, judges were selected by the governor and confirmed by the senate. 26 Fla.Stat. Ann. 609 (1970), Commentary. At-large election districts in Florida and elsewhere historically have been used to dilute the black voter strength. See Rogers v. Lodge, 458 U.S. 613 (1982); Connor v. Finch, 431 U.S. 407 (1977); White v. Regester, 412 U.S. 755 (1973); McMillan v. Escambia County, Florida, 638 F.2d 1239, 1245-47 (5th Cir. 1981), modified 688 F.2d 960, 969 (5th Cir. 1982), vacated 466 U.S. 48, 104 S.Ct. 1577, on remand 748 F.2d 1037 (5th Cir. 1984).[9]

The history of elections of African-American circuit judges in Florida shows the system

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[6] These rights are guaranteed by the Fifth, Sixth, Eighth, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, and Article I, Sections 1, 2, 9, 16, 17, and 21 of the Florida Constitution.

[7] The Fifteenth Amendment is enforced, in part, through the Voting Rights Act, Chapter 42 United States Code, Section 1973, et al.

[8] For a brief period, between 1865 and 1868, the state constitution, inasmuch as it was in effect, did provide for election of circuit judges.

[9] The Supreme Court vacated the decision because it appeared that the same result could be reached on non-constitutional grounds which did not require a finding of intentional discrimination; on remand, the Court of Appeals so held.

has purposefully excluded blacks from the bench. Florida as a whole has eleven African-American circuit judges, 2.8% of the 394 total circuit judgeships. See Young, Single Member Judicial Districts, Fair or Foul, Fla. Bar News, May 1, 1990 (hereinafter Single Member District). Florida's population is 14.95% black. County and City Data Book, 1988, United States Department of Commerce. In the Seventh Circuit (Volusia, Flagler, and Putnam Counties), there are currently twenty circuit judgeships, none of whom are black.[10] Volusia County has nine county judges, only two of whom are African-American. Id. The complete absence of any circuit judge of color in the three counties that comprise the seventh circuit is such stark discrimination as to show racist intent. See, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Florida's history of racially polarized voting, discrimination[11] and disenfranchisement,[12] and use of at-large election systems to minimize the effect of the black vote shows that an invidious purpose stood behind the enactment of elections for circuit judges in Florida. See Rogers, 458 U.S. at 625-28. It also shows that an invidious purpose exists for maintaining this system in the Circuit. The results of choosing judges as a whole in Florida, establish a prima facie case of racial discrimination contrary to Equal Protection and Due Process in selection of the decision-makers in a criminal trial. These results show discriminatory effect which, together with the history of racial bloc voting, segregated housing, and disenfranchisement in Florida, violate the right to vote

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[10] The Florida Bar Journal, September 1996, and undersigned counsel's personal observations based on twenty years of law practice in the seventh circuit.

[11] See Davis v. State ex rel. Cromwell, 156 Fla. 181, 23 So.2d 85 (1945) (en banc) (striking white primaries).

[12] A telling example is set out in Justice Buford's concurring opinion in Watson v. Stone, 148 Fla. 516, 4 So.2d 700, 703 (1941) in which he remarked that the concealed firearm statute "was never intended to apply to the white population and in practice has never been so applied."

as enforced by Chapter 42, United States Code, Section 1973. See Thornburg v. Gingles, 478 U.S. 30, 46-52 (1986). This discrimination also violates the heightened reliability and need for carefully channeled decision-making required by the freedom from cruel and unusual capital punishment. See Turner v. Murray, 476 U.S. 28 (1986); Beck v. Alabama, 447 U.S. 625 (1980). Florida allows just this kind of especially unreliable decision to be made by sentencers chosen in a racially discriminatory manner and the results of death-sentencing decisions show disparate impact on sentences. See Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.R. 27 (1984); see also, Radelet and Mello, Executing Those Who Kill Blacks: An Unusual Case Study, 37 Mercer L.R. 911, 912 n.4 (1986) (citing studies).

Because the selection of sentencers is racially discriminatory and leads to condemning men and women to die on racial factors, this Court must declare that system violates the Florida and Federal Constitutions. It must reverse the circuit court and remand for a new trial before a judge not so chosen, or impose a life sentence.

5. Appellate review

a. Proffitt

In Proffitt v. Florida, 428 U.S. 242 (1976), the plurality upheld Florida's capital punishment scheme in part because state law required a heightened level of appellate review. See 428 U.S. at 250-251, 252-253, 258-259.

Appellant submits that what was true in 1976 is no longer true today. History shows that intractable ambiguities in our statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt. Hence the statute is

unconstitutional.

b. Aggravating Circumstances[13]

Great care is needed in construing capital aggravating factors. See Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988) (Eighth Amendment requires greater care in defining aggravating circumstances than does due process). The rule of lenity (criminal laws must be strictly construed in favor of accused), which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose, Bifulco v. United States, 447 U.S. 381 (1980), is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112 (1979). Cases construing our aggravating factors have not complied with this principle.

Attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death-eligible persons, or channel discretion as required by Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988). The aggravators mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring) with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Herring).

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with

[13]Appellant raised this issue below in his Motion to Declare Florida's Death Penalty Statute Unconstitutional which the trial court denied prior to trial. (R32-37) (See, specifically, paragraphs 3, 4, 7, 11, 13, and 18).

Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts).[14]

The "felony murder" aggravating circumstance has been liberally construed in favor of the state by cases holding that it applies even where the murder was not premeditated. See Swafford v. State, 533 So.2d 270 (Fla. 1988).

Although the original purpose of the "hinder government function or enforcement of law" factor was apparently to apply to political assassinations or terrorist acts,[15] it has been broadly interpreted to cover witness elimination. See White v. State, 415 So.2d 719 (Fla. 1982).

c. Appellate Reweighing

Florida does not have the independent appellate reweighing of aggravating and mitigating circumstances required by Proffitt, 428 U.S. at 252-53. Such matters are left to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So.2d 1200 (Fla. 1986). Appellant raised this issue below in his pretrial motion attacking the constitutionality of Florida's death penalty scheme. (R32-36) (See, specifically, paragraphs 12 and 16).

d. Procedural Technicalities

Through use of the contemporaneous objection rule, Florida has institutionalized disparate

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[14] For extensive discussion of the problems with these circumstances, see Kennedy, Florida's "Cold, Calculated, and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L.Rev. 47 (1987), and Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L.Rev. 523 (1984).

[15] See Barnard, Death Penalty (1988 Survey of Florida Law), 13 Nova L.Rev. 907, 926 (1989).

application of the law in capital sentencing.[16] See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) (absence of objection barred review of use of improper evidence of aggravating circumstances); Grossman v. State, 525 So.2d 833 (Fla. 1988) (absence of objection barred review of use of victim impact information in violation of Eighth Amendment); and Smalley v. State, 546 So.2d 720 (Fla. 1989) (absence of objection barred review of penalty phase jury instruction which violated Eighth Amendment). Capricious use of retroactivity principles works similar mischief. In this regard, compare Gilliam v. State, 582 So.2d 610 (Fla. 1991) (Campbell[17] not retroactive) with Nibert v. State, 574 So.2d 1059 (Fla. 1990) (applying Campbell retroactively), Maxwell v. State, 603 So.2d 490 (Fla. 1992) (applying Campbell principles retroactively to post-conviction case, and Dailey v. State, 594 So.2d 254 (Fla. 1991) (requirement of considering all the mitigation in the record arises from much earlier decisions of the United States Supreme Court).

e. Tedder

The failure of the Florida appellate review process is highlighted by the Tedder[18] cases. As this Court admitted in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989), it has proven impossible to apply Tedder consistently. This frank admission strongly suggests that other legal

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[16] In Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977), this Court held that consideration of evidence of a nonstatutory aggravating circumstance is error subject to appellate review without objection below because of the "special scope of review" in capital cases. Appellant contends that this Court's retreat from the special scope of review violates the Eighth Amendment under Proffitt.

[17] Campbell v. State, 571 So.2d 415 (Fla. 1991).

[18] Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (life verdict to be overridden only where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.")

doctrines are also arbitrarily and inconsistently applied in capital cases.

6. Other Problems With the Statute

a. Lack of Special Verdicts

Our law provides for trial court review of the penalty verdict. Yet the trial court is in no position to know what aggravating and mitigating circumstances the jury found, because the law does not provide for special verdicts. This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact-finding process in violation of the Eighth Amendment.

In effect, our law makes the aggravating circumstances into elements of the crime so as to make the defendant death-eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16 and 17 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). But see Hildwin v. Florida, 490 U.S. 638 (1989) (rejecting a similar Sixth Amendment argument).

b. No Power to Mitigate

Unlike any other case, a condemned inmate cannot ask the trial judge to mitigate his sentence because Rule 3.800(b), Florida Rules of Criminal Procedure, forbids the mitigation of a death sentence. This violates the constitutional presumption against capital punishment and disfavors mitigation in violation of Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It also violates Equal Protection of the laws as an irrational distinction trenching on the fundamental

right to live.

c. Florida Creates a Presumption of Death[19]

Florida law creates a presumption of death where, but a single aggravating circumstance appears. This creates a presumption of death in every felony murder case (since felony murder is an aggravating circumstance) and every premeditated murder case (depending on which of several definitions of the premeditation aggravating circumstance is applied to the case).[20] In addition, HAC applies to any murder. By finding an aggravating circumstance always occurs in first-degree murders, Florida imposes a presumption of death which is to be overcome only by mitigating evidence so strong as to be reasonably convincing and so substantial as to constitute one or more mitigating circumstances sufficient to outweigh the presumption.[21] This systematic presumption of death restricts consideration of mitigating evidence, contrary to the guarantee of the Eighth Amendment to the United States Constitution. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); Adamson, 865 F.2d at 1043. It also creates an unreliable and arbitrary sentencing result contrary to Due Process and the heightened Due Process requirements in a death-sentencing proceeding. The Federal Constitution and Article I, Sections 9 and 17 of the Florida Constitution require striking the statute.

d. Florida Unconstitutionally Instructs Juries Not To Consider Sympathy.

In Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), reversed on procedural grounds sub

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[19] Appellant raised this issue below in his pretrial motion challenging the constitutionality of Florida's statute. (R32-37) (See, specifically, paragraphs 5, 6, and 12).

[20] See Justice Ehrlich's dissent in Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984).

[21] The presumption for death appears in §§ 921.141(2)(b) and (3)(b) which require the mitigating circumstances outweigh the aggravating.

nom. Saffle v. Parks, 494 U.S. 484 (1990), the Tenth Circuit held that jury instructions which emphasize that sympathy should play no role violate the Lockett[22] principle. The Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987) (upholding constitutional instruction prohibiting consideration of mere sympathy), writing that sympathy unconnected with mitigating evidence cannot play a role, prohibiting sympathy from any part in the proceeding restricts proper mitigating factors. Parks, 860 F.2d at 1553. The instruction given in this case also states that sympathy should play no role in the process. The prosecutor below, like in Parks, argued that the jury should closely follow the law on finding mitigation. A jury would have believed in reasonable likelihood that much of the weight of the early life experiences of Appellant should be ignored. This instruction violated the Lockett[23] principle. Inasmuch as it reflects the law in Florida, that law is unconstitutional for restricting consideration of mitigating evidence.

e. Electrocution is Cruel and Unusual.

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

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[22] Lockett v. Ohio, 438 U.S. 586 (1978).

[23] Lockett v. Ohio, 438 U.S. 586 (1978).

1990). It offends human dignity because it mutilates the body. Knowledge that a malfunctioning chair could cause the inmate enormous pain increases the mental anguish.

This unnecessary pain and anguish shows that electrocution violates the Eighth Amendment. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Coker v. Georgia, 433 U.S. 584, 592-96 (1977). Appellant raised this issue in his attach on the constitutionality of Florida's statute. (R-32-37) (See, specifically paragraph 19). Additionally, since Appellant's trial, the cruel and unusual aspect of Florida's electric chair has been the subject of much litigation. See, e.g., Jones v. Butterworth, 22 Fla. L. Weekly S192 (Fla. April 10, 1997) [Court orders evidentiary hearing on petitioner's claim "Due to the fact that flames have erupted on two occasions during electrocutions conducted in Florida's electric chair...."]. See also, Jones v. Butterworth, 22 Fla. L. Weekly S294 (Fla. May 22, 1997) and Jones v. Butterworth, 22 Fla. L. Weekly S347 (Fla. June 13, 1997).

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, Appellant respectfully requests this Court to vacate the death sentence and remand for the imposition of life imprisonment without possibility of parole. In the alternative, this Court should vacate his death sentence and remand for a penalty phase before a newly empaneled jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118, this 29th day of September, 1997.

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