IN THE SUPREME COURT OF FLORIDA

ALLEN WARD COX,	)	
	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC00-1751
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The record comprises twenty-nine volumes. Volumes I through IX contain various pleadings filed in the case with pages numbered consecutively from 1 to 1732. Volumes X though XXIX consist of the transcripts of hearings, guilt phase, penalty phase, and sentencing. These transcript pages are numbered consecutively beginning with page 1 and concluding with 4011. Counsel will refer to the record on appeal using a roman numeral to designate volume number followed by a reference to the pertinent pages.

STATEMENT OF THE CASE

On February 5, 1999, a Lake County Grand Jury returned an indictment charging Allen Ward Cox, the appellant, with the premeditated first-degree

murder[1] of Thomas M. Baker, Jr. The indictment also charged one count of battery in a detention facility.[2] The victim of the battery was Lawrence Wood, another inmate. (I 1) Appellant entered a plea of not guilty to both counts and filed a notice under Florida Rule of Criminal Procedure 3.202 (demand for discovery). (I 11-13)

Appellant filed several pretrial motions dealing with Florida's death penalty. See e.g., (I 132-86; II 187-205, 208-387, III 388-91, 454) Prior to the commencement of the guilt/innocence phase, the trial court ordered, over defense objection, Dr. McMann (a penalty phase mental health witness) to turn over to the state's expert all of her test results and notes. The trial court also allowed the state to depose Dr. McMann prior to the commencement of any trial proceedings. (XI 326-38, 362-86)

Immediately prior to jury selection, appellant pled guilty to count II of the indictment, battery in a detention facility. (XII 411-20)

Prior to any inmate testimony, the trial court granted appellant's motion in limine. The trial court excluded any testimony regarding appellant's statement that he was already serving two life sentences. The trial court ruled that any probative

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[1] §782.04(1)(a)1, Fla. Stat. (1998).

[2] §§784.03, 784.02, Fla. Stat. (1998).

value was outweighed by the prejudice. (XVI 1381-84)

During the testimony of Inspector Faulk, the witness erroneously told the jury that the maximum sentence for second degree murder was twenty-five years. The trial court denied appellant's motion for mistrial but gave a curative instruction. (XIX 1834-41)

Inspector Fault also testified that approximately one week after the murder, appellant made an oral statement to Faulk indicating that appellant had heard that they had found the murder weapon. Following a hearing, the trial court found that there was no discovery violation and, in the alternative, that any violation was inadvertent. Appellant's subsequent motion for mistrial was denied. (XIX 1926-50)

After the state rested appellant moved for a judgment of acquittal based on the circumstantial nature of the evidence and the lack of evidence proving premeditation. The trial court denied the motion. (XX 2145-69)

During the appellant's case-in-chief, an inmate witness who had become hostile to the defense blurted out an unresponsive answer that revealed that appellant was serving two life sentences. The trial court denied appellant's subsequent motion for mistrial but did give a curative instruction. (XXII 2463-77)

Appellant presented the testimony of several other witnesses, introduced

physical evidence, and testified in his own behalf. The defense rested and renewed his motion for judgment of acquittal which the trial court denied. (XXIII 2713-14)

The state presented three witnesses in rebuttal. (XXIII 2722-XIV 2818) Appellant presented one witness in surrebuttal. (XIV 2823-27) Appellant's renewed motion for judgment of acquittal was denied. (XIV 2837)

A penalty phase commenced on March 16, 2000. (XXV 3035) Appellant attempted to stipulate to his prior violent felony convictions. Appellant's offer was rebuffed by the state and denied by the trial court. (XI 220-29; XXV 3036-41, 3089) The state's entire case-in-chief at the penalty phase consisted of the testimony from five victims of appellant's prior violent felony convictions. (XXV 3090-3136)

Appellant presented the testimony of several family members as well as a mental health expert during the penalty phase case-in-chief. (XXV 3147-3200; XXVI 3279, 3326-3400; XXVII 3401-16, 3503-3600)

The state presented several witnesses in rebuttal at the penalty phase. (XXVII 3417-48; XXVIII 3612-3750) Appellant recalled one witness in surrebuttal. (XXVIII 3751-55)

Appellant proposed over twenty special jury instructions, some of which the trial court granted although most were denied. (XXVI 3283-23) The trial court

overruled appellant's string of objections to the jury being instructed regarding the heinousness factor (HAC) as well as the heightened premeditation factor (CCP). (XXVI 3463-86)

During closing argument by the state, appellant's objection was overruled. (XXIX 3809-10) Following deliberations, the jury returned with a recommendation (10-2) that the trial court impose the death penalty. (XXIX 3886-90)

Following a hearing on June 29, 2000 (XXIX 3903-93), the trial court sentenced Allen Cox to death on July 24, 2000. (XXIX 3903-4008) In sentencing Allen Cox to death, the trial court found four aggravating factors. The court also found substantial mitigation. (VIII 1513-60) The trial court sentenced appellant to five years on the battery count. (VIII 1576)

Appellant filed a timely notice of appeal on August 23, 2000. (IX 1587-88) This brief follows.

STATEMENT OF THE FACTS

State's Guilt Phase Case-in-Chief

The killing at issue occurred at Lake Correctional Institute (hereinafter LCI) near Clermont, Florida. In December, 1998, LCI was home to almost 1,000 inmates. (XV 1027-32) The prison was also a "psych camp", in the vernacular,

meaning that many of the inmates suffered some form of mental illness. The facility included a 180 bed mental health unit that housed inmates in a secure facility. (XV 1032) LCI was also home to approximately 200 inmates on out-patient status who took medication and received therapy. However, they worked alongside the rest of the inmates on the compound. (XV 1033-49)

On December 21, 1998, Thomas Baker, Jr. was stabbed in the prison yard near the canteen. After he was stabbed, Baker ran to corrections officer Susan Parker's post in C-dorm, arriving at approximately 12:45 p.m. Baker told Officer Parker that he had been stabbed. Baker seemed to be in some distress. (XV 1116-22) Officer Parker called for assistance and began ministering to inmate Baker. Once Baker's shirt was removed, Officer Parker noticed a small puncture wound in his back. (XV 1122) Officer Parker asked Baker who had stabbed him. Baker responded, "Big Al, Echo dorm, quad 3."[3] (XV 1050-52, 1129)

Unfortunately for inmate Baker, medical help was not immediately forthcoming. (XV 1050-52) Although the puncture wound in Baker's back was not bleeding externally, Baker exclaimed that his lungs were filling up with blood. Additionally, the corrections staff noticed blood trickling from Baker's mouth.

[3] Further questioning revealed that Baker did not know his assailant's Christian name. (XV 1129)

Rather than wait for the emergency cart any longer, several officers put Baker on a stretcher and took him to the medical unit. (XV 1050-52, 1165)

Thomas Baker lost consciousness and died approximately fifteen minutes after the initial attack. The cause of death was a single stab wound to the chest accompanied by internal blood loss. (XIV 996) The fatal wound was to the left side of Baker's back below the shoulder blade. The wound entered the chest cavity between two ribs, went through the midpoint of his left lung, through the aorta, and then into the right lung. The wound measured almost seven inches in depth. (XIV 991-93) The autopsy also revealed a few small bruises, scratches or abrasions on various parts of Baker's body. (XIV 991) The medical examiner also noted two very shallow, non-life-threatening puncture wounds, one to each of Baker's sides. (XIV 991)

After the stabbing, Captain Johnson ordered the entire compound locked down. (XV 1058-60) Scrutiny of the bunk roster of Echo dorm, specifically Quad 3, revealed an inmate by the name of Allen Cox, the appellant. (XV 1055-56, 1216-17) Officer Joseph McBrayer took Cox into custody near his dorm without incident. Appellant seemed calm and composed without any signs of intoxication or drug use. He had no noticeable blood on his clothing. (XVI 1216-22, 1237-40)

The only eyewitnesses to the stabbing and the events leading up to the

homicide were fellow inmates at the prison. Of course, all of these witnesses had prior felony convictions which were used as impeachment. Additionally, several of the eyewitnesses were psychiatric patients who were taking psychotropic drugs on a daily basis. (See e.g. XVII 1524-26, XVIII 1688-91, 1778-79) All of the information concerning the prelude to and the homicide itself came from these inmate witnesses.

On Sunday, December 20, 1998, the day before the murder, Allen Cox discovered that the footlocker in his "house" (cell) had been burglarized. His property had been stolen. He was angry.[4] Cox stood on top of the balcony railing that day and announced to all of the inmates within earshot, that he would pay a $50.00 reward for the name of the culprit. He eventually raised the reward to $100.00 and promised the informant anonymity. Cox said that if he found the culprit, he would kill him.[5] Cox added that he did not care about the consequences. He announced that he was not afraid of a life sentence. Other inmates heard him say that he could do his time on death row with a color television. (XVI 1385-97,

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[4] This was not the first time that Cox had been victimized. (XX 2072-78, XXIII 2671)

[5] In prison vernacular, "kill" did not necessarily mean to end one's life . It generally meant the meant the declarant intended to "mess up" or "beat up" someone. (XVII 1440-41, 1538-39; XVIII 1785-86)

1405, 1432-34; XVII 1527-30; XVIII 1647-49, XX 2055-56)

At approximately 7:30 a.m. on Monday, the next day, Tony Wilson, a black homosexual inmate, began fighting with Thomas Baker, the eventual murder victim. Baker was upset that Tony Wilson had purportedly told Allen Cox that Baker was the thief. Baker and Wilson had had a prior feud when Tony's "sugar daddy", Dancing Willie, stole Baker's shoes. (XVII 1506-15; XVIII 1696-1707) After his fight with Tony Wilson, Baker asked another inmate to watch his back. The inmate assumed that Baker feared retribution from Dancing Willie. (XVII 1508-9)

Later that day, during the noon hour, many of the inmates had finished their lunch chow. Almost 200 inmates had gravitated around the canteen where they could buy snacks and pick up mail. (XVII 1462-69) Right before lunch that day, Cox told Robert Nies that Dancing Willie and Tony were accusing Thomas Baker of the theft in hopes of getting the reward money. Cox told Nies that he did not think that Baker committed the theft. (XVIII 1720-21, 1728-30) Shortly before the murder Gerald Hatcher was standing near the canteen. Hatcher saw Cox walking with two other inmates. As they walked by, Hatcher heard someone say, "I believe in my heart that he did it and I think you should kill the little bastard." (XVII 1498-99)

Melvin Young was eating ice cream near the canteen at chow time. He noticed Cox call Baker off the handball court in order to talk. (XVIII 1650-53) Several inmates heard a commotion. They looked up and saw Allen Cox fighting with Thomas Baker. Cox was on top of Baker and was punching him. During the fight, Baker yelled "I ain't got it!" (XVII 1450-58) At one point Baker got up, but Cox grabbed him and threw him to the ground. Cox then pulled a shank from his waistband and stabbed Baker once is the back. (XVII 1593-97, 1650-53, 1738-50). Someone in the crowd yelled, "Man, you're going to kill him." (XVIII 1745) After the admonition from the crowd, Cox seemed to let up and hit Baker with a knife a couple of times below the waist. (XVIII 1758) Cox then stopped the attack, got up, and walked away. Some inmates heard Cox say, "I've got one more of you [mothers] to get." (XVII 1450-58, 1483, 1594-97; XVIII 1738-50; XX 2059) One inmate noticed that Cox stuck his weapon inside his jacket sleeve and walked away between the weight pile and the pump house. (XVIII 1653)

Meanwhile, Baker got up and ran. He fell near the canteen but got up and ran to C-dorm. (XVII 1598-99, 1650-53) A few inmates noticed blood coming from Baker's mouth as he ran for help.

Robert Nies watched as guards and another inmate ministered to Baker as they waited for medical attention. (XVIII 1692-94) Nies later saw Cox by the

canteen. Nies told Cox that he thought Baker was going to die. Cox responded, "I'm tired of this shit. Maybe they will just give me the electric chair." (XVIII 1694-95)

After the stabbing, Cox returned to his cell where he punched his cellmate Lawrence "Woody" Wood.[6] As he hit Woody, another inmate heard Cox accusing Woody of stealing his money. Cox told Woody, "I got your friend, [mother]. You're lucky I put it up or I'd get your ass." (XX 2078-83) Cox then left E-dorm and was arrested shortly thereafter. As Cox was leaving the dorm, he encountered Donny Cox (no apparent relation) on the steps.[7] Cox asked Donny if Woody had given him the stolen money. After Donny denied any knowledge, appellant reportedly said, "If I find out whose got my money, I'm killing you, too." (XVIII 1780-82)

After locking down the compound, police decided that "Big Al" was Allen Cox, the appellant. (XVI 1216-17) They took Cox into custody. A pat down revealed no weapons. (XVII 1217-19) Police did not tell Cox why they were

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[6] Immediately prior to the start of the trial, appellant pled guilty to count II of the indictment which charged the battery of Lawrence Wood while in a detention facility. (XII 411)

[7] Of the numerous inmates who testified at trial, Donny Cox held the record for the most felony convictions with 54. (XVIII 1780)

taking him into custody. He cooperated and went with them willingly. They found no blood on appellant's clothing. (XVI 1222) Investigators searching the next day found a shank (a homemade knife) in a pipe near the pump house. (XVI 1244-51, 1257-58, 1293-96, 1324-25) It was not uncommon to find homemade weapons like this on the compound at LCI. (XVI 1326)

Appellant's Case-in-Chief at the Guilt Phase

Dr. Reeves, a forensic pathologist, examined the autopsy results. Dr. Reeves concluded that the knife found by police and attributed to the appellant could not possibly have inflicted the fatal wound on Thomas Baker. (XXI 2251-54, 2262) Specifically, Dr. Reeves pointed out that the knife admitted into evidence by the state was three inches too short to cause a wound that deep.[8] (XX 2175-2200; XXI 2210-14) While elasticity (compression of the tissue) could explain a deeper wound than the length of the knife, Reeves did not believe a three inch excursion in that location would not be possible.[9] (XXI 2210-14) Reeves also would expect some trace of blood would remain on the blade, especially since the knife was so

[8] The fatal stab wound measured between 7 and 8 inches while the knife in question had a blade shorter that 5 inches. (XXI 2219-21, 2228-31, 2245-48)

[9] Such an occurrence would fracture the ribs. Baker's ribs were not fractured.

crude.[10] (XXI 2217-19)

Appellant also called Vincent Maynard, aka Pig, another inmate in the prison. Appellant's case suggested that Maynard was the true assailant. Allen Cox had owed Vincent Maynard $500.00 for several months. When Maynard found out that Cox was "holding out" on him, Maynard became upset.[11]

Maynard saw Tony Wilson and Thomas Baker fight that morning after Wilson accused Baker of the burglary. (XXI 2281-83) Wilson warned Baker that Baker had better get a knife and should watch his back. (XXI 2283-85)

Maynard also saw the fight between Cox and Baker after it started.[12] Maynard walked with Cox to the canteen that day. Maynard assured Cox that Baker was not the thief. Cox asked Maynard to give him a moment alone to talk with Baker. A short while later, Maynard heard the commotion and looked up to see the fight. Baker appeared to be reaching for a weapon, when Cox beat him to the punch and pulled out his shank. (XXI 2298-2305) Cox stabbed Baker three

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[10] The state found no blood on the knife.

[11] It became obvious that Cox had previously had enough money to repay his debt to Maynard when Cox announced that $500.00 had been stolen from his footlocker.

[12] Maynard and Cox had been drinking buck (homemade prison wine), smoking pot and eating pills (Kolonpins) all weekend. This continued into Monday morning. As a result, Cox was hung over, white as a ghost and "pretty out of it." (XXI 2291-94)

times. Throughout the incident, Cox was white as a ghost and incoherent. He seemed not to comprehend what anyone said. (XXI 2304-6)

Allen Cox put his credibility at issue by testifying at the guilt phase. Woody had been his roommate for less than thirty days when Cox's money disappeared from his footlocker. Cox offered a $50.00 reward but did not threaten the culprit. Cox only wanted the burglar to move out of his quad. (XXIII 2616-22) Tony Wilson told Cox that he had seen Thomas Baker coming out of Cox's room with a canteen bag. Cox knew about the prior problems between Wilson and Baker. Cox believed that Tony was trying to set Baker up as the fall guy. (XXIII 2622-24)

On the morning of the murder, Dancing Willie (Tony's "sugar daddy") and several of his friends paid a visit to Cox. The group attempted to collect the reward money pointing out that Tony had identified Thomas Baker as the burglar. Cox refused to pay contending that they were attempted to set up Baker. (XXIII 2625-26) Cox subsequently armed himself with a knife that day. He was afraid that Dancing Willie and his friends would make good on their threats to return for the money. (XXIII 2627-28; XXI 2286-90)

Meanwhile, Cox talked to Vincent Maynard that morning. Maynard was upset that Cox had not repaid his debt. (XXIII 2628-30) Cox skipped lunch that day and went right to the canteen for his mail. He saw Maynard and Baker there

together. Cox asked Maynard for a moment alone with Baker so that he could assure Baker that he knew that he was innocent. Before he could say anything, Baker showed Cox that he was armed with a knife and was not afraid. Baker angrily denounced Cox for his failure to repay Maynard. Cox grabbed Baker's knife hand and hit him in the face. (XXIII 2634-39) Maynard ran up and entered the fray. Maynard pulled out a knife and tried to stab Cox in the side. Cox retreated such that Baker was pulled between him and Maynard's knife. Maynard stabbed Baker in the back as Maynard lunged at Cox. (XXIII 2640-41)

Cox was still struggling with Baker. Maynard had been pushed into the bushes. Cox knocked Baker to the ground and forced him to drop his knife. Once he had Baker on the ground, Cox pulled out his knife and asked what he had done with the stolen money. Baker claimed that he gave it all to Woody. As Cox started to leave, Baker began kicking. Cox then poked Baker lightly in the buttocks region of his buttocks. (XXIII 2641-42) Cox then hid the knife in the pipe behind the pump house, went back to his cell, and inflicted the beating on Woody. (XXIII 2641-42)

Michael Johnson, a inmate with only one prior felony conviction, supported Cox's testimony that placed the lethal shank in Vincent Maynard's hand. Johnson saw Maynard and several other inmates talking right after Baker's stabbing.

Maynard and the others then walked over by the lake[13]. Johnson watched as Maynard and his crew took shanks out of their pockets and threw them into the lake. (XXII 2597-2600)

State's Rebuttal in the Guilt Phase

Willie James Pittman, aka Dancing Willie, admitted that he took two of his friends when he paid a visit to appellant's small cell in a effort to collect the reward money for Tony.[14] Pittman was looking out for Tony who he described as dumb and gullible. Cox refused to pay the money. However, when he left Cox that morning, Pittman thought it was on good terms. (XXIII 2722-35)

Cox's roommate, Lawrence Woods, aka Woody, testified that Cox told him the night before the murder that he would make sure that the thief never got around to spending the stolen money. (XXIII 2740-43) Cox appeared sober on the morning of the murder. Another inmate brought a knife to Cox that morning. Cox hid the knife in his clothing and told Woody he had someone to take care of that day. (XXIII 2740-47) Woods denied any preferential treatment from the state in exchange for his testimony. (XXIII 2747-48, 2757-60)

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[13] Lake Correctional Institution is very unusual in that the prison walls contain a lake.

[14] Pittman admitted a homosexual relationship with Tony Wilson. (XXIII 2724-25.

Appellant's Surrebuttal at the Guilt Phase

Manocher Rafi shared a cell with Lawrence Wood (Woody) in the Lake County Jail when Woody had returned to testify. Woody told Rafi that the prosecutor would have to make it worth his while for him to testify. (XXIV 2823-27)

State's Penalty Phase Case-in-Chief

Despite appellant's willingness to stipulate to his prior violent felony convictions, the only evidence presented by the state during their case-in-chief at the penalty phase were witnesses who testified in detail about appellant's prior offenses. Bonnie Pirneau[15] described in graphic detail how Allen Cox abducted her from her job at a convenience store in Margate, Florida in October of 1989. (XXV 3114-22) Cox, armed with a knife, literally dragged Pirneau out of the store and down the block. In the process, Pirneau fell off a wall and fractured her pelvis. She landed in an ant bed resulting in numerous bites on her arms and legs. With her pelvis fractured and as ants bit her, Cox demanded oral sex. He then forced Pirneau to get on her knees and attempted to anally rape her. When Cox couldn't penetrate her anus, he forced Pirneau on her back and vaginally raped her. During

[15] Bonnie was a petite, soft-spoken woman who was about five feet tall, and weighed approximately 100 pounds. (VIII 1675, 1706)

the entire episode, Cox screamed at Pirneau. He promised to come back and kill her if she told anyone what he had done. (XXV 3114-22)

In November, 1989, Judith and Earl Turner were asleep in their home in Broward County, Florida. Judith woke up to see a figure in her bedroom doorway. The burglar, Allen Cox, placed his hand over Judith's mouth and warned her not to get up. With his other hand, Cox used a three-hole punch to beat her sleeping husband in the head. Judith was able to escape and call the police. Earl Turner received 40 stitches as a result of appellant's assault. (XXV 3104-12)

Mary Hamilton told the jury how a masked Allen Cox robbed her at gunpoint while she worked in her convenience store in Lebanon, Kentucky in May, 1980. (XXV 3090-93, 3099-3101) A then-seventeen Allen Cox fled the store with the money. (XXV 3090-93, 3103)

Subsequently, Mary Hamilton became very angry when Cox, along with another man, robbed her store again less than one year later. Cox and the other man were both armed and wore masks. Cox was ultimately apprehended and put in prison. (XXV 3093-98) After serving his time in Kentucky, Cox moved to Florida.

The state concluded their case-in-chief in the penalty phase by introducing the certified judgments and sentences for two counts of robbery in Kentucky and

one count of escape in Kentucky. (XXV 3124-32) The state also introduced judgments and sentences from Broward County, Florida reflecting the convictions for armed burglary, kidnapping, sexual battery, attempted sexual battery, and aggravated battery. (XXV 3132-36)

Appellant's Penalty Phase Case-in-Chief

Allen is the product of the clichéd Kentucky bloodline. Although the record is somewhat confusing on this issue, there was definitely some degree of inbreeding in Allen Cox's family tree. Allen's paternal grandmother (Hazel Cox) and his maternal grandfather were first cousins. (XXV 3157-59; XXVI 3209-10) Elizabeth Veatch diagramed the family tree which apparently revealed that two pairs of appellant's great-grandparents were brother and sister. (XXVI 3224-28; IX 1714)

The first ten years Allen's life was spent in poverty and misery. Ray Allen Cox, appellant's father quit school after the eighth grade and got married at age 17.[16] Ray Cox married Barbara Sallee, his first cousin with whom he had grown up. (XXV 3157-59; XXVII 3509) The couple lived in a one-room building. When Allen was six or seven years old, his parents divorced. They subsequently reconciled only to divorce again shortly thereafter. (XXVII 3510-13)

[16] Ray's own mother had married at age 13. (XXVII 3510)

Ray worked for $3.00 a day and tried as best as he could to support his family. The children ate mostly beans, potatoes, and cornbread. (XXVII 3518, 3522) Allen's parents fought and argued throughout their stormy relationship.[17] Barbara once tore Ray's clothes off and scratched his face in a grocery store. (XXVII 3524-25) Ray woke up one morning on the couch with his wife standing over him trying to cut him with a butcher knife. (XXVII 3526-27) Another time, Barbara fired 14 shots at her husband while he was in his car with his eleven-year-old nephew.[18] (XXVII 3579-85) Yet another time, Barbara enlisted the aid of her son Allen in stealing Ray's bed when they were separated. (XXVII 3579-85)

Ray described his wife as "pretty high strung." (XXVII 3522) Although Ray would sometimes discipline the children using a switch, Barbara was a bit more rough. (XXVII 3528-33) Barbara could go off at any moment. (XXVII 3530-33) Ray was frequently gone from the house and missed the beatings. Allen's sister described them as horrible and frequent. Her mother would use whatever was handy, but seldom used her own hand. She used switches, fly swatters, belts, and shoes. (XXV 3180-82) Allen's mother treated him more

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[17] Their hatred for each other was palpable over the telephone even to this day. (XXVI 3358)

[18] When Ray and Barbara remarried again after their divorce, Ray wisely sold the gun to his nephew. (XXVII 3586)

roughly than his siblings. Allen bore a remarkable resemblance to his father whom Barbara despised. (XXV 3182-86)

When Allen was approximately ten years old, his mother had had enough. After a huge fight, Barbara drove her young son out into the country and dumped him "like a dog." (XXV 3191-95) Allen's sister still remembers the look on his face as he stood in the middle of a gravel road with his small bag of clothes as they drove away. Barbara had dumped Allen very near his father's house. He subsequently dumped Allen at his own mother's home where Hazel Cox finished the job of rearing Allen. (XXV 3147-51) Allen behaved himself and was no trouble at all other than the time he attempted suicide. After the suicide attempt, his grandmother took Allen to a psychiatrist. Allen was not acting normal. (XXV 3151-53)

Dr. Elizabeth McMann, a forensic psychologist spent a total of 13½ hours interviewing, evaluating, and testing Allen Cox. (XXVI 3326-40) She also examined voluminous material associated with appellant's case and his life. Dr. McMann concluded that Cox suffers from a mild cortical dysfunction. He also has a low-average IQ. (XXVI 3340) Dr. McMann explained that Cox's brain is not intact. He suffers from a mild deficit on his right side. He does not see the world as most others do. His thinking is very concrete with no abstractions. (XXVI

3336-41) His contact with reality is reasonably good with one exception; he becomes anxious in situations involving other people. (XXV 3341) He never trusted people because his upbringing and development gave him no reason to do so.[19] (XXVI 3345) He suffers from dysphoria (a form of depression). Dr. McMann found a chronic level of depression and suicidal ideation that was on going for years. (XXVI 3345-46) Cox had been on a relatively high dose of antidepressants ever since 1991. (XXVI 3347-50)

State's Rebuttal in the Penalty Phase

Dr. Michael Gutman, a forensic psychiatrist, testified in rebuttal for the state. He reviewed material in the case and spent two hours evaluating Cox.[20] Dr. Gutman agreed with most of Dr. McMann's findings and conclusions. He did quibble with a few. (XVII 3712-41) Dr. Gutman agreed Cox suffered from a dysthymic disorder. Gutman also recognized the abuse Allen received as a child. The abuse clearly had a destructive influence.[21] However, Dr. Gutman did not

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[19] Dr. McMann explained that people develop as individuals during the first seven years of life. Allen's formative years were horrific. (XXVI 3350-51, 3356)

[20] Dr. Gutman specialized in head injuries. Cox had suffered a couple of head injuries in his lifetime. These could result in cortical dysfunction. Gutman could have ordered brain scans for diagnostic purposes, but saw no need, especially in light of his time constraint. (XXVIII 3699-3702)

[21] Dr. Gutman explained that all people react differently to childhood abuse. Some are "broken" by the experience, while others become hardened. (XXVIII

believe that Allen's horrible childhood played any role in his decision to kill. (XXVIII 3660-72, 3702)

Additionally, Dr. Gutman perceived Allen Cox, the man, very differently than Dr. McMann. Gutman concluded that Cox had social skills and street smarts. He found him affable, glib, and articulate. (XXVIII 3676-77, 3712-13) Contrary to Dr. McMann, Gutman did not observe any significant evidence of organic brain damage. (XXVIII 3678) Gutman diagnosed Cox with polysubstance abuse combined with a depressive disorder. Gutman also diagnosed a personality disorder, not otherwise specified, featuring an antisocial personality disorder and an aggressive personality. (XXVIII 2679-80)

Gutman also disagreed somewhat with Dr. McMann regarding Allen's depression. Gutman recognized dysphoria as a chronic depressive disorder that needed treatment. (XXVIII 3692) Allen's DOC charts showed a prior diagnosis of a major depressive disorder. (XXVIII 3692-93) However, Gutman believed Cox to be in remission. Although he had not recovered completely, the disorder was in control. If medication were stopped, Cox could develop a major depressive disorder. Gutman did not believe the disorder would become apparent in only

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3668-70)

seventeen days.[22] (XXVIII 3692-95)

The state also presented two witnesses, a nurse and a psychological specialist at LCI, who both ministered to appellant's mental disorders and medication. Although Cox could have requested additional psychological counseling (other than the one visit per month), he never took that initiative. (XXVIII 3620-30) Appellant stopped taking Sinequan on December 4, 1998, approximately 2½ weeks before the murder. Until then, Cox took 200mg of Sinequan daily with a maximum dose allowed at 300mg. The nurse called it an average dose. On the day of the murder, the doctor started appellant on 20mg of Prozac daily. (XXVIII 3612-18) After the murder, appellant requested to discontinue the Prozac and restart Sinequan. The Prozac was not helping and had side effects. (XXVIII 3630-38, 3648-49)

The state also presented Barbara Edelen, Allen Cox's own mother to testify in rebuttal at the penalty phase.[23] The gist of her testimony was to defend her child

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[22] Cox was on no psychotropic medication for seventeen days preceding the murder.

[23] Defense counsel made much of the fact that Allen's own mother testified for the state in their quest for the death penalty. The state subsequently felt compelled to request that the trial court take judicial notice that Allen's mother had been subpoenaed as a witness and was therefore required to testify. (XXIX 3953-55) However, after her testimony, when she requested a moment alone with her son, the prosecutor said that it would be understandable if Cox did not want to talk

rearing methods and to minimize the abuse. (XXVII 3417-3445)

Appellant's Surrebuttal at the Penalty Phase

Although they agreed on much, Dr. McMann and Dr. Gutman sharply disagreed as to their perception of Allen's personality. Dr. McMann found Allen to be withdrawn, nonverbal, and uncomfortable with people. Dr. Gutman found him to be affable, personable, even articulate. Dr. McMann explained that Allen might have been more comfortable with a male. Additionally, Allen's defense lawyer was not present during McMann's interview and Dr. Gutman was the last of many people to interview Cox during this lengthy process. (XXVIII 3151-55)

SUMMARY OF THE ARGUMENTS

During the middle of trial, the lead investigator disclosed for the first time an oral statement purportedly made by Allen Cox after his arrest. The failure to disclose the statement was intentional. The fact that the statement was inculpatory reveals the substantial nature of the violation. Defense counsel immediately objected and moved for a mistrial saying that the defense theory had been compromised. This Court cannot say beyond a reasonable doubt that the error did not materially hinder appellant's trial preparation.

During the guilt/innocence phase, an inmate/witness violated the trial court's

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to his mother. (XXVII 3448)

order in limine by telling the jury that Allen Cox was serving two life sentences at the time of his alleged crime. This revelation cast Cox in an extremely poor light with the jury. They found out that Allen Cox was the worst of the worst of those in prison. This is especially true in light of the fact that the numerous inmates who testified were all serving substantially shorter sentences.

The trial court erroneously applied Florida Rule of Criminal Procedure 3.202. The trial judge forced the defense expert to turn over her notes and to submit to a deposition prior to the commencement of the guilt/innocence phase. As a result, a new penalty phase is warranted.

Appellant offered to stipulate to his prior violent felony convictions. Appellant hoped to preclude the victims of his prior crimes from testifying at his penalty phase. The trial court's rejection of appellant's stipulation resulted in the jury's consideration of unnecessarily inflammatory testimony that became a feature of the trial in violation of Old Chief v. United States, 519 U.S. 172 (1997).

Fundamental error occurred when the prosecutor erroneously told the jury that they were required by law to recommend a death sentence if the aggravating factors outweigh the mitigating factors. Additionally, the prosecutor compounded the error when he reiterated this misstatement of law during closing argument at the penalty phase. In that same argument, the prosecutor improperly denigrated

valid mitigating evidence. Despite the fact that there was no objection, fundamental error occurred.

Appellant takes issue with the trial court instructing the jury and finding the application of the HAC and CCP aggravating factors. The evidence did not support the instructions nor the finding of these two factors. Appellant also contends the trial judge inappropriately dismissed valid mitigation based upon a misapplication of the law. Additionally, the trial court's consideration of valid mitigating evidence was improperly diminished by a misapprehension of the law.

When one considers the valid aggravating factors and the substantial mitigation, this first-degree murder is not the most aggravated nor the least mitigated. A proper weighing of the circumstances results in the inescapable conclusion that life is the appropriate sentence. Appellant also challenges various aspects of Florida's capital sentencing scheme especially in light of the United States Supreme opinion in Apprendi v. New Jersey, ____ U.S. ____, 120 Supreme Court 2348 (1999).

ARGUMENTS

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

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL FOLLOWING A DISCOVERY VIOLATION IN THE MIDDLE OF TRIAL THAT RESULTED IN A DENIAL OF A FAIR TRIAL.

Investigation Cornelis Faulk was the senior inspector in charge of this murder investigation. (XIX 1805-6, 1813-14) Allen Cox was taken into custody and placed in administrative confinement on December 21, 1998 the day of the murder. (XIX 1809-10) On December 29, 1998, Faulk was investigating the murder by interviewing other inmates who had been placed in administrative confinement also. He was investigating Thomas Baker's murder. (XIX 1821-23) He got a message that Allen Cox, the appellant, wanted to talk to him. (XIX 1821-22) Cox was brought to an interview room where he told Faulk that a number of innocent people were locked up in confinement. Cox told Faulk that they had nothing to do with the incident and that they did not need to be there. (XIX 1822-

23) Before returning to his cell, Cox asked Faulk if they had found the weapon. Faulk did not respond. At that point, Cox said, "I heard you found a (or the) weapon." (XIX 1823) Cox then described the weapon as being gray in color, an ice pick-type weapon with tape wrapped around it and a curved handle. Cox said that he had placed it in the bottom of the gate post at the pump house. (XIX 1823) In fact on the day after the murder, investigators found the weapon exactly where Cox described. (XIX 1825)

The state of Florida failed to provide the defense with Cox's oral statement, "I heard you found the weapon." This revelation led to a Richardson[24] hearing once it became clear that a discovery violation had occurred.[25] (XIX 1823-24, 1931) Specifically, Inspector Faulk wrote in his investigative diary that Allen Cox accurately described the weapon that police had seized. However, Inspector Faulk did not make any notation, nor did he reveal in his deposition, that Cox allegedly said that he had heard that they had found the knife. (XIX 1927-28) In fact, during his deposition, defense counsel specifically asked Inspector Faulk, "Was there any evidence to indicate that Cox knew that the shank had been found?".

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[24] Richardson v. State, 246 So.2d 771 (Fla. 1971).

[25] Inspector Faulk and his investigative diary, reports, etc. were a frequent problem in the discovery process both before trial and during trial. See, e.g. (X 176-87; XI 265-75; XIX 1871)

Faulk answered, "No, not that I know of." (XIX 1941-42)

At the Richardson hearing that followed, Faulk explained that he waited until Cox left the room before making any notes. Cox had requested an audience with Faulk in order to tell him that innocent people were locked up in confinement. (XIX 1934-37) As he was leaving to return to his cell, Cox said the statement about hearing that they had found the knife. In between those two statements, Cox described the knife in detail. Faulk's notes reflected everything except Cox's statement about hearing that they had found the knife.[26] (XIX 1934-38) Faulk testified at the Richardson hearing that the undisclosed statement did not seem significant to him at the time. (XIX 1938-39) Defense counsel pointed out to Inspector Faulk that he denied any such statement by Cox when asked point blank at his pretrial deposition. (XIX 1941-42)

At the end of the hearing, the state argued that no discovery violation occurred and, if it had, it was certainly inadvertent. (XIX 1947) The trial court stated:

> THE COURT: I don't find that it is, either. And I likewise find if it was, it is inadvertent.

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[26] The notes also failed to reflect Cox's statement that they had a lot of innocent people locked up. However, this statement does not appear to be part of the Richardson inquiry. (XIX 1927-31)

(XIX 1947) The trial court did allow defense counsel to cross-examine Faulk about his omissions from his written report saying that he thought that would cure "any problem that we have." (XIX 1948) When the trial court asked defense counsel if he agreed, defense counsel replied:

> MR. STONE (defense counsel): In light of the Court's ruling with respect to the Richardson Hearing- -
>
> THE COURT: Let's just take, for the sake of discussion, Mr. Stone, lets pretend that I said it was a willful violation, what sanction would you - - first of all, what prejudice have you suffered?... Do I need to put the trial off to give you the opportunity to depose this officer again - - what prejudice have you suffered?
>
> MR. STONE: Your honor, we have labored under the assumption, and without anything controverted, is contrary to the statement in this gentlemen's deposition and ... **our entire case preparation, the thrust of our entire consideration of the State's case, as well as the preparation of our defense, is based upon the lack of knowledge on the part of the defendant**.
>
> THE COURT: Okay. Let's assume, okay, it's willful, it's prejudice, what sanction is appropriate? Hypothetically?
>
> MR. STONE: I'd say a mistrial.
>
> THE COURT: Okay. Well, we are not going to have a mistrial. My ruling it is the same with regard to the Richardson inquiry. Bring the jury

back in.....

(XIX 1948-49)(Emphasis added.)

The state's failure to disclose the substance of any oral statement made by the defendant, together with the name and address of each witness to the statement, is a discovery violation. Kucher v. State, 758 So.2d 1165 (Fla. 2nd DCA 2000) If there is a **reasonable probability** that the defendant's trial preparation or strategy would have been materially different had the violation not occurred, then a defendant has been procedurally prejudiced. Pomeranz v. State, 703 So.2d 465 (Fla. 1997), citing State v. Schopp, 653 So.2d 1016, 1020 (Fla. 1995). On appeal, discovery rulings are subject to an abuse of discretion standard. State v. Tascarella, 580 So.2d 154 (Fla. 1981). If the appellate court can ascertain **beyond a reasonable doubt** that the error did not materially hinder the defendant's trial preparation, the error may be deemed harmless.[27] Pender v. State, 700 So.2d 664 (Fla. 1997).

Looking at this record on appeal, this Court cannot say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation. State v. Schopp, 653 So.2d 1016, 1020 (Fla. 1995). During the hearing on the

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[27] Prior to this Court's ruling in Smith v. State, 500 So.2d 125 (Fla. 1986), a Richardson violation constituted *per se* reversible error that could never be harmless.

discovery violation, defense counsel pointed out:

> The substance of the statement is not only the description and the location of the knife, but whether - - the credibility of that statement is based on whether or not Allen Cox knew the knife had been found. And Inspector Faulk has already admitted that in his testimony that - - if Allen Cox doesn't know where that knife is and comes out after a week in the hole and says, "here is where it is and here is what it looks like," that statement has a lot more credibility than if he comes out of the hole having had someone tell him it appears that they found the knife. Do you understand the logic?
>
> THE COURT: I understand.
>
> MR. HIGGINS (Defense counsel): Consequently the omission of the business about "I heard you guys found the knife," goes directly to the substance and the credibility of the statement and the weight the Defense is able to place on it.

(XIX 1933-34)

Appellant's defense theory was that Vincent Maynard committed the murder with another, undiscovered knife that he subsequently disposed of in the lake. As such, the defense embraced the shank found in the pipe. That particular knife, which Cox would concede was his, was three inches too short to inflict the fatal wound. Additionally, Cox's knife had no blood on it. Cox had accurately described to Inspector Faulk the location and physical description of the smaller

knife, which could not have been the murder weapon. This confirmed that the knife found was the same knife that Cox had in his possession on the day of the murder. Therefore, the physical evidence was consistent with Cox's statement and inconsistent with the state's theory that he inflicted the fatal blow.

The undisclosed oral statement purportedly made by Cox to Inspector Faulk ("I heard you found the knife"), indicates that Cox, despite being in virtual isolation/solitary confinement since his arrest, had heard through the grapevine that prison officials had found his knife. This enabled the state to argue that Cox heard about the smaller knife and allowed the State to shift away from the theory that the found knife was absolutely the actual murder weapon. This allowed the State an arguably alternative way to suggest that the defendant could be aware of another, actual murder weapon which was never found.[28] Clearly the defense theory was compromised in the middle of trial.

In State v. Schopp, 653 So.2d 1016, 1021 (Fla. 1995), this Court recognized that in the **vast majority of cases** it will be readily apparent that the record is insufficient to support a finding of **harmless error**. This Court also recognized that "where the defendant's trial preparation or strategy reasonably could have

[28] In fact, this is exactly what the prosecutor attempted to "throw into the mix", over objection, during final summation. (XXIV 2978-79)

been affected by the discovery violation it will be difficult to determine whether the verdict could have differed had the violation not occurred or had the trial court acted to avert the prejudice". Id.

Clearly the violation in Appellant's case was willful. Any discoverable evidence in the hands of the police is constructively in the hands of the prosecution. Tarrant v. State, 668 So.2d 223, 225 (Fla. 4th DCA 1996) In his pretrial deposition, Inspector Faulk flatly denied that Appellant had made any such statement. (XIX 1941-42) The fact that the undisclosed evidence was an incriminating statement made by the appellant leads to the inevitable conclusion that the violation was substantial. See, e.g., Loisell v. State, 703 So.2d 534 (Fla. 4th DCA 1997) [where state fails to disclose an oral statement to a policeman, the failure to do a Richardson inquiry is not harmless. The failure to disclose reasonably could have affected defendant's trial strategy.] Defense counsel clearly stated on the record that the unfortunate and untimely disclosure adversely affected their trial strategy and preparation. Reversal is required.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHERE A WITNESS VIOLATED THE TRIAL COURT'S ORDER IN LIMINE WHEN HE TOLD THE JURY THAT APPELLANT WAS ALREADY SERVING TWO LIFE SENTENCES.

Great pains were taken by all of the parties below in keeping from the jury the fact that Allen Cox was serving two life sentences when he allegedly killed another inmate. After Cox discovered his money had been stolen from his footlocker, he angrily vowed that he would "kill" the culprit. He said that he did not care if he got caught, because he was serving a life sentence with no chance of parole. The trial court wisely excluded this statement as more prejudicial than probative. (XVI 1381-84) Each of the inmate witnesses who heard appellant's announcement was cautioned outside the presence of the jury prior to their testimony.

During the defense case-in-chief, Vincent Maynard, aka Pig, was called by the defense. Maynard was essentially a hostile witness who became more hostile when he realized that the defense plan was to point the finger at him as the actual murderer. Throughout his testimony, Maynard was a particularly difficult witness to control. Many of his answers were unresponsive. Outside the presence of the jury, the trial court cautioned the witness:

> THE COURT: Mr. Maynard, before I do get the jury, let me caution you, Mr. Maynard, please answer the lawyers' questions, okay, whether it is Mr. Stone, on behalf of Mr. Cox, or one of the State Attorneys, answer their questions carefully. Okay? I don't want to get us in a situation where I get argued with about a mistrial. Okay?
>
> THE WITNESS: Yes, sir.

(XXI 2395) Subsequently, defense counsel was questioning Maynard regarding Maynard's recent revelations (in the middle of trial) that Cox had given him a radio as partial payment on a debt and, in so doing, told Maynard that he was going to kill somebody that day. (XXII 2462-63) Defense counsel then moved on to another subject:

> [Defense counsel]: Now, on July 22nd 1999, you talked with me, Mr. McCune, and Mr. Gross, that is when you said, "I never saw him hit him in the side, I saw him hit him two times in the ass."
>
> A. Sure, that is the first time you were present, sir.
>
> Q. Neither of those statements are exactly protecting Mr. Cox, are they?
>
> A. Well - -
>
> Q. So don't come in here and tell us - -
>
> Mr. Gross (prosecutor): Objection.
>
> THE COURT: Sustained.

> THE WITNESS: **Sir, he has two life sentences already**.
>
> THE COURT: Mr. Maynard, answer his questions. Okay?

(XXII 2464-65) At that point, the trial court excused the jury and appellant moved for a mistrial, pointing out that the witness had repeatedly made non-responsive comments indicating that he had passed a polygraph. Now, to compound the problem he had mentioned appellant's prison sentencing status in direct contravention of to the court's previous instructions as recently as Friday afternoon. (XXII 2465-66) The prosecutor explained that the witness was "riled" when he realized that the defense intended to prove that he was the actual murderer. (XXII 2466-67) The prosecutor obviously saw the error as substantial.

> MR. GROSS (prosecutor):...Mr. Maynard is riled and he had said some things that I regret him saying, ... I guess that all being said, ...where do we go from here? It is obviously within your discretion to grant a Motion For Mistrial, if you feel that the fairness is destroyed by those remarks... certainly your other option is to instruct the jury and certainly to instruct this witness as bluntly and as emphatically as you can, your Honor, not to say anything about any life sentences and not to say anything more that isn't pertaining to the question or else we will be trying this case all over again. And then to instruct the jury to please disregard these volunteered statements....I would suggest that you even mislead the jury that this [that Appellant has two life sentences] is not

> accurate. I certainly don't mind if you mislead this jury and tell them it's not accurate and this is just based on rumor and it's not true....

(XXII 2466-68) The prosecutor suggested that a curative instruction might remedy the situation and urged the court to "flat out tell" the jury that Allen Cox had never been convicted of murder.[29] (XXII 2468-69)

After a short recess, the trial court put on the record that Vincent Maynard was called as a defense witness in the sixth day of trial and that the questions and answers had been quite antagonistic for some time. Maynard had twice before inappropriately mentioned a polygraph, without objection from the defense. Based on the totality of the circumstances, the trial court denied the motion for mistrial. (XXII 2471-72) In giving the curative instruction, the trial court refused to lie to the jury. The court declined to tell the jury that Allen Cox was not serving a life sentence when in fact he was. The trial court instructed the jury:

> Ladies and Gentlemen, you are instructed that the sentence that Mr. Cox was serving at Lake Correctional Institution is not relevant to this case in any way. He has never been convicted nor is he serving any sentence for homicide or any type of Murder.

(XXII 2476) Afer the "curative" instruction, the trial court denied appellant's

[29] In fact, Allen Cox had never committed any type of homicide.

renewed motion for mistrial. (XXII 2476-77)

The grant or denial of a motion for mistrial following the exposure of the jury to improper and prejudicial information is governed by the abuse of discretion standard. San Martin v. State, 717 So.2d 462 (Fla. 1998) and Cole v. State, 701 So.2d 845 (Fla. 1997). Appellant contends on appeal that the trial court abused its discretion in denying appellant's timely motion for mistrial. Alternatively, and in light of the concession by the prosecution, the trial court should have instructed the jury that Allen Cox was **not** serving a life sentence.

This argument falls in the very broad area of improper evidence of uncharged crimes or bad acts. This issue hinges on that type of prejudicial evidence that was revealed to the jury in direct violation of the trial court's order. Generally, state witnesses are the offending parties engaging in an improper attempt to obtain a conviction. See, Quinones v. State, 766 So.2d 1165 (Fla. 3rd DCA 2000). [evidence of other crimes or prior bad acts constitute improper character evidence where the defendant's character is not an issue. Robertson v. State, 25 Fla.L.Weekly D900 (Fla. 3rd DCA April 12, 2000).]

The fact that the jury already knew that Allen Cox was a state prisoner is of no importance. Under Florida law, Cox could have been serving as little as a year and a day. Until Maynard's outburst, the jury may well have thought he had a

short sentence. Even prisoners doing time in state prison can be prejudiced once the jury finds out they are serving two life sentences.[30] The jury undoubtedly saw Allen Cox as the worst of the worst.

Two cases are particularly helpful and enlightening. In Thomas v. State, 701 So.2d 891 (Fla. 1st DCA 1997), the defendant was a state prisoner charged with attempted first-degree murder of a fellow inmate in the exercise yard with a weapon made by fastening a razor blade to the handle of a toothbrush. Over a timely objection, the state's first witness, a prison guard, was permitted to testify that Thomas was housed in a wing of the prison reserved for the "more violent inmates." The first district reversed for a new trial finding that the testimony was prejudicial. Its natural impact would have been to imply that Thomas was prone to resort to violence, and that he probably acted consistently with that propensity with a regard to the incident in question, rather than in self-defense. The testimony was irrelevant to any issue in the case and did nothing more than establish the

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[30] Earlier in the trial, Inspector Faulk had previously given the jury the erroneous impression that the maximum sentence for second-degree murder was twenty-five years in prison. The jury was subsequently instructed otherwise, however appellant maintained his motion for mistrial. Appellant contended that the jury undoubtedly believed that anyone serving a life sentence **must** have committed a first-degree murder. (XIX 1834-41) This compounded the error raised herein. Even though the trial court told the jury Cox had committed no murders, ironically the jurors probably did not believe the judge.

defendant's propensity for violence.

Bozeman v. State, 698 So.2d 629 (Fla. 4th DCA 1997) involved a conviction for battery on a police officer and resisting an officer with violence. Bozeman was an inmate at the Broward County Jail when he allegedly struck a deputy who was trying to return the inmate to his cell. The victim/deputy referred to the unit where the incident occurred as a "special management" division. The witness was subsequently allowed to explain, over objection, that the special management unit housed the "worse behaved inmates in the Broward County jail system," men who were "maladjusted" and "violent," who are placed there because "they [had] exhibited the propensity for violent behavior towards other inmates and staff. They are there for escape risks." Bozeman v. State, 698 So.2d at 630. The fourth district concluded that the danger of unfair prejudice far outweighed any probative value of the testimony. In granting a new trial, the appellate court pointed out that the evidence suggested that Bozeman had committed other crimes or bad acts. Such evidence can have a powerful effect on the results at trial. Id.

The unresponsive and prejudicial outburst by Vincent Maynard destroyed any chance that appellant had for a fair trial. The jury found out that he was serving two life sentences. The trial court's curative instruction did not change that impression. The trial court chose to reject the prosecutor's stipulation to

misleading the jury by telling them that Cox was not in fact serving a life sentence of any sort. Instead, the trial court told the jury that Cox's two life sentences was of no concern to them. The trial court did instruct the jury that Cox had no convictions for homicide. Whether the jury believed this instruction or not can only be speculated.

Although the trial court told the jury that appellant's two life sentences was of no concern to them, the jury certainly heard and considered as impeachment the respective sentences imposed on the numerous inmates who testified at trial. A comparison of the testifying inmates' sentences with Allen Cox's two life terms clearly demonstrated to the jury that Allen Cox is the "worst of the worst." The jury heard that Marcus Adorno, Melvin Young, Robert Nies, and Walter Dorsey had already been released from prison by the time they testified. (XVII 1447, 1590, 1643, 1688, 1736) The jury heard that Gerald Hatcher was on work release and would soon be completely free. (XVII 1497-98) Donny Cox served a twenty year sentence in Florida and would be released by Florida authorities in ninety days. (XVIII 1778)[31] Jesse McGraw had almost completed an eleven year sentence and expected to be out in twenty six months. (XVI 1386) Ronald Ralph

[31] Georgia had placed a detainer on Donny Cox, but there was no indication of the possible sentence in Georgia.

expected to be released the week after trial following a nine year sentence with a three year minimum mandatory. (XVI 1421-23) Michael Gardner had done six years and expected to be released in one year. (XVII 1524) Anthony Love had completed twelve years and would be released in seven years. (XX 2048) Donald Johnson was serving a thirty year sentence and Vincent Maynard was serving a fifteen year minimum mandatory sentence. (XX 2071; XXI 2276) Although Willie Pitman and Lawrence Woods also testified as inmates, there was no evidence of their respective sentences. In comparison and in contrast, the jury found out that Allen Cox was serving two life sentences at the time he committed this murder. This was an inappropriate consideration at the guilt phase. Reversal is required.

POINT III

THE TRIAL COURT'S CONTRAVENTION OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.202 RESULTED IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

Prior to trial, appellant challenged the constitutionality (both facially and as applied) of Florida Rule of Criminal Procedure 3.202. (II 281-95) Appellant contended that the rule was unconstitutional as applied to him where he had been in the custody of the State of Florida, specifically the Department of Corrections,

since 1991. During that time, appellant had been examined by psychiatrists, psychologists, and mental health specialists in excess of 70 occasions, and on a monthly basis since December, 1996. (II 291) As such, any information obtained by the state through further evaluation of appellant's mental state was already in their possession. Appellant argued that the least intrusive and most constitutionally acceptable means for the state to obtain the evidence that it sought was to refer to its own records. (II 294) The trial court ultimately denied both constitutional attacks prior to the commencement of trial. (III 505-8; X 130-39)

As part of the preparation for the presentation of mitigating evidence at the penalty phase, appellant sought the services of Dr. Elizabeth McMann. Five days before the commencement of the guilt/innocence phase of appellant's trial, the state sought discovery of Dr. McMann's notes, testing results, and evaluation of Allen Cox. This became a point of contention prior to trial and appellant repeatedly objected based on Dr. McMann's status as a penalty phase witness rather than a guilt/innocence phase witness.[32] Appellant contended that the state sought discovery of information that should not be discoverable until after a guilty

[32] The State contended that the defense, based on a compromise, had agreed to disclose Dr. McMann's notes and report. Although the defense furnished the state with Dr. McMann's name on a witness list three weeks before trial, the defense had not listed its proposed mitigating factors. (Dr. McMann had been ill and the list was not complete.)

verdict for first-degree murder if that was indeed the result of the first phase. (XI 294-305, 326-38, 352-57)

Over appellant's objections, the trial court ordered Dr. McMann to turn over her notes to the state's expert prior to the guilt/innocence phase of trial. (XI 326-33, 362-86) Dr. McMann had already been deposed by the State. The trial court subsequently admitted that he might have erred by letting deposition proceed prior to trial. However, the court concluded that since appellant made no admissions to the doctor, no harm was done. (XI 362-86)

Matters of statutory construction or interpretations of rules are decisions of law which are subject to *de novo* review. City of Jacksonville v. Cook, 765 So.2d 289 (Fla. 1st DCA 2000) Florida Rule of Criminal Procedure 3.202 sets forth the procedure in a capital case wherein the defendant must give notice of his intent to present, during the penalty phase of the trial, expert testimony of a mental health professional, who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigation circumstances. The defendant gives notice listing the statutory and nonstatutory mental mitigating circumstances that the defendant expects to establish through expert testimony and the names and addresses of the mental experts by whom the defendant expects to establish mental mitigation, insofar as is possible. The rule then provides:

> After the filing of such notice and on the motion of the state indicating its desire to seek the death penalty, the court shall order that, **within 48 hours <u>after</u> the defendant is convicted of capital murder**, the defendant be examined by a mental health expert chosen by the state. ...

Fla.R.Crim.P. 3.202 (d). (Emphasis added.)

The trial court's erroneous ruling allowed the state to "jump the gun" in its preparation for the penalty phase. Although the state's expert did not examine appellant until after the guilt phase, the prosecution was allowed to depose Dr. McMann even prior to the commencement of the **guilt** phase. Additionally, Dr. McMann was ordered to provide her notes and testing data to the state's expert far earlier than required by the rule. This was clearly error. It gave unfair advantage to the state who had much more time than they should have to prepare this particular aspect of their penalty phase rebuttal. Interestingly, in case of a defendant's refusal to cooperate, Rule 3.202(e)(1) provides as one possible sanction allowing the state's expert to review all mental health reports, tests, and evaluations by the defendant's mental health expert. The trial court's misapplication of the rule in this case imposed this sanction on appellant where there had been no refusal to cooperate. Defense counsel pointed this out to the trial court to no avail. (XI 373) A new trial with a level playing field is required.

POINT IV

THE TRIAL COURT ERRED IN REFUSING TO ACCEPT APPELLANT'S OFFER TO STIPULATE TO HIS PRIOR VIOLENT FELONY CONVICTIONS IN CONTRAVENTION OF OLD CHIEF V. UNITED STATES[33] RESULTING IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL.

Prior to the commencement of the penalty phase, appellant filed an offer to stipulate to his status of imprisonment, as well as his previous convictions for violent felonies. (IV 600-11; XI 220-29) Counsel offered to stipulate in an effort to preclude the state from presenting detailed testimony and evidence regarding Appellant's prior violent felony convictions. Specifically, appellant contended that his willingness to stipulate to the application of these aggravating factors rendered any detailed evidence cumulative and unnecessary and, more importantly, unfairly prejudicial. Such evidence could suggest to the jury an improper basis for their sentence and recommendation. Despite appellant's offer to stipulate, the trial court allowed the state, over defense objection, to present the live testimony of the victims of appellant's prior kidnapping, sexual battery, attempted sexual battery, aggravated batteries, armed burglary, and armed robberies. (XXV 3036-41, 3089-

[33] Old Chief v. United States, 519 U.S. 172 (1997).

3136) In fact, the **only** evidence presented by the state during their penalty phase-case-in-chief was the testimony and documentation detailing these horrific crimes which occurred ten to twenty years prior to the crime at issue. This was error and denied Mr. Cox's rights pursuant to Article I, Sections 2, 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.[34]

This issue should be controlled by the United States Supreme Court opinion in Old Chief v. United States, 519 U.S. 172 (1997). In Old Chief, the defendant was charged with the offense of possession of a firearm by a convicted felon. At trial the defendant offered to stipulate that the government has proven one of the essential elements of the offense, i.e., the defendant's prior felony conviction. The United States Supreme Court held that the district court abused its discretion when it spurned the defendant's offer and allowed the admission of the full record of the prior judgment of conviction. The defendant's prior offense, assault causing serious bodily injury, was of such a nature that the probative value was substantially outweighed by the danger of unfair prejudice. Since the nature of the prior offense raised the risk of verdict tainted by improper considerations, the

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[34] The introduction of evidence is judged by an abuse of discretion standard. San Martin v. State, 717 So.2d 462 (Fla. 1998).

defendant was entitled to a new trial. The court grounded the holding, in part, on Federal Rule of Evidence 403 relating to probative value outweighing the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.

In Brown v. State, 719 So.2d 882 (Fla. 1998), this Court applied Old Chief, supra, pointing out that the holding was grounded on the Federal Rule of Evidence which is reflected by an almost identical provision in the Florida Evidence Code. §90.403, Fla. Stat. (2000) Although this Court has not yet applied Old Chief, supra, to a situation such as this, the holding and the logic are clearly applicable.

Appellant recognizes that this Court has previously held that the prosecution can introduce evidence regarding a prior violent felony beyond the mere judgment itself. However, this rule has proven to be unworkable. It has spawned tremendous litigation over the extent, nature, and source of evidence concerning prior violent felonies. Trawick v. State, 473 So. 2d 1235 (Fla. 1985); Stano v. State, 473 So. 2d 1282 (Fla. 1985); Tompkins v. State, 502 So. 2d 415 (Fla 1986); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Freeman v. State, 563 So. 2d 73 (Fla. 1990); Duncan v. State, 619 So. 2d 279 (Fla. 1993); Finney v. State, 660 So. 2d 674 (Fla. 1995). In Trawick, supra, this Court held it to be error to allow "such detailed testimony" about a prior attempted murder. 473 So. 2d at 1240. In Stano, supra,

this Court found the detailed testimony and argument about the prior violent felonies to be admissible. However, this Court also stated, "The State's argument about these other crimes approached the outermost limits of propriety." 473 So. 2d at 1289.

In Rhodes, supra, this Court began to describe the limits of testimony concerning a prior violent felony. This Court held a taped statement of a victim of a prior violent felony to be inadmissible.

> Although this Court has approved introduction of testimony concerning the details of prior felony convictions involving violence during the penalty phase of a capital trial, *Tompkins; Stano*, the line must be drawn when that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value. Not only did the introduction of the tape recording deny Rhodes his right of cross examination, but the testimony was irrelevant and highly prejudicial to Rhodes' case. The information presented to the jury did not directly relate to the crime for which Rhodes was on trial, but instead described the physical and emotional trauma and suffering of a victim of a totally collateral crime committed by the appellant.

Rhodes v. State, 547 So. 2d at 1204-1205.

In Freeman, supra, this Court held the testimony of the victim's widow of a prior first degree murder should not have been introduced.

> We agree that Ms. Epps should not have been called to testify concerning her husband's death. While the details of a prior felony conviction are admissible to prove this aggravating factor, *Perri v. State*, 441 So. 2d 606 (Fla. 1983), Ms. Epps was not present when her husband was killed and, therefore, her testimony was not essential to

this proof.

Freeman v. State, 563 So. 2d at 76 (footnote omitted).

In Duncan, supra, this Court held the admission of an autopsy photograph of the victim of a prior homicide was inadmissible.

> In *Rhodes v. State*, 547 So. 2d 1201, 1204-05 (Fla. 1989), we noted that evidence concerning the circumstances of a prior felony conviction involving the use or threat of violence is admissible during the penalty phase of a capital trial. However, we cautioned that there are limits on the admissibility of such evidence. We emphasized that "the line must be drawn when [evidence] is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value." *Id*. at 1205.
>
> We agree with Duncan that the prejudicial effect of the gruesome photograph clearly outweighed the probative value. Section 90.403, Fla.Stat. (1991). The photograph did not directly relate to the murder of Deborah Bauer but rather depicted extensive injuries suffered by that victim of a totally unrelated crime. Moreover, the photograph was in no way necessary to support the aggravating factor of conviction of a prior violent felony. A certified copy of the judgment and sentence for second-degree murder indicating that Duncan pled guilty to and was convicted of a violent felony had been introduced.

Duncan v. State, 619 So. 2d at 282.

In Finney v. State, supra, this Court discussed the limits of testimony concerning a prior violent felony:

> Although the testimony elicited here from the victim of the rape/robbery was not unduly prejudicial, we take this opportunity to point out that victims of prior violent felonies should be used to place the facts of prior convictions before the jury with caution. *Cf. Rhodes*, 547 so. 2d at 1204-05 (error to present taped statement of victim of

> prior violent felony to jury, where introduction of tape violated defendant's confrontation rights and the testimony was highly prejudicial). This is particularly true where there is a less prejudicial way to present the circumstances to the jury. *Cf. Freeman v. State*, 563 So. 2d 73, 76 (Fla. 1990) (surviving spouse of victim of prior violent felony should not have been permitted to testify concerning facts of prior offense during penalty phase of capital trial where testimony was not essential to proof of prior felony conviction), *cert. denied*, 501 U.S. 1259, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991). Caution must be used because of the potential that the jury will unduly focus on the prior conviction if the underlying facts are presented by the victim of that offense.
>
> Evidence that may have been properly admitted during the trial of the violent felony may be unduly prejudicial if admitted to prove the prior conviction aggravating factor during a capital trial. This is particularly true where highly prejudicial evidence is likely to cause the jury to feel overly sympathetic towards the prior victim. *See e.g. Duncan*, 619 So. 2d 279 (error to admit gruesome photograph of victim of prior unrelated murder for which defendant had been convicted where photograph was unnecessary to support aggravating factor); *Freeman*, 563 So. 2d at 75 (error to allow surviving spouse of victim of prior violent felony to testify concerning facts of prior offense where testimony was not essential to proof of prior felony conviction).

Finney v. State, 660 So. 2d at 683.

This Court's frequent discussions of this issue have left litigants with a case by case balancing test regarding the admissibility of evidence concerning a prior violent felony. This test involves the source of the testimony, the emotional nature of the testimony, the relevance of the testimony, the necessity of the testimony, and the prejudice to the defendant from the testimony. This sort of overall balancing

test gives little firm guidance to trial judges or litigants as to when this testimony is admissible.

A better rule is outlined by the Oklahoma Court of Criminal Appeals in Brewer v. State, 650 P.2d 54 (Okl.Cr. 1982). The Court in Brewer dealt with the admissibility of evidence as to an identical aggravating circumstance. 650 P.2d at 63. The Court held that defendant must be given an opportunity to stipulate to the validity of his prior violent felony convictions. Id. If the defendant stipulates to the validity of the prior convictions, then the prosecution is limited to the introduction of the judgment and sentence on the prior felonies. Id. The Court in Brewer went on to place strict limits on the introduction of evidence concerning the prior felony even in cases where the defendant refuses to stipulate.

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

Id.

The Oklahoma procedure is far preferable to the current ill-defined limits. It sets out a bright line rule for everyone to follow as opposed to the current imprecise balancing test. This procedure also satisfies all of the concerns of the

capital sentencing process. If a defendant stipulates to the prior convictions, then there is no need to prove this aggravating circumstance.

The current practice in capital sentencing of allowing evidence beyond the judgment has had several negative affects. It has resulted in persistent and increasing litigation over the precise limits of such testimony. The current procedure also increases the arbitrariness in capital sentencing. There will be extreme variation from case to case in the availability of witnesses from prior violent felonies, in the emotional nature of their testimony and in the extent to which prosecutors and judge observe the ill-defined limits on such testimony. There will inevitably be cases where the limits are exceeded. Trawick, supra; Rhodes, supra; Freeman, supra; Duncan, supra. There will be other cases in which the evidence is used for improper purposes. Finney, supra. Finally, there will be cases in which evidence is taken to the "outermost limits of propriety." Stano, supra at p.1289. All of this will lead judges and juries to different results based on an identical prior record.

At appellant's penalty phase, the only evidence presented by the state during its case-in-chief concerned the details of the prior violent felonies to which Allen Cox stipulated. It was highly inflammatory and involved the testimony of victims which is strictly scrutinized. See, e.g., Finney v. State, 660 So.2d 674 (Fla. 1995).

This Court has repeatedly held that the details of prior violent felonies must not be emphasized to the point where they become the feature of the penalty phase. Id.; Duncan v. State, 619 So.2d 279, 282 (Fla. 1993) This is precisely what occurred in the present case. When the prosecution's evidence concerning prior violent felonies is more extensive than that concerning the offense itself, it can only be described as a feature of the case. See, Long v. State, 610 So.2d 1276, 1280-81 (Fla. 1993); Bell v. State, 650 So.2d 1032, 1035 (Fla. 5th DCA 1995) Since the objectionable evidence subsequently became a feature[35] of the penalty phase, this Court should vacate appellant's death sentence and remand for a new penalty phase.

[35] It was the only evidence presented by the State during its penalty phase case-in-chief. Additionally, the testimony was from the unfortunate victims of many particularly horrible crimes. There was testimony from a small, extremely vulnerable woman describing in graphic detail an especially horrible and brutal kidnapping and rape.

POINT V

FUNDAMENTAL ERROR OCCURRED WHEN THE PROSECUTOR REPEATEDLY MISSTATED THE LAW DURING VOIR DIRE AND ENGAGED IN IMPROPER ARGUMENT THEREBY TAINTING THE JURY'S DEATH RECOMMENDATION.

The Prosecutor Repeatedly Misstated the Law During Jury Selection.

Appellant contends that fundamental error occurred when the prosecutor repeatedly misstated the law during jury selection. This error, combined with the prosecutor's inflammatory and objectionable closing argument at the penalty phase misled the jury. Even though defense counsel failed to object, fundamental error occurred. The jury's death recommendation was unconstitutionally tainted. Amends. V, VI, VIII, and XIV U.S.Const.; Art.I, §§9 & 16, Fla. Const.

During jury selection, the prosecutor told the perspective jurors that if the aggravating factors outweigh the mitigating factors, **the jury must recommend the death penalty**. (XIII 632-33, 636, 637, 641, 689-690) The prosecutor successfully used his misstatement of law to disqualify many jurors for cause.

> Miss Salamone: I think I already know the answer, but I have to ask...If you have the evidence and aggravation outweighing the evidence in mitigation, **the law says that you must recommend that Mr. Cox die.**

(XIII 633) (Emphasis added.) The perspective juror told the prosecutor that she could never vote that way. The prosecutor proceeded to get a similar answer from nine additional perspective jurors, thereby disqualifying them for cause. (XIII 633-43) The jurors clearly understood and accepted at face value the prosecutor's misstatement of the law. One juror reiterated her inability to vote for death.

> Perspective Juror: Yes, and even though as you point out **I would be breaking the law**, I could not make that decision.
>
> Mr. Gross(prosecutor): We need your candor now and I appreciate it.

(XIII 637)(Emphasis added.)

Perspective juror Melinda apparently knew more case law than the prosecutor in this case. Melinda indicated that she would have no trouble at the guilt phase, but admitted that she could not sentence someone to death. (XIII 640-41) The prosecutor questioned her further:

> Mr. Gross: Can you imagine, even though the law requires you to do that?
>
> Perspective juror (Melinda): I didn't realize that the law required you to do that.

(XIII 641) The prosecutor admitted that he might be talking too simplistically. However, the prosecutor reiterated that after weighing the evidence and "depending upon which way it balances out, that is supposed to decide your

recommendation." (XIII 641)

The prosecutor's statement of the law was clearly erroneous. A jury may choose to exercise mercy even in a case where the aggravating factors outweigh the mitigating circumstances. Henyard v. State, 689 So.2d 239 (Fla. 1996); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975); Gregg v. Georgia, 428 U.S. 153, 203(1976); See, also, Urbin v. State, 714 So.2d 411 (Fla. 1998). The jurors' misapprehension of the law persisted throughout voir dire. One juror subsequently expressed her confusion regarding her duty to vote for death.

> Mr. Stone (defense counsel): Okay. So there is [sic] no circumstances under which you could participate and recommend death?
>
> ****
>
> Are you saying that you would not want to participate as a juror if you knew that the possible outcome was a recommendation of death?
>
> Perspective Juror: Correct....there are two choices, one is life imprisonment and the death penalty, right?
>
> Mr. Stone: Yes, ma'am.
>
> Perspective Juror: Okay. Then if I did not have to vote for the death penalty - -
>
> Mr. Stone: Then you could participate as a juror and follow the laws as instructed by the Judge?
>
> Perspective Juror: **Not the way it was pointed out to me previously, because when I got that**

> **question before, it was that if I didn't do it I was going to be breaking the law, practically**, that was my response to it. So I said yes to him and I'm saying no to you...It's just that I'm hearing two different things. I heard one thing from him and one from you,....

(XIII 688-690) The prosecutor's misstatement of the law adversely affected jury selection and deprived Allen Cox of his constitution rights to due process and a fair trial.

The Prosecutor's Penalty Closing Argument was Improper and Prejudicial.

Very early in the prosecutor's final summation, he told the jury:

> I stand before you again today on behalf of the decent law abiding people of this community and this state, who I represent.

(XXVIII 3767-68) This statement by the prosecutor is the type of appeal to passion, emotion and prejudice condemned by Florida Courts. In King v. State, 623 So.2d 486, 488 (Fla. 1993), the defendant was granted a new sentencing proceeding in a capital case where the prosecutor admonished the jurors that "they would be cooperating with evil and would themselves be involved in evil just like [the defendant]" if they recommended life imprisonment. Similarly, "message to the community" arguments, whereby the prosecutor exhorts the jury to convict the defendant as a means of sending a message to the community at large, constitute improper conduct due to "obvious appeal to the emotions and fears of jurors."

Bertolotti v. State, 476 so.2d 130, 133 (Fla. 1985). In Campbell v. State, 679 So.2d 720, 725 (Fla. 1996), this Court found it was reversible error where the prosecutor stated that the death penalty is a message sent to certain members of society who chose not to follow the rules. The prosecutor's argument that he represented the decent law abiding people of this community and this state clearly implied that defense counsel represented Allen Cox, also known as the dregs of society. This type of argument is particularly egregious in a case of this nature (a drug-dealing lifer stabbing another inmate to death).

The prosecutor reiterated his misstatement of the law from jury selection by erroneously telling the jury that they **must** vote for death if the aggravating circumstances outweigh the mitigating circumstances. (XXVIII 3773-4) This only compounded the fundamental error that occurred during jury selection.

The prosecutor also improperly denigrated valid mitigating evidence during final summation. In discussing appellant's admittedly traumatic childhood, the prosecutor asked that the jury "put that in its proper context, it happened more than twenty-five years before the defendant decided to kill Thomas Baker. (XXVIII 3799) As this Court stated in Nibert v. State, 574 So.2d 1059 (Fla. 1990), an abusive childhood is clearly a valid mitigating factor that should be considered by both the jury and the trial court. The fact that the abuse finally stopped in no way

lessens the mitigation.

In Brooks v. State, 762 So.2d 879, 903 (Fla. 2000) this Court reversed a death sentence while condemning a prosecutor for referring to "those flimsy,... phantom, mitigating circumstances." This Court called the comments egregiously improper. The prosecutor's characterization of the mitigating circumstances and repeatedly characterizing such circumstances as "excuses," was clearly an improper denigration of the case offered by [the defendant's] in mitigation. Id. The defense counsel in Brooks failed to object to the prosecutor's characterization of the mitigating circumstances as well.

For an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process. See State v. Johnson, 616 So.2d 1, 3 (Fla. 1993). Fundamental error is defined as the type of error which "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Urbin v. State, 714 So.2d 411, 418 n.8 (Fla. 1998) Appellant's submits that the prosecutor's misstatement of the law throughout voir dire combined with the improper closing argument reaches the threshold level of fundamental error. Reversal is required.

POINT VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY OVER TIMELY OBJECTION AND FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL WHERE THE EVIDENCE DID NOT SUPPORT THE AGGRAVATING FACTOR.

Defense counsel objected to any instruction on the "heinousness" (HAC) aggravating factor contending that the evidence did not support it. (XXVII 3463-75) The trial court overruled the objections and subsequently allowed the jury to consider this particular aggravator over appellant's renewed objection. (XXIX 3874, 3880)

In finding this particular aggravating factor, the trial court cited the fact that during the confrontation with Baker, Cox knocked him to the ground, then struck him numerous times. Baker attempted to get up but was thrown back to the ground each time. Cox then pulled out his weapon and stabbed Baker several times. During the attack, Baker continued to kick and attempted to escape denying the theft. After stabbing Baker three times, Cox left the scene. Baker got up, ran a short distance, fell, got back up, and ran over three hundred feet to C-dorm. Realizing that he had been stabbed, Baker sought medical help from the prison staff. While waiting for medical assistance which was rather slow in coming, Baker coughed up blood and had increasing difficulty breathing. He expressed

fear and repeated the urgency for medical attention. He remained conscious for approximately fifteen minutes after the stabbing.[36] (VIII 1517-19) In finding HAC, the trial court noted the numerous stab wounds, the fact that the victim's lungs filled up with blood, and that the victim had a substantial period of time (approximately 15 minutes) to contemplate his demise. (VIII 1519)

Any murder could be characterized as heinous, atrocious, or cruel. However, to avoid such an over broad and unconstitutional application of HAC, restrictions have been placed on this aggravating factor. It is well-settled that the aggravator does not apply unless it is clear that the defendant intended to cause unnecessary and prolonged suffering. Bonifay v. State, 626 So.2d 1310, 1313 (Fla. 1993). Also, any "instantaneous or near instantaneous death" does not qualify as HAC. Donaldson v. State, 722 So.2d 177, 186 (Fla. 1998).

The State has the burden of proving aggravating circumstances beyond a reasonable doubt.[37] Robertson v. State, 611 So.2d 1228, 1232 (Fla. 1993).

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[36] With remarkable candor, the State conceded at trial that only 15 minutes elapsed between the start of the fight and the victim losing consciousness. (XXIX 3813)

[37] The State also conceded at trial that the murder was (1) not heinous ["I don't know if one would say it was extremely wicked or shockingly evil."]; (2) was not atrocious ["I don't think atrocious applies. It's not outrageously wicked or vile what happened to Thomas Baker."] but (3) did contend the murder was especially cruel. (XXIX 3811-15). Despite these critical concessions by the

Moreover, even the trial court may not draw "logical inferences" to support a finding of a particular aggravating circumstance when the state has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983) However, more recently, this Court has stated that it is not within its function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt. "Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Willacy v. State, 696 So.2d 693, 695 (Fla. 1997)(footnote omitted). See also, Way v. State, 760 So.2d 903, 918(Fla. 2000).[38]

In this Court's application of this factor, it has required HAC murders to have been torturous, not simply physically so, but mentally as well. Wickham v. State, 593 So.2d 191, 193 (Fla. 1991); Richardson v. State, 604 So.2d 1109 (Fla. 1992). Thus, where a defendant shot a victim causing instant death, this aggravator may have applied because preceding the painless death was a prolonged or significant period where the victim was aware of his impending death. See, e.g.,

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prosecutor, the trial court still found this aggravating circumstance.

[38] Incomplete and misleading jury instructions on elements of the crime, e.g., aggravating circumstances, are reviewed as fundamental error. Hubbard v. State, 751 So.2d 771 (Fla. 5th DCA 2000)

Cooper v. State, 492 So.2d 1059 (Fla. 1986) (victim bound and helpless, gun misfired three times); Preston v. State, 607 So.2d 404 (Fla 1992) (fear and strain can justify HAC). On the other hand, quick deaths, in which the victim had no awareness they were about to be killed, or that they knew for only a short time, do not become especially heinous, atrocious, or cruel, even where the victim was stabbed. See e.g., Wickham v. State, 593 So.2d 191 (Fla. 1991)(Ambushing a "Good Samaritan" and shooting him twice was not HAC even though he pled for his life); Scull v. State, 533 So.2d 1137 (Fla. 1988)(A single blow to the head does not support HAC).

In Wilson v. State, 436 So.2d 908, 912 (Fla. 1983), this Court specifically held that a single stab wound to the chest was not such as to make the manner of death unnecessarily tortuous or conscienceless and set apart from the norm of capital felonies. Similarly, although the victim in this case suffered two additional minor puncture wounds, the medical examiner testified that they were "very swallow" and were clearly non-life-threatening. The two minor wounds were on the sides of the upper thigh/buttock area and were only two centimeters deep. (XIV 991)

In essence, this killing was a single stab wound murder. The physical confrontation between Cox and Baker that occurred immediately prior to the stab

wound was not a prolonged beating. Rather, Cox punched Baker several times and threw him to the ground in an effort to gain physical control. Once Cox had physical control, he fatally stabbed Baker using one thrust to the chest. The other two puncture wounds were no more than incidental contact. The entire incident consumed only a few minutes.

It is important to note that this murder occurred in a state prison. Inmates cannot pull out a gun to expeditiously kill another inmate. Cox did the next best thing by fatally stabbing Baker with one thrust of a home-made knife. He clearly did not intend for the victim to suffer. The fact that Baker lived for approximately fifteen minutes was through no fault of appellant. In Teffeteller v. State, 439 So.2d 840, 841 (Fla. 1983), the victim lived for a couple of hours after a shotgun blast to his chest. Despite the fact that the victim was in "undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been", this Court concluded that the trial court improperly found HAC. There is not sufficient competent evidence to support the trial court's finding of this factor. The jury instruction, over defense objection, tainted the jury's recommendation. Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I, §§9 and 16, Fla. Const.

POINT VII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED MANNER WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION.

Appellant objected vehemently to the trial judge instructing the jury regarding the "heightened premeditation" aggravating factor. The trial court overruled counsel's objections that the evidence did not warrant the instruction. (XXVII 3475-86; XXIX 3880) The trial court subsequently instructed the jury on this factor. (XXIX 3974-75)

In finding this aggravating factor, the trial court relied on Allen Cox's announcement the day before the murder that he intended to kill the person who broke into his locker and stole his money. He also announced that he did not care whether he got a death sentence or not. He then went about determining who had stolen from him by offering a reward and conducting his own investigation. The next day, Cox obtained a weapon, accosted the victim and stabbed him three times. After the stabbing, Cox announced that he had "one more of you [mothers] to get", before going to E-dorm and confronting Lawrence Wood. He told Wood, "I just got your little buddy, and you're lucky I put it up or I'd get your ass, too." (XVII 1519-22)

In Jackson v. State, 648 So.2d 85, 89 (Fla. 1994), this Court held:

> [I]n order to find the CCP aggravating factor under our case law, the jury must determine 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 (cold)...; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated)...; and that the defendant exhibited heightened premeditation (premeditated)...; and that the defendant had no pretense of moral or legal justification.

[Citations omitted.]

Appellant submits that the trial court erred in finding this particular aggravating factor.[39] Specifically, appellant contends that the murder of Thomas Baker was much more akin to a murder committed in the heat of anger without the requisite coldness, calculation, and heightened premeditation. Additionally, Allen Cox clearly had a **pretense** of moral or legal justification.

Appellant's "house" had been burglarized and almost $500.00 in cash was missing. Allen Cox was angry.[40] His confrontation with Thomas Baker occurred less than 24 hours later. His anger had not dissipated. As such, his actions did not meet the requisite "cold" prong of CCP. Indeed, the killing was prompted by

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[39] See Point VI for the standard of appellate review.

[40] This was not the first time Cox had been victimized. (XXIII 2671)

emotional frenzy or a fit of rage. This specifically excludes this aggravating factor. Jackson v. State, 648 So.2d 85, 89 (Fla. 1994).

At trial, the state made much of appellant's rant the day before the murder. In his angry tirade, appellant vowed revenge if he caught the thief. He said he would "kill" and "stab" the culprit. Initially, appellant points out that his diatribe was probably just so much prison machismo. Additionally, numerous inmates admitted that a threat to "kill" in prison generally means an intent to "mess somebody up, not necessarily to actually end their life."[41] (XVII 1538-39; XVIII 1785-86)

The fact that appellant armed himself prior to venturing out of his dorm on the day of the murder is not determinative of his intent to kill either. Arming oneself with a shank in prison is frequently the normal course of business. (XXI 2307-16) [There are hundreds of shanks on the compound.] Prisoners carry shanks as much for self-preservation as for any other reason.

Appellant also contends that the evidence does not support the trial court's conclusion that his plan to kill was "calculated." Undoubtedly, appellant intended

[41] In fact, an inmate in the large crowd of witnesses yelled out for Cox to stop, "you will kill him." At that point, Cox seemed to ease up and broke off the confrontation shortly thereafter. (XVIII 1758)

to confront Thomas Baker. However, there was no calculated plan to kill.[42] The fact that the confrontation and subsequent fight occurred at "high noon" in plain view of 200 fellow inmates is indicative of the lack of a calculated plan.

Allen Cox Had a Pretense of Moral or Legal Justification.

When an individual is serving life in prison without any chance of parole, his cell is his home, indeed his castle, even if he must share it with another convicted felon. The evidence at trial revealed that another inmate broke into appellant's footlocker and stole approximately $500.00 in cash. This was not the first time that appellant's "house" had been burglarized. He was angry. He was tired of being the victim. He wanted his money back and he wanted revenge. That being the case, he certainly had a **pretense** of moral or legal justification.

In Banda v. State, 536 So.2d 221, 225(Fla. 1988), this Court defined a pretense of moral or legal justification as "any claim of justification or excuse that, although insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide." While Baker's burglary of appellant's "house" and theft of his money did not legally justify Baker's murder,

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[42] Some inmates said Cox appeared "out of it" and incoherent. (XXI 2305-6) This is evidence that Cox did not possess the requisite "heightened premeditation." See Christian v. State, 550 So.2d 450, 452 (Fla. 1989) [During the commission of the homicide, fellow prisoners described him as being in a daze, or acting as though he was out of it.]

it does provide a **pretense** of justification which rebutted the otherwise cold and calculated nature of the offense as required by Banda v. State, 536 So. 2d at 225. It also negated "cold" element of the CCP factor required under Jackson v. State, 648 So.2d at 89, because the killing was not the product of cool and calm reflection, but an act prompted by emotional frenzy, panic, anger, or a fit of rage. In Cannady v. State, 620 So.2d 170 (Fla. 1993), this Court found that the CCP factor did not apply when the defendant murdered the man he believed had raped his wife two months earlier, because the murder was not cold, although it may have been calculated.

This Court has also disapproved the finding of this aggravating factor in other cases where there was at least a pretense of moral or legal justification. In Blanco v. State, 452 So.2d 520 (Fla. 1984), the victim confronted and struggled[43] with the defendant during a burglary. In Christian v. State, 550 So.2d 450 (Fla. 1989), this Court concluded the evidence did not support CCP in a prison murder where the victim knocked the defendant unconscious and, for three weeks after the attack, made death threats until the defendant surprised and killed the victim. In contrast, this Court approved a finding of CCP in a prison murder where the

[43] Baker clearly struggled with Appellant that day. He might even have been armed.

defendant thought the victim would stab his friend over a debt, even though the victim had not threatened such action prior to the murder. Williamson v. State, 511 So.2d 289 (Fla. 1987).

Cox engaged in no such anticipatory violence in this case. The perceived wrong was not imagined. Thomas Baker in collusion with Cox's own roommate stole a large sum of money from his prison footlocker. Cox was clearly acting within the purview of this dependant clause.[44]

[44] In Hill v. State, 688 So.2d 908 (Fla. 1996), this Court refused to recognize an anti-abortionist's murder of an abortionist (to protect innocent, unborn life) as being within the purview of a "pretense of moral or legal justification. In light of Hill, this aggravating factor may not sufficiently narrow the class of death-eligible defendants sufficiently to meet constitutional muster, thereby rendering Florida's death sentencing scheme unconstitutional (arbitrary and capricious). State v. Dixon, 283 So.2d 1 (Fla. 1973); Proffitt v. Florida, 428 U.S. 242 (1976). Appellant attacked the constitutionality of this factor prior to trial on these grounds (failure to narrow the class.) (II 248-49)

POINT VIII

THE TRIAL COURT ERRED IN FAILING TO CONSIDER AVAILABLE MITIGATING EVIDENCE AND IN GIVING LITTLE WEIGHT TO VALID MITIGATION BASED ON A MISTAKE OF LAW.

In its sentencing order, the trial court assigned either "no weight", "slight weight", "some weight", or "little weight" to many of the valid mitigating circumstances that had been proven. The trial court's action was based on a misapplication of the law. For example, the trial court agreed there was severe domestic violence in appellant's childhood home. However, the trial court assigned only "slight weight" to this particular mitigating circumstance because:

> ...Mr. Cox only lived in his parents' home until he was approximately ten years old and his father was not present during some of this time. At age ten or eleven, Mr. Cox went to live with his grandmother, who was a very loving, comforting, and supportive influence in Mr. Cox's life. Hazel Cox, Mr. Cox's grandmother, provided Mr. Cox with a good life. She took him to church and taught him right from wrong. Furthermore, although Mr. Cox did witness some of the domestic violence that occurred between his parents, so did his siblings and they have not committed crimes over a 20-year span of time. Elizabeth Ann Veatch testified that both she and her sister are happily married with children, and neither she nor her sister have ever been in trouble with the law.

(VIII 1525) (Footnote omitted) Based on similar rationale, the trial court gave

lesser weight to the fact that appellant's mother was very cruel and unpredictable ["...Mr. Cox was no longer subject to his mother's behavior after approximately the age of 10, ..."] (VIII 1525-26); Appellant was singled out for physical abuse ["...slight weight, as Mr. Cox left this environment at 10 years old..."] (VIII 1526-27); Allen's father was frequently absent from home [slight weight for similar reasons] (VIII 1527); Appellant's parents endured a stormy relationship where they divorced, remarried, and divorced again when Allen was eleven years old [some weight since appellant lived with his grandmother from the age 10] (VIII 1529); and Allen was forced to haul firewood as a small child until he dropped from physical exhaustion [slight weight because his sister was forced to do similar chores and she did not grow up to commit murder]. (VIII 1528).

Whether a particular circumstance is truly mitigating in nature is a question of law and subject to *de novo* review by this Court. Campbell v. State, 571 So.2d 415 (Fla. 1990). Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard. Id. The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. Id. By giving valid circumstances little, slight, or some weight, the trial court is, in effect, concluding that valid mitigation was not very

mitigating at all. The trial court based this conclusion on the erroneous premise that Allen Cox was placed in his grandmother's home at the age of eleven. She in turn provided him with a loving and supportive environment. Evidence at trial established that the effects of a horrible childhood cannot always be overcome. Dr. McMann testified that an individual's psyche is pretty well established by one's seventh birthday. Even Dr. Gutman admitted that the "formative psychological" years ended by age fourteen, while an individual's moralistic formulation is complete at age seven. (XXVIII 3703-4)

Appellant's trial court made the same mistake as the trial judge in Nibert v. State, 574 So.2d 1059 (Fla. 1990). Nibert's trial judge found Nibert's physical and psychological abuse during his youth to be "possible" mitigation, but dismissed the mitigation by pointing out that "at the time of the murder the Defendant was twenty-seven (27) years old and had not lived with his mother since he was eighteen (18)". Nibert v. State, 574 So.2d at 1062. This Court pointed out that the fact that a defendant had suffered through more than a decade of psychological and physical abuse during his formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the

contrary. Id.

The trial court also rejected other valid mitigating circumstances based on his erroneous conclusion that the evidence was "irrelevant" and was thus not mitigating in nature. The court appeared to require appellant to prove a "nexus" between the mitigating factor and the murder. For example, the trial court rejected as mitigating that Allen Cox came from a diluted gene pool. (Appellant's great grandparents were brother and sister.) The trial court wrote:

> First, no one established that this had absolutely any effect whatsoever on Mr. Cox or his ability to function as a normal, law-abiding citizen. Second, no one established that this fact contributed in any way to the killing of Mr. Baker....

(VIII 1552) Using similar rationale, the trial court rejected as mitigation that appellant's psychotropic medication had been discontinued several weeks before the murder ["no evidence established or even inferred that this medication change caused Mr. Cox to decompensate or contributed to the advance planning and ultimate killing or Mr. Baker."] (VIII 1548-49); Appellant suffers from a high level of anxiety when dealing with other people [given no weight by the trial court where the trial court concluded that this factor did not contribute to appellant's actions that led to the victim's death] (VIII 1539-40); appellant still feels protective toward his mother even though she treated him with cruelty as a child. [trial court

found factor not mitigating and termed this factor irrelevant] (VIII 1534); and appellant suffers from a mental disorder that is amenable to treatment [entitled to only slight weight where appellant failed to prove any nexus with the murder] (VIII 1536).

The trial court's misapplication of the law unconstitutionally tipped the scales in favor of death. Allen Cox's death sentence violates due process.

POINT IX

THE DEATH SENTENCE IS DISPROPORTIONATE IN LIGHT OF THE FACTS SURROUNDING THE MURDER AND THE SUBSTANTIAL MITIGATION WEIGHED AGAINST THE VALID AGGRAVATION.

The law of Florida reserves the death penalty for only the most aggravated and least mitigated of first-degree murders. Urbin v. State, 714 So.2d 411, 416 (Fla. 1998); Almeida v. State, 748 So.2d 922, 933 (Fla. 1999); Cooper v. State, 739 So.2d 82, 85 (Fla. 1999). "Thus, our inquiry when conducting proportionality review is two-pronged: we compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated and (2) the least mitigated of murders". Cooper, 739 So.2d at 82.; Almeida, 748 So.2d at 933. (Emphasis in opinions.)

Proportionality review is a "unique and highly serious function of this

Court", which arises from a variety of sources in the Florida Constitution, and "rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties." See, Tillman v. State, 591 So.2d 167, 169 (Fla. 1991); Sinclair v. State, 657 So.2d 113, 114 (Fla. 1995); Urbin v. State, 714 So.2d at 416; Knight v. State, 721 So.2d 287, 299-300 (Fla. 1998); Woods v. State, 733 So.2d 980, 990 (Fla. 1999).

The trial court found four aggravating factors; (1) under sentence of imprisonment; (2) prior violent felony conviction; (3) especially heinous, atrocious, or cruel (HAC); and (4) heightened premeditation (CCP). (VIII 1514-22) The trial court accorded "great weight" to each and every one of these four aggravating factors. Additionally, the trial court accepted a plethora of valid mitigating evidence. Appellant has discussed elsewhere his contention that the evidence does not support HAC nor CCP. See Points VI and VII, supra. Striking those two aggravating factors leaves only two valid aggravating circumstances. Even though the trial court gave both great weight, closer scrutiny reveals that the circumstances underlying both of these factors could be much worse. While it is true that appellant was under sentence of imprisonment, he killed another inmate, not a corrections officer. While this may sound callous, realistically the choice of

victim diminishes the circumstance's application in society's eyes.

Appellant also concedes that he had prior violent felony convictions, specifically two armed robberies, one escape, one kidnapping, one sexual battery, one attempted sexual battery, two aggravated batteries, one armed burglary of a dwelling, and one battery on another inmate. (VIII 1515-16) Initially appellant points out that he had no prior conviction of another capital felony. §921.141(5)(b), Fla. Stat. (2000) In fact, appellant had no prior homicide convictions of any sort. Hence, the application of this aggravator to appellant is not the **most** aggravating.

Additionally, the two armed robberies and subsequent escape in Kentucky all occurred in appellant's reckless youth. He was only seventeen or eighteen at most. While not an excuse, this should mitigate this portion of the aggravator. Remoteness in time can diminish the weight given this aggravator. Thompson v. State, 495 So.2d 153 (Fla. 1989). Other than the battery on an inmate, the remaining charges occurred during two separate, albeit violent incidents in the span of one week in 1989. For those offenses, Allen Cox was serving two life sentences plus a term of years. Although the crimes were certainly prior violent felonies that caused the victims undue pain and suffering, they certainly could have been worse. He did not kill anyone.

The battery on Lawrence Wood is diminished by the fact that it occurred practically simultaneously with the capital murder. Francis v. Dugger, 908 F.2d 696, 705 (11th Cir. 1990). Additionally, the obvious observation is that, although he certainly could have, he did not kill Lawrence Wood. For these reasons, appellant submits that the valid aggravating circumstances certainly could have been more weighty.

There was substantial mitigation accepted and found by the trial court.

The trial court interestingly pointed out that Section 921.141(6)(h), Florida Statutes (2000) provides as a **statutory mitigator** "the existence of any other factors of the defendant's background that would mitigate against the imposition of the death penalty." The trial court points out that these formally "nonstatutory" should really be considered **statutory mitigating** circumstances. (VIII 1523) Regardless of their label, the trial court found much evidence in mitigation:

(1) Severe domestic violence in Cox's childhood home - slight weight;

(2) Cox's mother was very cruel and unpredictable - slight weight;

(3) Cox's mother was very cruel to the children - slight weight;

(4) Frequently absent father who failed to protect Cox from mother's physical abuse - slight weight;

(5) Cox's mother was emotionally unstable - slight weight;

(6) Cox was forced to haul firewood as a small child until he dropped from

physical exhaustion - slight weight;

(7) Cox's parents divorced and remarried only to divorce again - some weight;

(8) Cox has no happy memories from his childhood - slight weight;

(9) Cox's mother abandoned him when he was eleven years old forcing his father to send him to his grandmother's house for her to raise - some weight;

(10) Cox was the frequent victim of inconsistent and unpredictable patterns of discipline as a child - no separate weight;

(11) Cox's mother failed to demonstrate any maternal affection - no additional weight;

(12) Allen grew up feeling unwanted, unloved, and worthless - no additional weight;

(13) Cox's is able to form friendships - slight weight;

(14) Cox suffers from dysthymic disorder, a chronic depressive disorder unrelated to substance abuse; the disorder is amenable to treatment - slight weight;

(15) Appellant has been diagnosed additionally with adjustment disorder with depression; major depressive disorder, recurrent and severe; anti-social personality; alcohol dependance; and mixed personality disorder - slight weight;

(16) Cox has been on anti-depressant medication since 1991 - no additional weight;

(17) Cox suffers from severe depression - no additional weight;

(18) Cox attempted suicide once in his youth and still has suicidal thoughts - slight weight;

(19) Cox demonstrates brain impairment possibly from a head injury and/or a congenital birth defect - slight weight;

(20) Cox's early childhood left him with feelings of hopelessness, insecurity, rejection, and inadequacy - no additional weight;

(21) Cox was severely injured in a motorcycle accident when he was sixteen rendering him unconscious - no additional weight;

(22) Cox suffers from very rigid and repetitive thinking - no additional weight;

(23) Cox is alienated and isolated and is distrustful of others - little weight;

(24) Cox suffers from a severely impaired spectrum of emotional responses - slight weight;

(25) As a result of his childhood, Cox has no sense of moral development - no additional weight;

(26) Cox's mental illness could have been treated and controlled with medication and/or counseling - no additional weight;

(27) At the time of the offense, Cox's ability to exercise good judgment was impaired - no additional weight;

(28) Cox behaved throughout these court proceedings - some weight;

(29) Cox's moral development was similar to a retarded person - no additional weight;

(30) Cox is able to function and grow in prison - some weight;

(31) Allen Cox is loved by his family - slight weight; and

(32) Cox is a human being - no additional weight.

(VIII 1524-58) Additionally, the trial court accepted some proposed factors as

proven, but rejected them as not mitigating of the murder committed by Cox.

> (1) Despite her mistreatment of him during his formative years, Allen Cox remained protective of his mother - irrelevant and therefore not mitigating;
>
> (2) Cox suffers from a high level of anxiety and has very poor coping skills - did not contribute to his actions in committing the murder and is therefore not mitigating;
>
> (3) Cox has an overall low - average IQ - did not influence his actions during the homicide and is therefore not mitigating;
>
> (4) Cox describes himself as a loner - not mitigating;
>
> (5) Cox's usual medication was discontinued several weeks before the murder - not mitigating where it was not proven that it contributed to the commission of the murder;
>
> (6) Cox did not resist apprehension and cooperated with authorities by allowing them to take him into custody - not mitigating;
>
> (7) Cox was willing to plead guilty and accept a consecutive life sentence - not mitigating;
>
> (8) Allen Cox did not come from a diverse gene pool - not mitigating where no one proved this contributed to the murder; and
>
> (9) This country's capital sentencing scheme is fraught with error - not mitigating.

(VIII 1529-58) Additionally, the trial court rejected numerous proposed mitigating factors, concluding that they were not supported by the evidence.

This Court is left with two (at the most three) valid aggravating factors weighed against the substantial mitigation accepted by the trial court. Appellant

argues elsewhere that the trial court failed to give appropriate consideration and/or weight to the mitigating evidence. See Point VIII, supra. With this background, this Court must compare and contrast Allen Cox and his background and first-degree murder with other similar cases in this state's jurisprudence.

Of the numerous prison stabbing murders committed in the post-Furman[45], appellant was able to find only seven defendants sentenced to death for a prison stabbing.[46] All seven capital cases were reviewed by this Court in the 1980s. This Court affirmed six of the seven cases and remanded one with the imposition of a life sentence.

Demps v. State, 395 So.2d 501 (Fla. 1981) involved the stabbing of another inmate at Florida State Prison in 1976. Although the trial court found four aggravating factors, this Court disapproved two of them.[47] That left Demps with

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[45] Furman v. Georgia, 408 U.S. 238 (1972)

[46] Counsel found two reported cases where inmates committed similar crimes but received a sentence less than death. See Brown v. State, 493 So.2d 80 (Fla. 1st DCA 1986)[Brown convicted of first-degree murder for the stabbing death of a fellow inmate at Union Correctional Institution and sentenced to life in imprisonment] and Quintana v. State, 452 So.2d 98 (Fla. 1st DCA 1984)[Quintana convicted of first-degree murder for stabbing death of fellow inmate; reversed and remanded for new trial].

[47] Despite the fact that the victim died from "stab wounds" after being transported first to UCI, then to Lake Butler, and then to Shands Teaching Hospital in Gainesville (thereby obviously surviving for quite some time), this Court found that HAC was a erroneously applied. Demps v. State, 395 So. 2d at 506. See Point

two valid aggravating factors (prior violent felony conviction and under sentence of imprisonment). However, the opinion in Demps is distinguishable from appellant's case. Demps' prior violent felony convictions included two first-degree murders and one attempted murder. Demps' prior record was much more egregious and violent than appellant's. Additionally, there was absolutely **no mitigation** found for Bennie Demps. Demps v. State, 395 So.2d at 506.

In Morgan v. State, 415 So.2d 6 (Fla. 1982) the defendant was serving a thirty year sentence for second-degree murder. Upset because of an unpaid debt, Morgan sneaked into the victim's cell and fatally stabbed him ten times as he slept. Morgan's case is distinguishable from appellant's where Morgan was already serving a sentence for a **homicide**. Additionally, Morgan inflicted multiple fatal stab wounds (10) upon a defenseless, sleeping victim. There were three valid aggravators - under sentence of imprisonment, prior violent felony conviction, and HAC. Perhaps most importantly, absolutely **no mitigation** applied to Morgan.

In Williams v. State, 438 So.2d 781 (Fla. 1983) the defendant stabbed another inmate (Huff) as Huff delivered a breakfast tray to the defendant.[48]

VI.

[48] Despite the fact that Williams stabbed his victim and he lived long enough to identify his attacker, the trial court did not find that the murder was especially heinous, atrocious, or cruel. Williams v. State, 438 So.2d at 786.

Williams is distinguishable from appellant's case where Williams' prior violent felony conviction was a murder and where absolutely **no mitigation** was found to exist.

Lusk v. State, 446 So.2d 1038 (Fla. 1984) involved a stabbing during Thanksgiving dinner at Florida State Prison. Lusk stabbed his victim three times in the back with three valid aggravating circumstances. Despite a life recommendation, this Court affirmed the death sentence. Lusk's case is distinguishable from appellant's because Lusk had committed a prior first-degree murder. Additionally, there was absolutely **no mitigation** found in Lusk's case.

Muhammad v. State, 494 So.2d 969 (Fla. 1986) is easily distinguishable from appellant's case. Muhammad was on death row for two prior first-degree murders when he murdered a guard with a sharpened spoon which he used to inflict more than a dozen wounds on his victim. Again and perhaps most telling is that Mohammad involved absolutely **no mitigation**.

Christian v. State, 550 So.2d 450 (Fla. 1989) involved an ongoing dispute with another inmate (Moore) who had cheated at cards. Moore hit Christian in the head with a set of weights. Three weeks later, Christian armed himself and stabbed a handcuffed and defenseless Moore as two guards escorted Moore back to his

cell.[49] Moore broke and ran, but Christian caught and stabbed him twenty- six times before pushing him off the third-floor deck.[50] This Court struck one of the four aggravators found by the trial court (CCP), finding that there was at least a colorable claim that the murder was motivated out of self-defense. Christian v. State, 550 So.2d at 452. That left three valid aggravating circumstances. This Court vacated Christian's death sentence and remanded for a life sentence. The only evidence in mitigation mentioned anywhere in the opinion is Christian's "imperfect self-defense" claim. Christian v. State, 550 So.2d at 452. Like appellant, Christian had a violent background, but no prior homicides. He was serving a thirty year sentence for armed robbery and aggravated assault. Additionally, he had been convicted of another aggravated assault while in prison, and had been the subject of several disciplinary reports, mostly for fighting. Christian v. State, 550 So.2d at 454. While it is true that Christian's jury recommended a life sentence, appellant apparently established much more valid evidence in mitigation than did Christian.

Finally, Williamson v. State, 511 So.2d 289 (Fla. 1987) arose from Cross City Correctional Institution. The defendant and his "partner" Omer were selling

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[49] Moore was still on detention for his prior attack on Christian.

[50] The autopsy revealed that Moore was still alive at the time he fell.

marijuana for the victim (Drew), also an inmate. Omer owed Drew $15.00 which Omer decided not to pay. The defendant advised Omer that they would have to kill the victim, a "country boy", who would stab Omer if he did not pay his debt. While another inmate acted as a lookout, Omer and the defendant enticed the victim to leave his job at the maintenance shop building and come outside. The defendant tricked the victim into handing him a knife which the defendant then used to stab the victim repeatedly while Omer held him from behind. Finding three valid aggravating circumstances and absolutely **no mitigating** circumstances, this Court found that death was the appropriate penalty. Aside from the fact that there was **no mitigation**, the Williamson case is distinguishable from appellant's where it involved multiple stab wounds inflicted by multiple assailants upon a helpless unarmed victim without warning.

Appellant's case is not the most aggravated of first-degree murders considered by this Court. Even more obvious is the fact that appellant's case is not the least mitigated of first-degree murders. Unlike most of the aforementioned capital defendants, Allen Cox had no prior homicides. Additionally, only two valid aggravating circumstances apply. Most importantly, the trial court found substantial valid mitigation. This Court should vacate appellant's death sentence and remand for imposition of a sentence of life imprisonment without any

possibility of parole.

POINT X

FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE U.S. CONSTITUTION, AMENDMENTS VIII AND XIV, BECAUSE IT DOES NOT REQUIRE NOTICE OF AGGRAVATING CIRCUMSTANCES, DOES NOT REQUIRE SPECIFIC JURY FINDINGS REGARDING THE SENTENCING FACTORS, PERMITS A NON-UNANIMOUS RECOMMENDATION OF DEATH, IMPROPERLY SHIFTS THE BURDEN OF PROOF AND PERSUASION TO THE DEFENSE, AND FAILS ADEQUATELY TO GUIDE THE JURY'S DISCRETION, THEREBY PRECLUDING ADEQUATE APPELLATE REVIEW.

The U.S. Supreme Court recently held that held that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Apprendi v. New Jersey, ___ U.S. ___, 120 S. Ct. 2348, 2355 (2000) [quoting Jones v. United States, 526 U.S. 227, 252-53 (1999)]. Grounding its decision both in the traditional role of the jury under the Sixth Amendment and principles of due process, the Court made clear that:

> "[i]f a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others . . . it

> necessarily follows that the defendant should not — at the moment the state is put to proof of those circumstances — be deprived of protections that have, until that point unquestionably attached."

Id. at 2359. These essential protections include (1) notice of the government's intent to establish facts that will enhance the defendant's sentence, (2) determination by a jury that (3) such facts have been established by the government beyond a reasonable doubt. Id. at 2362-63; Jones, 526 U.S. at 231.

While the majorities in Apprendi and Jones attempted to distinguish capital sentencing schemes, the distinction is not logically tenable, as the dissenters in Jones noted:

> If it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death.

Jones, 526 U.S. at 272 (Kennedy, J., dissenting; see also Apprendi, 120 S.Ct. at 2388 ("If the Court does not intend to overrule Walton,[51] one would be hard pressed to tell from the [majority] opinion.") (O'Connor, J., dissenting). As Justice Kennedy anticipated, the majority's ruling compels a reexamination of the Court's capital jurisprudence regarding the roles of judge and jury. Jones, 526 U.S. 272..

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[51] Walton v. Arizona, 497 U.S. 639 (1990).

Florida's capital sentencing scheme, like the hate crimes statute at issue in Apprendi, exposes a defendant to enhanced punishment — death rather than life imprisonment — when a murder is committed "under certain circumstances but not others." Id. at 2359. Indeed, this Court has emphasized that "[t]he aggravating circumstances" in Florida law "actually define those crimes . . . to which the death penalty is applicable . . ." State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). While this Court properly recognized in Dixon that individual aggravating circumstances must be proved beyond a reasonable doubt, it has thus far failed to apply other due process requirements, as outlined in Apprendi, to the capital sentencing context. Thus, under Florida law (1) the state is not required to provide notice of the aggravating circumstances it intends to establish at the penalty phase; (2) the jury is not required to make any specific findings regarding the existence of aggravating circumstances, or even of a defendant's eligibility for the death penalty; (3) there is no requirement of jury unanimity for finding individual aggravating circumstances or for making a recommendation of death; and (4) the state is not required to prove the appropriateness of the death penalty beyond a reasonable doubt.

1) Notice.[52] Under Florida law, in contravention of basic due process

[52] Appellant unsuccessfully sought, prior to trial, the aggravating circumstances on which the state intended to rely. (I 132-39; II 278-80; III 471; X 59-62)

principles, the state is not required to provide notice of the aggravating circumstances it intends to prove at the penalty phase. See, e.g., Vining v. State, 637 So. 2d 921, 927 (Fla. 1994). In other contexts, however, this Court has properly recognized that punishment-related facts must be charged, presented to a jury, and proved beyond a reasonable doubt, in a separate punishment determination proceeding. See, State v. Harbaugh, 754 So. 2d 691 (Fla. 2000) (felony DUI); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984) (sentencing enhancement for use of a firearm).

2) Specific Jury Findings.[53] Although the sentencing jury is instructed to determine whether individual aggravating circumstances have been established beyond a reasonable doubt, it is not required to make any specific findings regarding the existence of particular aggravators, only to make a recommendation as to the ultimate question of punishment. The jury is thus a "black box"that renders a life or death decision without disclosing its reasoning.

Apprendi logically compels the conclusion that a sentencing jury must make findings regarding the existence of individual aggravating circumstances. Two of

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[53] Appellant unsuccessfully requested interrogatory verdict forms at the penalty phase. (III 471-2; X 81-91) Appellant also challenged the statute based on the failure of the instructions to adequately channel the jury's discretion. (II 248-9; III 525; X 113-15)

the four aggravating circumstances at issue in this case (HAC and CCP), like the biased motive factor in Apprendi, involve "[t]he defendant's intent in committing a crime," a consideration that "is perhaps as close as one might hope to come to a core criminal offense 'element,'" requiring a jury's determination. See, Apprendi, 120 S. Ct. at 2364.

Even if Apprendi did not compel jury findings regarding every aggravator, its logic would appear, at a minimum, to require a jury finding of death eligibility. Again, as the dissenters in Jones and Apprendi noted, the defendant could not be sentenced to death under the Arizona statute at issue in Walton, "unless the trial judge found at least one of the enumerated aggravating factors." Jones, 526 U.S. at 272 (dissenting opinion); accord Apprendi, 120 S.Ct. at 2388 (O'Connor, J., dissenting). Precisely the same is true in Florida. See § 921.141 (2)(b) (1997).

The Jones majority attempted to distinguish Hildwin v. Florida, 490 U.S. 638, 640 (1989), on the ground that a Florida jury **implicitly** finds the existence of the necessary aggravating circumstances when it recommends a sentence of death. 526 U.S. at 250-51. This, however, leaves no record of which aggravators the jury did or did not find. Moreover, if the jury recommends life, there is no jury finding implicit or otherwise regarding the existence of **any** aggravating circumstance. Consequently, in an override case, the defendant's sentence is increased from life

to death based **solely** upon judicial findings of fact, in violation of the defendant's due process and jury trial rights.

Hildwin does not, moreover, address the Eighth Amendment concerns raised by the absence of any mechanism for determining which aggravating and mitigating circumstances the jury relied upon in sentencing. See Combs v. State, 525 So. 2d 853, 859 (1988) (Shaw, J., specially concurring) (lack of jury findings, combined with Tedder deference, raises serious arbitrariness problem); cf. Parker v. Dugger, 498 U.S. 308, 321 (1991) (emphasizing importance of adequate appellate review to individualized sentencing). The failure to require specific jury findings impermissibly undermines the reliability of the sentencing process and the adequacy of appellate review.

3) Jury Unanimity. The Supreme Court has never specifically addressed whether a unanimous verdict is required in a capital case. However, it has never upheld a verdict of less than nine to three, even in a non-capital case. See Johnson v. Louisiana, 406 U.S. 356 (1972) (upholding 9:3 verdicts in serious felonies); Apodaca v. Oregon,406 U.S. 404 (1972) (upholding verdicts of 10:2 and 11:1 in non-capital felonies); Burch v. Louisiana, 441 U.S. 130 (1979) (six person jury must be unanimous). The Court took pains to note that Apodaca was a non-capital case. See Burch, 441 U.S. at 136.

Florida law requires unanimity at the guilt/innocence stage of a capital case. See, e.g., Williams v. State, 438 So. 2d 781 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1956). But it does not require unanimity either to find individual aggravating circumstances or to render a recommendation of death, which is nonetheless entitled to great weight under Tedder. Given that aggravating circumstances are essential elements that must be instructed and proved beyond a reasonable doubt, a non-unanimous death verdict. violates due process and the protection against cruel and/or unusual punishment guaranteed by the United States and Florida Constitutions.

4) Burden and Standard of Proof.[54] Apprendi reaffirmed that the due process prohibition on burden-shifting enunciated in Mullaney v. Wilbur, 421 U.S. 684 (1975), and the reasonable doubt standard apply to the determination of sentence enhancements. 120 S.Ct. at 2362, 2359, 2364. Florida's capital sentencing statute violates these constitutional requirements by placing the burden on the **defendant** to prove that "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." § 921.141(2)(b), (3)(b), Fla. Stat. (1993); see also Dixon, 283 So. 2d at 9. The plain meaning of this

[54] Appellant challenged the constitutionality of this aspect of Florida's statute prior to trial. (II 299-309; IV 509; X 140-41)

language requires imposition of a death sentence if the aggravating and mitigating evidence is in equipoise. This impermissibly relieves the state of its burden to prove, beyond a reasonable doubt, that death is the appropriate sentence.

The burden-shifting instruction also "vitiates the individualized sentencing determination required by the Eighth Amendment." See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir.), cert. denied, 486 U.S. 1026 (1988) (instruction that advised jury that "death is presumed to be the proper sentence unless [aggravating factors] are overridden by one or more . . . mitigating circumstances" violated Eighth Amendment).

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to reverse and remand for a new trial as to Point I and II. As to Points III, IV, V, VI and VII vacate the death sentence and remand for a new penalty phase or, in the alternative, the imposition of a life sentence. As to Points VIII, IX and X, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Allen Ward Cox, DC#188854, Florida State Prison, P.O. Box 181, Starke, FL 32091, this 1st day of May, 2001.

_____
CHRISTOPHER S. QUARLES
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CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
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