FLORIDA COLLEGE OF ADVANCED JUDICIAL STUDIES

2009

CONDUCTING THE PENALTY PHASE OF A CAPITAL CASE

by

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Includes selected cases through March 31, 2009

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Preface

These materials were originally authored in outline form by Judge Susan Schaeffer of St. Petersburg, Florida. For several years, Judge Schaeffer taught the Penalty Phase portion of the "Handling Capital Cases" course at the Florida College of Advanced Judicial Studies and the National Judicial College, University of Nevada, Reno. I have been privileged to take her place at both institutions.

I am indebted to Judge Schaeffer for the format and organization of these materials. However, the materials have been substantially edited, updated, and expanded over the past several years to bring them current and include more materials. My goal is to turn what was really an outline into a source book for Florida judges and lawyers to use as a ready reference.

These materials are not the last word on this important subject. They are at best a bench book that can be used as a starting point by judges assigned to a capital case. The law in capital litigation is constantly changing. Both state and federal courts review these cases regularly, and it is not unusual for the law to change during the pendency of a capital case. Accordingly, judges assigned to these cases need to be ever mindful of the need to keep current on state and federal decisions in their jurisdictions and elsewhere.

These materials are periodically updated. The updates, the materials used at the National Judicial College, and other materials on the subject of the trial of capital cases can be found on the Internet at http://www.flcourts18.org under "Capital Case Materials."

These materials have grown significantly over the last few years and the editorial assistance I received this year from Mary Jean Hinson of the Florida Commission on Capital Cases made these materials much more useful.

Comments, criticisms, and suggestions on how to improve these materials are most welcome.

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April 1, 2009

6.1.0 INTRODUCTION

Thirty-six states have capital punishment as a possible penalty for the most serious homicides.[1] All of them have some sort of post-verdict hearing to determine whether the death penalty should be imposed. These hearings are sometimes referred to as the "penalty phase" or "presentence hearing."

There must be a finding (verdict) of guilt by the Court or jury before the penalty is considered in a capital case. While the procedure used to determine the penalty differs from state to state, arriving at that decision is the most difficult task presented to a judge or jury. And, due to the finality and severity of the death penalty, there is no decision that will receive more judicial scrutiny. Judicial review will take place in both state and federal courts, and it is not unusual for these courts to review a single case a number of times. More death penalty cases are reversed in the United States than any other type of case in criminal law.

For instance, nationally, only about 23 percent of these appeals were affirmed as to judgment and sentence in 1998 and 1999. In 2000, the Supreme Court of Florida reversed 42 percent of the death penalty cases it decided on plenary appeal. The statistics for 2001 improved. Twenty-two plenary appeals were decided in 2001. Of that number, 63 percent were affirmed. From 2002 through 2004, the percentage of cases affirmed on direct appeal has been between 79 percent and 80 percent.[2]

It is not possible to pinpoint the reason or reasons for the improved statistics involving death penalty appeals in Florida in the past few years because of the many variables involved. These variables include the county in which the murder occurred, the facts of the particular cases, developments in the law, and changes in judicial personnel on the Supreme Court. However, the Supreme Court of Florida has required trial judges to attend intense continuing judicial education programs involving the trial of capital cases since Rule 2.050(b)(10) was enacted in 1997, and this requirement may account for some of the improvement.

There are three basic schemes used to impose the death penalty in the United States. Each state has its own variations, but these schemes can be categorized as the Florida scheme,[3] the Georgia scheme,[4] and the Texas scheme.[5] Each of the thirty-eight states follow one of these schemes.

6.1.1 THE FLORIDA SCHEME

Florida was the first state to reenact the death penalty after the dust settled from the constitutional crisis caused by the United States Supreme Court in *Furman v. Georgia*.[6]

Three states, Alabama, Delaware and Florida, follow the Florida scheme. Indiana was a Florida-scheme state, but the Indiana Legislature rewrote that state's statute to make Indiana a Georgia-scheme state in 2002.[7] The Florida scheme requires the jury to unanimously find a

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[1]New Jersey and New Mexico have abolished capital punishment.

[2]Data provided by the Office of the State Courts Administrator.

[3]FLA. STAT. 921. 141 (2004).

[4]GA. CODE ANN. " 10, -17, -30 et seq.

[5]Vernon's Ann. Texas C.C.P. Art. 37-3071 .

[6]Furman v. Ga., 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

[7]IN ST 35-50-2-9 (2002).

defendant guilty of first-degree murder. Then, the same jury (unless the defendant waives a jury) hears evidence to establish statutory aggravating factors and statutory or nonstatutory mitigating circumstances. The aggravating factors must be established beyond a reasonable doubt. The fact-finder must only be "reasonably convinced" as to the existence of mitigating factors. While the jury is not required to recommend the death penalty in any case, if the jury finds one or more aggravating circumstances, and determines these circumstances sufficient to recommend the death penalty, it must determine whether sufficient mitigating circumstances exist that outweigh the aggravating circumstances.[8] Based upon these considerations, the jury then recommends whether the defendant should be sentenced to life imprisonment or death. A simple majority of the jury is necessary for the recommendation to be for the death penalty.[9] It is not necessary for a majority of the jury to agree on any particular aggravating circumstance.[10] Florida, is the only state that allows the jury to find the existence of aggravating circumstances and recommend the defendant receive the death penalty by majority vote.[11] Alabama requires at least 10 jurors to recommend the death penalty.[12] Most states require unanimity. With rare exceptions, the judge must give the jury recommendation "great weight," but the final decision as to the penalty is made by the judge. After the jury renders its recommendation, the judge must give both sides an opportunity to present additional evidence or argument. A comprehensive sentencing order, complete with findings and conclusions of law, is required if the death penalty is imposed.

6.1.2 THE GEORGIA SCHEME

The Georgia scheme is similar to the Florida scheme.[13] The two schemes differ in that the prosecutor is not limited to presentation of evidence establishing statutory aggravating factors. After one statutory aggravating factor has been established, the prosecutor may present all relevant evidence of aggravation. The jury must state in its verdict the aggravating factors found beyond a reasonable doubt and, if the death penalty is unanimously recommended, the Court must impose the death penalty. The fact that the jury determines the sentence instead of the judge is another difference between the Florida and Georgia schemes.

6.1.3 THE TEXAS SCHEME

The Texas scheme has a different approach than the Florida and Georgia schemes.[14] In Texas, the jury is required to answer three interrogatories. The interrogatories must be answered either "yes" or "no." The first two interrogatories must be answered "yes" unanimously or "no" by a vote of at least ten to two. The last interrogatory must be answered "no" unanimously or "yes" by a vote of at least ten to two. The interrogatories are as follows:

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[8]See §6.15.6 for a discussion of the jury's discretion not to recommend a death sentence.

[9]Aguirre-Jarquin v. State, 2009 WL 775388 (Fla. March 26, 2009); Franklin v. State, 965 So. 2d 79 (Fla. 2006).

[10]Steele v. State, 931 So. 2d 538 (Fla. 2005).

[11]Steele v. State, 921 So. 2d 538 (Fla. 2005).

[12]AL ST sec 13A-5-45.

[13]GA. CODE ANN. § 10 -17 -30 et seq.

[14]Vernon's Ann. Texas C.C.P. Art. 37.071.

1. Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?
2. Whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken?
3. Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

Texas is the only state that uses the Texas scheme. Oregon's scheme is close to the Texas scheme in that it requires interrogatories to be submitted to the jury that are similar to the Texas interrogatories. However, unlike Texas, Oregon does not limit evidence of aggravating circumstances to the issues contained in the interrogatories.[15] Oregon is a Georgia-scheme state with a Texas twist.

These three schemes were originally approved on Eighth and Fourteenth Amendment grounds by the U.S. Supreme Court in the 1976 trilogy of cases: *Gregg v. Georgia*, *Proffitt v. Florida*, and *Jurek v. Texas.*[16]

6.1.4 UNDERSTANDING THE THREE DEATH PENALTY SCHEMES

The case that is cited as the authority for the creation of the three schemes is *Furman v. Georgia*.[17] Unfortunately, the separate opinions in the case caused much confusion and resulted in different state legislatures taking different approaches when reenacting death penalty statutes. There are some lessons from *Furman* that are clear. Justice Douglas stated one when he discussed the meaning of "cruel and unusual punishment":

> It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.
>
> There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature.[18]

The Eighth and Fourteenth Amendments to the United States Constitution require the judge or jury not be precluded from considering any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a mitigating circumstance as a basis for a sentence less than death.[19] The judge must instruct the jury that mitigating factors may not be

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[15]OR ST S 163.150.

[16]Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

[17]Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[18]*Furman*, 408 U. S. at 242.

[19]Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982).

limited by statute.[20]

The Supreme Court of Florida and the federal courts regularly render decisions involving death penalty cases. The decisions have an effect on the way these cases are tried. Some of the decisions invoke major changes in procedure.[21] Others affect a broad category of cases on constitutional grounds, such as an Eighth Amendment ban on the execution of the mentally retarded or juveniles.[22] Still others substantially affect the way capital cases are tried.[23] Trial judges assigned to capital cases must be familiar with the latest decisions in order to keep up with the changes that regularly occur.

Federal decisions do not always apply to Florida cases. Cases involving Texas or any of the numerous Georgia-scheme states may not affect the law in Florida. Additionally, it is important to remember it is not unusual for a state legislature to enact variations that differ from the general scheme that state has chosen to follow. For instance, two Florida-scheme states, Alabama and Delaware, allow nonstatutory aggravating circumstances to be presented to the jury. Cases from other states must be read carefully.

The United States Supreme Court has rendered a number of decisions that add both substantive and procedural requirements to death penalty cases. For instance, the sentencing court cannot be given unbridled discretion to impose the death penalty,[24] nor can the sentencing court be given no discretion.[25] The death penalty cannot be imposed for "ordinary" murder,[26] for the rape of an adult woman or a child,[27] or for a felony murder unless the defendant possessed a sufficiently culpable state of mind.[28] Additionally, the Supreme Court has prohibited the execution of an insane person,[29] a person who is mentally retarded,[30] or a juvenile who is under the age of 18 years.[31] The

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[20]Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

[21]Spencer v. State, 615 So. 2d 688 (Fla. 1993). (Separate hearing required before the judge for additional matters to be presented.)

[22]Atkins v. Va, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (mental retardation); Roper v. Simmons, 125 S. Ct. 1183 (2005**)** (juveniles).

[23]Ring v. Ariz, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). (aggravating circumstances must be determined by the jury and established beyond a reasonable doubt).

[24]Furman, 408 U.S. at 285.

[25]Woodson v. N. C., 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976); Sumner v. Shuman, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987).

[26]Godfrey v. Ga, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

[27]Coker v. Ga, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977); Kennedy v. Louisiana, __ U. S. __, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008).

[28]Enmund v. Fla, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

[29]Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986).

[30]*Atkins*, 536 U.S. at 321.

[31]*Roper*, 125 S. Ct. at 1196.

Supreme Court has also required the sentencing court to consider all mitigating circumstances.[32] Recently, the United States Supreme Court held in *Ring v. Arizona*, that the decision in *Apprendi v. New Jersey*,[33] applies to capital cases (other than fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt). This decision has had far-reaching effects on states that allow a judge or a panel of judges (Arizona, Colorado, Nebraska, Nevada) to determine the existence of aggravating factors. The decision may ultimately be the undoing of the Florida scheme and deserves further discussion.

6.1.5 *RING* AND THE "FLIGHT TO *APPRENDI*-LAND"[34]

Background

The original trilogy of cases that approved the new capital punishment schemes, *Gregg v. Georgia*, *Proffitt v. Florida*, and *Jurek v. Texas*[35] were all decided on strictly Eighth and Fourteenth Amendment grounds. All three cases held that capital punishment is not cruel and unusual for Eighth Amendment purposes and the procedures devised under the three schemes passed Constitutional muster under the due-process provision of the Fourteenth Amendment. There was no Sixth Amendment (right to jury trial) claim presented in *Proffitt* and, since the jury determines the sentence under the Georgia and Texas schemes, there was no Sixth Amendment challenge in *Gregg* or *Jurek*.

The United States Supreme Court did consider Sixth Amendment challenges to the Florida scheme in *Spaziano v. Florida*[36] and *Hildwin v. Florida*.[37]

In *Spaziano*, the issue presented was whether the trial judge had the power to override a jury recommendation of life imprisonment. In its opinion, the Court did not decide if jury sentencing is required in capital cases and only addressed the question of whether, given a jury recommendation of life, the trial court could override that recommendation and impose a death sentence.[38]

The Court recognized that a capital sentencing proceeding is very much like a trial on the issue of guilt or innocence because of the "embarrassment, expense and ordeal . . . faced by a defendant which are at least equivalent to that faced by any defendant in the guilt phase of a criminal trial."[39] Accordingly, the Court has held that the Double Jeopardy Clause prohibits the prosecution

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[32]Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

[33]*Ring*, 536 U.S. at 584; Apprendi v. N.J., 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[34]This curious phrase was coined by Justice Scalia in his concurring opinion in Ring v. Arizona.

[35]*Gregg*, 428 U.S. at 169; *Proffitt*, 428 U.S. at 247; *Jurek*, 428 U.S. at 268.

[36]Spaziano v. Fla. 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984).

[37]Hildwin v. Fla, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989).

[38]In fact, the Petitioner in Spaziano did not argue that the penalty phase of a capital case is "so much like a trial" it is controlled by *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 91 (1968) which recognized the right to jury trial is applicable to the states through the Fourteenth Amendment.

[39]*Spaziano*, 468 U.S. at 458.

from "repeated efforts to persuade a sentencer to impose the death penalty."[40]

However, the Court held that, while the penalty phase of a capital trial may be like a trial for double jeopardy purposes, it is not like a trial for purposes of the Sixth Amendment right to jury trial.[41] The judicial override of the jury in *Spaziano* was approved.

In *Hildwin*, the issue was more focused. The per curiam opinion opens with the statement, "This case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida."[42]

The Court noted that in *Spaziano* it had rejected the claim that a jury trial was required on the sentencing issue of life or death. The Court stated, "If the Sixth Amendment permits a judge to impose a sentence of death when the jury recommends life imprisonment, however, it follows that it does not forbid the judge to make the written findings that authorize imposition of a death sentence when the jury unanimously recommends a death sentence."[43] Citing *McMillan v. Pennsylvania*,[44] the Court reiterated the fact that findings made by a judge rather than a jury do not violate the Sixth Amendment's guarantee of right to trial by jury. A plain reading of *Spaziano* and *Hildwin* leads to the inescapable conclusion that the Florida scheme is constitutionally valid on Sixth, Eighth, and Fourteenth Amendment grounds, and that a jury need take no part in determining whether to impose a death sentence. The state of Arizona took comfort in these rulings and confidently defended its capital punishment statute before the Court in 1990, one year after the decision in *Hildwin*.

Walton v. Arizona[45]

Until recently, the state of Arizona followed the Georgia scheme with one important variation - - the trial judge presided over the penalty phase without a jury and made the findings determining whether to impose the death penalty. Walton made a direct Sixth Amendment challenge to this procedure before the Supreme Court. He lost.

First, Walton argued that every finding of fact underlying a sentencing decision must be made by a jury and not a judge. The Court rejected that argument and, citing *Clemons v. Mississippi*,[46] held that the argument had been previously soundly rejected. The Court went on to analogize the Arizona scheme with the Florida scheme. Having approved the Florida scheme in *Hildwin*, the Court observed that "A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona."[47]

Walton also argued unsuccessfully that, while in Florida, aggravating circumstances are only "sentencing considerations," in Arizona they are elements of the offense. The court rejected this argument stating that aggravating circumstances are only "standards to guide the making of the choice between the alternative verdicts of death or life imprisonment." The Court rejected the notion

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[40]Id.; Bullington v. Mo, 451 U.S. 430, 444, 101 S. Ct. 1852, 1861, 68 L. Ed. 2d 278 (1981).

[41]*Spaziano*, 468 U.S. at 459.

[42]*Hildwin,* 490 U.S. at 638.

[43]*Id*.

[44]McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986).

[45] 497 U.S. 639 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).

[46]494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990).

[47]*Walton*, 497 U.S. at 648.

that "a state must denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances."

After *Walton*, all seemed well and stable in the capital punishment arena. But a surprise attack was looming on the far right flank.

Alamendarez-Torres v. United States

In *Almendarez-Tores v. United States*,[48] the Court addressed the problem of enhanced penalty due to prior conduct: a deportation. Almendarez-Tores was an illegal alien who had been previously deported. He illegally returned to the United States and was convicted of an aggravated felony. The statute in question allowed for an enhanced sentence due to the prior deportation. The Court ruled that prior record or recidivism is a "sentencing factor" and not an element of the offense charged. This seemly innocuous statement came back the next year in a different context.

Jones v. United States

In *Jones v. United States*,[49] the court was faced with a federal statute that defined carjacking and provided separate maximum penalties if, at the time of the crime, (1) the person was in possession of a firearm (penalty of not more than 15 years) or (2) serious injury resulted (penalty of not more than 25 years) or (3) death resulted (penalty of any number of years up to life.) The Court held that the statute established three separate offenses and the facts (elements) that enhanced the penalties had to be alleged in the indictment and proven beyond a reasonable doubt. *Id.*, at 243, n.6.

Then came *Apprendi*.

Apprendi v. New Jersey[50]

In New Jersey, the Legislature decided to increase the maximum penalty for certain offenses if they qualified as "hate crimes." Possession of a firearm for an "unlawful purpose" is a second-degree offense punishable by "between five and 10 years."[51] However, a separate statute provides for an "extended term" of imprisonment if the trial judge finds, by a preponderance of the evidence, that "the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."[52] The "extended term" authorized is between 10 and 20 years.

Charles C. Apprendi, Jr., was prosecuted under this statute after he admittedly fired several .22-caliber bullets into the home of an African-American family that had recently moved into his neighborhood. The indictment did not mention the hate crimes statute. Apprendi entered into a plea bargain in which the State reserved the right to request the Court to impose the higher "enhanced" sentence. Apprendi reserved the right to challenge the hate crimes sentence on the ground that it violated the United States Constitution. The trial judge imposed a 12-year sentence--two years more than the maximum allowed without the "enhancement."

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[48] 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

[49] 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999).

[50] 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[51] N.J. STAT. ANN. § 2C:39-4(a) and 2C-43-6(a)(2).

[52] N.J. STAT. ANN. § 2C:39-4(a), 2C-43-6(a)(2).

On appeal, Apprendi argued the Due Process Clause of the United States Constitution required that the finding of bias upon which his hate crime sentence was based had to be proved to a jury beyond a reasonable doubt. The Appellate Division of the Superior Court of New Jersey upheld the statute relying upon the decision of *McMillan v. Pennsylvania*.[53] The court ruled the hate crime enhancement was merely a "sentencing factor" rather than an element of the underlying offense.[54] The New Jersey Supreme Court affirmed. The Court reasoned that "due process only requires the State to prove the 'elements' of an offense beyond a reasonable doubt."[55] The Court stated: "The Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor."[56] There was a dissent. The dissent believed that the case turned on two critical characteristics: (1) "a defendant's mental state in committing the subject offense . . . necessarily involves a finding so integral to the charged offense that it must be characterized an element thereof" and, (2) "the significantly increased sentencing range triggered by . . . the finding of a purpose to intimidate" means that the purpose "must be treated as a material element that must be found by a jury beyond a reasonable doubt."[57]

The United States Supreme Court reversed. The Court noted,

> "(t)he historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes from the jury the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[58]

Thus, the Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[59] Justice Thomas filed a concurring opinion suggesting the continued validity of *Walton v. Arizona*, *supra*, could be called into question by the *Apprendi* decision.

Most state courts, post-*Apprendi*, took the position that the decision did not pertain to capital cases because the maximum penalty in these cases already is death and, therefore, it is unnecessary for the jury to make findings of aggravation and mitigation beyond a reasonable doubt. The Court of Appeals in Maryland took that position in *Borchardt v. State*.[60] That case provides an excellent review of similar cases from other state courts. The Supreme Court of Florida ruled that *Apprendi*

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[53]McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986).

[54] State v. Apprendi, 698 A.2d 1265 (1997).

[55]State v. Apprendi, 731 A.2d 485, 492 (1999).

[56] *Id*. at 494-495.

[57]*Id.*, 731 at 498.

[58]530 U. S. at 482.

[59]*Apprendi*, 530 U.S. at 490.

[60]Borchardt v. State, 786 A.2d 631 (Md. 2001).

does not apply to the Florida scheme on numerous occasions.[61] Not long after publication of the *Borchardt* case, the Supreme Court accepted certiorari in *Ring v. Arizona*.[62] The Court also stayed executions for two Florida death-row inmates, Bottoson and King.

Ring v. Arizona[63]

On November 28, 1994, Timothy Ring and two others robbed a Wells Fargo van in Glendale, Arizona, and killed the driver. The evidence at the guilt phase of the trial failed to prove that Ring was a major participant in the armed robbery or that he actually murdered the victim. However, between Ring's trial and sentencing hearing, one of the codefendants accepted a second-degree plea and agreed to cooperate with the prosecution against Ring. The codefendant testified that Ring actually killed the victim and was the leader in the escapade. The trial judge entered the "Special Verdict" required by Arizona law and sentenced Ring to death.

In an opinion by Justice Ginsberg, the Court noted that, under Arizona law, "a defendant cannot be sentenced to death unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment and not the death penalty." Accepting that proposition to be the law in Arizona, the Court concluded, "we are persuaded that *Walton*, in relevant part, cannot survive the reasoning of *Apprendi*."

Justice Scalia, joined by Justice Thomas, filed a concurring opinion. This opinion may be more important than the majority opinion.

Justice Scalia would overrule *Furman v. Georgia,* but he does not have the votes. He agrees with Justice Rhenquist's dissenting opinion in *Garner v. Florida*,[64] where it was stated, "The prohibition of the Eighth Amendment relates to the character of the punishment, and not the process by which it is imposed."

He is apparently of the opinion that jury verdicts finding aggravating circumstances must be unanimous. He stated, "I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment the defendant receives--whether the statute calls them elements of the offense, sentencing factors or Mary Jane--must be found by the jury beyond a reasonable doubt." Proof beyond a reasonable doubt traditionally requires a unanimous verdict.[65] The Court, in *Patton*, held that "(a) jury trial under the Sixth Amendment must contain the following elements: (1) That the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous." The Court has upheld state statutes that authorize less-than-unanimous verdicts.[66] And *Patton* was "abrogated" when the Court approved the six-person jury

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[61]*See* Hurst v. State, 819 So. 2d 689 (Fla. 2002); Mills v. Moore, 786 So. 2d 532, 536-37 (Fla. 2001).

[62]Ring v. Ariz., 534 U.S. 1103 (2002).

[63]Ring v. Ariz., 536 U.S. 584 (2002).

[64]Garner v. Fla., 430 U.S. 349, 371, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

[65]Patton v. U. S., 281 U. S. 276, 50 S. Ct.253, 74 L. Ed. 854 (1930).

[66]*See* Apodaca v. Or, 406 U.S. 404 (1972), (a 5-4 decision that involved several opinions by some Justices who are no longer on the Court.) *See also*, Johnson v. La, 406 U.S. 356 (1972), (which approved a statute that allowed a less than unanimous (9-3) verdict in criminal cases.)

used in Florida.[67] *Patton* was recognized as being overruled in *U. S. v. Spiegel*,[68] when the court ruled that defense counsel could not later complain when he agreed to excuse a juror and proceed with the remaining eleven. *Patton* is cited because Justice Sutherland's vision of the Sixth Amendment jury is still the vision seen by most federal judges since unanimous verdicts are required in federal courts. The validity of the less-than-unanimous verdict cases may be in doubt after *Ring*.

Justice Scalia admitted the Sixth Amendment claim in *Walton* "was not put with the clarity it obtained in *Almendarez-Tores* and *Apprendi*." However, if the issue had been "better put" at the time *Walton* was decided, he still "would have approved the Arizona scheme--I would have favored the State's freedom to develop their own capital sentencing procedures (already erroneously abridged by *Furman*) over the logic of the *Apprendi* principle."

Since *Walden*, Justice Scalia says he has "acquired new wisdom." He now realizes two things: "First, that it is impossible to identify with certainty those aggravating factors whose adoption has been wrongfully coerced by *Furman*, as opposed to those that the State would have adopted in any event." Second, "our people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because a *judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it."

Finally, Justice Scalia decided to take a barb at Justice Breyer to make the most important point of his opinion and, perhaps, the most important point in the entire case. Justice Breyer believes the Sixth Amendment requires jury sentencing in capital cases. Justice Scalia disagrees. He stated,

> Today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so - by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase. There is really no way in which JUSTICE BREYER can travel with the happy band that reaches today's result unless he says yes to *Apprendi*. Concisely put, JUSTICE BREYER is on the wrong flight; he should either get off before the doors close, or buy a ticket to *Apprendi*-land.[69]

Justice Scalia believes a bifurcated trial with a penalty phase is not necessary to a capital punishment scheme. As long as the jury finds an aggravating factor, the states are free to devise procedures (possibly post-verdict by judge alone) to determine whether the death penalty is appropriate. All of the aggravating factors listed in the Florida statute, except two, are developed during the guilt phase of the trial. The exceptions are the aggravators involving the existence of a prior felony. However, as is plainly stated in *Almendarez-Tores*, the fact of prior record does not need to be submitted to the jury. The presence or absence of prior record can be considered by the Court. Under Justice Scalia's view, matters of mitigation could be considered by the Court without further jury involvement in determining the ultimate sentence.

Ring is probably the most significant death penalty case decided by the United States

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[67]Williams v. Fla., 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970).

[68] U. S. v. Spiegel, 604 F. 2d 961 (5th Cir.1979).

[69]*Ring*, 536 U. S. at 613.

Supreme Court in 30 years.[70] The decision will certainly affect the way capital cases are tried in Florida.

6.1.6 IMPACT OF *RING* AND *APPRENDI*

What is the impact of *Ring* and *Apprendi* on the Florida death penalty scheme? The U. S. Supreme Court did not provide any hints. In fact, Florida's scheme was only mentioned in the context of *Walton* in the *Ring* opinion. *Proffitt v. Florida*, *Spaziano v. Florida*, and *Hildwin v. Florida* are still the law of the land, but there is no doubt the validity of the Florida death penalty statute has been called into question. The following defects in the Florida scheme will be argued based upon *Ring* and *Apprendi*:

(1) The penalty phase jury verdict assumes at least one aggravating factor has been found beyond a reasonable doubt, but that finding is advisory only and not binding upon the Court.

(2) Unlike most Georgia-scheme states, the jury verdict does not contain interrogatories requiring a unanimous finding of at least one aggravating circumstance. (In fact, in Florida, assuming there are several available aggravating factors, seven jurors could each individually believe a different aggravating factor exists to the exclusion of all others and recommend a death sentence. Thus, theoretically, it is possible for only one juror in twelve to believe a particular aggravating factor exists.) The Supreme Court of Florida has held that the trial judge does not have the authority to require the jury to answer interrogatories on the penalty phase jury recommendation.[71]

(3) Unlike many states, the aggravating circumstances are not required to be set forth in the indictment.[72] For years, prosecutors in Florida made a cruel game out of keeping the aggravating factors to be relied upon secret until the last possible moment.[73] Recently, the Supreme Court of Florida authorized trial judges to require the prosecutor to disclose aggravating factors that will be relied upon at trial.[74] See §6.4.0 for more discussion about disclosure of aggravating and mitigating circumstances.

(4) The trial judge has the authority, limited as it may be, to override the jury recommendation for life imprisonment.

Assuming Florida's death penalty statute will not pass all of the Sixth Amendment tests required by *Apprendi* and *Ring*, what are trial judges to do pending further direction by the United States Supreme Court?

Some of the problems with Florida's death-penalty scheme raised by *Ring* and *Apprendi* are substantive and not procedural. And, of course, courts "are not at liberty to add words to statutes that were not placed there by the Legislature."[75] Therefore, anticipating a Supreme Court ruling by instructing jurors that their verdict is binding and not advisory, or their verdict must be unanimous, is not the substantive law of this state and is error.

The Supreme Court of Florida has taken the position (less than unanimously) that, since the

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[70]See, Duest v. State, 855 So. 2d 33 (Fla. 2003), Anstead, J. (concurring in the result only).

[71]State v. Steele, 921 So. 2d 538 (Fla. 2005).

[72]New Jersey is the most recent state to require aggravating circumstances to be contained in the indictment. State v. Fortin, 843 A. 2d 974 (N.J. 2004).

[73]Ruffin v. State, 397 So. 2d 277 (Fla. 1981).

[74]State v. Steele, 921 So. 2d 538 (Fla. 2005).

[75]Hayes v. State, 750 So. 2d 1, 4 (Fla.1999).

Florida scheme was not specifically invalidated by *Ring*, no problem exists. This position is a proper course to follow under our federal system, particularly under the Supremacy Clause contained in Article VI of the Constitution of the United States. The Supreme Court of Florida has stated

> The Supremacy Clause of the Constitution of the United States provides that document is the Supreme Law of the Land. Upon the State courts, equally with the courts of the Federal system, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, whenever those rights are involved in any suit or proceedings before them. Consequently, it is the duty of State Supreme Courts to follow the guidelines announced by the Supreme Court of the United States in Construing Federal Constitutional Rights.[76]

The Court has also stated, "despite any tension" between Florida cases such as *Spaziano* and *Ring* "this Court relies on the United States Supreme Court's admonition that lower courts should 'follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'"[77]

Obviously, if the State Supreme Courts are bound by United States Supreme Court precedent, trial courts are also bound by it.

Recently, Justice Scalia took the Supreme Court of Missouri to task for failing to follow precedent and reminded the state courts that only the United States Supreme Court can overrule its precedents, even when there has been a change in judicial doctrine or when the prior holding "appears to rest on reasons rejected in some other line of decisions."[78]

The *Ring* decision was released on June 24, 2002. The 2002 term ended on June 30, 2002. The stay of execution for Bottoson and King was lifted by the United States Supreme Court on June 28, 2002, just before the term ended. Florida's Governor signed new death warrants on July 1, 2002, and set the first execution on July 8, 2002, a week away. On July 8, 2002, the Supreme Court of Florida stayed the executions and set oral argument in the cases for August 21, 2002.

Justice Wells, in his dissenting opinions to the orders staying the executions, pointed out the likely confusion among Florida's trial judges as a result of the stay. He was concerned trial judges would be left with the impression the *Ring* case has affected the Supreme Court's prior rulings upholding the Florida death penalty statute. He pointed out *Ring* did not disturb the 25 years of precedent in those cases.[79] His concerns proved to be justified because there was some confusion about the application of *Ring* to Florida procedure. But *Proffitt v. Florida*, *Spaziano v. Florida*, and *Hildwin v. Florida*, have not been overturned by the United States Supreme Court and, the Supreme Court of Florida has not determined the Florida capital punishment scheme is invalid on independent grounds under the Constitution of the State of Florida. Unless and until a different ruling comes from Tallahassee or Washington, D.C., the sworn duty of a trial judge is to follow precedent.[80]

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[76]State v. Dixon, 283 So. 2d 1, 24 (Fla. 1973) [citing Irvin v. Dowd, 359 U.S. 394, 79 S. Ct. 825, 3 L. Ed. 2d 900(1959); Smith v. O'Grady, 312 U.S. 329, 61 S. Ct. 572, 85 L.Ed.859 (1941); United States v. Bank of New York and Trust Company, 296 U.S. 463, 56 S. Ct. 343, 80 L.Ed. 331 (1936); Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L.Ed. 791 (1935)].

[77]Marshal v. Crosby, 911 So. 2d 1129 (Fla. 2005).

[78]Roper v. Simmons, 543 U.S. 551, 629; 125 S. Ct. 1183, 1129; 161 L, Ed. 2d 1, 41 (2005).

[79]Bottoson v. Moore, 824 So. 2d 115 (Fla. 2002), Wells, J., dissenting.

[80]There has been some movement to try to correct some of the perceived problems with the Florida scheme by trial judges who were requiring interrogatory verdicts for the penalty phase

The justices released their opinions on the cases on October 24, 2002.[81] The seven justices issued eight opinions. All of the justices agreed that the Supreme Court of Florida is bound by principles of *stare decisis* to deny relief to Bottoson and King. The United States Supreme Court declined to intervene, and they were subsequently executed.

The Supreme Court of Florida (less than unanimously) has taken the position that as long as there is a prior violent felony aggravator, the requirements of *Ring* are satisfied. This, of course, ignores the rest of the requirements of the Florida scheme, including the fact that the trial judge has the duty to find the existence of aggravating and mitigating circumstances in addition to the prior violent felony and to weigh these circumstances without any input from the jury.[82]

The Justices were concerned enough about the problems with the Florida scheme to ask the Legislature to review it and bring Florida into line with the rest of the country, at least as far as unanimity in the verdict for a recommendation of death.[83] As Justice Cantero stated in the *Steele* opinion, "(t)he bottom line is that Florida is now the *only* state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote *both* whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state."[84] The Legislature declined the invitation.

Cunningham v. California

The Justices had another opportunity to apply *Apprendi* and *Ring* to a state sentencing scheme in *Cunningham v. California*.[85] The State of California's determinate sentencing law (DSL) provides for three levels of sentencing. There is a lower term, a middle term and an upper term. The middle term is the presumptive sentence and the upper term cannot be imposed unless an aggravating factor is found by the trial judge by a preponderance of the evidence.

John Cunningham was found guilty of a sex crime in California and was exposed to a six-year lower term sentence, a 12-year middle term sentence and a 16-year upper term sentence. The trial judge found six aggravating factors, including the particular vulnerability of the victim and Cunningham's violent conduct, which indicated a serious danger to the community, and sentenced Cunningham the upper term of 16 years.

The United States Supreme Court, through Justice Ginsberg, repeated the principal that "the Federal Constitution's jury trial guarantee proscribes a sentencing scheme that allows a judge to

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that include the number of jurors finding each aggravating and mitigating circumstance. See, Huggins v. State, 889 So. 2d 743, 776-777 (Fla. 2004) (Pariente, J., dissenting). This movement, while commendable, is unlikely to correct the constitutional deficiencies in the Florida scheme. Of course, this is just the author's opinion. The Supreme Court of Florida has recently disapproved the use of interrogatories on the penalty phase verdict. State v. Steele, 921 So. 2d 538 (Fla. 2005).

[81]Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002).

[82]Seibert v. State, 923 So.2d 460 (Fla. 2006); Winkles v. State, 894 So.2d 842 (Fla.2005); Duest v. State, 855 So.2d 33, 49 (Fla. 2003); Doorbal v. State, 837 So. 2d 940 (Fla. 2003); Kormondy v. State, 845 So.2d 41, 54 (Fla. 2003).

[83]State v. Steele, 921 So. 2d 538 (Fla. 2005).

[84]*Id*. at p.9.

[85]Cunningham v. California, 549 U. S. 270, 127 S. Ct.856, 166 L. Ed. 2d 856 (2007).

impose a sentence above the statutory maximum based upon a fact, other than a prior conviction, not found by a jury or admitted by the defendant.". . . " The relevant 'statutory maximum' . . . is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional facts."

The Supreme Court of Florida has repeatedly rejected all of the *Ring/Apprendi* arguments to date.[86] However, the *Cunningham* case will require the Court to revisit these decisions again.

6.1.7 RETROACTIVE EFFECT OF SUPREME COURT CASES UNDER THE ANALYSIS OF *TEAGUE v. LANE*

The United States Supreme Court has held that, with rare exceptions, decisions making constitutional changes in procedure will be applied retroactively only to cases on direct review and not on collateral review.[87] The reasons for this policy are not readily apparent and deserve further discussion.

Teague, a black man, was convicted in Illinois by an all-white jury and his conviction was affirmed on appeal. He sought collateral review, complaining the jury was not composed of a fair cross-section of the community. He was convicted before *Batson v. Kentucky*[88] was decided, and he sought that case to be applied retroactively to his case.

The United States Supreme Court noted it had often applied a new constitutional rule of criminal procedure to the defendant in the case announcing the new rule. The question of whether the new rule should be applied retroactively was left for the next case. The Court decided that retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.[89]

The Court admitted it is difficult to determine when a case announces a new rule and no attempt was made to "define the spectrum of what may or may not constitute a new rule for retroactivity purposes." The Court then went on to explain, "In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government," or, "(T)o put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."[90]

The Court adopted Justice Harland's view that new rules should always be applied retroactively to cases on direct review, but that, generally, they should not be applied retroactively to criminal cases on collateral review. This policy is justified on several grounds:

(1) Failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates "basic norms of constitutional adjudication." There are two reasons for that:

a. The Court can only promulgate new rules in specific cases and cannot possibly decide all cases in which review is sought. Accordingly, "the integrity of judicial review" requires the application of the new rule to "all similar cases pending on direct review."

b. Selective application of new rules violates the principle of treating similarly situated defendants the same.

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[86]Taylor v. State, 937 So. 2d 590 (Fla. 2006).

[87]Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

[88]Batson v. Ky., 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Batson stands for the proposition that potential jurors cannot be peremptorily challenged on account of their race.

[89]*Teague*, 489 U.S. at 300.

[90]*Id.* at 301.

(2) Habeas corpus has always been a collateral remedy not designed to be used as a substitute for direct review. "The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed."

(3) Given the "broad scope" of constitutional issues reviewable on habeas corpus, "it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of habeas cases on the basis of intervening changes in constitutional interpretation." This is so because "the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, . . . the habeas court need only to apply the constitutional standards that prevailed at the time the original proceedings took place."

(4) "The costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus . . . generally outweighs the benefits of this application."

(5) State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during habeas proceeding, a new constitutional command.

The Court adopted Justice Harland's view that there exists only two exceptions to the rule. First, a new rule should be applied retroactively on habeas if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Second, a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are implicit in the concept of ordered liberty." This second exception involves bedrock procedural elements, e.g., the right to counsel, necessary to obtain a valid conviction. This exception is also illustrated by recalling the classic grounds for habeas relief: "that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based upon a confession extorted from the defendant by brutal methods." *Teague* will foreclose relief to death-row inmates like Bottoson and King whose cases were in postconviction-relief or in federal habeas proceedings because the United States Supreme Court has ruled that *Ring* is not retroactive under the *Teague* analysis.[91]

However, blindly following the precedent in *Spaziano* and *Hildwin* is not the only approach courts are taking in applying *Ring*. The Supreme Court of Nevada invalidated the part of that state's death penalty statute that allowed a three-judge panel to find the aggravating circumstances in the event the jury was unable to reach a unanimous penalty decision.[92]

The Supreme Courts of Colorado and Nebraska followed Nevada's lead. In the case of *Wolt v. People*,[93] the Colorado Supreme Court declared the Colorado statute requiring a three-judge panel to find the facts to establish aggravating circumstances to be unconstitutional under the *Ring*

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[91]Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). [Justice Scalia is of the opinion there never has been an exception that would survive *Teague* analysis. He stated, "This class of rules is extremely narrow and 'it is unlikely that any . . . ha(s) yet to emerge.'" Tyler v. Cain, 533 U.S. 656, 667, n.7, 121 S. Ct.2478, 150 L. Ed. 2d 632 (2001) (quoting Sawyer v. Smith, 497 U.S. 227, 243, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990)).]

[92]Johnson v. State, 59 P.3d 450 (Nev. 2002).

[93]Woldt v. People, 64 P.3d 256 (Colo. 2003).

decision.[94] The Nebraska Supreme Court issued a similar ruling.[95] However, the Legislature amended Nebraska's death penalty statute in anticipation of the ruling. The Nebraska Supreme Court ruled the amendment to be procedural and remanded the case for a new penalty phase under the new statute. Of course, these western states are Georgia-scheme states and *Spaziano* and *Hildwin* do not apply to them.

Some of the justices (a slim majority) on the Supreme Court of Florida have taken the view that, so long as "past record" or some aggravating circumstance inherent in the guilt phase verdict is present, *Ring* does not apply.[96] Justice Shaw was one of those justices, and he is no longer on the Court. This approach ignores several real problems, including the fact that the jury recommendation does not have to be unanimous, the statutory scheme is not set up that way and the trial judge still finds the existence of other aggravating circumstances without assistance from the jury. In one recent case, the only aggravating circumstance involved was heinous, atrocious and cruel (HAC).[97] Justice Pariente pointed out that the jury did not make a specific finding of the existence of that aggravating circumstance and expressed her concern.

6.1.8 RETROACTIVE APPLICATION OF RULES UNDER FLORIDA LAW

The rule in *Teague v. Lane* does not constrain the state courts, when reviewing state criminal convictions, from giving broader effect to new rules of criminal procedure than is required under *Teague*.[98]

In determining whether a new rule (such as *Ring v. Arizona*) should be applied retroactively, the Supreme Court of Florida considers (1) the need for finality of decisions and (2) the fairness and uniformity of the court system. A new rule of law will not be applied retroactively unless the new rule (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance. A decision is of "fundamental significance" when it either places "beyond the authority of the state the power to regulate certain conduct or impose certain penalties" or "when the rule is of sufficient magnitude to necessitate retroactive application after assessing three factors which are, (a) the purpose to be served by the new rule, (b) the extent of reliance on the old rule, and (c) the effect on the administration of justice of a retroactive application of the new rule.[99] For instance, the Supreme Court's holding that

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[94]Interestingly, the Colorado statute provided that life imprisonment should be imposed in the event the Colorado death penalty scheme was declared unconstitutional. The Supreme Court of Colorado declined to order new sentencing hearings because "we would have to (1) ignore the mandatory provision of section 18-1.3-401(5) directing resentencing to life imprisonment without the possibility of parole, in the event the death penalty statute is held unconstitutional." Florida Statute 775.082(2) provides as follows: "In the event the death penalty in a capital felony is held to be unconstitutional by the Supreme Court of Florida or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1)."

[95]State v. Gales, 658 N.W.2d 604 (Neb. 2003).

[96]Duest, 855 So. 2d at 49 (Fla. 2000).

[97]Butler v. State, 842 So. 2d 817 (Fla. 2003).

[98]Danforth v. Minnesota, __ U. S. __, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008).

[99]Witt v. State, 387 So. 2d 922 (Fla. 1980); Chandler v. Crosby, 916 So. 2d 728 (Fla. 2005).

"knowledge of the victim's status" as a law enforcement officer as an element of attempted murder of a law enforcement officer was not a decision of fundamental significance and would not be applied retroactively.[100]

6.1.9 THE FEDERAL DEATH PENALTY ACT (FDPA)

The FDPA is basically a Georgia-scheme statute. It provides that the prosecution must notify the defendant "a reasonable time before trial or before acceptance by the Court of a plea of guilty" that it intends to seek the death penalty. The notice must contain all of the aggravating factors the prosecution intends to prove to justify the death sentence. The jury, in a separate sentencing hearing, must make three separate determinations. First, the jury must find beyond a reasonable doubt that the defendant acted with one of four mental culpability factors, ranging from an intentional killing to intentionally engaging in violence "knowing that the act created a grave risk of death," with the victim's death as a direct result. Next, the jury must consider whether the existence of at least one statutory aggravating factor has been proven beyond a reasonable doubt. Third, the jury must consider whether all the aggravating factors, both statutory and nonstatutory, found to exist outweigh all mitigating factors beyond a reasonable doubt. The jury's finding must be unanimous. Mitigating factors may be proven by a preponderance of the information and may be found by just one or more members of the jury. Information relevant to the sentence, including any mitigating or aggravating factors, "is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues or misleading the jury." Both the government and the defendant have an opportunity to rebut any information and present argument as to the sentence.[101]

United States v. Fell[102]

Fell challenged the constitutionality of the FDPA on two grounds--failure of the FDPA to require aggravating circumstances to be submitted to the Grand Jury and included in the indictment upon probable cause and failure of the FDPA to comply with the requirements of Sixth Amendment due process by allowing otherwise inadmissible evidence (hearsay) to be considered in determining whether an aggravating circumstance has been proven beyond a reasonable doubt.

In his opinion, Judge Sessions acknowledged that *Ring* did not discuss the question of whether the facts to be relied upon in securing the death penalty had to be included in the indictment. He believes "the clear implication of the decision, resting squarely as it does on *Jones*, is that in a federal capital case, the Fifth Amendment right to grand jury indictment will apply." Unfortunately for Fell, the government saw this one coming and amended the indictment.

Judge Sessions also found fault with the "relaxed evidentiary standard" included in the FDPA during the penalty phase of the proceedings. He does not believe this standard can "withstand due process and Sixth Amendment scrutiny, given the Supreme Court's concern for heightened reliability and procedural safeguards in capital cases." In Fell's case, the prosecutor intended to introduce into evidence a statement made by a deceased codefendant. This statement would not be admissible under the Federal Rules of Evidence. In discussing the background of the Due Process Clause, Judge Sessions stated:

"[A]s assurance against ancient evils, our country, in order to preserve 'the blessings

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[100]State v. Barnham, 921 So. 2d 513 (Fla. 2005).

[101]18 U.S.C.A. 3591.

[102]217 F. Supp.2d 469 (D. Vermont 2002).

> of liberty', wrote into its basic law the requirement, among others, that the forfeiture of the lives . . . of people accused of crime can only follow if procedural safeguards of due process have been obeyed." Chambers v. Florida, 309 U.S. 227, 237, 60 S. Ct. 472, 84 L.Ed. 716 (1940). Although the rights of an accused to confront and cross-examine witnesses are set forth in the Sixth, not the Fifth Amendment, "[t]he rights to confront and cross-examine witnesses . . . have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Indeed, "the absence of proper confrontation at trial 'calls into question the ultimate integrity of the fact-finding process.' " Ohio v. Roberts, 448 U.S. 56, 64, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (quoting Chambers, 410 U.S. at 295, 93 S. Ct. 1038) (internal quotation omitted).[103]

Thus, he reasoned, since the text of the Sixth Amendment's Confrontation Clause refers to "all criminal prosecutions," the rights enumerated there are not confined to trial. The Sixth Amendment does not operate to exclude all hearsay. But, in order for hearsay to be admissible, the proponent must demonstrate necessity (such as the unavailability of the declarant) and trustworthiness. Since "an accomplice's confession that implicates a defendant does not fall within a firmly rooted hearsay exception, it is presumably unreliable."[104]

Judge Sessions concluded his opinion as follows:

> If the death penalty is to be part of our system of justice, due process of law and the fair-trial guarantees of the Sixth Amendment require that standards and safeguards governing the kinds of evidence juries may consider must be rigorous, and constitutional rights and liberties scrupulously protected. To relax those standards invites abuse, and significantly undermines the reliability of decisions to impose the death penalty.

217 F.Supp.2d at 489.

The *Fell* case was ultimately reversed by the United States Court of Appeals for the Second Circuit. The Court held that the relaxed standard allowing hearsay to be admitted in the penalty phase was permissible.[105]

Subsequently, in *Crawford v. Washington*,[106] the United States Supreme Court addressed the admissibility of hearsay testimony. The Court held that the confrontation clause of the Sixth Amendment precludes the admission of out-of-court statements that are "testimonial" in nature unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. While the Court did not provide an inclusive list of "testimonial" statements, they include, at a minimum, prior testimony at a preliminary hearing; testimony before a grand jury, or at a former trial; and testimony elicited during police interrogations. The only exceptions to the rule are those firmly rooted exceptions known to the common law when the Constitution was adopted in 1791.[107]

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[103]*Id*. at 485-486.

[104]*Id*. at 486.

[105]U. S. v. Fell, 360 F.3d 135 (2d Cir. 2004); *cert. den*., 543 U.S. 946, 125 S. Ct. 369, 160 L. Ed. 2d 369 (2004).

[106]Crawford v. Wash., 531 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[107]Justice Scalia wrote the opinion for the Court and cited Professor Wigmore's 1940 edition of his work on evidence as authority. The author found the edition cited and, after deleting

United States v. Quinones[108]

The ruling in *Quinones* is not an attack on the death penalty from the right--it comes from the other direction. The issue presented to Judge Rakoff was stated as follows: "[w]hether the death penalty violate(s) due process, and is therefore unconstitutional, because, by its very nature, it cuts off a defendant's ability to establish his actual innocence." He determined that it was. Judge Rakoff's opinion points out some very disturbing aspects of death penalty litigation.

Judge Rakoff expressed concern about the real possibility of an innocent person being executed. He then relied upon cases and studies that show through new technology, such as DNA testing, that a number of defendants on death rows across the country have been proven innocent, sometimes hours before their scheduled executions. He was unwilling to accept that considerations of deterrence and retribution can constitutionally justify the knowing execution of innocent persons. He pointed out several pitfalls in federal practice that can result in unreliable death sentences such as, unlike many states, federal practice allows conviction upon the uncorroborated testimony of an accomplice and circumstantial evidence does not have to exclude to a moral certainty other reasonable inferences except guilt. He also noted that it is "reasonably well established that the single most common cause of mistaken convictions is inaccurate eye-witness testimony."

He concluded that execution, "by cutting off the opportunity for exoneration, denies due process and, indeed, is tantamount to foreseeable, state-sponsored murder of innocent human beings."[109]

Quinones was reversed by the Second Circuit on the grounds that the FDPA does not violate due process.[110]

Cases such as *Fell* and *Quinones* point out the difficulties that federal trial judges have with the reliability of judgments in capital trials. Trial judges across the country have similar concerns.

The United States Supreme Court did not mention in *Crawford* whether hearsay is admissible in the penalty phase of a capital trial. Many jurisdictions require the rules of evidence to be followed, at least by the prosecutor, during the penalty phase.[111] The question of how to prove a fact beyond a reasonable doubt with hearsay testimony is still difficult to answer. The application of *Crawford* to the penalty phase will be argued in the future, and wise prosecutors will avoid using hearsay to prove aggravating circumstances.

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exceptions that are archaic, concluded the following statements to have been admissible in evidence at common law in 1791: (1) Declarant unavailable - dying declarations, statements of facts against interest, declarations of family history (pedigree), attestation of a subscribing witness, entries made in the regular course of business, recitals in deeds and ancient documents and reputation; (2) Availability of declarant immaterial - official statements in public records, sundry exceptions such as learned treatises, reports of foreign courts, commercial price lists, etc. and spontaneous statements.

[108]U. S. v. Quinones, 196 F. Supp.2d 416 (S.D.N.Y 2002); 205 F.Supp.2d 256 (S D N Y 2002).

[109]205 F. Supp.2d at 268.

[110]U. S. v. Quinones, 313 F. 3d 49 (2d Cir. 2002).

[111]AR ST S 5-4-602 (Arkansas); CT ST S 53a-46a (Connecticut); LA C.Cr.P. Art. 905.2 (Louisiana); NJ ST 2C: 11-3 (New Jersey); OH ST S 2929.03 (Ohio). This list is not exhaustive.

6.2.0 IS THE DEFENDANT INELIGIBLE TO BE SENTENCED TO DEATH?

Before beginning to prepare for the sentencing phase (and in most cases, prior to the trial itself), there should be a determination of whether the defendant is ineligible for the death penalty under the law of Florida or the case law of the United States Supreme Court. The Florida Rules of Criminal Procedure provide that authority.[112] If the defendant is ineligible to receive the death penalty, there is no need to conduct a penalty phase trial, and it is error to do so.[113] Six categories of prohibition exist in Florida.

6.2.1 THE AGE OF THE DEFENDANT

The United States Supreme Court has ruled that execution of juvenile offenders under the age of 18 at the time the murder was committed violates the Eighth Amendment.[114] The decision was a 5-4 decision, with Justice Kennedy writing the majority opinion. Justice Scalia wrote a well reasoned, strongly-worded dissent for the minority.

Previously, the Court stated, in a plurality opinion, that it is unconstitutional to execute a defendant who is 15 years old (or younger) when the murder is committed.[115] However, the Court decided it was not cruel and unusual punishment to execute a defendant who was 16 or 17 when the murder was committed.[116]

In 2002, the Florida Constitution was amended to include the following provisions in Article I, Sec. 17:

> Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the Legislature. *The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.* Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the Legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively. (Emphasis supplied.)

This amendment was probably enacted to prohibit the Supreme Court of Florida from declaring the death penalty unconstitutional as cruel or unusual punishment under the Florida Constitution. It also has had the effect of abdicating part of state sovereignty to five justices on the

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[112] Fla. R. Crim. P. 3.190(a).

[113] Reed v. State, 496 So. 2d 213 (Fla. 1st DCA 1986).

[114] *Roper*, 125 S. Ct. at 1196.

[115] Thompson v. Okla., 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1988).

[116] Stanford v. Ky., 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989).

United States Supreme Court. The age, under consideration here is the chronological age of the defendant, not the defendant's mental or emotional age.[117]

6.2.2 THE *ENMUND/TISON* EXCLUSION

In *Enmund v. Florida*,[118] the Court held that the Eighth Amendment does not permit a defendant to be sentenced to death who aids and abets a felony (in *Enmund*, a robbery) in the course of which a murder is committed by others, but who does not himself kill, attempt to kill, or intend that a killing take place, or that lethal force be employed. *Tison v. Arizona*[119] held that major participation in a felony that resulted in murder, even if the defendant is not the killer, combined with defendant's reckless indifference to human life are sufficient to satisfy the *Enmund* culpability requirement. For instance, in *Lugo v. State*,[120] a codefendant who was not "the hands-on killer" was held equally as culpable as his codefendant. That case involved organized racketeering that started with abduction and ended with murder.

The Supreme Court of Florida has suggested that, in an armed robbery committed by two or more codefendants, where there are no eyewitnesses, the evidence is circumstantial, and the killer is not clearly identified, the *Enmund/Tison* culpability requirement cannot be met.[121]

However, when a defendant's statement places him at the crime scene, a bloody shoe print located next to the body matches the defendant's shoes he was wearing at the time of the crime, and the defendant admits he disposed of the shoes because there was blood on them, the evidence is sufficient to establish the defendant either murdered the victim or acted in reckless regard for human life and the *Enmund/Tison* standard is satisfied.[122]

The United States Supreme Court has stated the *Enmund/Tison* decision can be made by a jury, the trial judge, or an appellate court, even a federal habeas court.[123] The Supreme Court of Florida has held that, if an *Enmund/Tison* issue exists, it must be addressed in the sentencing order with findings supporting the *Enmund/Tison* culpability requirement, especially if the facts of the case make the issue at least arguable.[124] But, if the trial judge is satisfied the *Enmund/Tison* culpability requirement cannot be met, there is no reason to allow the death penalty to become an issue at trial.[125]

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[117]Alston v. State, 723 So. 2d 148 (Fla. 1998). See also, Nelson v. State, 748 So. 2d 237 (Fla. 2000) where the defendant was 18 years at the time he committed the crime, but had the emotional maturity of a 12- or 13-year-old.

[118]458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

[119]481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987).

[120]845 So. 2d 74 (Fla. 2003).

[121]Jackson v. State, 575 So. 2d 181 (Fla. 1991); *Benedith v. State*, 717 So. 2d 472 (Fla. 1998). Another case discussing the *Enmund/Tison* issue is *Fernandez v. State*, 730 So. 2d 277 (Fla.1999)(getaway driver who did not participate in the killing was ineligible for the death penalty under *Enmund*).

[122]Perez v. State, 919 So. 2d 347 (Fla. 2005).

[123]Cabana v. Bullock, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986).

[124]*Benedith*, 717 So. 2d at 477.

[125]*Reed*, 496 So. 2d 213 (Fla. 1st DCA 1986).

6.2.3 THE DEFENDANT IS MENTALLY RETARDED

Execution of a mentally retarded person is considered cruel and unusual punishment under the Eighth Amendment.[126] Section 921.137, Florida Statutes, prohibits the execution of a mentally retarded defendant. The statute contains a complicated definition of "mentally retarded," which requires a three-prong test to be applied before a finding of mental retardation can be made. The first prong involves "sub-average intellectual functions usually assessed by an IQ test or an assessment of intellectual ability that tends to fall below a score of 70, so 69 and below."[127] The IQ testing is performed by administering a Wechsler Series or Stanford-Binet test. The second prong involves deficits in adaptive functioning, which concerns general functioning behavior in life. The third prong requires that the deficiencies must be present prior to age eighteen. All three prongs must be present before mental retardation can be found.[128] It is proper for the experts appointed to evaluate the defendant to ignore testing for the second and third prong if the evidence supports an IQ of 70 or higher.[129] More perplexing is the procedure provided in the statute. The defendant is required to file a notice that mental retardation is going to be relied upon as a defense to the death penalty at least 20 days prior to trial, but the issue is not set for hearing until after the jury recommends the death sentence. The procedure provided for by the statute will result in an unnecessary waste of time and resources since the defense will have to spend the time preparing mitigation for the penalty phase rather than focusing on the mental retardation issue. And, doubtless, the defendant will want the penalty phase jury to hear evidence of mental retardation as a bar to execution. Since the statute does not provide for bifurcation of the mental retardation issue from mitigating circumstances, it would be most awkward for there to be a judicial determination of whether the defendant is mentally retarded after the sentencing recommendation is returned by the jury. There is no compelling reason to require this issue to be determined post-trial.

The Supreme Court of Florida had the opportunity to address the cumbersome procedure provided by the statue and, under the Court's authority to promulgate rules of practice and procedure in the courts, adopted a procedure that allows for the determination of mental retardation by the trial judge pretrial.[130]

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[126]Atkins v. Virginia, 536 U. S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

[127]Johnston v. State, 930 So. 2d 581 (May 4, 2006) (Opinion withdrawn pending rehearing.).

[128]Phillips v. State, 984 So. 2d 503 (Fla. 2008).

[129]*Id.*

[130]Amendments to Floridal Rules of Criminal Procedure and Florida Rules of Appellate Procedure, 875 So. 2d 563 (Fla. 2004). *See* Fla. R. Crim. P. 3.203. The enactment of this rule caused much criticism and dismay among several members of the Legislature. Legislators should stay out of the rule-making arena. They have no expertise there. Determining the difference between substantive and procedural rules is usually not a difficult task. In Schriro v. Summerlin,, 546 U.S. 6, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004) , Justice Scalia stated, "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." See *Bousley, supra* at 620-621, 118 S. Ct. 1604 (rule "hold[s] that a . . . statute does not reach certain conduct" or "make[s] conduct criminal"); *Saffle, supra,* at 495, 110 S. Ct. 1257 (rule "decriminalize[s] a class of conduct [or] prohibit[s] the imposition of . . . punishment on a particular class of persons"). In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural. See *Bousley, supra,* at 620, 118 S. Ct. 1604."

The burden of proof to establish mental retardation under F. S. 921.137(1) and under Rule 3.203, Fla. R. Crim. P. is "clear and convincing evidence." This burden of proof is directly contrary to the holding in *Cooper v. Oklahoma*.[131] In that case, the United States Supreme Court stated, " . . . a state may presume that a defendant is competent and require him to shoulder the burden of proving incompetence by a preponderance of the evidence." The Court held that the higher standard of "clear and convincing evidence" violates due process. There should be no different burden of proof in cases involving incompetence and mental retardation.

In *Schriro v. Smith*,[132] the Court addressed the issue of whether a jury trial is required to determine whether a defendant is mentally retarded. While the case may have limited application because it was a habeas action, the Court made it clear that *Atkin*s authorizes the states to develop procedures to determine if a defendant is mentally retarded. The Court stated,

> The Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim. *Atkins* stated in clear terms that "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." 536 U.S., at 317, 122 S.Ct. 2242 (quoting *Ford v. Wainwright,* 477 U.S. 399, 416-17, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); modifications in original). States, including Arizona, have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. While those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition.

The test for mental retardation in *Atkins* placed the ceiling of mental retardation at an I.Q. of 70. Seventy is the generally accepted ceiling throughout the country, and it is the ceiling under the Florida statute.

6.2.4 THE MORE CULPABLE CODEFENDANT RECEIVED A LIFE SENTENCE.

The Supreme Court of Florida has held that the death penalty is disproportional if it is imposed upon a defendant who is not at least equally as culpable as the codefendant.[133] Thus, the sentence imposed on an equally or more culpable codefendant is relevant to a proportionality analysis.[134] Disparate treatment of a codefendant, however, is justified when the defendant is the more culpable participant in the crime.[135]

While determining proportionality is the Supreme Court of Florida's responsibility, it is a waste of time and resources to conduct a penalty phase hearing in an obvious case when the

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[131]517 U. S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996).

[132]546 U. S. 7, 126 S. Ct. 7, 163 L.Ed.2d 6 (2005).

[133]Downs v. State, 572 So. 2d 895 (Fla.1990), *cert. denied*, 502 U.S. 829, 112 S. Ct. 101, 116 L. Ed. 2d 72 (1991); Slater v. State, 316 So. 2d 539 (Fla.1975).

[134]Cardona v. State, 641 So. 2d 361 (Fla.1994), *cert. denied*, 513 U.S. 1160, 115 S. Ct. 1122, 130 L. Ed. 2d 1085 (1995).

[135]Hayes v. State, 581 So. 2d 121 (Fla.), *cert. denied*, 502 U.S. 972, 112 S. Ct. 450, 116 L. Ed. 2d 468 (1991). Larzelere v. State, 676 So. 2d 394 (Fla. 1996). See also, Hazen v. State, 700 So. 2d 1207 (Fla. 1997); Evans v. State, 808 So. 2d 92 (Fla. 2002).

defendant is less culpable than the codefendant who received a lesser sentence.[136] "A trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence."[137]

One problem that occurs fairly regularly is the situation where a codefendant is found guilty of a lesser offense, or allowed to plea to a lesser offense as part of a plea bargain. The Supreme Court of Florida "performs an analysis of relative culpability" to ensure that equally culpable co-defendants are treated alike and receive equal punishment.[138] However, this type of analysis cannot be made when one co-defendant is found guilty of, or pleads guilty to, a lesser offense. The Court has stated, " . . . it is not this Court's role to consider or re-weigh the evidence that led to the co-defendant's conviction." Instead, the Court simply accepts the conviction of the lesser offense and determines that the codefendants are not equally culpable.[139] In other words, when a codefendant is convicted of a lesser offense, his sentence for that offense is not relevant to the claim that the sentence is disproportionate.[140] A death sentence for an equally culpable co-defendant is not disproportionate if the life sentence received by the other co-defendant was the result of a guilty plea.[141]

6.2.5 NO AGGRAVATING FACTORS ARE PRESENT

Florida law requires at least one aggravating factor be present before a defendant may be sentenced to death. If it is clear no aggravating factors exist, there would appear to be no reason to hold a penalty phase. So, if there are no aggravating factors, there will be nothing to give the jury to consider, and there would be no need to go through the penalty phase. The death penalty is simply impermissible without an aggravating factor.[142]

The *Furman*[143] case held that the aggravating or "special" circumstances in a statute must significantly "narrow" the class of cases that are eligible for the death penalty. And the Supreme Court of Florida has stated that the Florida Statute, with its 14 aggravating circumstances, does just that.[144] But saying it doesn't make it so. It is difficult to imagine any but the most unlikely facts that would support a first-degree murder charge that does not have at least one aggravating circumstance.

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[136]Ray v. State, 755 So. 2d 604 (Fla. 2000).

[137]Sexton v. State, 775 So. 2d 923, 935 (Fla. 2000) (quoting Puccio v. State, 701 So. 2d 858, 860 (Fla. 1997); Hertz v. State, 803 So. 2d 629, 652 (Fla. 2001); White v. State, 817 So. 2d 799 (Fla. 2002).

[138]See, Shere v. Moore, 830 So. 2d 56, 60 (Fla. 2002).

[139]See, Jennings v. State, 718 So. 2d 144,153 (Fla. 1998); Smith v. State, 2008 WL 4355404 (Fla. Sept. 25, 2008)..

[140]England v. State, 940 So. 2d 389 (Fla. 2006); Caballero v. State, 851 So. 2d 655 (Fla. 2003); Steinhorst v. Singletary, 638 So. 2d 33,35 (Fla. 1994).

[141]Smith v. State, 998 So. 2d 516 (Fla. 2008).

[142]Banda v. State, 536 So. 2d 221 (Fla. 1988); Elam v. State, 636 So. 2d 1312 (Fla. 1994).

[143]Furman v. Ga., 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

[144]Douglas v. State, 878 So. 2d 1246 (Fla. 2004).

This problem is likely to continue to be the subject of argument in the future just as in the past. In felony murder cases, the problem is most apparent. The felony that raises the homicide from some lesser offense to first-degree murder is automatically used to create an aggravating circumstance.[145]

6.2.6 THE STATE DOES NOT SEEK THE DEATH PENALTY

The death penalty may not be imposed if the prosecutor does not seek it.[146] If the prosecutor does not seek the death penalty, the jury should be instructed prior to beginning voir dire in the guilt phase as follows:

> "The penalty for first-degree murder in this state is death or life imprisonment without the possibility of parole. However, not every first degree murder case involves the death penalty. This is one of those cases. The death penalty is not an issue in this case."

6.3.0 DEATH IS DIFFERENT

One phrase often repeated in death penalty cases is that DEATH IS DIFFERENT. Death penalty trials cannot be treated like every other kind of criminal trial. Judges who make this mistake invite almost sure reversal. Consider what Justice Stewart said in his concurring opinion in *Furman v. Georgia*:[147]

> . . . [T]he penalty of death differs from all other forms of criminal punishment, not in degrees but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice, and it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

The principal differences in death-penalty proceedings from all others can be broken down into the three main categories discussed below in §§6.3.1-6.3.3.

6.3.1 HIGHER (SOMETIMES CALLED "SUPER") DUE PROCESS STANDARDS

Defendants in death penalty cases are entitled to "super" due process because of the finality of the penalty. The courts have expressed this concept in a variety different contexts. Some of them are discussed below.

6.3.2 CONFIDENTIAL INFORMATION

Consider the case of *Gardner v. Florida*.[148] For many years, it was customary in Florida for a judge to order a presentence investigation (PSI) prior to sentencing a defendant in most cases. It

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[145]Albelaez v. State, 2005 WL 168570 (Jan. 27, 2005), __ So. 2d __ (Fla. 2005); Ault v. State, 866 So. 2d 674 (Fla. 2003); Walton v. State, 847 So. 2d 438 (Fla. 2003); Card v. State, 803 So. 2d 613 (Fla. 2001); Blanco v. State, 706 So. 2d 7 (Fla. 1997).

[146]Lankfield v. Idaho, 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1990).

[147]408 U.S. at 306.

[148]430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

was customary for the probation officer to include a confidential section in the PSI for the judge only. In *Gardner*, the judge asked for a PSI. The customary confidential section was included in it. Neither the state attorney nor the defense attorney requested to read the confidential section, nor was there any evidence anything in the confidential section was used to the detriment of the defendant. However, since death is different, the Court held the defendant was denied due process because the trial judge read confidential material without giving the defendant and his attorney a chance to read and respond to it.

6.3.3 CONTINUANCES

Trial judges are all familiar with the vast body of case law that holds the granting or denying of a motion to continue rests within the sound discretion of the trial court and will not be disturbed on appeal unless an abuse of discretion is found.[149] In a regular trial, trial judges are rarely reversed for failing to grant a continuance. But, in a death penalty trial, including the penalty phase itself, judges are required to bend a little and be overly cautious in denying the defense a continuance, especially if it appears the death penalty is likely. This need for caution does not mean the Court should grant an unreasonable request. But, if the request is reasonable, and was not brought on by the defendant's own dilatory conduct, a better practice is to allow the continuance. "Super" due process means continuances must be allowed that would normally be denied.

For some cases discussing penalty phase continuances, see the following:

1. *Scull v. State*, 569 So. 2d 1251 (Fla. 1990) (resentencing defendant one day after receipt of the mandate and three days after defense counsel returned from vacation violated due process.)
2. *Espinosa v. State*, 589 So. 2d 887 (Fla. 1991), *rev'd on other grounds*, *Espinosa v. Florida*, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992). (Refusal of trial judge to allow defendant time and money to fly family members in for penalty phase was not an abuse of discretion when the motion was not made until the penalty phase was scheduled to begin.)
3. *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994). (Defendant waived right to present witnesses in the penalty phase of the trial when he insisted all during the trial that no witnesses were to be called and then, on the day of the penalty phase, changed his mind, knowing the witnesses were unavailable.)
4. *Sliney v. State*, 699 So. 2d 662 (Fla. 1997). (Trial court did not abuse discretion in a capital murder case by not allowing a continuance after defendant fired his own attorney and asked for public defender at close of guilt phase, and by not appointing investigator to research mitigating evidence. The penalty phase was scheduled to begin one month after appointment of counsel who had worked on case in its earlier stages, and more than a year had passed since the indictment was filed.)
5. *Manso v. State*, 704 So. 2d 516 (Fla. 1997). (Abuse of discretion not to allow a continuance for competency exam of the defendant who showed signs of being incompetent in court, and experts who examined him believed he needed hospitalization and evaluation.)

6.3.4 DIFFERENT EVIDENTIARY STANDARDS

Consider the case of *Green v. Georgia*.[150] In that case the defendant and a codefendant raped and killed the victim. In the penalty phase of Green's trial, Green attempted to introduce a cell-mate's

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[149]Hernandez-Alberto v. State, 889 So. 2d 721 (Fla. 2004); State v. Charles, 827 So. 2d 1107 (Fla. 2002).

[150]442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979).

testimony that the codefendant told him that he killed the victim after telling Green to go on an errand. There was nothing in Georgia's law that allowed this hearsay testimony, so the trial judge excluded it. The Georgia Supreme Court affirmed the death sentence, and Green petitioned for certiorari, assigning as error the trial court's refusal to allow the hearsay testimony. In a short, two-page opinion, including Justice Rehnquist's dissent, the U.S. Supreme Court reversed Green's death sentence. The per curiam opinion held that the hearsay testimony was relevant to Green's punishment and stated: "In these unique circumstances, the hearsay rule may not be applied mechanistically to defeat the ends of justice."[151] There was no analysis in the opinion suggesting the testimony was not hearsay, nor was there any suggestion that the testimony was admissible as an exception to the hearsay rule under Georgia's rules of evidence. The Court simply found death to be different and, therefore, fairness required the proffered testimony to be admitted. The *Green* decision would clearly have been different if Green had not been sentenced to die. The strict evidentiary standards that apply to other cases cannot be blindly followed in a penalty phase if a defendant may be sentenced to death.

6.3.5 INTENSE AND MULTIPLE SCRUTINY OF THE COURT'S RULINGS

No case will be reviewed as meticulously as a death case, or by so many courts, often more than once per court. And it is clear that what today may be a death case may not be one tomorrow. Consider the case of Charles William Proffitt. Proffitt broke into his victim's house in 1973. While inside, he was surprised by the victim. Proffitt stabbed him and he died. His wife was awakened, and she was beaten by Proffitt, although she survived. The jury recommended the death penalty, and the trial judge sentenced Profitt to death. The Supreme Court of Florida affirmed Proffitt's death sentence in 1975.[152] In 1976, the United States Supreme Court decided Proffitt's case in the now famous trilogy of *Gregg, Proffitt,* and *Jurek,* which upheld the three different death penalty schemes of Georgia, Florida, and Texas.[153] The following courts reviewed (or refused to review) Proffitt's case the listed number of times:

1.	Florida Circuit Court	4
2.	Supreme Court of Florida	5
3.	United States District Court	3
4.	Eleventh Circuit Court of Appeals	3
5.	United States Supreme Court	5

On two occasions, the Supreme Court of Florida called Proffitt's appeals from denials of his postconviction-relief motions "legally frivolous" and dismissed them. These "legally frivolous" dismissals are interesting only because of Proffitt's last appeal to the Supreme Court of Florida. In this last appeal in 1987, some 14 years after Proffitt's crime, the Supreme Court of Florida stated, "[O]ur present capital sentencing law mandates that we reduce Proffitt's sentence to life imprisonment without possibility of parole for twenty-five years."[154] Thus, it can readily be seen that long delays contribute to the reason why defense counsel file so many appeals. The passage of time and the development of a state's body of death penalty law may make death sentences that were appropriate when originally imposed disproportionate or otherwise inapplicable. Charles William

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[151] *Id*. at 97.

[152] Proffitt v. State, 315 So. 2d 461 (Fla. 1975).

[153] *Proffitt*, 428 U.S. at 260.

[154] Proffitt v. State, 510 So. 2d 896, 897 (Fla. 1987).

Proffitt is a perfect example of this. He no longer sits on Florida's death row.

6.3.6 INTENSE AND MULTIPLE SCRUTINY OF DEFENSE COUNSEL'S PERFORMANCE

The adequacy of defense counsel's representation and performance is usually reviewed in post conviction proceedings. However, every defense counsel who undertakes a death penalty case and loses it will find his or her performance scrutinized for effectiveness from Tallahassee to Washington, D.C. It is the trial judge's responsibility to monitor counsel's performance in the guilt phase and the penalty phase of the trial. Defense counsel are required to fully investigate penalty phase issues. This requirement includes reviewing prior convictions, including reading readily accessible public records, such as the court files, in order to discover any mitigating evidence and to anticipate the aggravating details.[155] The trial judge should be satisfied that counsel has done their investigation and are fully prepared before beginning a capital trial. Inadequate investigation by counsel may support a finding of ineffective assistance in postconviction-relief proceedings.[156] Several pretrial conferences may be needed to accomplish this important task.

Opening statements and closing arguments are fertile grounds for error. For instance, in the case of *Nixon v. Crosby*,[157] the Supreme Court of Florida ordered a new trial after nearly 20 years of litigation. The facts of the case were particularly disgusting. The defendant kidnapped the victim, took her to some woods, tied her to a tree, poured gasoline on her, and burned her alive. Court-appointed counsel had a most difficult and uncooperative client. Since the defendant had confessed to the murder, counsel decided to use a version of Clarence Darrow's defense of Leopold and Loeb and admitted to the jury the State would prove the facts of the murder beyond a reasonable doubt. He stated,

> In this case, there will be no question that Jeannie [sic] Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt. In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

On postconviction-relief, the Supreme Court remanded the case to the trial court after determining that this tactic was "the functional equivalent to a guilty plea"[158] and ordered a hearing to determine if the defendant agreed to it. The Court stated,"Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough."

Furthermore, the Supreme Court warned trial judges as follows:

> [W]e hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and

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[155]Rompilla v. Beard, 545 U. S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005).

[156]State v. Pearce, 994 So. 2d 1094 (Fla. 2008).

[157]Nixon v. Crosby, 857 So. 2d 172 (Fla. 2003).

[158]Nixon v. Singletary, 758 So. 2d 618, 625 (Fla. 2000)(Nixon II).

> question the defendant on the record as to whether or not he or she consents to counsel's strategy. This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.[159]

At the hearing on remand, the defendant did not testify. In fact, apparently, he never communicated agreement or disagreement to trial counsel on any subject.

The following discussion occurred at the hearing between post conviction counsel and Nixon's trial counsel:

> Q: Did you discuss the strategy of not contesting guilt with the defendant?
> A: I thought I answered it. But if I didn't answer it, then yes, he was advised as to that, yes.
> Q: And how did he respond?
> A: To the best of my knowledge, again he did nothing, except after it occurred that he was not real pleased. And I think I answered that before also.
> Q: Now what do you mean by he did nothing?
> A: He did nothing. I don't know. I don't know what else I can say, Mr. Evans. I have said it before.

The Supreme Court ordered a new trial and the State petitioned the United States Supreme Court for certiorari.

Justice Ginsberg, writing for the Court, reversed the holding of the Supreme Court of Florida.[160] In her opinion, Justice Ginsberg observed that "when a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course."[161] In such cases, counsel must be judged by the same standard as in other ineffective assistance of counsel claims, which is: "Did counsel's representation fall below an objective standard of reasonableness?"[162] Accordingly, the Supreme Court of Florida applied the wrong standard that of a presumption of deficient performance and a presumption of prejudice, as described in *United States v. Chronic.*[163] The Chronic test is reserved for cases wherein counsel fails to meaningfully oppose the prosecution's case.[164] In Nixon's case, the record showed that defense counsel cross-examined witnesses when he thought their statements needed clarification, objected to the introduction of crime scene photographs and challenged certain jury instructions.

The Court noted that a "guilty plea cannot be inferred by silence."[165] Conceding guilt in the opening statement does not carry with it the waiver of constitutional rights as does a guilty plea. For instance, the state was required to present evidence establishing the elements of the offense, the right of cross-examination was preserved, and objections to evidence could be made. Additionally, the right to appeal was preserved.

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[159] *Id*.

[160] Florida v. Nixon, 543 U.S. 175, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004).

[161] *Id*. at 555.

[162] *Id*.

[163] 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

[164] *Id*.

[165] *Id.* at 559.

There are certain duties defense counsel have in representing a client in a death penalty case. Defense counsel must consult with the client about "important decisions" including "overarching defense strategy." But that obligation does not require counsel to obtain the client's consent for "every tactical decision." The defendant has the ultimate authority (1) to plead guilty, (2) to waive a jury, (3) to testify in his or her own behalf, and (4) to take an appeal.[166] Otherwise, counsel's performance must be governed by the *Strickland* standard of whether counsel's representation fell below an objective standard of reasonableness.[167]

The opinion in the *Nixon* case gives defense counsel the authority to exercise professional judgment in cases, rather than more narrowly defining counsel's role in the defense. That does not mean counsel's performance will not be closely scrutinized when trial tactics fail. Trial judges should be aware defense counsel's performance deserves attention and seeking the consent of the defendant before making concessions or waivers is still preferable because it will save time in the long run.

The Supreme Court of Florida followed the holding in *Florida v. Nixon* in *Harvey v. State*.[168] In that case, defense counsel admitted the defendant committed murder during opening statement but the court ruled the prejudice prong of *Strickland* had not been shown.

One would think that the days of racial stereotyping and bigotry would be over in court proceedings. That was not the case in *State v. Davis*.[169]

Davis, who was black, was represented by a white lawyer who addressed racial prejudice during voir dire to the all-white jury panel by stating:

> Now, Henry Davis is my client and he's a black man, and he's charged with killing Joyce Ezell who was a white lady, lived in Lake Wales. *Now, all of us that are talking now, myself and all of y'all, are all white.*
>
> There is something about myself that I'd like to tell you, and then I'd like to ask you a question. *Sometimes I just don't like black people. Sometimes black people make me mad just because they're black.* And, you know, I don't like that about myself. It makes me feel ashamed. But, you know, sometimes if this was a thermometer of my feelings, and if you took it all the way up to the top, and this was one, this was five, all the way up here was ten, you know, my feelings would sometimes start to boil and *I get so mad towards black people because they're black* that it might go all the way up to the top of that scale. And, you know, I'm not proud of that and it embarrasses me to tell y'all that, to say it in public.

During final argument, counsel reminded the jury of his voir dire questioning by commenting,

> Henry is a black man, Mrs. Ezell was a white woman. We are all of us white. I'm a white southerner. You have told me and the court that you would disregard and not base your verdict on the question of race. I will believe you, I will trust you on that. It is hard for me to talk to you, my friends and neighbors, about something like this. I will not believe that race will be a factor in your decision, but I will ask you to be especially vigilant, because being a white southerner, I know where I come from.

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[166]*Id*. at 560.

[167]Strickland v. Wash., 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[168]Harvey v. State, 946 So. 2d 937 (Fla. 2006).

[169]State v. Davis, 872 So. 2d 250 (Fla. 2004).

> And I told you a little bit when we were questioning you as to potential jurors about some feelings that I have, and maybe very deep down y'all have them too.

The case reached the Supreme Court on postconviction-relief because the trial judge granted a new penalty phase hearing due to other deficiencies in presentation of mitigation and the State appealed. Davis cross-appealed for a new trial. The Supreme Court ordered a new trial and, among other things, stated, "Initially, we strongly reaffirm the principle that racial prejudice has no place in our justice system." The Court held that expressions of racial prejudice during voir dire amounted to ineffective assistance of counsel.

6.3.7 DISCRETION OF TRIAL COURT IN MAKING RULINGS

Normally, trial judges do not receive criticism for exercising discretion in ruling on discovery matters and the admissibility of evidence. A stricter standard is involved in death penalty cases.

It is an abuse of discretion to exclude an undisclosed defense witness without considering less extreme alternatives. And the weighing of the probative value of evidence as compared to its prejudice is skewed towards the defendant. Likewise, restricting cross-examination by the defense can lead to reversal.[170]

6.4.0 SUBSTANTIVE AND PROCEDURAL MATTERS

There are a number of substantive and procedural matters that are unique to capital trials. Death qualification of jurors, the bifurcated penalty phase proceeding and the disclosure of aggravating and mitigating circumstances only begin the list. This section will address the disclosure of aggravating and mitigating circumstances, the question of whether aggravating circumstances must be submitted to the Grand Jury and contained in the indictment, the right to a jury trial, and the use of shackles or restraints on the defendant.

6.4.1 GUILTY PLEAS

There are cases in which the defendant will want to plead guilty and move directly to the penalty phase hearing. What is the responsibility of the court and defense counsel in such cases?

In *Bradshaw v. Stumpf*,[171] the Court considered the voluntariness of a guilty plea in a post conviction habeas proceeding. The Court stated:

> Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not met and the plea is invalid.
>
> Stumpf's guilty plea would indeed be invalid if he had not been aware of the nature of the charges against him, including the elements of the aggravated murder charge to which he pleaded guilty. A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, "with sufficient awareness of the relevant circumstances and likely consequences."
>
> In Stumpf's plea hearing, his attorneys represented on the record that they had explained to their client the elements of the aggravated murder charge; Stumpf himself then confirmed that this representation was true. While the court taking a defendant's plea is responsible for ensuring "a record adequate for any review that may be later sought," we have never held that the judge must himself explain the

[170]McDuffie v. State, 970 So. 2d 312 (Fla. 2007).

[171]543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

> elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel. (Citations omitted.)

It is important to make a complete record at the hearing on the entry of a guilty plea in a capital case. The issue of the voluntariness of the plea will return on collateral attack if the death penalty is imposed. The Supreme Court of Florida has approved a plea colloquy in one case and quoted it fully.[172]

What if defense counsel elects to focus on the penalty phase of the case without the specific permission of the defendant? In *Florida v. Nixon,*[173] the defendant's attorney determined the evidence against his client was clear and overwhelming. During opening statement, he told the jury his client's guilt "would not be subject to any reasonable dispute." The Supreme Court of Florida held that this amounted to a plea of guilty and remanded the case to determine if Nixon consented to this strategy by his counsel. Nixon's attorney testified that the defendant was not communicative. The Supreme Court of Florida reversed for a new trial.

The U. S. Supreme Court reversed. Justice Ginsberg stated, "An attorney undoubtedly has a duty to consult with the client regarding "important decisions," including questions of overarching defense strategy. *Strickland,* 466 U.S., at 688, 104 S.Ct. 2052. That obligation, however, does not require counsel to obtain the defendant's consent to "every tactical decision." She stated, "A defendant, this Court affirmed, has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." A guilty plea is more than a confession. It waives the necessity of proof. During the trial, Nixon retained the right to cross-examine witnesses, the right to object to evidence, and the right to require the State to prove each element of its case beyond a reasonable doubt. He did not waive his right to appeal errors in the trial or in the jury instructions. Thus, the Court reasoned, the Supreme Court of Florida applied the wrong standard under *Strickland*.

The Nixon case is a valuable resource in situations where the capital defendant refuses to cooperate with defense counsel.

6.4.2 DISCLOSURE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

A defendant has no constitutional right to a statement of particulars listing the aggravating circumstances the State will rely upon during the penalty phase trial.[174] This limitation is seldom a real problem since most aggravating circumstances arise out of the facts of the case. However, many states require some sort of pretrial disclosure (*e.g.*, Colorado,[175] Pennsylvania,[176] South Carolina,[177]

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[172]Lynch v. State, 841 So.2d 362 (Fla. 2003).

[173]543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004).

[174]Riffin v. State, 397 So. 2d 277 (Fla. 1981); Clark v. State, 379 So. 2d 97 (Fla. 1979).

[175]C.R.S. 18-1.3-1201(3)(b). (Within 20 days after the filing of the notice of intent to seek the death penalty.)

[176]PA ST RCRP Rule 801. (At or before the time of arraignment.)

[177]SC ST S 16-3-20(B) (Before trial.)

and Washington[178]). The failure to disclose the aggravating (and mitigating) circumstances prior to opening statements during the penalty phase can put the trial judge at a real disadvantage when called upon to make evidentiary rulings. And keeping the list a secret can contribute to the Supreme Court of Florida ordering a new penalty phase.[179]

Recently, the Supreme Court of Florida has approved trial judges ordering the prosecutor to disclose the aggravating circumstances the State intends to rely upon at trial.[180] The Court justified the required disclosure on the grounds that prior case precedent was decided when there were only six aggravating circumstances listed in the statute and the number has now creeped up to 16, many of which overlap.

The Court noted that under current Florida law the trial judge cannot prohibit the State from relying upon an undisclosed aggravating factor. The discovery violation would at best justify a continuance.

While the Court authorized the trial judge to order aggravating circumstances to be disclosed, it did not require the defendant to disclose mitigating circumstances. The Court pointed out there is a difference in proving aggravating circumstances and proving mitigators. In order for the death penalty to be a possible penalty, the State must prove at least one aggravating circumstance beyond a reasonable doubt; whereas, to obtain a life sentence, the defendant need not prove anything in mitigation.

Trial judges should order the disclosure of aggravating circumstances early in the case, hold a pretrial conference prior to the beginning of the penalty phase, if not before, and insist that counsel provide a written list amending the aggravating circumstances previously disclosed and setting forth all mitigating circumstances in order to avoid surprise and error in making evidentiary rulings.

6.4.3 PLEADING AGGRAVATING CIRCUMSTANCES IN THE INDICTMENT

There has been considerable discussion recently over whether aggravating circumstances have to be submitted to the Grand Jury and listed in the indictment. The Supreme Court of Florida has repeatedly held this not to be a requirement.[181] However, since *Ring* defines aggravating circumstances as the "functional equivalent" of elements of an offense, the argument can be made that current Florida rules and decisions require aggravating circumstances to be contained in the indictment in order for the death penalty to be a possible penalty. *Fla. R. Crim. P.* 3.140(d) requires "an indictment or information on which the defendant is to be tried shall contain the essential facts constituting the offense charged." Presumably, "essential facts" include the elements of the offense. The Supreme Court has held "the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time - before trial, after trial, on appeal. or by habeas corpus."[182]

Some states presently require the aggravating circumstances, or, in Georgia-scheme states,

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[178]WA ST 10.95.040(2). (Within 30 days after arraignment.)

[179]Perry v. State, 801 So. 2d 78 (Fla. 2001)(State's argument that inadmissible evidence of prior incidents of domestic violence constituted 'anticipatory rebuttal' failed because penalty phase jury instructions were not yet resolved, and the mitigating circumstances were not finalized.)

[180]State v. Steele, 931 So.2d 538 (Fla.2005).

[181]Coday v. State, 946 So. 2d 988 (Fla. 2006); Parker v. State, 904 So. 2d 370 (Fla. 2005); Hodges v. State, 885 So. 2d 338 (Fla. 2004); Blackwelder v. State, 851 So. 2d 650 (Fla. 2003); Porter v. Crosby, 840 So. 2d 981 (Fla. 2003).

[182]State v. Gray, 435 So.2d 816 (Fla. 1983).

at least one of them, to be listed in the indictment itself (California,[183] Indiana,[184] and Ohio[185]).

6.4.4 RIGHT TO JURY RECOMMENDATION

The defendant has an absolute right to a jury advisory recommendation of life or death.[186] However, a sentence of death is not constitutionally required to be imposed upon the recommendation of a jury.[187] The death penalty can be constitutionally imposed by a judge if the defendant waives a jury[188] without running afoul of the ruling in *Ring v. Arizona*, which requires a jury to determine aggravating circumstances.[189]

6.4.5 WAIVER OF JURY RECOMMENDATION

The defendant may waive his right to a jury recommendation without the consent of the state.[190] But the judge has the absolute discretion to accept or reject the defendant's purported waiver.[191] Even if both the defendant and the State request a jury waiver, the judge can require a jury recommendation.[192] But, there are several good reasons to allow the jury to be waived:

(1) The "guilt phase" jury would not have to be "death qualified" other than to inquire whether the jurors could return a guilty verdict knowing the death penalty is a possible penalty. This waiver saves time (sometimes days or weeks) on voir dire and eliminates many of the errors that occur during voir dire and final arguments in death penalty cases.

(2) A jury recommendation to impose the death penalty may be an emotional response to the offense and the defendant and not founded upon sound legal principles. The possibility of an emotional verdict that will have to be given "great weight" is eliminated.

(3) The penalty phase can be scheduled at the convenience of the parties and the court without concern about a jury wandering around the community being influenced by outside factors.

(4) There is a better opportunity for the litigants and the witnesses to interact directly with the ultimate sentencer (the judge) when a jury is not involved.

(5) There is less chance of reversible error in a non-jury trial.

The only tactical advantage a capital defendant may have with a penalty phase jury under

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[183]CA PENAL S 190.1(b).

[184]IN ST 35-50-2-9(a).

[185]OH ST S 2929.03(B).

[186]FLA. STAT. § 921.141 (1) (West 1994).

[187]*Spaziano*, 468 U.S. 447.

[188]Lynch v. State, 841 So. 2d 362 (Fla. 2003)

[189]*Ring*, 536 U.S. 584.

[190]FLA. STAT § 921.141 (1) (West 1994).

[191]State v. Carr, 336 So. 2d 358 (Fla. 1976); Sireci v. State, 587 So. 2d 450 (Fla. 1991); Reynolds v. State, 934 So. 2d 1128 (Fla. 2006).

[192]Muhammad v. State, 782 So. 2d 343 (Fla. 2001); Bolin v. State, 869 So.2d 1196 (Fla.2004).

Florida's death penalty scheme is the possibility that the jury may recommend a life sentence. There is no other advantage. The jury recommendation will not include any interrogatories setting forth which aggravating circumstances were found, and by what vote; which mitigating circumstances were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no one will ever know if one, more than one, any, or all of the jurors agreed on any of the aggravating or mitigating circumstances.[193] Nor will anyone ever know if the jury's recommendation was based upon passion or prejudice, or was simply arbitrary. Accordingly, the jury recommendation (unless it is for life) is meaningless to the trial judge, who has the ultimate responsibility to find the facts, impose the sentence, and give the jury's recommendation "great weight."

Prior to 1994, there was disagreement among the District Courts over whether the State had to agree to the defendant's waiver before the Court could dispense with the jury's recommendation. The Second District and Fourth District Courts held the State had to concur with the waiver. The Fifth District did not agree and certified the question to the Supreme Court of Florida. In *State v. Hernandez*,[194] the Supreme Court held that the defendant could waive a jury's recommendation, with or without the State's concurrence. Although *Hernandez* involved a plea of guilty, the rationale of the case implies the defendant could also waive the jury recommendation after a finding of guilt by a jury. Of course, the judge still has to agree.

A knowing and voluntary waiver must be supported by the record. [195] The waiver must be by the defendant and not through representations of counsel.[196] A waiver dialog is contained in the Appendix to these materials.

The question of the voluntariness of the waiver of the penalty phase jury may not be reviewed on direct appeal unless the defendant attacks the voluntariness in the trial court.[197]

6.4.6 USE OF SHACKLES AND RESTRAINTS ON THE DEFENDANT; ARMED DEPUTIES IN THE COURTROOM DURING TRIAL; STUN BELTS; DEFENDANT TRIED IN JAIL CLOTHES; UNRULY DEFENDANTS

In *Illinois v. Allen*,[198] the Supreme Court held that it was permissible to bind and gag an "obstreperous defendant" in order to maintain courtroom decorum, but only as a last resort.

In *Holbrook v. Flynn*,[199] the Court held that shackling, unlike other security precautions, such as additional law enforcement presence in the courtroom, should be permitted only where justified by an essential State interest specific to each trial. While an accused is entitled to have his guilt or innocence determined solely on the basis of evidence introduced at the trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial, that principle does not mean that every practice tending to single out an accused from everyone

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[193]*See* Ibar v. State, 938 So. 2d 451 (Fla. 2006).

[194]State v. Hernandez*,* 645 So. 2d 432 (Fla. 1994).

[195]Lamadline v. State, 303 So. 2d 17 (Fla. 1990); Griffin v. State,820 So. 2d 906 (Fla. 2002).

[196]Thibault v. State, 850 So. 2d 485 (Fla. 2002).

[197]Dessaure v. State,891 So.2d 455(Fla.,2004).

[198]Ill. v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

[199]Holbrrok v. Flynn, 475 U.S. 460, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986); Bryant v. State, 785 So. 2d 422 (Fla. 2001).

else in the courtroom must be struck down.

As a general rule, a defendant has the right to appear before a jury free from physical restraints.[200] However, restraints "may be necessary to prevent the defendant form disrupting the trial . . . and to protect the physical well being of the jury, lawyers, judge and other trial participants."[201] Restraints may be ordered only if they are necessary to maintain courtroom security. Blind deference to security policies established by the sheriff are insufficient to justify restraints.[202]

Florida acknowledges that restraints may adversely interfere with the defendant's case.[203] The Supreme Court of Florida requires the trial court to conduct an evidentiary hearing on the issue of whether the defendant should be restrained if an objection is made.[204] At least one Florida court and the federal courts have considered it a claim for ineffective assistance of counsel if no hearing is requested.[205] Thus far, the Supreme Court of Florida has not granted postconviction-relief on an ineffectiveness claim involving the failure to object to shackles.[206] While the *Elledge* case gives good guidance, it was decided before *Teague v. Lane*,[207] and it is doubtful that the Circuit Court of Appeals would hear such a claim today. The unreported case of *Chavez v. Cockrell*[208] contains an excellent discussion of how *Teague* applies to cases involving physical restraint situations.

The trial court should make every effort to conceal restraints from the jury, but a brief exposure of a defendant to the jury while wearing prison garb or in restraints is not per se prejudicial.[209] No reported capital case has been reversed solely because the jury briefly observed the defendant in shackles or being escorted by officers to the courtroom.[210]

The trial court must be prepared to justify the use of shackles or other forms of restraint. Normally, an evidentiary hearing must be held before ordering shackling. However, it may be

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[200]Ill. v. Allen, 397 U.S. at 341-344.

[201]Isreal v. State, 837 So. 2d 381, 390 (Fla. 2002).

[202]Jackson v. State, 648 So.2d 1299 (Fla. 4th DCA 1997).

[203]McCoy v. State, 503 So. 2d 371 (Fla. 5th DCA 1987).

[204]Bello v. State, 547 So. 2d 914 (Fla. 1989); Bryant v. State, 785 So. 2d 422 (Fla. 2001).

[205]Elledge v. Dugger, 823 F. 2d 1439, rehearing granted in part, 833 F. 2d 250 (11th Cir. 1987); Lewis v. State, 864 So. 2d 1211 (Fla. 4th DCA 2004); Cramer v. State, 843 So. 2d 372 (Fla 2d DCA 2003).

[206]Hendrix v. State, 908 So. 2d 412 (Fla. 2005); Derrick v. State, 581 So. 2d 31 (Fla. 1991); Correll v. Dugger, 558 So. 2d 1422 (Fla. 1990).

[207]Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). See § 6.1.7 for a discussion on the retroactive application of Supreme Court decisions announcing new procedural rules.

[208]Chavez v. Cockrell, 2001 WL 1609347 (N. D. Tex. December 12, 2001) (Not reported in F. Supp.).

[209]Sireci, at 888; Gore v. State, 846 So. 2d 461 (Fla. 2003); Cooper v. State, 739 So. 2d 82 (Fla. 1999); Maxwell v. State, 490 So. 2d 927 (Fla. 1986); Heiney v. State, 447 So. 2d 210 (Fla. 1984).

[210]Hernandez v. State, 2009 WL 217972 (Jan. 30, 2009).

harmless error not to hold a hearing if the defendant's prior conduct in court justifies shackling.[211] Defendants who have been in possession of a weapon while in custody may be restrained.[212] Defendants who have threatened to attempt to escape during trial and batter or inflict bodily harm upon persons in the courtroom may be restrained.[213] Belligerent conduct at a prior hearing and refusal to comply with a deputy's orders may justify restraints.[214] Violent conduct against a court deputy can justify use of restraints.[215] A defendant who has previously been sentenced to death, and who previously tried to escape, may be shackled during retrial of the penalty phase.[216] The fact that a defendant has previously been found in possession of a weapon while in jail may justify shackling.[217] The decision to shackle can be justified when numerous defendants are on trial, some of whom have violent criminal histories. However, the decision to shackle must be an individualized decision based upon competent evidence.[218]

In deciding whether to physically restrain defendant and what method to use, the Court must balance its obligation to maintain courtroom safety against risk that security measures may impair defendant's presumption of innocence. The Court may order physical restraints only if it finds them to be necessary to maintain security of courtroom.

It is incumbent on defense counsel or the defendant to object to shackling. Failure to object, or request a hearing, amounts to a waiver of the issue on appeal.[219]

Armed Deputies

An alternative to using shackles or other restraints is the increase of security personnel. A defendant is not prejudiced by the presence of armed deputies in the courtroom.[220] It is advisable to augment regular uniformed officers with officers in plain clothes to minimize the possibility of prejudice and to allow the officers an opportunity to overhear conversations in the audience.

Stun Belts

Recently, security personnel have been provided with a new form of restraint called a "stun belt." Law enforcement believed that placing a "stun belt" on a defendant in lieu of shackles would

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[211]Heiney v. State, 447 So. 2d 210 (Fla. 1984); Bryant v. State, 785 So. 2d 442 (Fla. 2001)

[212]Hendrix v. State, 908 So. 2d 362 (Fla. 2005); Derrick v. State, 581 So. 2d 31 (Fla. 1991); Correll v. Dugger, 558 So. 2d 1422 (Fla. 1990).

[213]Blanco v. State, 603 So. 2d 132 (Fla. 3d DCA 1992).

[214]Brown v. State, 856 So. 2d 1116 (Fla. 4th DCA 2003).

[215]Israel v. State, 837 So. 2d 381 (Fla. 2002).

[216]Csubak v. State, 644 So. 2d 93 (Fla. 1994).

[217]Derrick v. State, 581 So. 2d 31 (Fla. 1991).

[218]United States v. Baker, 432 F. 3d 1189 (11th Cir. 2005).

[219]Hendrix v. State, 908 So. 2d 412 (Fla. 2005).

[220]Elledge v. State, 911 So. 2d 57 (Fla. 2005).

be preferable. Trial judges tended to agree. In *United States v. Gray*,[221] the trial judge noted that "there is a significant difference between the use of shackles--a heavy, loud and obvious form of restraint--and the use of stun belts, which may be worn unobtrusively beneath clothing." The "stun belt" can be activated by a security officer and delivers a 50,000 volt shock when activated, which temporarily immobilizes the wearer. The "stun belt" is unobtrusive, can be worn under clothing and is not apparent to the jury. One would think defendants would welcome the "stun belt" as an alternative to shackles, but, of course, that is not the case.[222] One trial judge has suggested the following factors be considered before using the "stun belt":

(1) the seriousness of the crime charged and the severity of the potential sentences;
(2) the threats of violence made by the defendant against witnesses;
(3) prior record of the defendant for acts of violence or escape;
(4) allegations of gang activity and the likelihood that associates of the defendant will attend the trial;
(5) the opinion of the courthouse security officer;
(6) potential prejudice to the defendant for wearing the "stun gun" belt;
(7) the likelihood of accidental activation of the device;
(8) potential physical danger to the defendant if the device is activated;
(9) the availability and viability of other means to ensure courtroom security;
(10) the potential danger to the defendant and others present in the courtroom if other means are used to secure the courtroom; and,
(11) the existence of a clear, written policy governing the activation of the device.[223]

The "clear written policy" in place in the *Gray* case was to activate the belt only if the prisoner (1) tampered with the belt, (2) failed to comply with orders to stop movement, (3) attempted to escape, (4) took any action to inflict bodily harm upon any person, and (5) made any intentional attempt to avoid constant visual contact with the court deputy.

Naturally, not everything always goes as planned. Sometimes the "stun belt" is activated accidentally. This occurred in *Chavez v. Cockrell*,[224] in the presence of the jury. On the following day, the trial court questioned each juror separately. Four jurors assumed the defendant had been shocked by some type of electronic device, four thought he had been shocked but did not know why and four knew there had been some commotion in the court room but did not know why. Each juror advised the trial judge that the juror could remain fair and impartial, and the trial judge determined what the jurors had observed and heard would not affect their impartiality and the defendant's presumption of innocence was not infringed. The trial judge made the best of a bad situation and the Texas Criminal Court of Appeals approved the procedure as well as the trial judge's findings in an unpublished opinion.

In *United States v. Durham*,[225] the court vacated convictions for three counts of armed bank robbery because the trial judge did not make a sufficient record to justify the use of the "stun belt." Upon remand, the trial judge, obviously frustrated with the ruling, went to great lengths to provide justification for the use of the device.[226] The trial judge found Durham to "possess a rare

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[221]U. S. v. Gray, 254 F. Supp. 2d 1 (D.C. D. C. 2002).

[222]See the unpublished opinion in U. S. v. Davis, 2003 WL 210889017 (E.D. La. May 9, 2003).

[223]*Id*.

[224]*Chavez*, 2001 WL 1609347 at 1.

[225]U. S. v. Durham, 287 F.3d 1297 (11th Cir. 2002).

[226]U. S. v. Durham, 219 F.Supp.2d 1234 (N. D. Fla. 2002).

combination of skill, ingenuity, cunning and fearlessness. These characteristics, in conjunction with the challenge he appears to relish in attempting to escape, make this defendant one of the most dangerous and one of the highest escape risks of any defendant to come before this court." He then proceeded to list numerous incidents involving the defendant's unacceptable behavior, including the fact that he had successfully slipped out of leg irons while being watched by a guard and almost succeeded in escaping from the Hillsborough County Jail. He plotted a detailed escape plan while in the Escambia County Jail and threatened to kill the prosecutor in his case. While on 15-minute surveillance and in solitary confinement, he broke his cell's floor grate and used it as a tool to remove material around the cell window so that it was easily removable. Additionally, due to a prior escape attempt at the maximum security prison at Leavenworth, the Bureau of Prisons had determined that he should be confined in the super-maximum security prison *underground* in Florence, Colorado.

There is a Florida case involving the use of the stun belt and the test to be used when deciding to use it. In *Weaver v. State,*[227] the defendant fired his lawyer and proceeded to trial pro se. He received the death penalty and complained on appeal about the use of the stun belt during his trial. The trial judge held an "informal" hearing on the stun belt issue (the sheriff was not under oath). The trial judge considered the fact that the defendant's pro se status required him to move about the courtroom during the trial, including side-bar conferences, and access to witnesses and jurors. Additionally, the State intended to introduce firearms and ammunition in evidence during the trial. The Supreme Court of Florida upheld the trial judge's decision to use the stun belt under the circumstances. The use of restraints is within the sound discretion of the trial court.[228]

Of course, during Weaver's trial, the stun belt was accidentally discharged during voir dire, but outside the presence of the jurors. The trial judge inquired of the defendant if he was "okay" and the defendant replied that he was "just shaken up a bit." A brief recess was held and the trial resumed. On appeal, Weaver claimed after the electric shock "he became meek and subdued" and was no longer a "zealous advocate for himself."

The Court noted this issue to be one of first impression in Florida but considered cases from other states where accidental discharges have occurred outside the presence of the jury.[229] The Court held that the accidental discharge did not prejudice the defendant. Prejudice to the defendant is the test to use in these cases.

Another new weapon used as a form of restraint is the "tazer." This device projects an electric charge in a trajectory like a firearm for up to 20 feet. It has the advantage of not causing permanent injury, or at least it is not supposed to, but other than that, it has all of the disadvantages of using a firearm because the person activating the device may miss the target and hit another person, or the target may obtain cover behind an object or another person.

It is advisable to know what devices security has in the courthouse and which devices are being used during a trial.

Trial judges must make the record clear in order to justify the use of restraints, including "stun belts."

Jail Garb

A criminal defendant cannot be required to appear at trial in jail garb. This is because it is

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[227]Weaver v. State, 894 So.2d 178 (Fla. 2004).

[228]Elledge v. State, 408 So. 2d 1021, 1023 (Fla. 1981).

[229]State v. Wachholtz, 131 Idaho 74, 952 P.2d 396, 398 (Ct.App.1998); Hawkins v. Comparet-Cassani, 251 F.3d 1230, 1239 (9th Cir.2001) (noting at least nine accidental activations nationwide in initial years of stun belt's use).

prejudicial to defendants who cannot post bail, thus implicating equal protection concerns.[230]

Unruly Defendants

Unruly defendants who disrupt court proceedings must be warned of the consequences if they continue their behavior. The trial judge has the discretion to gag a defendant who continues to cause outbursts in the presence of the jury. The Supreme Court will not interfere with this decision absent an abuse of discretion.[231] This standard is consistent with the most recent pronouncement of the United States Supreme Court on the subject.[232]

In England's case, the Supreme Court suggested some of the constitutionally permissible ways to handle an unruly defendant are to (1) bind or gag him, thereby allowing him to remain in the courtroom, (2) cite him for contempt (a useless remedy in a capital case), or (3) take him out of the courtroom until he promises to conduct himself properly.[233]

Removing a defendant from the courtroom can cause evidentiary problems, especially if identity is an issue in the trial. Judges have fashioned various approaches to this problem. In some cases, witnesses had an opportunity to view the defendant in the courtroom prior to his removal.[234] These witnesses testified that the person sitting at defense counsel's table earlier in the day was the perpetrator. The court noted that bringing the defendant into the courtroom bound and gagged was likely to have "significant prejudicial impact upon the jury." Another court used that option and the defendant engaged in disruptive behavior during the proceedings.[235] However, the appellate court approved the procedure. Finally, another court allowed the identification witnesses to base their identification on identification made at earlier hearings.[236] The option selected must be based upon the circumstances in the particular case.

6.4.7 DEFENDANT'S COMPETENCE TO PROCEED

The issue of the defendant's competence to proceed is frequently raised in capital cases. The state has the right to insist that measures are taken to restore competency, even to the extent of forced medication. In *Sell v. United States*, the Court set forth the standards that must be followed for the state to be able to insist that involuntary medication be administered in order to restore a defendant's competency.[237]

First, the trial court must find that important governmental interests are at stake. This finding

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[230]Lewis v. State, 864 So. 2d 1211 (Fla. 4th DCA 2004); Cramer v. State, 843 So. 2d 372 (Fla. 2003); Mullins v. State, 766 So. 2d 1136 (Fla. 2d DCA 2000).

[231]Elledge v. State, 408 So. 2d 1021, 1022-23 (Fla. 1981); England v. State, 940 So. 2d 389 (Fla. 2006).

[232]Deck v. Missouri, 544 U. S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 963 (2005).

[233]*England*, 940 So. 2d at 404.

[234]West v. State, 610 So. 2d 159 (Ga. App. 2005); Sanders v. State, 530 S. E. 2d 203 (Ga. App. 2000).

[235]State v. Peralta, 897 So. 2d 967 (La. App. 2002).

[236]State v. Addison, 871 So. 2d 536 (La. App. 2004).

[237]Sell v. United States, 539 U. S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003).

must be based upon factors such as whether the individual is accused of a serious crime. That should not be difficult in a capital case. However, special circumstances may lessen the state's interest in restoring the defendant's competency. A lengthy confinement in a mental institution may diminish the risks that ordinarily would attach to freeing without punishment a defendant who has committed a serious crime. This consideration may take on more significance in a capital case if the defendant is elderly or has an unrelated terminal disease.

Second, the trial court must find that involuntary medication will significantly further the state's interest. The court must find that administration of the drugs is substantially likely to render the defendant competent to stand trial and is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist his attorneys.

Third, the trial court must find that involuntary medication is necessary to further the state's interests. This means the court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results.

Fourth, the trial court must find that the administration of the drugs is medically appropriate. This means the administration of the drugs is in the patient's medical best interest in light of his medical condition.

6.4.8 RIGHT TO SELF-REPRESENTATION AND LIMITS TO THAT RIGHT - *FARETTA* AND *NELSON*

Generally, a defendant who is competent has the right of self-representation, provided the pitfalls for exercising that right are explained to him or her.[238]

However, the right of self-representation is not absolute. A defendant may be mentally competent to stand trial but not competent to conduct the trial. According to the American Psychiatric Association, "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illness can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant." The right of self-representation at trial does not go so far as to allow a defendant who lacks the mental capacity to conduct a defense without the assistance of counsel. Additionally, the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer. Trial proceedings must not only be fair--they must appear to be fair.[239] The record should almost always contain medical testimony justifying refusing a competent defendant the right of self-representation.

There are other instances when a defendant may not exercise the right of self-representation. A defendant has no right to represent himself on direct appeal.[240] The right of self-representation may be revoked by the trial judge if a defendant engages in serious obstructive conduct, abuses the dignity of the courtroom, or avoids compliance with "relevant rules of procedure and substantive law."[241] One way to try to avoid revocation of the right of self-representation is to appoint standby counsel to advise the defendant of proper procedure. It is permissible to appoint standby counsel over the defendant's objection.[242]

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[238]Faretta v. California, 422 U. S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

[239]Indiana v. Edwards, __ U. S. __, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008)

[240]Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U. S. 152, 163, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000).

[241]Illinois v. Allen, 397 U. S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

[242]McKaskle v. Wiggins, 465 U. S. 168, 178-179, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

A defendant may request the court to discharge court-appointed counsel without requesting self-representation. Such a request requires the court to inquire about the grounds for the request if they are not in writing.[243] The inquiry need go no further if the complaints about court-appointed counsel's performance are merely "generalized complaints," such as any of the following examples:[244]

1. Counsel spent less than an hour with the defendant prior to trial.
2. Counsel did not provide information about his or her case.
3. Defendant generally does not like counsel's performance.
4. Lack of communication between counsel and the defendant.
5. Defendant asks for a continuance to hire another lawyer.
6. Defendant objects to his exclusion from an in-chambers discussion between the judge, the prosecutor and court-appointed counsel.
7. General complaints about trial strategy.
8. Dissatisfaction with the progress of moving the case to resolution.
9. Complaint that counsel has "shown a great indifference."

Assuming no valid grounds for complaint about court-appointed counsel's performance are presented, the court is not required to inform the defendant of the right to self-representation. The need to conduct an inquiry under *Faretta* is triggered only by an "unequivocal assertion of the right to self-representation."[245]

However, once an "unequivocal assertion of the right to self-representation" is made, the court must conduct a "*Faretta* inquiry."[246] The inquiry focuses upon the defendant knowingly and voluntarily waiving the right to counsel and not upon whether the defendant has the skill and experience of a lawyer. So long as the defendant competently and intelligently chooses self-representation after being made aware of the dangers and pitfalls, the requirements of *Faretta* are satisfied.[247]

The decision to represent oneself must be timely. "Timely" means before the trial begins. Judicial discretion must be exercised when a claim for self-representation is made after the trial begins. The trial judge must consider such factors as the inconvenience threatened by the belated request against the prejudice for denying the request; the circumstances of the trial itself, such as whether it is in an advanced stage; and, the issue of whether the defendant has been disruptive during the trial.[248]

The question of whether a request for self-representation is "timely" between the guilt and penalty phase of a capital case has not been answered. It is suggested that the request should be treated as "timely" for the purpose of conducting a hearing on the request in order to properly

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[243]Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973).

[244]Guardado v. State, 965 So. 2d 108 (Fla. 2007). For an example of typical "generalized complaints" see Tennis v. State, __ So. 2d __, 2008 WL 5170559 (Fla. Dec. 11, 2008).

[245]Blake v. State, 972 So. 2d 839 (Fla. 2007); State v. Craft, 685 So. 2d 1292, 1295 (Fla. 1996).

[246]There is an extensive model dialog for such an inquiry contained in the committee notes to Rule 3.111, Fla. R. Crim. P.

[247]*Faretta*, 422 U. S. at 835; Adams v. United States ex rel. McCann, 317 U. S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 2d 268(1942).

[248]U. S. v. Doughterty, 473 F. 2d 1113 (C.A.D.C. 1972).

exercise judicial discretion in ruling on it.

If the defendant insists on self-representation after the guilt phase of the trial, or wants to fire defense counsel, and the court determines the request for self-representation is "timely," the same procedure must be followed as if this request had occurred before trial. Before allowing a defendant to represent himself, the following actions must be taken:[249]

(1) The trial judge must conduct a *Faretta* inquiry;

(2) The defendant must be given some time to prepare (10 minutes is not enough); and

(3) Standby counsel should be appointed and be available for the remainder of the penalty phase.

A defendant does not have the right to "hybrid representation" by acting as co-counsel.[250] However, the trial judge has the discretion to allow the defendant to be co-counsel and even address the jury during final argument. This decision will not be disturbed absent an abuse of discretion.[251] Experienced trial judges will likely not allow defendants to be co-counsel. Inexperienced judges will do so only once.

6.4.9 HEARSAY IN THE PENALTY PHASE

The Florida death penalty statute allows "any such evidence which the Court deems to have probative value" to be received in the penalty phase of a capital trial "regardless of its admissibility under the exclusionary rules of evidence provided the defendant is accorded a fair opportunity to rebut any hearsay statements."[252] *This statute should not be relied upon*. **The rules of evidence apply to the penalty phase of a capital case, subject, of course, to harmless error analysis.**[253] Thus, testimonial hearsay is not admissible absent witness unavailability and a prior opportunity for the opponent to cross-examine the witness. Cases decided prior to *Rogers* are no longer authority. The Supreme Court of Florida has not specifically applied the rules of evidence against a defendant in a penalty phase trial, but the Supreme Court of the United States has held in *Green v. Georgia*,

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[249]Amos v. State, 618 So. 2d 157 (Fla. 1993).

[250]McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); State v. Tait, 387 So. 2d 338, 340 (Fla.1980).

[251]Bell v. State, 699 So. 2d 674, 677 (Fla. 1997).

[252]FLA. STAT. § 921.141; Cannady v. State, 620 So. 2d 165, 169 (Fla. 1993).

[253]Crawford v Washington, 541 U. S., 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); Rogers v. State, 948 So. 2d 655 (Fla. 2006). The ruling in *Rogers* is probably not the weight of authority. A number of courts have held that hearsay is admissible in a sentencing proceeding. See, Stephens v. State, 580 So. 2d 11 (Ala. Crim. App. 1990); State v. Berry, 141 S. W. 3d 549 (Tenn. 2004); State v. Augustine, 359 N. C. 709, 616 S. E. 2d 515 (N. C. 2005), cert. den., 126 S. Ct. 2980, 165 L. Ed. 2d 988; Browning v. State, 188 P. 3d 60 (Nev. 2008); Summers v. State, 148 P. 3d 778 (Nev. 2006). The Fifth Circuit has held that hearsay is admissible under the F.D.P.A. to prove a nonstatutory aggravating circumstance because the jury is selecting a penalty within a permissible range and not deciding death eligibility. U. S. v. Fields, 483 F. 3d 313 (5th Cir. 2007). The case of State v. Stephenson, 195 S. W. 3d 574 (Tenn. 2006) contains a list of these cases.

that hearsay should at least be allowed to prove mitigation.[254] In that case, Green attempted to introduce, through a witness who claimed he heard it, a statement by the codefendant that he, and not Green, was the actual perpetrator of the crime. The statement was excluded because it was not allowed under the Georgia Rules of Evidence. However, the prosecutor argued that, in absence of direct evidence of the circumstances of the crime, the jury could infer that Green directly participated in the murder because more than one bullet was fired into the victim's body. While the Supreme Court did not explain the basis for its ruling, the matter may not have been accepted for certiorari review if the prosecutor had not taken unfair advantage in final argument.

Generally, *Crawford* requires the proponent of a hearsay statement to show the witness is unavailable and that the opponent has had an opportunity to cross-examine the witness prior to introducing the witness's testimony.[255] Additionally, the statement being offered must be "testimonial" in order for *Crawford* to apply. While the Court did not exhaustively define what is and what is not "testimonial," it did say "(w)hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[256] The appellate courts in the United States are churning out opinions involving what is and what is not "testimonial" at an amazing rate.[257]

The United States Supreme Court has given some additional guidance in cases involving statements made to police officers. The Court has held that statements made to the police are non-testimonial if they are made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.[258]

Of course, exceptions to the hearsay rule still apply. In *Crawford*, the Court limited the exceptions to those known at common law when the Constitution was passed in 1791.[259] Most of the exceptions to the hearsay rule involve non-testimonial matters. Only two forms of testimonial statements were admitted at common law, even though they were unconfronted: (1) dying declarations and (2) statements of a witness who was detained or kept away from court by the procurement of the defendant. The latter exception does not usually apply to homicide cases unless the motive was to prohibit the victim from testifying or providing evidence in a separate case.[260]

At least one federal court has questioned how any fact can be proven beyond a reasonable doubt through hearsay evidence.[261] Prior to *Crawford*, a number of states, *e.g.*, Louisiana, required

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[254]Green v. Ga., 442 U.S. 95, 99, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979).

[255]See 541 U. S. at 68, 124 S. Ct.at1354.

[256]*Id*.

[257]For a comprehensive analysis of the impact *Crawford* is having see Professor Latimer's article, *Confrontation After Crawford: The Decision's Impact on How Hearsay is Analyzed Under the Confrontation Clause*, 36 *Steton Hall L. R*., 327 (Number 2, 2006).

[258]Davis v. Washington, 547 U. S. 813, 126 S. Ct. 2266, 165 L. Ed.2d 224 (2006).

[259]The list of exceptions known at common law, absent the archaic ones, are provided in the appendix to these materials.

[260]Giles v. California, __, U. S. __, 128 S. Ct. 2678, 2008 WL 2511298 (2008); See, Stoll v. State, 762 So. 2d 870 (Fla. 2000); Gosciminski v. State, 2008 WL 4489264 (Fla. Oct. 8, 2008).

[261]U.S. v. Fell, 217 F. Supp. 2d 469 (D. Vt. 2002).

the rules of evidence to apply during the penalty phase.[262] Other states, *e.g.*, Arizona and Connecticut,[263] required the prosecution to follow the rules of evidence and allowed the defendant to use hearsay. Cases from other jurisdictions must be read with care after the *Crawford* decision..

In *Whorton v. Bockting*,[264] the Court held that Crawford is not retroactive, thus precluding review of cases raising the confrontation issue on collateral review. The Supreme Court of Florida has also held *Crawford* not to be retroactive.[265]

6.5.0 JUDGE'S PRELIMINARY COMMENTS TO THE JURY

A judge must give preliminary comments to the jury prior to the introduction of any evidence by the State or defense.[266] If the case is before the Court for re-sentencing, additional instructions will have to be given.[267] The Standard Jury Instructions are not always current, especially in capital cases, and Model Penalty Phase Jury Instructions are included with these materials. The judge must be careful instructing the jury as to its duties and responsibilities. The jury must not be instructed that, if the mitigating circumstances are not found to outweigh the aggravating circumstances, a death recommendation should be returned. This statement is not a correct statement of the law.[268]

6.6.0 OPENING STATEMENTS

Opening statements are permissible if either side requests to give one. Defense counsel may waive opening until after the State has presented its evidence.

6.7.0 STATE'S EVIDENCE IN SUPPORT OF THE DEATH PENALTY

The State is limited to the aggravating circumstances listed in the statute. Aggravating circumstances must be proven beyond a reasonable doubt.[269] Allowing the State to introduce aggravating circumstances not listed, such as the defendant's hatred for homosexual men, is error.[270] So is allowing testimony by the defendant's wife concerning various unrelated acts of domestic

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[262]State v. English, 367 So. 2d 815, 817 (La. 1979).

[263]ARIZ. REV. STAT. § 13-703 (2002); CONN. GEN. STAT. § 53a-46a.

[264]Wharton v. Brockting, 549 U. S. 270, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007).

[265]Chandler v. Crosby, 916 So.2d 728 (Fla. 2005).

[266]*See* Florida Standard Jury Instructions in Criminal Cases.

[267]*See* sec. 6.17.2.

[268]Gonzales v. State, 990 So. 2d 1017 (Fla. 2008).

[269]Ford v. Strickland, 696 F. 2d 804 (Cir. 1983); Card v. State, 453 So. 2d 17 (Fla. 1984); Johnson v. State, 438 So. 2d 774 (Fla. 1983); Williams v. State, 386 So. 2d 538 (Fla. 1980); Alford v. State, 307 So. 2d 433 (Fla. 1975).

[270]Bowles v. State, 716 So. 2d 769, 773 (Fla. 1998).

violence.[271] Nonstatutory aggravating circumstances, such as "lack of remorse," are not admissible.[272] However, a brief mention of lack of remorse does not always require a mistrial.[273] In *Butler v. State*,[274] the Supreme Court remarked, "Butler was also unfazed by the presence of the victim's children in the apartment at the time. The totality of the circumstances in this case, which includes this indifference, combined with the brutality of the murder, supports imposition of the death penalty."[275] This unfortunate remark was made in the context of justifying the existence of the HAC aggravator and not for the purpose of creating a new aggravating circumstance.

A defendant has no right to a statement of particulars listing the aggravating circumstances the State will rely upon during the penalty phase trial.[276] This limitation is seldom a real problem since most aggravating circumstances arise out of the facts of the case. However, many states require some sort of pretrial disclosure (*e.g.*, Colorado,[277] Pennsylvania,[278] South Carolina,[279] and Washington[280]) and some states even require the aggravating circumstances, or, in Georgia-scheme states, at least one of them, to be listed in the indictment itself (California,[281] Indiana[282] and Ohio[283]). The failure to disclose the aggravating (and mitigating) circumstances prior to opening statements during the penalty phase can put the trial judge at a real disadvantage when called upon to make evidentiary rulings. And keeping the list a secret can contribute to the Supreme Court of Florida ordering a new penalty phase.[284] Trial judges should hold a pretrial conference prior to the beginning of the penalty phase, if not before, and insist that counsel provide a written list of aggravating and

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[271]Perry v. State, 801 So. 2d 78 (Fla. 2001).

[272]Valle v. State, 581 So. 2d 40 (Fla. 1991); Robinson v. State, 520 So. 2d 1 (Fla. 1988); Patterson v. State, 513 So. 2d 1263 (Fla. 1987); Pope v. State, 441 So. 2d 1073 (Fla. 1983); Walton v. State, 547 So. 2d 622 (Fla. 1981).

[273]Smithers v. State, 826 So. 2d 916 (Fla. 2002); Shellito v. State, 701 So. 2d 837 (Fla. 1997).

[274]Butler v. State, 842 So. 2d 817 (Fla. 2003).

[275]*Id*. at 834.

[276]Riffin v. State, 397 So. 2d 277 (Fla. 1981); Clark v. State, 379 So. 2d 97 (Fla. 1979).

[277]C.R.S. 18-1.3-1201(3)(b). (Within 20 days after the filing of the notice of intent to seek the death penalty.)

[278]PA ST RCRP Rule 801. (At or before the time of arraignment.)

[279]SC ST S 16-3-20(B) (Before trial.)

[280]WA ST 10.95.040(2). (Within 30 days after arraignment.)

[281]CA PENAL S 190.1(b).

[282]IN ST 35-50-2-9(a).

[283]OH ST S 2929.03(B).

[284]Perry v. State, 801 So. 2d 78 (Fla. 2001)(State's argument that inadmissible evidence of prior incidents of domestic violence constituted 'anticipatory rebuttal' failed because penalty phase jury instructions were not yet resolved, and the mitigating circumstances were not finalized.)

mitigating circumstances to the Court in order to avoid surprise and error in making evidentiary rulings.

The State has the right to present aggravating circumstances and is not required to accept an offer to stipulate to the aggravators. It has been unsuccessfully argued that refusal on the part of the State to stipulate to an aggravator, such as prior violent felonies, violates the decision in *Old Chief v. United States,*[285] which held it to be an abuse of discretion for the trial court not to require the prosecutor to accept a stipulation in certain circumstances. However, that case only applies to matters involving a defendant's "legal status," such as in a case involving a felon in possession of a firearm and the Supreme Court of Florida has limited its application to those cases.[286]

6.7.1 AGGRAVATING CIRCUMSTANCES

Aggravating circumstances that may be considered in determining the sentence in a capital case in Florida are limited to the list contained in F.S. 921.141 (5). These circumstances are discussed below in the order they appear in the statute.

An aggravating circumstance should be submitted to the jury for its consideration if credible and competent evidence supports it. It is not error to instruct the jury on an aggravating circumstance if evidence supports it, even if the trial court ultimately declines to find the aggravator exists beyond a reasonable doubt.[287]

6.7.2 PRIOR VIOLENT FELONY AND UNDER SENTENCE OF IMPRISONMENT, ETC.

The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment, or placed on community control, or on felony probation.

This aggravator includes: (a) persons incarcerated under a sentence for a specific or indeterminate term of years; (b) persons incarcerated under a (felony) order of probation; (c) persons under either (a) or (b) who have escaped from incarceration; and (d) persons who are under sentence for a specific or indeterminate term of years and who have been placed on parole.[288] It does not include a person confined to a juvenile detention facility or a person who has escaped from a juvenile detention facility.[289] It also includes someone who had been placed on mandatory conditional release before the offense was committed.[290] It includes someone on control release.[291] The statute originally did not specifically include a defendant on community control. The Supreme Court of Florida held that someone on community control was not under a sentence of imprisonment for this

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[285]Old Chief v. U.S., 519 U.S.172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

[286]Brown v. State, 719 So. 2d 882 (Fla. 1998).

[287]Floyd v. State, 850 So. 2d 383, 405 (Fla. 2002); Aguirre-Jarquin v. State, 2009 WL 775388 (Fla. March 26, 2009).

[288]Peek v. State, 395 So. 2d 492 (Fla. 1981).

[289]Williams v. State, 707 So. 2d 683 (Fla. 1998). This situation will likely not arise in the future because juvenile offenders are no longer eligible for the death penalty.

[290]Haliburton v. State, 561 So. 2d 248 (Fla. 1990).

[291]Davis v. State, 698 So. 2d 1182 (Fla. 1997).

aggravating factor.[292] The Legislature amended the statute in 1991 to specifically include the defendant on community control. Likewise, the statute originally did not include a defendant on probation. The Supreme Court of Florida held that a defendant who was on probation was not under a sentence of imprisonment.[293] The Legislature amended the statute in 1996 to include the defendant who is on felony probation.

Ex Post Facto Application

What effect is there upon a defendant who was on community control for a felony offense or probation for a felony when the murder was committed, but was tried or retried afer the Legislature amended the statute to include a person on community control? Would it be a violation of the *ex post facto* provisions of the United States and Florida's constitutions to apply these amended provisions of the statute when they did not exist at the time of the murder? The Supreme Court of Florida has answered the question in the negative as to the community control amendment. In *Trotter v. State*,[294] the Court held it was not an ex post facto violation to include a defendant's being on community control as an aggravating factor, even though the original *Trotter* case was reversed for the exact same reason. The amendment occurred after the original *Trotter* opinion, but prior to the resentencing. However, the Court has held it would be an ex post facto violation to apply the fact that the defendant was on felony probation as an aggravating factor if the crime occurred prior to the time the statute was amended.[295] The distinction appears to be that community control is a refinement of the sentence of imprisonment factor, but probation is not. The Court reasoned community control is a sentence of imprisonment, but probation is not.

6.7.3 PREVIOUS CONVICTION OF CAPITAL OR VIOLENT FELONY

The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

This aggravator generally requires a prior conviction.[296] Proof of a murder for which a defendant has been indicted but not convicted cannot be used for this aggravating factor.[297] Naturally, questions arise as to what constitutes a prior conviction. A nolo contendere plea with a withhold of adjudication of guilt does not count as a prior conviction.[298] A nolo contendere plea does not admit guilt. On the other hand, when a defendant pleads guilty to a prior violent felony and

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[292]Trotter v. State, 576 So. 2d 691 (Fla. 1991).

[293]Ferguson v. State, 417 So. 2d 631 (Fla. 1982).

[294]Trotter v. State, 690 So. 2d 1234 (Fla. 1996).

[295]Merck v. State, 763 So. 2d 295 (Fla. 2000); Lukehart v. State, 776 So. 2d 906 (Fla. 2000); Zack v. State, 753 So. 2d 9 (Fla. 2000); Lebron v. State, 799 So. 2d 997 (Fla. 2001).

[296]Donaldson v. State, 722 So. 2d 177 (1998).

[297]Dougan v. State, 470 So. 2d 697 (Fla. 1985); Perry v. State, 395 So. 2d 170 (Fla. 1980)..

[298]Garron v. State, 528 So. 2d 353, 360 (Fla. 1988).

adjudication is withheld, there is a conviction for the purpose of this aggravating circumstance.[299] Interestingly, the rule is different for sentencing under the Florida Punishment Code.[300]

Evidence of a prior violent felony must be scrutinized with care. For instance, if the evidence of a robbery and kidnapping involved the use of a firearm, but the jury only found the defendant guilty of robbery and kidnapping, and the defendant was acquitted of the firearm charge--then the probative value of the admissibility of firearm evidence is outweighed by the prejudicial effect. Admission of firearm evidence under those circumstances is a serious error and will result in a new penalty phase trial.[301]

Care must be given to considering convictions from other states. Some convictions from other states sound like felonies but may only be misdemeanors. For instance, California gives judges discretion to treat certain violent felonies as misdemeanors. These felonies are called "wobblers" and, if a jail sentence is imposed instead of a prison sentence, the case is treated as a misdemeanor for all purposes.[302]

Previous felonies involving violence or the threat of violence are usually obvious (murder, kidnapping, rape, aggravated battery, aggravated assault, etc.) However, if the judgment and sentence are not for a crime of violence per se, such as burglary, or lewd and lascivious assault, there may be problems on appeal, unless the judgment of conviction shows the crime involved violence.[303]

The United States Supreme Court has recently addressed how the government must prove a prior violent felony under the Armed Career Criminal Act.[304] The act requires a minimum mandatory sentence of fifteen years after three prior convictions for serious drug offenses or violent felonies. The act includes burglary as a prior violent felony if it is committed in a building or enclosed space (generic burglary) but not in a boat or motor vehicle. In *Taylor v. United States*,[305] the Court held that in proving the prior violent felony, the Court could "look to statutory elements, charging documents, and jury instructions" to determine whether an earlier conviction was for "generic burglary." In *Shepard v. United States*,[306] the prosecutor attempted to show "generic burglary" through the introduction of police reports or complaint applications. The Court held that proof of prior violent felony is limited to examining the statutory definition, charging document, written plea agreement, transcript of the plea colloquy, and any explicit factual finding by the trial judge, to which the defendant assented.

Of course, cases in Florida courts do not arise out of the Federal Armed Career Criminal Act, and the prosecutors in Florida may present live testimony to prove a prior crime of violence,[307]

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[299]State v. Kern, 720 So. 2d 1085, 1087 (Fla. 1990); McCrae v. State, 395 So. 2d 1145, 1153-54 (Fla. 1980).

[300]Montgomery v. State, 897 So. 2d 1282 (Fla. 2005).

[301]Lebron v. State, 894 So.2d 849 (Fla. 2005).

[302]People v. Vessell, 36 Cal. App. 4th 285, 42 Cal. Rptr. 2d 241 (Cal. App. 2d Dist. 1995).

[303]See Mann v. State, 420 So. 2d 578 (Fla. 1982); Mann v. State, 453 So. 2d 784 (Fla. 1984); Hess v. State, 794 So. 2d 1249 (Fla. 2001).

[304]18 U. S. C. §924(e) (2000 ed. and Supp. II).

[305]Taylor v. United States, 495 U. S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990).

[306]Shepard v. United States, 544 U. S. 13, 125 S. Ct. 1254, 161 L. Ed.2d 205 (2005).

[307]Singleton v. State, 783 So. 2d 970 (Fla. 2001); Stewart v. State, 558 So. 2d 416 (Fla. 1990).

but *Taylor* and *Shepard* are instructive and may provide guidance if the State attempts to prove a prior crime of violence that is not obvious from the charging document.

The Supreme Court of Florida has determined, as a matter of law, a conviction for accessory after the fact to a crime of violence may not be used to find this circumstance.[308]

While it is not improper to consider a conviction that is on appeal,[309] the imposition of the death penalty may violate the Eighth Amendment if the conviction is reversed.[310] This rule applies to cases reversed after postconviction-relief unless, of course, the defendant is retried and convicted again.

If one of several prior crimes of violence used to establish this circumstance is later reversed, the Supreme Court of Florida may find the error to be harmless.[311] A contemporaneous conviction for a violent crime against the victim that occurred at the time of the killing cannot be used to support this circumstance.[312] But, improper consideration of a contemporaneous crime, such as when the crime occurred after the murder, is subject to harmless error analysis. Thus, reversal may not be necessary if there are other violent crimes in the defendant's record that would justify finding this aggravator.[313] However, if two or more victims are involved, and a violent crime occurred against a separate victim, a contemporaneous conviction can be used.[314] This aggravating circumstance applies to both victims in cases of double murders.[315]

It is error to consider a contemporaneous felony as an aggravating circumstance if the felony was dismissed by a judgment of acquittal due to failure of proof of *corpus delicti*.[316] A violent felony that is committed after the murder, but before the penalty phase, may be used as an aggravating circumstance if the defendant has been convicted prior to sentencing.[317] A prior adjudication of delinquency for a violent felony may not be used to support this circumstance.[318]

In a case of first impression, the Supreme Court of Florida, in a 4-3 decision, decided that a conviction for an out-of-state "gross" misdemeanor of "battery causing substantial harm," which

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[308]*Donaldson*, 722 So. 2d at 184-185.

[309]*Peek*, 395 So. 2d at 499.

[310]Johnson v. Miss., 486 U. S. 578, (1988); Preston v. State, 564 So. 2d 120 (Fla. 1990); Rivera v. Dugger, 629 So. 2d 105 (Fla. 1993).

[311]Stano v. State, 708 So. 2d 271 (Fla. 1998); Buenoano v. State, 708 So. 2d 941 (Fla. 1998); Rivera v. State, 717 So. 2d 477 (Fla. 1998).

[312]Holton v. State, 573 So. 2d 284 (Fla. 1990); Bruno v. State, 574 So. 2d 76 (Fla. 1991); Elledge v. State, 613 So. 2d 434 (Fla. 1993).

[313]*Holton*, 573 So. 2d at 291.

[314]King v. State, 390 So. 2d 315 (Fla. 1980); Pardo v. State, 563 So. 2d 77 (Fla. 1990); Stein v. State, 632 So. 2d 1361 (Fla. 1994); Francis v. State, 808 So. 2d 110 (Fla. 2002).

[315]Bevel v. State, 983 So. 2d 505 (Fla. 2008).

[316]Atkins v. State, 452 So. 2d 529 (Fla. 1984).

[317]Brown v. State, 473 So. 2d 1260 (1985).

[318]*Merck*, 664 So. 2d at 944 ;Henyard v. State, 689 So. 2d 239 (Fla. 1996).

is equivalent to Florida's felony of aggravated battery, cannot be used to support this aggravator.[319]

If the prior crime(s) of violence is quite old, and the defendant has led a "comparatively crime-free" life in the interim, this aggravator will not carry the same weight with the Supreme Court of Florida when it conducts its proportionality review.[320] However, at least in one case, the court approved a death sentence when the two prior violent felonies were over thirty years old. One of the prior felonies was the manslaughter of the defendant's first wife and the homicide for which he was sentenced to death was the murder of his second wife.[321] Trial judges should consider the age of prior convictions when weighing them in most cases..

The State *may not* establish and introduce details of a prior conviction in the form of testimonial hearsay absent witness unavailability and prior opportunity for cross examination.[322] The statute allowing such testimony should not be relied upon.[323] However, direct testimony from a victim may be used to establish the facts of a prior violent felony. For instance, it is permissible to allow the victim of a prior violent felony, whose arms had been cut off by the defendant, to testify and show her prosthetics.[324]

One problem that occurs with some frequency is whether to consider prior capital felonies or felonies involving violence when the convictions for those crimes occur after the death sentence is originally imposed. This problem arises when the defendant is sentenced to death and, while the appeal is pending, convictions are obtained for other crimes. If the appeal is successful and the case is remanded for a new penalty phase, the resentencing court may find aggravators not found in the original sentencing proceeding. The new aggravators may be found because resentencing is a *de novo* proceeding, and the Court can consider all issues bearing on proper sentence.[325]

Juvenile adjudications are not "convictions" within the meaning of this aggravating circumstance.[326]

A prior conviction for a violent felony is a "strong" aggravator. The death sentence has been upheld when this aggravator is the only one present.[327] This aggravator is among "the most weighty in Florida's sentencing calculus."[328]

Doubling

It is not doubling for the trial court to find "a capital felony committed by a person under

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[319]Carpenter v. State, 785 So. 2d 1182 (Fla. 2001).

[320]Larkins v. State, 739 So. 2d 90 (Fla. 1999).

[321]Rogers v. State, 948 So. 2d 655 (Fla. 2006).

[322]*Id*.; Crawford v. Washington, 541 U. S. 36, 123 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[323]FLA STAT 921.141(1).

[324]Singleton v. State, 783 So. 2d 970 (Fla. 2001).

[325]*Preston*, 607 So. 2d at 407-409; Castro v. State, 644 So. 2d 987 (1994); *Bowles*, 804 So. 2d at 1177.

[326]Merck v. State, 664 So. 2d 939 (Fla. 1995).

[327]Ferrell v. State, 680 So. 2d 390 (Fla. 1996); Duncan v. State, 619 So. 2d 279 (Fla. 1993).

[328]Sireci v. Moore, 825 So. 2d 882 (Fla. 2002).

sentence of imprisonment" and "a previous conviction of another capital felony" when an inmate serving a term for a previous murder conviction murders a fellow inmate.[329] Similarly, if a defendant is on parole for a prior murder and commits another murder, the "prior violent felony" aggravator may be found as well as the "capital felony committed by a person under sentence of imprisonment" aggravator. These aggravators are two separate and distinct characteristics not based upon the same evidence and same essential facts.[330]

6.7.4 GREAT RISK TO MANY PERSONS

The defendant knowingly created a great risk of death to many persons.

"Many persons" is not a few people.[331] In *Johnson v. State*,[332] the Supreme Court of Florida held there must be four or more persons, *other than the victim*, threatened with a great risk of death for this circumstance to apply. The Court had previously stated that three persons plus the victim were not insufficient to invoke this aggravating circumstance.[333]

"Great Risk" is not a mere possibility, but a likelihood or high probability.[334] The doctrine of "transferred intent" may apply to this circumstance.[335]

It is not a great risk to many persons when the two other persons who were in the vicinity of a shooting were out of the line of fire and fifty other persons gathered at the scene after the shooting.[336]

6.7.5 FELONY MURDER

The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, sexual battery, aggravated child abuse, abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

This circumstance adds an aggravating circumstance to most felony-murder cases. However, eligibility for this aggravating circumstance is not automatic. The list of enumerated felonies in F.S.

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[329]Lusk v. State, 446 So. 2d 1038 (Fla. 1984).

[330]Waterhouse v. State, 429 So. 2d 301 (Fla. 1983)[receded from on other grounds, State v. Owen, 696 So. 2d 725 (Fla. 1997)].

[331]Kampff v. State, 371 So. 2d 1007 (Fla. 1979).

[332]Johnson v. State, 696 So. 2d 317 (Fla. 1997); *See also*, Johnson v. State, 696 So. 2d 326 (Fla. 1997).

[333]Bello v. State, 547 So. 2d 914 (Fla. 1989); Alvin v. State, 548 So. 2d 1112 (Fla. 1989).

[334]*Johnson*, 696 So. 2d at 324-325; King v. State, 514 So. 2d 354 (Fla. 1987); *Kampff*, 371 So. 2d at 1009-1010. See also, Trepal v. State, 621 So. 2d 1361 (Fla. 1993).

[335]Howell v. State, 707 So. 2d 674 (Fla. 1993).

[336]Alvin v. State, 548 So. 2d 1112 (Fla. 1989).

782.04 (the felony-murder rule) is slightly different from the list contained in F.S. 921.141 (5)(d). In fact, the list of felony-murder aggravators contains an aggravator that is not listed in the felony-murder rule and is not a separate crime--"abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability or permanent disfigurement." The Supreme Court of Florida has relied upon the difference in the two lists to justify the constitutionality of this aggravating circumstance.[337] However, this circumstance will probably exist in most felony-murder cases. It is not necessary for the underlying felony to be charged or proven.[338]

There is some controversy around the country as to whether allowing this circumstance as an aggravating factor, as well as a basis for a first-degree murder conviction, properly narrows the persons eligible for the death penalty. Several courts have declared the aggravator to be unconstitutional.[339] The Supreme Court of Florida has held this aggravating circumstance to be constitutional.[340] However, there is not a single Florida case upholding the death penalty when felony-murder has been the only aggravating factor.[341] The United States Supreme Court has upheld a case in which the only aggravator was the felony-murder rule, but the validity of the aggravator was not an issue before the Court.[342]

The Supreme Court of Florida's rulings put the trial judge in quite a dilemma when the only aggravating circumstance is the felony-murder aggravator. The trial judge has to death-qualify the jury and receive the jury's recommendation. If it is a death recommendation and entitled to "great weight," the trial judge is in the position of sentencing the defendant to death knowing the sentence will be reversed on the Supreme Court's proportionality review, or not following the recommendation because the death sentence will be reversed.

One problem the Supreme Court of Florida has periodically had to deal with is the Legislature's proclivity to widen the definition of common law crimes based upon the most recent horrendous murder. The addition of aggravated child abuse to the list of felonies available as an aggravating circumstance is the most recent example of this problem.

Unlike felony murders such as murder committed during the course of a robbery, which requires two distinct crimes--robbery and homicide - a homicide that involves aggravated child abuse may only require one single act - child abuse. The court addressed this problem in *Brooks v. State*.[343] In *Brooks*, the defendant caused the death of a child with a single stabbing blow. He argued the felony-murder rule should not apply under the circumstances, and the State should have been limited to proving premeditation for a first-degree murder conviction. In analyzing this argument the Court stated:

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[337]Francis, 808 So. 2d at 136; Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997).

[338]Rivera v. State, 717 So. 2d 477 (Fla. 1998); Sochor v. State, 619 So. 2d 285 (Fla. 1993).

[339]*See* Tennessee v. Middlebrooks, 840 S.W. 2d 317 (Tenn. 1992); Enberg v. Meyer, 820 P.2d 70 (Wyo. 1991); State v. Cherry, 257 S.E. 2d 551 (N.C. 1979).

[340]*See* Taylor v. State, 638 So. 2d 30 (Fla. 1994) and cases cited therein. *See also*, Blanco v. State, 706 So. 2d 7 (Fla. 1997), where both the majority opinion and the specially-concurring opinion discuss this problem and illustrate the differences of opinions among Florida's Justices.

[341]See, for example, Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Terrt v, State, 668 So. 2d 954 (Fla. 1996); Jones v. State, 705 So. 2d 1364 (Fla. 1998), Williams v. State, 707 So. 2d 683 (Fla. 1998), and cases cited therein.

[342]Blystone v. Pennsylvania, 494 U.S. 299, 110 S. Ct. 1078, 108 L. Ed. 2d 253 (1990).

[343]918 So.2d 181 (Fla. 2005).

> Brooks argues on appeal that the trial court erred by finding that he committed the murders during the course of a felony, which was aggravated child abuse as defined by statute, and then applying the aggravated child abuse aggravating circumstance set forth in section 921.141(5)(d), Florida Statutes (2002), during sentencing. He contends that because the single act of stabbing Stuart formed the basis of both the aggravated child abuse aggravating factor under section 921.141(5)(d) of the Florida Statutes and the first-degree felony murder charge, the court should have found that the aggravated child abuse allegation "merged" with the more serious homicide charge. Thus, according to Brooks, the State should have been totally precluded from invoking the felony murder doctrine and should have been limited to proving first-degree murder only on the theory of premeditation for both murders. Brooks does not merely attack the use of the underlying felony as an aggravator; he asserts that the state is prohibited from using aggravated child abuse as the felony crime. We agree.

The Court went on to explain that it may be possible under different facts for the felony-murder rule to apply to child abuse cases. But a separate act or acts of child abuse such a striking, shaking or throwing must be proven in order to invoke the felony murder rule.[344]

Another problem involving recent legislation is the Florida Legislature's proclivity to "widen the net" in order to place criminal responsibility on relatively low-level offenders. Examples include the broadening of the definitions of robbery and burglary from their common law roots. Burglary can be committed in several different ways in Florida, some of which resemble trespass more than burglary at common law. However, the Supreme Court has held that Florida's burglary statute "genuinely narrows the class of capital defendants eligible for the death penalty."[345]

The state attorney is not precluded from relying upon this aggravating circumstance even if there is a stipulation that the State's theory is premeditation so long as a qualifying underlying felony is proven beyond a reasonable doubt.[346]

For further information on the application of the felony-murder rule, see §. 6.9.6 of these materials which discusses "lack of intent to kill" under nonstatutory mitigating circumstances.

Doubling

The underlying felony of child abuse sometimes merges into the homicide and cannot be used to establish the felony-murder aggravator.

The background for this proposition is contained in *Mills v. State*.[347] In that case, the defendant was charged with breaking into a house in the middle of the night intending to steal something. During the burglary, the homeowner confronted the defendant and was shot and killed. The defendant was charged with one count of felony murder, one count of burglary while armed with a firearm, and one count of aggravated battery with a firearm. The Supreme Court held that, while the defendant could be found guilty of all three charges, it was not proper to convict him for aggravated battery and simultaneously for homicide as a result of one shotgun blast because the single act of shooting could not support a conviction for both felony murder and aggravated

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[344]See, Mapps v. State, 520 So. 2d 92 (Fla. 4th DCA 1988). See also, Lukehart v. State, 776 So. 2d 906 (Fla. 2000); Mills v. State, 476 So. 2d 172 (Fla. 1985).

[345]Carter v. State, 980 So. 2d 473 (Fla. 2008).

[346]Pietri v. State, 644 So. 2d 1347 (Fla. 1994).

[347]Mills v. State, 476 So. 2d 172 (Fla. 1985).

battery.[348] The Court stated, "We do not believe that the Legislature intended dual convictions for both homicide and the lethal act that caused the homicide without causing additional injury to another person or property."[349] The lesser offense of aggravated battery "merged" with the homicide.

In *Brooks v. State,*[350] the defendant was charged with killing a small child. The death resulted from a single stab wound. The State sought to use aggravated child abuse as an aggravating circumstance. The Supreme Court held because there was no separate offense of aggravated child abuse outside the homicide, that crime could not serve to support the felony-murder aggravating circumstance.

The Court observed that aggravated child abuse is sometimes available to support the felony murder aggravating circumstance.[351] It becomes available when there are multiple acts of aggravated child abuse such as throwing, shaking and striking the child thereby fracturing the child's skull.

It is not improper doubling for the court to find the aggravators of felony murder, pecuniary gain and avoid arrest where the victim was kidnapped in order to steal her car, which was needed for a get away vehicle, and the motive for the murder was so the victim could not identify the defendant.[352]

It is improper doubling to find the existence of two separate felony-murder aggravating factors if more than one felony was committed during a single homicide, *e.g.*, sexual battery and kidnapping,[353]

Ex post facto Application

Some of the felony-murder crimes were added after the statute was originally enacted. Aggravated child abuse was added to F.S. §921.141(5)(d) effective October 1, 1995. Aggravated abuse of an elderly or disabled person was added effective October 1, 1996. Can these aggravators be applied to the murder of a child under the age of 18, or of an elderly person or disabled adult, as defined by F.S. §825.101, if the murder occurred prior to the time the statute was amended, but the penalty phase trial or resentencing occurs after the amendment date? Would applying these aggravators violate the *ex post facto* provisions of the United States and Florida Constitutions? Using the analysis of *Trotter v. State*,[354] it could be argued, as it was by the majority of the Court in *Trotter*, that these additions were mere "refinements" to the felony-murder aggravator, and therefore did not constitute a "substantive change" in the aggravating factor. However, the better argument is that it would be an ex post facto violation to apply this aggravator to murders that occurred prior to their being included as felony crimes permitting first-degree murder convictions pursuant to F.S.§782.04.

The jury must be instructed on the elements of the underlying felony. The instruction must include necessary definitions (such as elderly person or disabled adult). The instructions must also be given if the case is before the Court for a new penalty phase trial, and the underlying felony was

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[348]*Mills*, 476 So. 2d 177.

[349]*Id.*

[350]Brooks v. State, 903 So.2d 938 (Fla. 2005).

[351]Mapps v. State, 520 So.2d 92 (Fla. 4th DCA 1988).

[352]Spann v. State, 857 So. 2d 845 (Fla. 2003).

[353]Tanzi v. State, 964 So. 2d 106 (Fla. 2007).

[354]*Trotter*, 690 So. 2d at 1234.

either not charged in the indictment or the original jury did not unanimously find felony murder by special verdict.

There are cases in which the facts may or may not support both felony-murder and the cold, calculated and premeditated (CCP) aggravator. It may be helpful to ask the jury to return a special verdict to determine the existence of one or both theories in the guilt phase of the case. The special verdict can then be used to justify findings as to the felony-murder and CCP aggravators.[355]

6.7.6 AVOIDING ARREST OR ESCAPING

The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

There is no presumption of the existence of this circumstance. The supporting evidence must be "very strong" to permit a finding of this circumstance.[356] In cases where the victim is not a law enforcement officer, the State must prove that "the sole or dominant motive for the murder was the elimination of the witness."[357] Mere speculation by the State cannot support this aggravating circumstance.[358] The case of *Urbin v. State,*[359] contains a listing of the many cases that discuss the "sole or dominant" requirement to find this circumstance.

This aggravating circumstance often arises in cases where the victim is a police officer. The facts in these cases are usually pretty clear. However, the defendant must know the victim to be a police officer in order to use this fact to justify the existence of this aggravating circumstance.[360]

In *Urbin*, the Court would not allow this circumstance even though the defendant disclosed that one of the motives for the murder of the victim was because the victim "saw his face." The Court said the facts showed this motive was a "corollary, or secondary motive, not the dominant one.[361] The defendant's statement that he had killed the victim because "he didn't want the woman to see his face" provided only one of numerous motives for the murder of the victim in *Hurst v. State*.[362] In *Hurst*, the Court cited *Consalvo* and stated, "The mere fact that the victim knew and could identify the defendant, without more, is insufficient to prove this aggravator." [363]

The mere fact that the victim had known the defendant for a long period of time (and, therefore, would be able to identify him) is insufficient to establish this circumstance absent strong

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[355]See Perry v. State, 801 So. 2d 78 (Fla. 2001).

[356]Riley v. State, 366 So. 2d 19, 22 (Fla.1978); *Rodriguez*, 753 So. 2d at 47-48.

[357]*Zack*, 753 So. 2d at 20; Urbin v. State, 714 So.2d 411 (Fla. 1998); Consalvo v. State, 697 So. 2d 805, 819 (Fla. 1996) (speculation not enough); Preston, 607 So. 2d at 409. (the fact that it may have been one of the motives is not enough.) Davis v. State, 604 So. 2d 794 (Fla. 1992); Connor v. State, 803 So. 2d 598 (Fla. 2001).

[358]*Connor*, 803 So. 2d at 610.

[359]Urbin v. State, 714 So. 2d 411 (Fla. 1998).

[360]Green v. State, 975 So. 2d 1081 (Fla. 2008).

[361]*Id*. at 416.

[362]*Hurst*, 819 So. 2d at 696.

[363]*Id*. at 696.

proof of intent.[364] However, evidence that the defendant, who was known to the blind robbery victim, shot and killed the victim after the accomplice spoke the defendant's name, was sufficient to establish this aggravating factor.[365]

This circumstance is allowed most often in cases where the victim is abducted from the scene of one crime, perhaps a robbery, and taken to a remote area and killed for no other apparent motive.[366] It is not allowed when the defendant panics during a robbery and starts shooting.[367]

Proof of this aggravator often comes from the defendant's statements to the police or some other person and is sufficient to find this aggravating factor.[368] In *Willacy v. State*,[369] there were no reported statements made by the defendant, who was the next door neighbor of the victim, but the only apparent motive for the killing appeared to be the elimination of a witness who could identify the defendant. The Court upheld the trial court's finding of this aggravating factor. However, in a later case where the defendant and victim knew each other, the Court did not allow this aggravating factor because the defendant's premeditated plan was to kill the victim and steal her property.[370]

The doctrine of "transferred intent" can apply to this aggravating factor if the evidence supports it. The explosion of a bomb in an automobile can be an example of the application of transferred intent if the defendant does not select the victim.[371]

In cases where the victim is not a police officer, the defendant may be entitled to a special jury instruction that the primary or dominant motive for the murder must have been to eliminate the witness. However, the defendant must specifically request this instruction.[372]

Doubling

It is impermissible doubling to find this aggravating circumstance and the circumstance the

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[364]Caruthers v. State, 465 So. 2d 496 (Fla. 1985); *Consalvo*, 697 So. 2d at 819*; Zack*, 753 So. 2d at 9.

[365]Harmon v. State, 527 So. 2d 183 (Fla. 1988).

[366]See cases discussed in Preston v. State, 607 So. 2d 404, 409 (Fla. 1992). See Hall v. State, 614 So. 2d 473, 477 (Fla. 1993) and cases cited therein where the Supreme Court stated " . . . we have uniformly upheld finding this aggravator when the victim is transported to another location and then killed." See also Routly v. State, 440 So. 2d 1257 (Fla. 1983); Davis v. State, 698 So. 2d 1182 (Fla. 1997); Alston v. State, 723 So. 2d 148 (Fla. 1998); Jones v. State, 748 So. 2d 1012 (Fla. 1999); Card v. State, 803 So. 2d 613 (Fla. 2001).

[367]*Caruthers*, 465 So. 2d at 498.

[368]Sireci v. Moore, 885 So. 2d 882 (Fla. 2002); Derrick v. State, 641 So. 2d 378 (Fla. 1994); Trease v. State, 768 So. 2d 1050 (Fla. 2000); *Reynolds,* 934 So. 2d at 1156; Farina v. State, 801 So. 2d 44 (Fla. 2001); Jones v. State, 963 so. 2d 180 (Fla. 2007); Bevel v. State, 983 So. 2d 505 (Fla. 2007).

[369]Willacy v. State, 696 So. 2d 693 (Fla. 1997).

[370]*Zack*, 753 So. 2d at 14.

[371]*Howell,* 707 So. 2d. at 678.

[372]Nelson v. State, 850 So. 2d 514 (Fla. 2003).

victim was a law enforcement officer.[373] Additionally, it is almost always impermissible to find this aggravating circumstance and the disrupt or hinder law enforcement aggravating circumstance.[374] In order to justify finding both of the circumstances, the facts supporting each of them must be separate and distinct, such as the defendant murdering one victim to avoid arrest for the attempted murder of another victim while disrupting his trial on an unrelated charge.[375]

There is no per se prohibition to finding the avoiding-arrest aggravator and CCP provided the evidence is separate as to each. For instance, the avoid-arrest aggravator may focus on the motive for the killing, and CCP may focus upon the manner in which the killing took place.[376]

It is permissible to consider the avoid-arrest aggravator along with the pecuniary-gain aggravator if the evidence supports each aggravator.[377]

While the avoid-arrest aggravator must be shown to be the sole or dominant motive for the killing, the pecuniary-gain aggravator does not have to reach that level of proof. It is sufficient if the evidence shows the murder was motivated, at least in part, by a desire to obtain money, property or other pecuniary gain.[378]

It is not improper doubling for the court to find the aggravators of felony murder, pecuniary gain and avoid arrest where the victim was kidnapped in order to steal her car, which was needed for a getaway vehicle, and the motive for the murder was so the victim could not identify the defendant.[379]

6.7.7 PECUNIARY GAIN

The capital felony was committed for pecuniary gain.

This factor has been held to apply only where the "murder is an integral step in obtaining some sought-after specific gain."[380] If the theft of money or other property is completed, and the murder was not committed to facilitate it, this factor does not apply.[381] Likewise, if the murder is completed, and a theft of property is an afterthought, this aggravator does not apply. There must be "a pecuniary motivation for the murder itself."[382]

There is a group of cases involving defendants who stole an automobile after a murder. In

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[373]Kearse v. State, 662 So. 2d 677 (Fla. 1995).

[374]Peterka v. State, 640 So. 2d 59 (Fla. 1994).

[375]Provenzano v. State, 497 So. 2d 1177 (Fla. 1986).

[376]Morton v. State, 689 So. 2d 259 (Fla. 1997).

[377]Hertz v. State, 803 So. 2d 629, 652 (Fla. 2001); Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994).

[378]Hildwin v. State, 727 So. 2d 193, 195 (Fla. 2003).

[379]Spann v. State, 857 So. 2d 845 (Fla. 2003).

[380]Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988).

[381]Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994).

[382]Bowles v. State, 804 So. 2d 1173, 1179-1180 (Fla. 2002) (rejecting afterthought argument under the facts); Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982).

some of the cases, the defendants abandon the automobile shortly after the murder. In those cases, the Court has held this aggravating circumstance not to have been proven beyond a reasonable doubt. Rather, the car was more likely to have been stolen to facilitate an escape from the scene. But, if the murder was committed during the forcible taking of an automobile, or, if the automobile is not abandoned, but continued to be used, improvement of the defendant's financial worth was the motivation for murder and the pecuniary-gain aggravator applies.[383]

Unlike the avoid-arrest aggravator, pecuniary gain does not have to be the sole or dominant motive for the killing. It is sufficient if the evidence shows the murder was motivated, at least in part, by a desire to obtain money, property or other pecuniary gain.[384]

How to weigh this aggravating factor depends upon the facts of the case. If the theft occurred during the course of a robbery, the State may very well think the felony-murder aggravator is more weighty. That belief may be misplaced. (See the discussion on lack of intent to kill in §. 9.9.6.) On the other hand, if the murder occurred over a dispute in the proceeds of a poker game by a couple of drunks, the aggravator may deserve little weight.

Doubling

When a homicide occurs during the course of a robbery, the felony-murder aggravator and the pecuniary-gain aggravator cannot both apply.[385] But, if two or more enumerated felonies were committed during the course of a homicide, one of which does not include obtaining money, (e.g., sexual battery) and one of which does (e.g., robbery), both aggravating factors may be found.[386] It is permissible to consider the pecuniary-gain aggravator and the avoid-arrest aggravator.[387]

It is not improper doubling for the court to find the aggravators of felony murder, pecuniary gain and avoid arrest where the victim was kidnapped in order to steal her car, which was needed for a getaway vehicle, and the motive for the murder was so the victim could not identify the defendant.[388]

6.7.8 DISRUPT OR HINDER LAW ENFORCEMENT

The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

This circumstance applies most frequently in witness elimination cases.[389] It has been sustained, for example, when a witness was killed to prevent him from testifying before the grand

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[383]See Rogers v. State, 783 So. 2d 980, 993 (Fla. 2001), and authority cited therein.

[384]*Hildwi*n, 727 So. 2d at 195.

[385]Francis v. State, 808 So. 2d 110, 136-137 (Fla. 2001).

[386]Spann v. State, 857 So. 2d 845, 856 (Fla. 2003); Griffin v. State, 820 So. 2d 906, 914-916 (Fla. 2002); Willacy v. State, 696 So. 2d 693, 696 (Fla. 1997); Green v. State, 641 So. 2d 391, 395 (Fla. 1994); Castro v. State, 597 So. 2d 259, 261 (Fla. 1992); Routly v. State, 440 So. 2d 1257, 1264-1265 (Fla. 1983); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976).

[387]Hertz v. State, 803 So. 2d 629, 652 (Fla. 2001).

[388]Spann v. State, 857 So. 2d 845 (Fla. 2003).

[389]White v. State, 817 So. 2d 799 (Fla. 2002); Shere v. State, 579 So.2d 86 (1991).

jury. It has also been applied in a case in which the defendant killed a key prosecution witness before the witness could testify against him.[390]

In *Koon v. State*,[391] the defendant was arrested on a federal counterfeiting charge. A codefendant and another witness testified against him at a preliminary hearing during which the federal magistrate announced that she would have dismissed the case if only one witness existed. Not surprisingly, the codefendant was murdered by the defendant. The defendant's nephew was with him at the time of the murder and testified against him at trial. The nephew escaped harm, probably because the defendant was serving a seventy-five year federal sentence and was held without bond pending trial.

This aggravating circumstance has also been applied when the victim is a confidential informant who was actively participating in a narcotics investigation and whose information led to the arrest of the defendant.[392]

The murder of a law enforcement officer sometimes qualifies under this aggravating circumstance. For instance, where the defendant had just walked away from work release, burglarized a dwelling, stolen a car, and shot a police officer who stopped him because of the stolen vehicle, the Supreme Court has allowed this aggravator.[393]

Another example is the murder of a parole officer after the officer warned the defendant to stay away from one of his female probation officers.[394]

Doubling

It is not permissible to find this factor and the avoiding-arrest or effecting-escape aggravator when they are based upon a single aspect of the case.[395] In the *Bello* case, the defendant killed a police officer who was attempting to enter his house and arrest him during a drug raid. The motivation for the murder was both to hinder law enforcement and to avoid arrest. The two aggravators merged and only one could be considered.

In one case involving the murder of a police officer, the trial judge found the existence of this aggravating circumstance as well as the avoid arrest and victim was a law enforcement officer aggravating circumstances. The sentencing order was approved because the trial judge stated the he considered all three to be one aggravating circumstance.[396]

The facts of the case may justify finding this aggravating circumstance as well as Cold, Calculated and Premeditated if the motive for the killing is witness elimination and the means meets the requirements of CCP.[397]

It is not permissible to use the same facts to support the hinder law enforcement aggravating

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[390]Koon v. State, 513 So. 2d 1253, 1256-1257 (Fla. 1987).

[391]513 So. 2d 1253 (Fla. 1987).

[392]Francis v. State, 473 So. 2d 672 (Fla. 1985).

[393]Pietri v. State, 644 So. 2d 1347 (Fla. 1994).

[394]Phillips v. State, 894 So. 2d 28 (Fla. 2005).

[395]Bello v. State, 547 So. 2d 914, 917 (Fla. 1989); Peterka v. State, 640 So. 2d 59 (Fla. 1994).

[396]*Pietri*, 644 So. 2d at 1349, n 5.

[397]Hodges v. State, 595 So. 2d 929 (Fla. 1992).

circumstance and the avoid arrest aggravating circumstance.[398]

See the comments in the doubling section of §6.7.6 for more information on doubling of this aggravating circumstance with the avoid arrest aggravating circumstance.

6.7.9 HEINOUS, ATROCIOUS OR CRUEL (HAC)

The capital felony was especially heinous, atrocious, or cruel.

There has been much activity about the constitutionality of this aggravating factor, and aggravating factors similarly worded from other states. The following U. S. Supreme Court cases discuss the problems with this factor:

Arizona	*Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990). *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).
Florida	*Espinosa v. Florida*, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992). *Sochor v. Florida*, 504 U.S. 527, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992). *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976).
Georgia	*Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).
Idaho	*Arave v. Creech*, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993).
Mississippi	*Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992). *Shell v. Mississippi*, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990). *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990).
Oklahoma	*Maynard v. Cartwright*, 401 U.S. 667, 91 S. Ct. 1160, 28 L. Ed. 2d 404 (1988).
Tennessee	*Bell v. Cone*, 543 U.S. 447, 125 S.Ct. 847, 160 L.Ed.2d 881 (2005).

The issue presented in these cases is whether the words selected in the statute can withstand a vagueness challenge. The aggravating circumstance must narrow the class of cases eligible for the death penalty.

The Supreme Court of Florida thought this vagueness challenge was solved when the Standard Jury Instruction was amended to include the entire *Dixon*[399] instruction, which the Court believed had been approved in the *Proffitt*[400] case along with Florida's present Standard Jury Instruction defining heinous, atrocious or cruel.[401] However, until recently, a careful reading of the

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[398]Peterka v. State, 640 So. 2d 59 (Fla. 1994).

[399]Dixon v. State, 283 So. 2d 1 (Fla. 1973).

[400]Proffit v. Fla., 428 U.S. 242, 259-260 (1976).

[401]The previous Florida Jury Instruction defining heinous, atrocious or cruel as "especially wicked, evil, atrocious and cruel" was declared unconstitutionally vague in *Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992).

United States Supreme Court cases might suggest the entire *Dixon* instruction is *not* acceptable. The definitions in Mississippi's jury instructions are the same as the definitions in Florida's jury instructions. Mississippi's instructions have been struck down by the United States Supreme Court as vague.[402] *Proffitt* approved *only* this part of the *Dixon* instruction: ". . . the conscienceless or pitiless crime which is unnecessarily torturous to the victim."[403] The following statement in *Sochor v. Florida,*[404] appears to support the argument that the United States Supreme Court does not approve of the entire *Dixon* instruction:

> Sochor contends, however, that the State Supreme Court's post *Proffitt* cases have not adhered to *Dixon's* limitation as stated in *Proffitt*, but instead evince inconsistent and over broad constructions that leave a trial court without sufficient guidance. And we may well agree with him that the Supreme Court of Florida has not confined its discussions on the matter to the *Dixon* language we approved in *Proffitt*, but has on occasion continued to invoke the entire *Dixon* statement, quoted above (which as "quoted above" is the present Florida Standard Jury Instruction), perhaps thinking that *Proffitt* approved it all.[405]

The Supreme Court of Florida has not interpreted *Sochor* to require elimination of the vague definitions in its jury instructions, but seems to believe that, as long as the whole instruction is given, it will pass constitutional muster.[406]

It appears that the federal Antiterrorism and Effective Death Penalty Act,[407] (the Act) and a recent case from Tennessee have laid the vagueness issue to rest. In *Bell v. Cone,*[408] the United States Supreme Court reviewed the Tennessee HAC aggravator.[409] In that case, the Court noted the Act dictates a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." The Act authorizes a federal court to grant a writ of habeas corpus based on a claim adjudicated by a state court only if the state-court decision "was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States." Such a decision is "contrary to . . . clearly established federal law" . . . "if the state court applies a rule that contradicts that governing law set forth in our cases or if the state court confronts facts that are materially indistinguishable from a

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[402]Shell v. Miss., 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1 (1990).

[403]Proffit, 428 U.S. at 255.

[404]Sochor v. Florida, 504 U.S. 527, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992), *rev'd on other grounds*, 504 U.S. 527 (1992).

[405]*Id*. at 536 (material in parenthesis supplied).

[406]*See* Francis v. State, 808 So. 2d 110 (Fla. 2001); Nelson v. State, 748 So. 2d 237 (Fla. 1999); Hall v. State, 614 So. 2d 473 (Fla. 1993); Preston v. State, 607 So. 2d 404 (Fla. 1992).

[407]28 U. S. C. A. §2254.

[408]Bell v. Cone, 543 U.S. 447, 125 S.Ct. 847, 160 L.Ed.2d 881 (2005).

[409]The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. T.C.A. s 39-2404(i)(5).

relevant Supreme Court precedent and arrives at a result opposite to ours."[410]

Importantly, the Supreme Court of Tennessee had construed the HAC aggravator "narrowly and had followed that precedent numerous times," thereby assuming "the responsibility to ensure that the aggravating circumstance is applied constitutionally in each case." Interestingly, the construction given by the Tennessee Court quoted *Dixon* with approval and defined HAC as "the conscienceless or pitiless crime which is unnecessarily torturous to the victim."[411]

The Supreme Court of Florida has held this aggravating circumstance would apply "only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another."[412] But the Court has upheld death sentences where the victim was conscious for merely seconds.[413] After *Sochor,* the Supreme Court of Florida has held that, for this factor to apply, the crime must be *both* conscienceless or pitiless *and* unnecessarily torturous to the victim.[414] Interestingly, the Supreme Court of Florida has held that it is not necessary to establish the element of "intent" before finding the HAC aggravating circumstance. It is enough if the killer is utterly indifferent to the suffering of another.[415] The Court has held the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator.[416] Although the possibility of error is now remote, it will be eliminated if the defense requests a particular HAC instruction and it is given.[417] However, the vagueness argument has been put to rest by *Bell* and Florida's Standard Jury Instruction on HAC appears to be sufficient. In fact, trial judges have been directed to read *fully* all applicable Standard Jury Instructions, unless a legal justification exists to modify the instruction.[418]

HAC is among "the most weighty in Florida's sentencing calculus."[419] In *Butler v. State*,[420] HAC was the only aggravator, and the death penalty was approved.

The following discussion illustrates the types of cases in which HAC applies:

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[410]Williams v. Taylor, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

[411]*Dicks*, 615 S.W.2d at 132.

[412]Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

[413]Rolling v. State, 695 So. 2d 278, 296 (Fla. 1997).

[414]Nelson v. State, 748 So. 2d 237, 245 (Fla. 1999); Knight v. State, 746 So. 2d 423, 438-439 (Fla. 1998); Zakrzewski v. State, 717 So. 2d 488, 492 (Fla. 1998); Hartley v. State, 686 So. 2d 1316, 1323 (Fla. 1996); Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992).

[415]*Francis*, 808 So. 2d at 110; Bowles v. State, 804 So. 2d 1173, 1177 (Fla. 2002); *Guzman*, 721 So. 2d at 1160**.**

[416]*Reynolds,* 934 So. 2d at 1155; Schoenwetter v. State, 931 So. 2d 857 (Fla. 2006); Lynch v. State, 841 So. 2d 362 (Fla. 2003); Farina v. State, 801 So. 2d 44 (Fla. 2001); Guzman v. State, 721 So. 2d 1155 (Fla. 1998).

[417]McDonald v. State, 743 So. 2d 501, 503-504 (Fla. 1999).

[418]Guzman v. State, 644 So. 2d 996, 999-1000 (Fla. 1994).

[419]Sireci v. State, 825 So. 2d 882, 887 (Fla. 2002).

[420]Butler v. State, 842 So. 2d 817 (Fla. 2003).

General – Applicable to All Type Homicides

HAC does not apply to most instantaneous deaths, or deaths that occur fairly quickly. But fear, emotional strain, and terror of the victim during events leading up to the murder may allow an otherwise quick death to become heinous, atrocious or cruel.[421] The Court has held that HAC can only be found in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or the utter indifference to or enjoyment of the suffering of another.[422]

Like other aggravating circumstances, HAC must be proven beyond a reasonable doubt and cannot be left to conjecture or speculation. There must be evidence in the record that establishes the facts that justify a finding of HAC.[423]

It is important to note that *nothing* done to a victim *after* the victim is dead or unconsciousness, including that which would otherwise qualify as heinous, atrocious or cruel, can be used to support this circumstance.[424] This is not universally true. At least one state, Tennessee, makes mutilating a dead body an aggravating factor.[425]

HAC cannot be applied vicariously. This aggravator cannot be applied to a defendant, who contracted with another to commit murder, even though the murder was committed in a heinous, atrocious, or cruel manner, if the evidence does not establish that the defendant knew how the third person would carry out the murder, especially where the evidence indicated the third person was supposed to use a gun rather than stabbing the victim.[426]

The Supreme Court of Florida has allowed the HAC aggravator to be included in the sentencing order if the facts justify it even if it was not submitted to the jury.[427] But this type of finding may no longer be constitutionally permissible after *Ring v. Arizona*.[428]

Strangulation Deaths

Both the Supreme Court of Florida and the United States Supreme Court agree the "strangulation of a conscious victim involves foreknowledge of death, extreme anxiety, and fear, and

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[421]Lynch v. State, 841 So.2d 362, 369 (Fla. 2003); Henyard v. State, 689 So. 2d 239, 253 (Fla. 1996); Wyatt v. State, 641 So.2d 1336, 1340-1341 (Fla. 1994); Preston v. State, 607 So.2d 404, 409-410 (Fla. 1992).

[422]Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993); *Cheshire*, 568 So. 2d at 912.

[423]*Knight*, 746 So. 2d at 435.

[424]*Zakrzewski*, 717 So. 2d at 493; Jones v. State, 569 So. 2d 1234, 1239 (Fla. 1990); Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984); Herzog v. State, 439 So. 2d 1372, 1379-1380 (Fla. 1983).

[425]TENN. CODE ANN. § 39-13-204 (2004).

[426] Omelus v. State, 584 So. 2d 563, 567 (Fla. 1991). *See also* Archer v. State, 613 So. 2d 446, 448 (Fla. 1993).

[427]Davis v. State, 703 So. 2d 1055, 1061 (Fla. 1997).

[428]*Ring,* 536 U.S. 584, 609 (2002).

this method of killing is one to which the factor of heinousness is applicable."[429] Strangulation deaths create a prima facie case for HAC.[430]

Proof of HAC may be established by the medical examiner. It is within a medical examiner's area of expertise to testify as to the physiological, rather than psychological, effects of strangulation. The medical examiner can testify the person being strangled would have experienced "frightening fear" and intense pain on the neck as well as a sense of impending death. The trial court has the discretion to allow testimony about the effect strangulation has on the various systems of the body.[431]

The state has the burden to prove beyond a reasonable doubt that the victim of strangulation was conscious at the time. Testimony of the medical examiner that the victim was conscious "more likely than not" is insufficient.[432]

Multiple Stab Wound Deaths/Slitting the Victim's Throat

HAC will apply to cases involving multiple stab wounds if the victim was alive and conscious when these multiple wounds were inflicted.[433] If there are defensive wounds, it may be assumed the victim was alive, unless the evidence clearly shows otherwise. Slitting the victim's throat after kidnapping the victim and further traumatizing her has been held to be HAC.[434] In *Butler v. State*,[435] the defendant's former girl friend was stabbed so many times the medical examiner said she had run out of words to describe them. Several of the wounds were defensive wounds, which showed the victim was alive for a substantial portion of the attack. The attack occurred in the victim's apartment in the presence of the victim's children. HAC was the only aggravating circumstance in the *Butler* case.

Beating Deaths

This circumstance applies when the victim was beaten to death.[436] One issue that regularly comes up in beating deaths is whether the victim was killed or lost consciousness early in the attack.

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[429]*Sochor*, 580 So.2d at 609.

[430]Orme v. State, 677 So. 2d 258 (Fla. 1996). *See also Bowles*, 804 So. 2d at 1178; Blackwood v. State, 777 So. 2d 399, 409 (Fla. 2000); Overton v. State, 801 So. 2d 877, 901 (Fla. 2001); Walker v. State, 597 So. 2d 560 (Fla. 2007).

[431]Huggins v. State, 889 So.2d 743 (Fla. 2004).

[432]See Frances v. State, 970 So. 2d 806, 815-816 (Fla. 2007).

[433]Simmons v. State, 934 So. 2d 1100 (Fla. 2006); Schoenwetter v. State, 931 So. 2d 857 (Fla. 2006); Cox v. State, 819 So. 2d 705, 720 (Fla. 2002); *Francis*, 808 So. 2d at 134-135; Pittman v. State, 646 So. 2d 167, 172-173 (Fla. 1994); *see also* cases cited therein; Davis v. State, 620 So. 2d 152, 152-153 (Fla. 1993).

[434]Card v. State, 803 So. 2d 613, 624-625 (Fla. 2001).

[435]Butler v. State, 842 So. 2d 817 (Fla. 2003).

[436]Guardado v. State, 965 So. 2d 108 (Fla. 2007); Buzia v. State, 926 So. 2d 1203 (Fla. 2006); Douglas v. State, 878 So.2d 1246 (Fla. 2004); Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998); Lawrence v. State, 698 So. 2d 1219, 1221-1222 (Fla. 1997); Whitton v. State, 649 So. 2d 861, 867 (Fla. 1994); *see also*, Dennis v. State, 817 So. 2d 741 (Fla. 2002).

The testimony of the medical examiner may establish the chain of events one way or the other, but often it is necessary to look at circumstantial evidence, such as whether there were defensive wounds or evidence that the beating took place in an area large enough to show that the victim was retreating or fighting back. As previously stated, nothing done to the victim after death or loss of consciousness can be used as evidence of HAC.

The case of *Douglas v. State*[437] is illustrative of how beating deaths are analyzed by the Suprme Court. In *Douglas*, the victim was a female friend of the defendant's girl friend. After a Christmas Day drinking binge with both women, the defendant took his girl friend home because she was not feeling well. Subsequently, he raped and brutally beat the victim to death with a tire tool. The medical examiner testified that the victim received at least ten blows to her face, seven blows to the back of her head, and seven to ten blows to her hands and arms. The sequence of the blows could not be determined but "it was unlikely" that the victim was struck from behind and immediately lost consciousness because there were injuries to both sides of her head (indicating she was moving her head from side to side to escape the blows) and there were defensive wounds to her hands and arms. Additionally, there was evidence of post mortem injuries to the body. After the victim was killed, the defendant ran over the body with his automobile in an attempt to make the crime scene look like a vehicular homicide.

The Supreme Court upheld the finding of HAC under the circumstances, regardless of the medical examiner's opinion that it was merely "unlikely" that the victim was initially rendered unconscious. The circumstances in *Douglas* were clearly different from the situation where the attack takes place in a short period of time, during which the victim lost consciousness and there was no prolonged suffering or anticipation of death.[438]

The intent to inflict pain is not a necessary element of this aggravating circumstance. HAC focuses on the means and manner in which death is inflicted, the immediate circumstances surrounding the death, and the victim's perception of the circumstances.[439]

Fire Deaths

This circumstance applies when the victim is set on fire, unless the burning occurred after death.[440]

Shooting Deaths

Most deaths caused by gunshot do not qualify as being heinous, atrocious, or cruel. Death by gunshot is generally instantaneous, or nearly so, and the Supreme Court of Florida has consistently held HAC does not apply in these cases, unless the shooting is accompanied by additional acts resulting in mental or physical torture to the victim.[441]

Cases in which the Court has disapproved the trial court's finding of HAC in shooting deaths

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[437]Douglas v. State, 878 So.2d 1246 (Fla. 2004).

[438]Elam v. State, 636 So. 2d 1312 (Fla. 1994).

[439]Buzia v. State, supra, note 359.

[440]Henry v. State, 613 So. 2d 429 (Fla. 1992); Willacy v. State, 696 So. 2d 693 (Fla. 1997); Way v. State, 760 So. 2d 903, 919 (Fla. 2000); Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000), *rev'd on other grounds*, 857 So. 2d 172 (Fla. 2003), *rev'd*, 540 U. S. 1217 (2004).

[441]Diaz v. State, 860 So. 2d 960, 966-967 (Fla. 2003); Rimmer v. State, 825 So. 2d 304, 327-328 (Fla. 2002); *Robertson*, 611 So. 2d at 1228.

include the following examples: forcing the victims into a house at gunpoint, and, along with accomplices, interrogating them for several hours before handing a gun to an accomplice to shoot the victims;[442] "execution style killings,"[443] including cases where the victim is shot several times and begs for his life;[444] shooting a police officer who is acting in the line of duty;[445] and murders that are cold, calculated, and premeditated and carried out stealthily.[446]

There are instances in which gunshot murders involve HAC. For instance, a finding of HAC was approved where the nine-year-old victim suffered substantial mental anguish by witnessing the defendant murder his mother and two siblings and was then shot with a shotgun, survived the initial shot, and was shot again.[447] Additionally, HAC has been held to apply when the defendant fired several non-lethal shots into the first victim's legs, then shot her in the head and dragged her screaming into an apartment where she was dispatched with a coup de grace. HAC was upheld as to the second victim because the first victim was the second victim's mother and the second victim had been confined in the apartment with the defendant, who terrified her for over 30 minutes with his gun and, after shooting her mother, made a phone call and then shot the second victim.[448] Fear, emotional strain, and terror, including the victim's knowledge that he is going to die, may make an otherwise quick death HAC.[449]

Kidnappings

One factor that can be taken into consideration in determining if HAC applies in a particular case is whether the victim was kidnapped or confined before being put to death. Kidnappings almost always involve CCP, HAC, or both.[450]

In *Parker v. State*,[451] the defendants kidnapped the 18-year-old-female victim from the convenience store where she worked and transported her by automobile some 13 miles away. They removed her from the car, stabbed her in the stomach with a fishing knife and shot her in the back of the head. There was evidence of a defensive wound and evidence in the automobile that some of her hair had been pulled out before she exited the automobile. The medical examiner testified that her bladder was completely voided prior to her death, which indicated either fear or pain from being stabbed.

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[442]Ferrell v. State, 686 So. 2d 1324, 1330 (Fla. 1996).

[443]Hartley v. State, 686 So. 2d 1316, 1323 (Fla. 1997); *Robinson*, 574 So. 2d at 112.

[444]Bonifay v. State, 626 So. 2d 1310, 1311 (Fla. 1993).

[445]Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995); Street v. State, 636 So. 2d 1297, 1303 (Fla. 1994); Brown v. State, 526 So. 2d 903, 906-907 (Fla. 1988).

[446]Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981).

[447]Hutchinson v. State, 882 So.2d 943 (Fla. 2004).

[448]*Lynch,* 841 So.2d at 369-370.

[449]Hudson v. State, 992 So. 2d 96 (Fla. 2008).

[450]*See, e.g.,* Boyd v. State, 910 So. 2d 167 (Fla. 2005); Crain v. State, 894 So. 2d 59 (Fla. 2004); Huggins v. State, 889 So.2d 743 (Fla. 2004); Pearce v. State, 880 So.2d 561 (Fla. 2004).

[451]Parker v. State, 873 So. 2d 270 (Fla. 2004).

Cases involving kidnapping usually include other forms of mistreatment to the victim such as stabbing and sexual battery. But kidnapping itself is a good indicator that HAC may be an appropriate aggravating factor in the case.[452]

Vicarious Liability

The HAC aggravator cannot be applied vicariously. Thus, if the only eyewitness evidence is a statement of the defendant in which he never admits to striking the victim and consistently states that the accomplice committed the murder of his own accord, and without prior discussion with or notice to the defendant, and there is no evidence establishing that the defendant directed or otherwise knew that victim would be killed or her manner of death, it is error to find HAC as an aggravator.[453]

6.7.10 COLD, CALCULATED AND PREMEDITATED

The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP).

This circumstance is as confusing as it is subjective. In 1994, the Supreme Court of Florida declared the Standard Jury Instruction defining this aggravating factor to be unconstitutionally vague.[454] The *Jackson* case requires a definition of terms to be read to the jury and used by the judge in applying this factor. These definitions are now part of the Standard Jury Instructions and have been held sufficient to withstand constitutional attack.[455] Some definitions that may be helpful to understand this aggravator are as follows:

> "Cold" means "calm, cool reflection, and not an act prompted by emotional frenzy, panic, or a fit of rage."[456]
>
> "Calculated" means the defendant had a "careful plan or prearranged design to commit the *murder*." A careful plan or prearranged design to *kill* is required--not a careful plan to commit another crime and a killing also takes place.[457]
>
> "Premeditated" is more than that required to prove first-degree, premeditated murder. It is "heightened premeditation."[458] "Heightened premeditation" is defined

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[452]See *Boyd*, 910 So. 2d 167 (Fla. 2005).

[453]Perez v. State, 919 So.2d 347 (Fla. 2005).

[454]Jackson v. State, 648 So. 2d 85, 87 (Fla. 1994).

[455]Donaldson v. State, 722 So. 2d 177, 187 n.12 (Fla. 1998); Bowles v. State, 804 So. 2d 1173, 1177 (Fla. 2002).

[456]*Jackson,* 648 So. 2d at 89; Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992).

[457]Pomeranz v. State, 703 So.2d 465, 471 (Fla. 1997); *Jackson,* 648 So.2d at 89-90; Valdes v. State, 626 So.2d 1316, 1323 (Fla. 1993); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987); Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984).

[458]*Jackson*, 648 So. 2d at 88.

as "deliberate ruthlessness."[459] This definition should not be used because it sounds like HAC, and the Supreme Court did not use it in the newly adopted Standard Jury Instruction. However, the Supreme Court has held that an element that must be proved in order to establish CCP is "deliberate ruthlessness." A finding of "deliberate ruthlessness" is necessary to raise the level of heightened premeditation required for CCP.[460]

"Pretense of moral or legal justification" means "Any claim of justification or excuse (such as self-defense) that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide."[461]

While the jury instruction does not define it, the Supreme Court has held that an element that must be proved in order to establish CCP is "deliberate ruthlessness." Deliberate ruthlessness is necessary to raise the level of heightened premeditation required for CCP.[462]

This aggravating circumstance is usually found in assassination or contract murders. Murders that occur when the defendant becomes enraged and attacks the victim do not rise to the level of CCP.[463]

The events that lead up to the killing are usually used to establish CCP. For instance, where it is shown the defendant was "desperate for money for drugs and to fix his vehicle"; failed in his attempt to commit a robbery; borrowed his girlfriend's car with a change of clothes inside; and, chose the victim because she knew him and would let him in her residence (which was located in a secluded area) is sufficient to prove CCP.[464]

A defendant who is "emotionally and mentally disturbed, or even mentally ill, can still have the ability to experience cool, and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation."[465]

There have been a number of cases in which the defendant has challenged the CCP aggravator on the basis of "pretense of moral justification."

In *Hill v. State*,[466] the defendant was convicted of murdering a physician who performed abortions at an abortion clinic. He claimed he had a pretense of moral justification for the murder. Surprisingly, there are a number of cases involving this situation that have been reported in the

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[459]Fennie v. State, 648 So. 2d 95, 99 (Fla. 1994); Walls v. State, 641 So. 2d 381, 388 (Fla. 1994).

[460]Buzia v. State, 926 So. 2d 1203 (Fla. 2006).

[461]Christian v. State, 550 So. 2d 450, 451-452 (Fla. 1989); Banda v. State, 536 So. 2d 221, 225 (Fla. 1988).

[462]Buzia v. State, 926 So. 2d 1203 (Fla. 2006).

[463]Williams v. State, 967 So. 2d 735, 764 (Fla. 2007).

[464]Guardado v. State, 965 So. 2d 108, 117 (Fla. 2007).

[465]Evans v. State, 800 So. 2d 182, 193 (Fla. 2001).

[466]Hill v. State, 688 So. 2d 901 (Fla. 1997).

United States.[467] Many of them involve the "necessity" defense and involve trespass on abortion clinic property. In the *Hill* opinion, the Supreme Court of Florida cited the *City of Witchita* case and quoted the Kansas Supreme Court, which said, "Regardless of what name is attached to the defense (and for the sake of simplicity we will refer to it as the necessity defense) one thing is clear: The harm or evil which a defendant, who asserts the necessity defense, seeks to prevent must be a legal harm or evil as opposed to a moral or ethical belief of the individual defendant."[468]

The Court went on to observe that "permitting a defendant to vindicate his or her criminal activity in such a manner would be an invitation for lawlessness." Quoting *Commonwealth v. Wall*,[469] the Court stated, "To accept appellant's argument would be tantamount to judicially sanctioning vigilantism. If every person were to act upon his or her personal beliefs in this manner, and we were to sanction the act, the result would be utter chaos."

The Supreme Court of Florida has rejected the "pretense of moral justification" argument in a case in which the female defendant shot a police officer in the head as he bent down to pick up some car keys she had dropped.[470] The defendant claimed the officer was going to try to rape her. The court reasoned that was a "purely subjective" belief. Nor was the court impressed with a defendant's claim that he massacred his wife and two children with a machete to save them from going through a divorce.[471]

There are several cases that have disallowed CCP as an aggravator on "pretense of moral justification" grounds. These cases involve prior difficulties with the victim who threatened violence against the defendant such as "jumping at him"[472] or a fellow inmate who "was a violent man who had previously attacked the defendant in a homicidal rage and had continued to make threats against the defendant up until the time he was killed."[473]

How do the definitions that are included in the Standard Jury Instructions apply to this aggravating circumstance? The easiest cases are those involving contract murders, or execution-style killings. The factor clearly applies to this type of case.[474] Beyond these cases, determining the application of CCP is not easy. All of the cases are fact-specific.

For instance, CCP is proven when the killing is a product of a careful plan or prearranged

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[467]See U.S. v. Turner, 44 F.3d 900 (10th Cir. 1995); N.E. Women's Ctr., Inc. v. McMonagle, 868 F. 2d 1342 (3d Cir. 1989); City of Missoula v. Asbury, 873 P.2d 936 (Mont. 1994); City of Witchita v. Tilson, 855 P.2d 911 (Kan. 1993); Jones v. City of Tulsa, 857 P.2d 814 (Okla. Crim. App. 1993); State v. Rein, 477 N. W.2d 716 (Minn. Ct. App. 1991); State v. Horn, 377 N.W.2d 176 (Wis. Ct. App. 1985), *aff'd*, 407 N.W.2d 854 (Wis. 1987).

[468]*City of Witchita*, 855 P.2d at 914-916.

[469]Commonwealth v. Wall, 539 A.2d 1325 (Pa. Super. Ct. 1988), *appeal denied*, 555 A.2d 114 (1988).

[470]*Jackson*, 704 So. 2d at 505.

[471]Zakrewski v. State, 717 So. 2d 488, 492 (Fla. 1998).

[472]Cannaday v. State, 427 So. 2d 723, 730-731 (Fla. 1983).

[473]Christian v. State, 550 So. 2d 450, 452 (Fla. 1989).

[474]Gordon v. State, 704 So. 2d 107, 114 (Fla. 1997); McCray v. State, 416 So. 2d 804, 807 (Fla. 1982).

design to commit murder before the fatal incident.[475] Obtaining a weapon that cannot be traced to the defendant shortly before the murder is evidence of CCP.[476]

In *Almeida v. State*,[477] the defendant established both statutory mental mitigating circumstances, and there was evidence he committed the murder after getting drunk and on impulse. The court held the facts to be legally insufficient to support a finding of CCP.

CCP can be proven by circumstantial evidence. Circumstantial evidence of premeditation can include nature of weapon used, presence or absence of adequate provocation, previous difficulties between parties, manner in which homicide was committed, and nature and manner of wounds inflicted.[478]

CCP can be established in some cases where the victim begs for mercy and is killed.[479]

Domestic Killings

The CCP factor did not generally apply to a "domestic" killing prior to 1996. The Supreme Court did not view these cases as reflecting "calm, cool reflection," but "mad acts prompted by wild emotion,"[480] or "the result of a heated domestic confrontation."[481] Justice Anstead's dissent in *Lawrence* reviews all the "domestic" cases where CCP was not allowed and questions how they can be distinguished from facts in the case. In 1998, the Supreme Court allowed the CCP aggravator in two domestic murders: one a murder of a former girlfriend and the defendant's child and one where the defendant murdered his wife and two children with a machete.[482]

The Court will now allow the CCP aggravator in "domestic murders" if the facts warrant it. Several of the earlier cases cited above would probably be decided differently today. Domestic violence awareness, being the hot topic it is, has caused the Supreme Court of Florida to reassess their position on this aggravator in domestic murders. The Court has recently stated that domestic situations are evaluated the same way as other cases in determining whether the death penalty is proportional. [483]

Vicarious Liability

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[475]Walls v. State, 641 So. 2d 381 (Fla. 1994).

[476]Dennis v. State, 817 So. 2d 741 (Fla. 2002).

[477]Almeida v. State, 748 So. 2d 922 (Fla. 1999).

[478]Pearce v. State, 880 So.2d 561 (Fla. 2004).

[479]See Johnson v. State, 969 So. 2d 938, 951 (Fla. 2007).

[480]Santos v. State, 591 So. 2d 160 (Fla. 1991); Douglas v. State, 575 So. 2d 165 (Fla. 1991); Richardson v. State, 604 So. 2d 1107 (Fla. 1992); Maulden v. State, 617 So. 2d 298 (Fla. 1993); Spencer v. State, 645 So. 2d 377 (Fla. 1994). But see Cummings-El v. State, 684 So. 2d 729 (Fla. 1996) where the CCP factor was upheld in a domestic murder. *See also,* Lawrence v. State, 698 So. 2d 1219 (Fla. 1997) where the CCP factor was upheld.

[481]Blakely v. State, 561 So. 2d 560 (1990).

[482]Walker v. State, 707 So. 2d 300 (Fla. 1998); Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998).

[483]Butler v. State, 842 So. 2d 817 (Fla. 2003).

Unlike HAC, this factor can be applied vicariously.[484] The heightened premeditation "does not have to be directed toward the specific victim. It is the manner of killing, not the target which is the focus of this aggravator."[485]

Doubling

It is not considered doubling of aggravating circumstances to find that the homicide was both HAC and CCP.[486] Also, the facts may justify a finding of CCP and hinder law enforcement.[487]

Ex Post Facto Application

This aggravating factor may be applied to cases in which the murder was committed before the legislature enacted it without violating the ex post facto clauses of the United States or Florida Constitutions. The Supreme Court of Florida has held that CCP does not add an entirely new factor as an aggravating circumstance, but only reiterates in part what is already present in the elements of premeditated murder.[488]

6.7.11 VICTIM A LAW ENFORCEMENT OFFICER

The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

What if the murder victim is a police officer, but the defendant does not know it? What if he did not know it, but should have known it? These questions have finally been answered in the context of the "avoid arrest" aggravator by the Supreme Court of Florida. In cases involving the "avoid arrest" aggravator, the state must either prove the victim was a police officer and the defendant knew it or prove the defendant's intent to avoid arrest was the dominant motive for the murder.[489] The proof to establish the law-enforcement-victim aggravator should show the defendant knew the victim was a law enforcement officer.

Doubling

This aggravating circumstance almost always involves a "doubling" or "merger" problem. Doubling occurs if this aggravating factor is combined with the avoiding arrest aggravator,

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[484]Howell v. State, 707 So. 2d 674, 682 (Fla. 1998); Sweet v. State, 624 So. 2d 1138, 1142 (Fla. 1993); Provanzano v. State, 497 So. 2d 1177, 1183 (Fla. 1986).

[485]Doorbal v. State, 837 So. 2d 940, 961 (Fla. 2003); Bell v. State, 699 So. 2d 674, 677-678 (Fla. 1997); Sweet v. State, 624 So. 2d 1138, 1142 (Fla. 1993).

[486]*Jackson*, 530 So. 2d at 273.

[487]Hodges v. State, 595 So. 2d 929 (Fla. 1992)

[488]Zeigler v. State, 580 So. 2d 1127 (Fla. 1991); Combs v. State, 403 So. 2d 418 (Fla. 1981).

[489]Green v. State, 975 So. 2d 1081 (Fla. 2008).

and the disrupting or hindering a law enforcement officer aggravator [490]

Ex Post Facto Application

This aggravating factor was added in 1987. However, it can be applied to a murder of a law enforcement officer occurring prior to the enactment of the aggravator without violating the Ex Post Facto Clauses of the United States and Florida Constitutions. The Supreme Court of Florida has held that this application is not an entirely new circumstance because "murder to prevent lawful arrest" and "murder to hinder the lawful exercise of any governmental function or the enforcement of laws" existed at the time of the murder, and the defendant was not prejudiced.[491]

6.7.12 VICTIM A PUBLIC OFFICIAL

The victim of the capital felony was an elected or appointed public official engaged in the performance of his official duties, if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

There are no reported cases involving this aggravating factor. However, it appears to be relatively self-explanatory. The "knowledge" discussion under section §6.7.11 above is a consideration here also.

Ex Post Facto Application

See the discussion under §§ 6.7.13 and 6.7.14, below.

6.7.13 VICTIM LESS THAN 12 YEARS OF AGE

The victim of the capital felony was a person less than twelve years of age.

This aggravating circumstance was enacted in 1997 and is self-explanatory.

Ex Post Facto Application

In *Rose v. State*,[492] the Court discussed the ex post facto application of this aggravator and determined that considering it was harmless error under the circumstances because the evidence presented to the jury established the victim was eight years old, and there were other aggravating circumstances.[493]

Applying this aggravator to murders that occurred prior to the enactment date would probably violate the ex post facto prohibition. In order for a law to fall within the ex post facto prohibition, it must be "retrospective"; that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing punishment for the crime. A law is "retrospective" for purposes of the ex post facto prohibition if

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[490]Weaver v. State, 894 So. 2d 178 (Fla. 2004); Kearse v. State, 662 So. 2d 677 (Fla. 1995); Armstrong v. State, 642 So. 2d 730 (Fla. 1994).

[491]*Jackson*, 648 So.2d 85, 92 (Fla. 1994); Valle v. State, 581 So.2d 40, 47 (Fla. 1991).

[492]Rose v. State, 787 So. 2d 786 (Fla. 2001).

[493]*Id.*.

it changes the legal consequences of acts completed before its effective date. A law violates the Ex Post Facto Clause, even where it merely alters penal provisions accorded by the grace of the Legislature, if it is both retrospective and more onerous than the law in effect on the date of the offense.[494]

Doubling

It is improper doubling to find this circumstance and that the defendant was engaged in aggravated child abuse at the time of the murder.[495]

6.7.14 VICTIM PARTICULARLY VULNERABLE DUE TO AGE, ETC.

The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

In *Francis v. State*,[496] the Supreme Court of Florida rejected the finding of this aggravating circumstance for the first time. The Court noted that aggravating circumstances must "not apply to every defendant convicted of murder, but must apply only to a subclass of defendants convicted of murder," The Court agreed that not every murder victim would fall into this category and found it not to be unconstitutionally vague. A similar statute ("particularly vulnerable due to youth") has been approved by a federal court.[497] The issue the Court resolved in *Francis* is the application of the terms "particularly vulnerable" and "advanced age."

In *Francis*, the two victims were twin sisters, 66 years of age. They appeared to be in reasonable health for their age. No particular disability was shown. The Court resorted to statutory construction to define "words of common usage" and, reading Webster's Dictionary, determined that "particularly" means "to an unusual degree," "vulnerable" means "open to attack or damage," "advanced" means "far on in time or course," and "age" means "the length of an existence extending from the beginning to any given time." Armed with these revelations, the Court held that "These are words clearly comprehended by the average citizen." The victims in *Francis* were active 66-year-olds who drove around in their vehicle and often attended garage sales. There was no evidence the women required any assistance to attend to their daily needs. They were in good health. The Court held this aggravator does not apply under those circumstances.

One of the reasons the trial judge believed this aggravator should apply was the "manner of death and the nature of the wounds inflicted upon them." The Court held these factors to have "very little relationship to the vulnerability of the victims. If that were the case, every murder victim would be vulnerable."[498]

The trial judge also found the victims to be within the class to which this aggravator applies because they were 66 years old. The Court pointed out "that the statute clearly reads that the person must not only be of 'advanced age' but must instead be "particularly vulnerable due to advanced

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[494]State v. Hootman, 709 So. 2d 1357, 1358-1359 (Fla. 1998).

[495]Lukehart v. State, 776 So. 2d 906, 925 (Fla. 2000).

[496]Francis v. State, 808 So.2d 110 (Fla. 2002) (citing Tuilaepa v. Cal., 512 U.S. 967 (1994)).

[497]U.S. v. Pretlow, 779 F. Supp. 758, 774 (D.N.J. 1991).

[498]*Francis*, 808 So. 2d at 139.

age."[499] The Court noted that the Legislature did not establish a particular age for this aggravator and, therefore, it does not apply unless the victim was "particularly vulnerable due to advanced age."

In *Woodel v. State*,[500] the Supreme Court of Florida held that the finding of this aggravator is not dependent on the defendant targeting his or her victim on account of the victim's age or disability. In *Woodel*, the victims were husband and wife, ages 74 and 79. The husband "led a sedentary lifestyle resulting from a triple bypass surgery. He previously had both knees replaced and walked with an uneven gait." The wife suffered from arthritis and had lost partial use of her arm. Defensive wounds were found on her other arm. The Court approved the finding of this aggravator under the circumstances.

In *Morrison v. State*,[501]the defendant claimed on appeal that this aggravator is unconstitutionally vague. Morrison's victim was 82 years old and had been totally disabled since childhood. However, the court declined to rule on this issue because it was not preserved for review.

Ex Post Facto Application

The Supreme Court of Florida determined the addition of this subsection was neither a refinement of an existing aggravating circumstance nor a reiteration of an existing element of the crime of first-degree murder; therefore, this aggravating factor cannot be applied to a murder that occurred prior to the enactment of the subsection without violating ex post facto laws.[502] The subsection became law on May 30, 1996.

6.7.15 DEFENDANT A MEMBER OF A STREET GANG

The capital felony was committed by a criminal street gang member, as defined in F.S. §874.03.

This aggravating factor may be problematical for at least two reasons:

l. The statutory definition of "criminal street gang" includes persons who have not committed any crime and appears to have First Amendment implications.[503]

2. It may be unconstitutional to apply this aggravating factor if the defendant's street gang membership was unrelated to the murder.[504]

Ex Post Facto Application

See the discussion in §6.7.13 and §6.7.14 above

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[499]*Id.*

[500]Woodel v. State, 804 So. 2d 316 (Fla. 2001).

[501]Morrison v. State, 818 So. 2d 432 (Fla. 2002).

[502]*Hootman*, 709 So. 2d at 1358-1360 (Fla. 1998), *rev'd on other grounds by* State v. Matute-Chirinos, 713 So. 2d 1006 (Fla. 1998).

[503]FLA. STAT. 874.03(1) (2006).

[504]Dawson v. Del., 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992).

6.7.16 CAPITAL FELONY COMMITTED BY A SEXUAL PREDATOR

The capital felony was committed by a person designated as a sexual predator pursuant to S. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

This aggravating circumstance was added during the 2005 legislative session and may be problematical for two reasons: (1) There is no requirement for the status of being a sexual predator to have any connection to the killing; and (2) This aggravator does nothing to "narrow the class of cases" that are subject to the death penalty. In fact, the aggravator includes persons the Legislature previously determined to no longer be a danger to the community.[505] It may be unconstitutional to apply this aggravating circumstance in a case were there is no connection between the murder and the status of being a sexual predator.

Doubling

Problems can be avoided with this aggravating circumstance because it is improper to double it with the prior conviction of a violent felony aggravating circumstance.

Ex Post Facto Application

See the discussion in §6.7.13 and §6.7.14.

6.7.17 PROOF PROBLEMS

(a) Burden of Proof

Each aggravating circumstance must be proven beyond a reasonable doubt. Inferences, speculation and probabilities are not enough.[506]

(b) Additional proof.

Most aggravating circumstances will not require additional proof in the sentencing phase, but will have been established or not at the guilt stage of the trial. Aggravating circumstances involving prior criminal history will require additional proof in the penalty phase. Evidence to prove these factors is usually offered in the form of stipulations, certified copies of judgments and sentences (or live testimony) and business records.

Live testimony by the victim is allowed to prove a prior crime of violence.[507] In the *Singleton*

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[505]It is the author's opinion this "status" aggravator reflects the anecdotal approach to the death penalty that has been prevalent in the Legislature in the last several years. It is no more than an overreaction to the crime du jour, this one being Jessica Lunsford's murder. It is a perfect example of "aggravator creep" that may eventually doom the death penalty scheme of many states, including Florida, because all first-degree murders will include one or more aggravating circumstances.

[506]Knight v. State, 746 So. 2d 423, 435 (Fla. 1998).

[507]Singleton v. State, 783 So. 2d 970, 977-978 (Fla. 2001); Stewart v. State, 558 So. 2d 416, 419 (Fla. 1990).

case, the Supreme Court of Florida approved the victim of the defendant's prior crime using her prosthetic arm to be sworn in and to point to defendant, even though the defendant's earlier crime had involved cutting off the victim's arms. However, the Court has discouraged the use of photos of the prior crime.[508] It is error to introduce a blowup of a photo used in the guilt phase of the trial in the penalty phase.[509] The use of an autopsy report to prove the violence of a prior crime of violence is also discouraged.[510] In addition, the hearsay rule prohibits the introduction of such a report, because it is prepared in contemplation of litigation and is inadmissible under the business records exception.[511]

(c) Admissibility of evidence.

The rules of evidence apply to the penalty phase of a capital case in Florida.[512] The United States Supreme Court has recognized that evidence that violates defendant's First Amendment right of association is generally inadmissible.[513]

Evidence of a prior violent felony must be scrutinized with care. For instance, if the evidence of a robbery and kidnapping involved the use of a firearm, but the jury only found the defendant guilty of robbery and kidnapping, and the defendant was acquitted of the firearm charge--then the probative value of the admissibility of firearm evidence is outweighed by the prejudicial effect. Admission of firearm evidence under those circumstances is a serious error and will result in a new penalty phase trial.[514]

(d) Discovery

The State is not required under present law to give notice of which aggravating circumstances will be relied upon.[515] However, the regular criminal rules of discovery require the State to disclose a broad range of documents, statements and tangible evidence that will be used in both the guilt and penalty phase of the trial. The defense must do likewise if the defendant elects to participate in discovery, so both sides should be able to determine the aggravating and mitigating factors to be

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[508]Elledge v. State, 613 So. 2d 434, 436 (Fla. 1993); Duncan v. State, 619 So. 2d 279, 282 (Fla. 1993); *contra* Lockhart v. State, 655 So. 2d 69, 72-73 (Fla. 1995).

[509]Ruiz v. State, 743 So. 2d 1, 8 (Fla. 1999).

[510]Henry v. State, 649 So. 2d 1366, 1369 (Fla. 1994).

[511]Brown v. International Paper Co, 710 So. 2d 666, 668 (Fla. 2d DCA 1998); Ehrhardt, Florida Evidence (2008), §803.6.

[512]Crawford v. Washington, 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); Rogers v. State, 948 So. 2d 655 (Fla. 2006).

[513]Dawson v. Del., 503 U.S. 159, 164-165 (1992).

[514]Lebron v. State, 894 So.2d 849 (Fla. 2005).

[515]Mines v. State, 390 So. 2d 332, 336 (Fla. 1980).

relied upon in the penalty phase.[516] It is likely, given the rulings in *Ring*[517] and *Apprendi*,[518] the United States Supreme Court will eventually require aggravating circumstances to be included in the indictment.

6.7.18 VICTIM-IMPACT EVIDENCE

Prior to *Payne v. Tennessee*,[519] the United States Supreme Court had held the Eighth Amendment, per se, prohibited victim-impact statements from being admitted in a capital sentencing procedure.[520] The case of *So. Carolina v. Gathers*[521] extended *Booth* to prohibit prosecutorial comment on the victim's personal characteristics. *Payne* overruled *Booth* and *Gathers* to allow this type of testimony and argument. However, this evidence is admissible only if state law permits it. *Further, Payne does not affect Booth's additional holding that the Eighth Amendment bars admissions of opinions of the victim's family about the crime, the defendant, and the appropriate penalty for the defendant.* Trial judges should preclude members of the victim's family from recommending a sentence, whether it is life or death.[522]

Florida has passed legislation that allows victim-impact testimony.[523] There are many Supreme Court of Florida cases that permit victim-impact testimony.[524] *Victim-impact* testimony causes problems because it does not relate to any aggravating circumstance and thus appears to be irrelevant to the sentencing process. However, in light of the many cases that permit it, this evidence should be allowed if the State offers to present it.

Some trial judges encourage the state attorney to resist the significant chance of error in the presentation of this evidence before the jury. It can more safely be presented at the *Spencer* hearing after the jury makes its recommendation. This procedure is the wisest course to follow. If necessary, in a proper case, ordering victim-impact evidence to be presented at the *Spencer* hearing can be justified due to its prejudicial effect.

It is permissible for the trial judge to limit the number of victim-impact witnesses. Five witnesses have been approved in a double homicide. Four witnesses have been approved for a single homicide and three witnesses have been consistently upheld.[525] However, trial judges regularly limit the number of witnesses to one or two.

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[516]FLA. R. CRIM. P. 3.220.

[517]Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[518]Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[519]Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

[520]Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987).

[521]South Carolina v. Gathers, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989).

[522]Floyd v. State, 569 So. 2d 1225, 1231 (Fla. 1990).

[523]FLA. STAT. § 921.141(7).

[524]Bonifay v. State, 680 So. 2d 413, 419-420 (Fla. 1996); Branch v. State, 685 So. 2d 1250, 1253 (Fla. 1996); Farina v. State, 680 So. 2d 392, 399 (Fla. 1996); Allen v. State, 662 So. 2d 323 (Fla. 1995); Windom v. State, 656 So. 2d 432, 438 (Fla. 1995).

[525]Deparvine v. State, 995 So. 2d 351 (Fla. 2008).

The cases of *Burns v. State*,[526] and *Looney v. State*,[527] discuss all the challenges made to victim-impact evidence and rejects them all. In *Looney*, the defendant argued that the victim-impact statute was unconstitutional because the Court has ruled it to be "procedural" and an infringement on the Court's rule-making authority. The Court rejected that argument by stating that "such a violation occurs when the 'legislatively imposed procedure' conflicts *with this Court's own rule* regulating the procedure."[528]

In *Sexton v. State*,[529] the Court discussed proper and improper victim-impact testimony. In *Sexton*, the Court stated, ". . . we caution that any *victim-impact* evidence must conform strictly to the parameters of the statute and our prior case law in order to avoid any potential danger of the testimony exceeding the purposes for which it is admissible." The victim-impact statute [F.S.921.141(7)] specifically regulates the content of victim-impact statements:

> Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, *victim-impact* evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim-impact evidence.

It is not unusual for the family of a murder victim to want to seek sympathy in order to encourage the jury to return a recommendation for the death penalty. Trial judges have an affirmative duty not to allow this to happen. Victims demanding an apology from the defendant or expressing a preference for the death penalty are often seen on television. That is not the purpose of victim-impact testimony, and these comments should not be allowed.

In Scott Peterson's recent murder trial in California, the parents of the victim (Peterson's pregnant wife) were allowed to make victim-impact statements. They "ripped into Peterson and begged for answers." They characterized the defendant as "selfish, arrogant, heartless and cowardly." The victim's brother asked, "You have no idea of what we've gone through . . . Did you really hate Laci and Conner that much?" He blasted Peterson for his "rich kid" persona that he said he adopted to make himself feel better. This outburst caused a member of the defendant's family to shout "Liar!" and be escorted from the courtroom by deputy sheriffs. The victim's mother called the defendant an "evil murderer."[530] This is precisely the type of "impact evidence" that is forbidden by both the United States Supreme Court and the Supreme Court of Florida. All trials, especially death penalty trials, are solemn, dignified proceedings. This type of insulting, vindictive outburst may be appropriate in courts in Third World countries but it cannot be tolerated here.

Some states ignore the stated purpose of victim-impact evidence and allow things to get out of hand. The California Supreme Court has approved victim-impact presentations that approach the outer edge. In two California cases, the prosecutors presented live testimony accompanied by over 100 photographs of the deceased at various stages of their lives, with the last three photographs being

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[526]Burns v. State, 699 So. 2d 646 (Fla. 1997).

[527]Looney v. State, 803 So. 2d 656 (Fla. 2001).

[528]*Id.* at 676; *See also* Jackson v. Fla. Dep't of Corr., 790 So. 2d 381, 385 (Fla. 2000).

[529]Sexton v. State, 775 So. 2d 923 (Fla. 2000).

[530]*Contra Costa* (Cal.)*Times.*

of the grave marker, with the inscription readable. In one of the cases, the photo presentation was narrated by the victim's mother with soft music playing in the background. The California court did not view the presentation as a "clarion for vengeance," although one justice expressed concern that the production had the potential to "imbue the proceedings with 'a legally impermissible level of emotion.'" The United States Supreme Court denied certiorari with Justice Stevens dissenting.[531] The Florida statute does not permit this type of circus.

The Supreme Court of Florida has not reversed a penalty phase trial because of improper victim-impact evidence. However, the Court has ruled this testimony has specific limits and has cautioned trial judges to require victim-impact evidence to conform strictly to the parameters of the statute and prior case law in order to avoid any potential danger of the testimony exceeding the purposes for which it is admissible.[532] In *Windom v. State*,[533] the Court held it to be error, although harmless error, to allow victim-impact testimony about the impact of the victim's death on children in the community other than the victim's two sons.

In addition to testimony with traditional questions and answers, the Court has approved allowing prepared statements by the victim's family members to be read to the jury.[534] The fact that family members read from a prepared statement does not diminish the defendant's right to cross-examine the witness.

Even though victim-impact evidence is admissible, the question of whether the prejudice outweighs the probative value of this type of testimony must be answered. Limiting the number of witnesses to one or two will assist in solving this problem, although the Supreme Court has consistently upheld three witnesses for a single homicide, and has approved five witnesses in a double homicide.[535]

6.8.0 DEFENDANT'S EVIDENCE IN SUPPORT OF A LIFE SENTENCE

In the penalty phase of a capital case, mitigating circumstances are defined as "factors that, in fairness or in totality of defendant's life or character, may be considered as extenuating or reducing degree of moral culpability for crimes committed."[536] Mitigating circumstances also include "any other aspect of the defendant's character or record, [and] any other circumstances of the offense."[537]

There are two types of mitigating circumstances: statutory and non-statutory. The fact that a mitigating circumstance is listed in the statute does not, by itself, mean it should be given any greater weight than a nonstatutory mitigating circumstance. However, there are differences between the two. Proof of a statutory circumstance requires the trial judge to give it the weight it deserves. There does not have to be a "nexus" between the statutory mitigating circumstance and the crime

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[531]Kelly v. California, __ U. S. __, 129 S. Ct. 564, __ L. Ed. 2d __ (2008).

[532]*Sexton*, 775 So. 2d 931, 933.

[533]Windom v. State, 656 So. 2d 432 (Fla. 1995).

[534]Damren v. State, 696 So. 2d 709, 712-713 (Fla. 1997); Davis v. State, 703 So. 2d 1055, 1060 (Fla. 1997); *Sexton*, 775 So. 2d at 931-932 (Fla. 2000).

[535]Deparvine v. State, 995 So. 2d 351 (Fla. 2008).

[536]Consalvo v. State, 697 So. 2d 805, 818-819 (Fla. 1996).

[537]Jones v. State, 652 So. 2d 346, 351 (Fla. 1995).

itself before it can be assigned weight.[538] And, while nonstatutory mitigation requires no "nexus' either, it is subject to the test of (1) whether the circumstance is truly mitigating, and (2) whether it is mitigating in the case at hand.[539] A lack of a "nexus" can justify reducing the weight assigned to a particular mitigating circumstance.[540]

Under the Florida death penalty scheme, the trial judge is *required* to consider all mitigating evidence presented by the defendant and supported by the evidence. The trial court "must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly mitigating in nature."[541]

There is no requirement that mitigating factors be proven beyond a reasonable doubt. Florida's jury instruction provides if the jury is "reasonably convinced" of a mitigating circumstance, they may consider it as established. The United States Supreme Court addressed a claim that the defendant had to prove a mitigating circumstance by a preponderance of the evidence and found no constitutional infirmity to this Arizona requirement.[542] Unfortunately, individual justices on the Supreme Court of Florida often refer to the burden of proof to prove mitigating circumstances as "greater weight of the evidence."[543] This is not the standard, unless being "reasonably convinced" is synonymous with "greater weight of the evidence." The Court has used the terms interchangeably.[544] However, it is safe to assume that being "reasonably convinced" is a lesser burden of proof than "greater weight of the evidence." In one case, the Supreme Court stated the burden of proof to be met "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented."[545]

6.8.1 STATUTORY MITIGATING CIRCUMSTANCES

The statute contains a list of certain mitigating circumstances that must be considered if the Court is "reasonably convinced" they are established by the evidence. The defense is not limited, however, to these statutory mitigating circumstances.

6.8.2 NO SIGNIFICANT PRIOR CRIMINAL HISTORY

The defendant has no significant history of prior criminal activity.

Prior criminal activity means prior to the murder. A defendant is entitled to have the jury consider this mitigating circumstance if his only criminal activity occurred after the murder but prior

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[538]Cox v. State, 819 So. 2d 705, 718 (Fla. 2002).

[539]Knight v. State, 726 So. 2d 423, 426 (Fla. 1998).

[540]*Cox*, 819 So. 2d at 718.

[541]Walker v. State, 707 So. 2d 300, 318 (Fla. 1997).

[542]Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).

[543]Weaver v. State, 894 So. 2d 178 (Fla. 2004).

[544]Ford v. State, 802 So. 2d 1121 (Fla. 2001).

[545]*Reynolds,* 934 So. 2d at 1159; Nibert v. State, 574 So. 2d 1059 (Fla. 1990).

to sentencing.[546]

Prior criminal history is not limited to violent felonies, as in the prior capital or violent-felony, aggravating circumstance. Therefore, if the defendant intends to rely on this mitigating circumstance, the State may rebut it by showing prior convictions for nonviolent felonies, misdemeanors, and even juvenile records of delinquent acts.[547] Furthermore, the State "is not limited to convictions when rebutting this mitigator."[548] "Arrests and other evidence of criminal activity, without convictions, may be 'significant' and may rebut this mitigator."[549]

In *Walton v. State*,[550] the defendant presented as mitigation that he had never been convicted of a crime; he was a quiet, kind, considerate and nonviolent person; he had adjusted to prison life and was not a threat to others; he had an honorable discharge from the army; and, he had a normal childhood. In rebuttal, the prosecutor presented evidence that Walton had purchased marijuana on three occasions, he sold marijuana and that a person had been seen carrying a 50-pound bag of marijuana towards Walton's house.[551]

However, the Court has held it to be an abuse of discretion for the trial judge to find that a 17-year-old defendant's arrest for stealing a $10 bill from the dashboard of a truck through an open window militated against giving this factor significant weight. The Court noted adjudication was withheld, and the defendant had successfully completed an alternative program.[552]

If the defendant announces this mitigating circumstance will not be relied upon, no evidence of nonviolent prior criminal activity can be elicited or introduced by the State. Neither should this circumstance be read to the jury or argued by either side.[553] In considering this circumstance, "prior" means prior to the commission of the murder, rather than prior to the defendant's sentencing.[554] The United States Supreme Court has held that, if the record is silent on this factor, no jury instruction need be given.[555] In other words, the defendant must either get a stipulation from the State that this factor exists or present some evidence to support it in order to be entitled to a jury instruction. Oral testimony by the defendant, or a family member is sufficient.

When a defendant has no significant prior criminal history, it is error not to find this mitigating circumstance.[556]

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[546]Hess v. State, 794 So. 2d 1249, 1265 (Fla. 2001); Davis v. State, 2008 WL 5245549 (Fla. Dec. 18, 2008).

[547]Booker v. State, 397 So.2d 910 (Fla. 1981); Quince v. State, 414 So. 2d 185, 188 (Fla. 1982).

[548]Lucas v. State, 568 So. 2d 18, 22 n.6 (Fla. 1990).

[549]Walton v. State, 547 So. 2d 622, 625 (Fla. 1989); Dennis v. State, 817 So. 2d 741, 763 (Fla. 2002).

[550]*Walton*, 547 So. 2d at 625.

[551]*Id.*

[552]Ramirez v. State, 739 So. 2d 568 (Fla. 1999).

[553]Maggard v. State, 399 So. 2d 973 (Fla. 1981).

[554]Scull v. State, 533 So. 2d 1137 (Fla. 1988); Harvey v. Dugger, 650 So. 2d (Fla. 1995).

[555]Delo v. Lashley, 507 U.S. 272, 113 S. Ct. 1222, 122 L. Ed. 2d 620 (1993).

[556]*Hess*, 794 So. 2d at 1265.

6.8.3 EXTREME MENTAL OR EMOTIONAL DISTURBANCE

The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

This mitigating circumstance does not require the establishment of insanity, or lack of legal responsibility.[557] It can be argued to the jury and the Court, with or without expert testimony, if the facts of the defendant's behavior show his mental condition contributed to his criminal behavior. For example, the fact that the defendant was intoxicated or under the influence of narcotics can support establishment of this factor.[558]

When experts testify as to this mitigating factor and their opinions conflict, the jury, and ultimately the sentencing judge, must reconcile these conflicts. If, after considering the conflicting testimony, the trial judge determines this mitigating factor does not exist, that finding will not generally be disturbed on appeal.[559] If the testimony is not in conflict, it may be error for the trial judge not to find this mitigating factor.[560] However, in a more recent opinion, the Supreme Court of Florida held, "Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case."[561] But there must be "other evidence" in the case that makes reconciliation "hard." In *Crook v. State*,[562] the uncontroverted evidence established the defendant had a well-documented head injury at age five when he was hit in the head with a pipe. After that time, he exhibited signs of neurological damage because he switched from being right-handed to being left-handed and was found not to be tracking visually. Testimony established that the defendant had frontal lobe brain damage that caused "difficulty in controlling his behavior and was prone to impulsive and aggressive behavior including rage." One expert opined that the defendant's brain was "broken." The trial court rejected the brain-damage testimony. The Court disagreed stating, "Whenever a reasonable quantum of competent, uncontroverted evidence has been presented, the trial court must find that the mitigation has been proved. All 'believable and uncontroverted mitigating evidence contained in the record must be considered and weighed in the sentencing process.' A trial court, however, may reject proffered mitigation if the record provides competent substantial evidence to support the trial court's decision."[563] The Court considers "brain damage" to be "a significant mitigating factor."[564]

In the *Crook* case, the defendant was also borderline mentally retarded. The decision in

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[557]Francis v. State, 808 So. 2d 110, 140 (Fla. 2002); Morgan v. State, 639 So. 2d 6, 13 (Fla. 1994); Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993); Huckaby v. State, 343 So. 2d 29, 33-34 (Fla. 1997).

[558]*See*, Holsworth v. State, 522 So. 2d 348 (1988).

[559]Martin v. State, 420 So. 2d 583 (Fla. 1982); Walker v. State, 707 So. 2d 300 (Fla. 1998).

[560]Mann v. State, 420 So. 2d 578 (Fla. 1982); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Knowles v. State, 632 So. 2d 62 (Fla. 1993).

[561]Foster v. State, 679 So. 2d 747, 755 (Fla. 1996). *See also* Holland v. State, 773 So. 2d 1065 (Fla. 2000); Wuornos v. State, 676 So. 2d 972 (Fla. 1996).

[562]Crook v. State, 813 So. 2d 68 (Fla. 2002).

[563]*Id*. at 76; Bevel v. State, 983 So. 2d 505 (Fla. 2008).

[564]*Id*. at 77.

Crook predated the United States Supreme Court's decision finding it unconstitutional to execute a mentally retarded defendant. It also predated the recently enacted Florida Statute that deals with the subject.[565] However, since Crook's I.Q. was around 70, he might not have met the requirements under Florida's statute. Interestingly, a Social Security evaluation established Crook was incapable "of maintaining employment within a competitive work setting due to his severe cognitive, emotional and behavioral defects." The trial court erred in failing to consider Crook's borderline mental retardation.

Crook's case was remanded for a new sentencing hearing and Crook was again sentenced to death. The Supreme Court remanded the case to the trial court for the imposition of a life sentence without possibility of parole because, in spite of strong aggravation--murder committed in the course of a sexual battery, pecuniary gain, and HAC--it was accompanied by extreme mitigation including frontal lobe brain damage, diminished control over inhibitions, disadvantaged and abusive home life, substance abuse that aggravated mental deficiencies and age of 20 at the time of the killing.[566]

The weight to be given this circumstance is up to the jury and the sentencing judge.

6.8.4 VICTIM PARTICIPATED OR CONSENTED

The victim was a participant in the defendant's conduct or consented to the act.

This mitigating circumstance is most often used in cases of self-defense. Even if the jury rejects the defense in the guilt phase, the jury or the sentencing judge may consider the victim's participation in mitigating the defendant's sentence.[567] In *Chambers*, the victim and the defendant voluntarily shared a long-standing, sado-masochistic relationship, which included severe and disabling beatings. The jury recommended a life sentence, but the trial judge sentenced the defendant to death. The Court reversed on *Tedder* grounds. Had the jury recommended a death sentence today, the result in *Chambers* may have had a different focus. "Domestic violence" is less tolerated today.

In *Wuornos v. State,*[568] the defendant, a prostitute, murdered one of her customers and attempted to invoke this mitigating circumstance because the victim "assumed the risk of bodily harm" when he sought the services of a prostitute. The Court stated:

> It would be absurd to construe this language as applying whenever victims have engaged in some unlawful or even dangerous transaction that merely provided the killer a better opportunity to commit murder, which the victim did not intend. What the language plainly means is that the victim has knowingly and voluntarily participated with the killer in some transaction that in and of itself would be likely to result in the victim's death, viewed from the perspective of a reasonable person. An example would be two persons participating in a duel, with one being killed as a result. The statute does not encompass situations in which the killer surprises the victim with deadly force, as happened here under any construction of the facts.[569]

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[565] FLA .STAT. § 921.137, *superceded* by Fla. R. Crim. P.3.202.

[566] Crook v. State, 908 So. 2d 350 (Fla. 2005).

[567] *See* Chambers v. State, 339 So. 2d 204 (Fla. 1976).

[568] *Wuornos,* 676 So. 2d at 975.

[569] *Id*.

This mitigator also applies in mercy killings if the victim asked to be killed.

6.8.5 VICTIM WAS AN ACCOMPLICE OR MINOR PARTICIPATION BY DEFENDANT

The defendant was an accomplice in the capital felony committed by another person, and his participation was relatively minor.

If there is any evidence to support this mitigating factor, it must be given to the jury to consider the appropriate weight.[570]

This circumstance is not applicable to a defendant who hires another person to commit the murder, even if the defendant is not present at the time of the homicide and does not participate in homicide.[571]

It is important to note this is different from the *Enmund* situation where the defendant is not eligible for the death penalty, but it would be appropriate in a case like *Tison* because, while the defendant may be death-eligible, he or she may have been a minor participant in the homicide. In such a case, the jury should be instructed on this mitigating circumstance, and it should be included in the sentencing order.

6.8.6 DEFENDANT UNDER EXTREME DURESS OR DOMINATION BY ANOTHER

The defendant acted under extreme duress or under the substantial domination of another person.

This circumstance occurs most often when one codefendant is significantly younger than another and under the domination of the older person[572] It could also apply in a mercy killing if the victim begs a defendant to kill him.

Generally, duress "refers not to internal pressures but rather to external provocations such as imprisonment or the use of force or threats." [573]

Failure to give this instruction has been held to be error in light of testimony that defendant suffered from pyromania, was borderline retarded, suffered from personality disorder, and at the time of the fire was overwhelmingly taken by impulse.[574]

When a defendant is committing a burglary and is "surprised" by the victim, the fact that the defendant "lost control" is not the type of duress this mitigating circumstance was designed to include.[575]

Likewise, this mitigator does not apply if, during a burglary, the victim gets loose from his bindings and attacks the defendant.[576]

A defendant is entitled to introduce evidence, such as evidence seized from a codefendant

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[570]Robinson v. State, 487 So. 2d 1040 (Fla. 1986).

[571]Atone v. State, 382 So. 2d 1205 (Fla. 1980).

[572]Witt v. State, 342 So. 2d 497 (Fla. 1977).

[573]Toole v. State, 479 So. 2d 731, 733 (Fla. 1985).

[574]*Id*. at 734.

[575]Blanco v. State, 706 So. 2d 7 (Fla. 1997).

[576]Walls v. State, 641 So. 2d 381 (Fla. 1994).

(weapons, masks, ammunition, sniper books), to support the theory that he was under the domination of another person or that his culpability was less than the codefendant.[577]

6.8.7 CAPACITY TO APPRECIATE CONDUCT SUBSTANTIALLY IMPAIRED

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

The fact that a defendant suffers from a mental infirmity, disease or defect short of insanity is not a defense to murder and is not relevant on the issue of guilt or innocence.[578]

Evidence of this circumstance is usually introduced when a defendant is not legally insane, but has mental problems that limit the capacity to conform conduct to the requirements of law.[579] If the trial judge does not recognize the distinction, the case will likely be sent back for reconsideration.[580] If there is any evidence to support this circumstance, the jury must be informed of it, and the judge must consider it in the sentencing order.[581] *Gudinas v. State*[582] is a case in which the Supreme Court of Florida sustained a judge's rejection of this mitigator, even when a doctor testified it existed. The doctor's opinion was based upon unsupported facts. So long as the sentencing court recognizes and considers this mitigating factor, the weight it is given will generally not be disturbed.[583] The Supreme Court has held evidence the defendant consumed alcoholic beverages, without more, does not require a jury instruction on the statutory mitigating circumstance of impaired capacity.[584]

6.8.8 AGE OF THE DEFENDANT

The age of the defendant at the time of the crime.

This mitigating circumstance does not apply to a defendant who is 17 years old or younger at the time of the murder. Those defendants are ineligible for the death penalty as a matter of law.[585] It applies to defendants who are death-eligible (over 18 years old).

It has been said that there is one thing about age: everybody has one. The age of a defendant, whether youthful, middle-aged, or aged is a relevant factor to consider in determining whether to

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[577]Rodgers v. State, 934 So.2d 1207 (Fla. 2006). (New penalty phase trial ordered.)

[578]State v. Nazario, 726 So. 2d 349 (Fla. 3d DCA 1999)

[579]Coday v. State, 946 So. 2d 988 (Fla. 2006).

[580]Ferguson v. State, 417 So. 2d 631 (Fla. 1982).

[581]*Knowles*, 632 So. 2d at 67 (Fla. 1993); Stewart v. State, 558 So. 2d 416 (Fla. 1990); *Mann*, 420 So. 2d at 581; *Huckaby*, 343 So. 2d at 33.

[582]Gudinas v. State, 693 So. 2d 953 (Fla. 1997).

[583]Quince v. State, 414 So.2d 185 (Fla. 1982); *Campbell v. State*, 571 So.2d 415 (Fla. 1990); *Gudinas,* 693 So.2d at 966.

[584]Duest v. State, 855 So. 2d 33 (Fla. 2003).

[585]Roper v. Simmons, 125 S. Ct. 1183, 1195-1196 (2005).

mitigate the defendant's punishment. The jury should be instructed on this mitigating circumstance any time it is requested by the defense.[586] In *Blackwood v. State,*[587] the defendant and the defendant did not request his age to be considered by the jury. The Court suggested it may have been error not to consider the defendant's age if he had requested it, but the error would have been harmless under the facts of that case. A clear reading of this case suggests, if the age mitigator is requested, it would be prudent for the trial judge to give it and weigh it in the sentencing order.[588] In the case of *Caballero v. State*,[589] the Court stated:

> The determination of whether age is a mitigating factor depends on the circumstances of each case, and is within the trial court's discretion. Scull v. State, 533 So. 2d 1137, 1143 (Fla.1988). Under our review for abuse of discretion, we will uphold the trial court's determination unless it is "arbitrary, fanciful, or unreasonable," so that no reasonable person would adopt the trial court's view. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla .1980). This Court has frequently held that a sentencing court may decline to find age as a mitigating factor in cases where the defendants were twenty to twenty-five years old at the time their offenses were committed. See Garcia v. State, 492 So. 2d 360, 367 (Fla.1986); Mills v. State, 476 So. 2d 172, 179 (Fla.1985).

Caballero was 20 when he murdered his victim. The trial court considered his age "in light of the evidence presented" and rejected age as a mitigating factor because Caballero did not demonstrate a lack of mental or emotional maturity, nor did he demonstrate that he was unable to take responsibility for or appreciate the consequences of his acts. The Court agreed. The Court has held that the age-mitigating factor *must* be found if the defendant is 17. Presumably, that decision now applies to defendants who are 18. It is the weight that can be diminished by evidence showing unusual mental or emotional maturity .[590] But, it is also clear "the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes."[591] In *Ramirez v. State*,[592] the Court held the lower court abused its discretion in giving "little weight" to the defendant's age at the time of the crime (one month over 17) when there was uncontroverted testimony the defendant was emotionally, intellectually, and behaviorally immature. In *Hunter v. State*,[593] the Supreme Court upheld the trial court's finding that the age mitigator, coupled with some mental defects, deserved only "some weight," even though the defendant was only 18 years of age.

The Court has recently stated that "(f)or a court to give a non-minor defendant's age

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[586]Archer v. State, 673 So. 2d 17 (Fla. 1996); *Campbell*, 679 So. 2d at 725-726.

[587]Blackwood v. State, 777 So. 2d 399, 410 (Fla. 2000).

[588]*See also* Mahn v. State, 714 So.2d 391 (Fla. 1998); *Gudinas*, 693 So.2d at 967 (Fla. 1997); Smith v. State, 492 So.2d 1063 (Fla. 1986).

[589]Caballero v. State, 855 So. 2d 655 (Fla. 2003).

[590]Ellis v. State, 622 So. 2d 991 (Fla. 1993); Morgan v. State, 639 So. 2d 6 (Fla. 1994); Shellito v. State, 701 So. 2d 837 (Fla. 1997).

[591]Urbin v. State, 714 So. 2d 411, 418 (Fla. 1998).

[592]Ramirez v. State, 739 So. 2d 568 (Fla. 1999).

[593]2008 WL 4352655 (Fla. Sept. 25, 2008).

significant weight as a mitigating circumstance at sentencing phase of capital murder case, the defendant's age must be linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems."[594] For instance, while the age of 21 chronological years is of little import by itself, if it is linked to "some other relevant characteristic of the defendant or the crime," such as significant emotional immaturity, it can become significant mitigation.[595]

In *Thompson v. State*,[596] the trial judge gave "considerable weight" to the defendant's intellectual deficit and mild mental retardation. This case was decided long before the United States Supreme Court declared the execution of mentally retarded persons to violate the Eighth Amendment.[597] The opinion in *Thompson* does not focus on the extent of the defendant's mental retardation but, assuming it is not severe enough to avoid the death penalty altogether, it should be considered with the age mitigator if the defendant is relatively young.

The "aging defendant" presents another problem. When is "advanced age" a mitigating circumstance? The Supreme Court of Florida has held age 54 not to be mitigating because age 54 is not "advanced enough to require special consideration."[598] The age of 58 years has also been held to lack mitigating significance.[599]

6.8.9 OTHER STATUTORY MITIGATING FACTORS

> The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

In 1996, the Florida Legislature added two entirely new aggravating circumstances.[600] It amended two other aggravators.[601] It also added this new mitigating factor.[602] This addition really did not add anything to Florida's body of case law, except that many mitigating circumstances that were previously classified as non-statutory mitigating circumstances will now be classified as statutory mitigating circumstances. No reported Florida case suggests that nonstatutory mitigating circumstances should be given different weight than statutory mitigating circumstances. The United States Supreme Court requires the jury and the judge to consider and weigh any aspect of the

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[594]Hurst v. State, 819 So. 2d 689 (Fla. 2002); Lebron v. State, 982 So. 2d 649 (Fla. 2008).

[595]Campbell v. State, 679 So. 2d 720 (Fla. 1996); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988); Lebron v. State, 982 So. 2d 649 (Fla. 2008).

[596]Thompson v. State, 648 So. 2d 692 (Fla. 1994).

[597]Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

[598]Agan v. State, 445 So. 2d 326 (Fla. 1984).

[599]Echols v. State, 484 So. 2d 568 (Fla. 1986).

[600]FLA. STAT. § 921.141 (5)(m)-(n).

[601]*Id.* at (5)(a), (d).

[602]*Id.* at (6)(h).

defendant's character or record, and any aspect of the offense that was mitigating.[603] The Legislature simply reclassified recognized nonstatutory "background" mitigating circumstances to be included as statutory mitigating circumstances. Among those included in the new statute are:

(1) Family background

Generally, family background problems can be considered as a mitigating circumstance.[604] Usually this mitigating circumstance becomes an issue worthy of significant weight when the defendant has a "troubled background with a family history of instability, poverty or abuse."[605] While it is unclear how much weight a "good family background" should be given, it is error to completely reject this mitigator as worthy of no weight.[606]

(2) Employment background

The fact the defendant was "a willing worker and a good employee" has been held to be mitigating.[607] So has the fact the defendant was a "thoughtful friend and employer."[608] A finding that the defendant is "a contributing member of society, a good employee, and a good and caring husband and father to his four children" has also been held to be mitigating.[609] In one case, a witness testified that the defendant's employers " reported that he was a good employee, a good kid, always respectful; never showed any signs of behavioral problems. . . . He had started to turn his life around. He obtained his GED and enrolled in the community college." [610] This mitigating circumstance is difficult to evaluate unless the defendant's employment is somehow connected with the murder. However, the Court has held employment background to be mitigating, and trial judges must consider it and discuss it in the sentencing order.

(3) Alcoholism, drug use/dependency

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[603]Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989); Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

[604]Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); Brown v. State, 526 So. 2d 903 (Fla. 1988); Boyett v. State, 688 So. 2d 308 (Fla. 1996); Wuornos v. State, 676 So. 2d 972 (Fla. 1996).

[605]*See* Parker v. State, 643 So. 2d 1032, 1035 (Fla. 1994); Besaraba v. State, 656 So. 2d 441, 446 (Fla. 1995); *Blanco*, 706 So. 2d at 7.

[606]Hurst v. State, 819 So. 2d 689 (Fla. 2002).

[607]Smalley v. State, 546 So. 2d 720 (Fla. 1989).

[608]Mordenti v. State, 894 So. 2d 161 (Fla. 2004).

[609]Hodges v. State, 885 So. 2d 338 (Fla. 2004).

[610]Chamberlain v. State, 881 So. 2d 1087 (Fla. 2004).

Alcoholism or drug abuse can be a mitigating factor.[611] But this mitigator is subject to the test of (1) whether the circumstance is truly mitigating, and (2) whether it is mitigating in the case at hand.[612] The Supreme Court of Florida has held the evidence that the defendant consumed alcoholic beverages, without more, does not require a jury instruction on the statutory mitigating circumstance of impaired capacity.[613] Questions that should be considered in weighing this mitigator are as follows: whether the defendant was under the influence of alcohol or drugs at the time of the murder and, this fact somehow lessened the defendant's moral culpability; whether the defendant's addiction to alcohol or drugs is in the remote past and had nothing to do with the murder; and whether past alcohol or drug abuse have caused mental difficulties that would tend to mitigate the murder.

(4) Military service

The fact the defendant has military service in his background is mitigating.[614] However, a discharge under less than honorable conditions may make counsel decide not to pursue this mitigator.[615] The Eleventh Circuit Court of Appeals has held military service to be a "significant" mitigating circumstance.[616]

(5) Mental problems that do not qualify under other statutory mitigating circumstances

This mitigating circumstance covers a variety of different situations. It has been applied in a case where a psychologist referred to the defendant as an "emotional cripple" who was brought up in a negative family setting.[617] It applies in a case involving posttraumatic stress disorder as a result of extended sexual abuse by the defendant's stepfather.[618] (Both are one word)

Usually, the testimony or other evidence establishing this mitigating circumstance does not rise to the level of "extreme" mental or emotional disturbance, or "substantial" incapacity. It is something less than "extreme" or "substantial." However, the evidence must still be considered by the jury and the judge as a mitigating circumstance. The trial judge must allow the evidence to be

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[611]Demps v. Dugger, 874 F. 2d 1385 (11th Cir. 1989); Miller v. State, 770 So. 2d 1144 (Fla. 2000); Merck v. State, 763 So. 2d 295 (Fla. 2000); Boyett v. State, 688 So. 2d 308 (Fla. 1996); Hall v. State, 541 So. 2d 1125 (Fla. 1989).

[612]*Knight*, 726 So. 2d at 423.

[613]Duest v. State, 855 So. 2d 33 (Fla. 2003).

[614]*See Demps,* 874 F. 2d at 1385; Card v. State, 803 So. 2d 613 (Fla. 2001).

[615]Peterka v. State, 890 So. 2d 219 (Fla. 2004).

[616]Jackson v. Dugger, 931 F. 2d 712 (llth Cir.1991).

[617]Amazon v. State, 487 So. 2d 8 (Fla. 1986).

[618]Jackson v. State, 704 So. 2d 500 (Fla. 1997).

presented, and it must be considered in the sentencing order.[619] In *Stewart v. State*,[620] the Court stated that it was not error for the judge to find the statutory mental mitigators did not exist, but it *was* error for the judge not to find the same evidence as nonstatutory mitigation. Depending upon the facts, it would generally be appropriate to give less weight to mental problems that do not rise to the level of "extreme" or "substantial."

(6) Abuse of defendant by parents (physical, mental, or sexual)

It is well established that a disadvantaged childhood, abusive parents, and lack of education and training, are mitigating in nature. Although in some cases family background and personal history may be given little weight, such evidence must be considered by the Court and discussed in the sentencing order. Mitigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant that might militate against the appropriateness of the death penalty for that defendant.[621] The nonstatutory mitigator of defendant's abusive childhood should not be rejected, even if the defendant demonstrated good behavior in adult life.[622]

(7) Contribution to community or society; charitable or humanitarian deeds

The Florida Supreme Court has held these circumstances to be mitigating.[623] In *Campbell*, the Court reminded trial judges to discuss and consider each mitigating circumstance in the sentencing order. The opinion requires the court to give a mitigating circumstance some weight if the court finds it to exist. However, the Court later receded from that position.[624] Generally, the relative weight to be given to a mitigating factor is the "province of the sentencing court."

(8) The quality of being a caring parent

The fact that a defendant is the father of two children and cared for them may be a mitigating factor, but it is probably not significant enough to justify a new penalty phase hearing due to the failure of counsel to present this fact to the jury.[625] And the fact the defendant is a drug addict with two children does not provide sufficient mitigation to outweigh three valid aggravating circumstances.[626]

This mitigating circumstance should be rejected if the evidence does not support it. For

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[619]See Booker v. Dugger, 922 F. 2d 633 (llth Cir.1991); See also Merck v. State, 763 So. 2d 295 (Fla. 2000).

[620]Stewart v. State, 620 So. 2d 177 (Fla. 1993).

[621]*Boyett*, 688 So. 2d at 310; *Brown*, 526 So. 2d at 908.

[622]Walker v. State, 707 So. 2d 300 (Fla. 1998).

[623]*Campbell*, 571 So. 2d at 420. *See also* Franklin v. Lynaugh, 487 U.S. 164 (1988) (O'Connor, J., concurring).

[624]Trease v. State, 768 So. 2d 1050 (Fla. 2000). See §6.17.8 which discusses the content of sentencing orders.

[625]Tafero v. Wainwright, 796 F. 2d 1314 (llth Cir.1986).

[626]Holton v. State, 573 So. 2d 284 (Fla. 1991).

instance, witnesses who testify to this mitigating circumstance should at least have firsthand knowledge of how many children the defendant has and whether he has provided parenting and support for them.[627]

(9) Defendant's regular church attendance; Defendant's religious devotion; Defendant's position of being a deacon in the church

This type of evidence has been held to be a nonstatutory mitigating circumstance. If presented, it should be considered and discussed in the sentencing order.[628]

6.9.0 NONSTATUTORY MITIGATING CIRCUMSTANCES

The Eighth and Fourteenth Amendments to the Constitution require the sentencing judge to consider as mitigating any aspect of a defendant's character or record and any of the circumstances of the offense the defendant proffers as a basis for a sentence less than death.[629]

The sentencing judge must instruct the jury that mitigating factors are not limited by statute. A new sentencing hearing will likely be ordered if the instruction is not given.[630] The error in failing to give the instruction is subject to harmless error analysis.[631] However, the Eleventh Circuit Court of Appeals generally applies harmless error to cases in which a strategic decision was made not to present mitigating evidence or where no mitigating evidence could have been produced.[632] Florida's Standard Jury Instructions are adequate to satisfy this requirement.

A wide variety of circumstances have been held to be mitigating under this category. The list is limited only by the imagination of counsel. There is often an overlap on circumstances involving "background." Sometimes these circumstances could be either statutory or nonstatutory.

The following circumstances have been held to be nonstatutory mitigating circumstances:

6.9.1 DEFENDANT'S REMORSE

The fact the defendant has expressed remorse is a mitigating circumstance.[633] The remorse must be genuine. Merely expressing "sorrow" for the victim is not the same as remorse and is not

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[627]Douglas v. State, 878 So. 2d 1246 (Fla. 2004).

[628]*Walker*, 707 So. 2d at 318.

[629]*Lockett*, 438 U.S. at 604-605; *Eddings*, 455 U.S. at 112.

[630]Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987);Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989); White v. State, 729 So. 2d 909 (Fla. 1999).

[631]Hitchcock, supra, note 437; Bottoson v. State, 674 So. 2d 621 (Fla 1996).

[632]Booker v. Dugger, 922 F. 2d 633 (11th Cir. 1991).

[633]*Boyett,* 688 So.2d at 310; *Smalley*, 546 So.2d at 723.

mitigating.[634] The State can rebut this mitigating circumstance by showing lack of remorse.[635] In *Agan v. State*,[636] the trial judge mentioned the defendant's lack of remorse in his sentencing order. The Supreme Court of Florida held this unfortunate statement was made "not in connection with aggravating factors but rather in connection with the finding that there were no mitigating circumstances." The judge referred to the absence of remorse in support of his rejection of defense counsel's arguments for mitigation on the ground of mental or emotional disturbance and on the ground of appellant's prompt confession and plea of guilty. Thus, the evidence was used, not in aggravation, but only to negate mitigation."[637]

Lack of remorse is not an aggravating circumstance. For example, it is error to admit the testimony of a former cellmate who related that the defendant said he "thought it was no big deal . . . that he killed three people."[638]

6.9.2 DEFENDANT'S POTENTIAL FOR REHABILITATION (LACK OF FUTURE DANGEROUSNESS)

Three states, Colorado,[639] Maryland[640] and New Mexico,[641] include lack-of-future-dangerousness as a statutory mitigating circumstance. The Texas statute requires the jury to find future dangerousness before considering the death penalty as a possible penalty. These states have substantial case law explaining how to prove or disprove future dangerousness or the lack of it. Looking at the defendant's past record is one method and expert testimony is another. Expert testimony in this area is not very reliable. Courts in two states, California[642] and Nevada,[643] have rejected such testimony. The United States Supreme Court has held that the use of this type of testimony does not violate the Constitution.[644]

The lack of future dangerousness is a nonstatutory mitigating factor in Florida.[645] Care should be used in allowing evidence on this issue in light of the difficulty in predicting future

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[634]Beasley v. State, 774 So. 2d 649 (Fla. 2000).

[635]Walton v. State, 547 So. 2d 622 (Fla. 1989).

[636]Agan v. State, 445 So. 2d at 328.

[637]*Id*.

[638]Cooper v. State, 856 So. 2d 969 (Fla. 2003).

[639]COLO. REV. STAT. § 18-1.3-1201(4)(k).

[640]MD. CODE ANN. art. 27 § 413 (1957).

[641]N.M. Stat. Ann. § 31-20A-6 (Michie 1978)

[642]People v. Lucerno, 750 P.2d 1342 (Cal. 1988). (Lucerno also holds if the defense introduces such expert testimony, the State may introduce experts in rebuttal.)

[643]Redmen v. Nevada, 828 P.2d 395 (Nev. 1992).

[644]Barefoot v. Estelle, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983).

[645]*Hitchcock*, 481 U.S. at 396; *Lockett*, 438 U.S. at 604-605; Delap v. Dugger, 890 F. 2d 285 (11th Cir. 1989)*;* Valle v. State, 502 So.2d 1225 (Fla. 1987).

conduct and the temptation on the part of the prosecution to overplay rebuttal evidence.

6.9.3 SENTENCE OF CODEFENDANT TO LIFE OR SOME LESSER TERM

This mitigating circumstance should be submitted to the jury only when there is an issue of fact as to which codefendant is the most culpable. If the question is--"Who actually killed the decedent?--it may be possible to resolve the question by a special verdict during the guilt phase. If it is unclear which codefendant is the most culpable, it is unlikely that the death penalty will ultimately be carried out.[646]

The defendant raised this issue in *Demps v. Dugger*.[647] In that case there were three codefendants. The other two were sentenced to life in prison but Demps was sentenced to death. In observing the differences in the defendants, the Court noted that ". . . only Demps had the loathsome distinction of having been previously convicted of the first-degree murder of two persons and the attempted murder of another, escaping the gallows only through the intervention of *Furman v. Georgia."*[648]

This mitigating circumstance constitutes "newly discovered evidence" if an equally culpable codefendant is sentenced to life after the defendant is sentenced. In fact, if a codefendant receives a life sentence, it may be impossible to give a death sentence to an equally culpable, or less culpable, codefendant regardless of the aggravation and mitigation.[649] If the defendant is more culpable than a codefendant who gets a life sentence or the codefendant pled to a lesser sentence, the codefendant's life sentence should be discussed as a mitigating factor in the sentencing order.[650] If the codefendant is allowed to plea to a lesser offense in return for giving testimony, the defendant and the codefendant have not been convicted of the same offense and the death sentence cannot be disparate.[651]

6.9.4 GOOD JAIL CONDUCT - INCLUDING CONDUCT ON DEATH ROW

Good jail conduct can be a mitigating factor. The weight to be given this factor depends upon just how "good" the conduct has been. In *Skipper v. South Carolina*,[652] the United States Supreme Court reversed a death sentence because the trial judge failed to allow testimony of jailers and a regular visitor regarding petitioner's good behavior during the seven months he spent in jail awaiting trial. This decision by the trial judge deprived the defendant of his right to place before the

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[646]State v. Mills, 788 So. 2d 249 (Fla. 2001); Mills v. State, 786 So. 2d 547 (Fla. 2001), Anstead, J., dissenting.

[647]*Demps*, 514 So.2d at 1093, 1094.

[648]*Id.* at 1093.

[649]Scott v. Dugger, 604 So. 2d 465 (Fla. 1992)*;* Puccio v. State*,* 701 So. 2d 858 (Fla. 1997)*;* Hazen v. State*,* 700 So. 2d 1207 (Fla. 1997)*;* Fernandez v. State, 730 So. 2d 277 (Fla. 1999); Ray v. State, 755 So. 2d 604 (Fla. 2000).

[650]Evans v. State, 808 So. 2d 92 (Fla. 2002); Sexton v. State, 775 So. 2d 923 (Fla. 2000); Gordon v. State*,* 704 So. 2d 107 (Fla. 1997).

[651]Knight v. State, 784 So. 2d 396 (Fla. 2001).

[652]Skipper v. S.C., 476 U.S. 1 (1986). *See also* Demps v. Dugger*,* 874 F. 2d 1385 (11th Cir. 1989).

sentencer relevant evidence in mitigation of punishment.

Expert testimony is often used to establish this mitigating circumstance. The fact that a defendant generally does well in a structured environment, such as a jail, can be rebutted by a showing of failure "to conform to social norms with respect to lawful behaviors as indicated by repeated lying;" aggressiveness, such as physical fights or assaults; display of a reckless disregard for the safety of himself or others; and poor disciplinary record while incarcerated on another charge.[653]

6.9.5 VOLUNTARY CONFESSION/COOPERATION WITH POLICE

In *Wilkerson v. Collins,*[654] the defendant took the police to the crime scene and confessed to the crime. He contended that such acceptance of responsibility for one's criminal conduct and cooperation with police historically had been treated as character evidence, which is entitled to consideration in mitigation. He was permitted to argue this mitigation before the jury, but the trial court refused to instruct the jury that he was entitled to have his conduct considered as mitigating. If this case had been tried in Florida, it would have been error not to instruct the jury as requested. But *Wilkerson* is a Texas case, and the odd result is the product of the Texas death penalty scheme.

Usually, this mitigating circumstance acts in combination with other nonstatutory mitigating circumstances to overcome the aggravating circumstances. In *Caruthers v. State*,[655] the Supreme Court of Florida disallowed two of the three aggravating circumstances. The disallowance left only the felony-murder aggravator. The Court determined the death penalty to be disproportionate and ordered the trial court to impose a life sentence. The court found the evidence established "one statutory mitigating circumstance, no significant history of prior criminal activity, and the nonstatutory circumstances of his voluntary confession, his conditional guilty plea subject to a life sentence, mutual love and affection of family and friends, his remorse, and his encouragement of his younger brother to do well and avoid violating the law.[656]

Boyett v. State,[657] was a jury override case. The judge found two aggravating factors, cold, calculated and premeditated and felony-murder. The jury recommended a life sentence. The trial judge sentenced Boyett to death. The Supreme Court of Florida reversed observing that the evidence of mitigation "includes Boyett's age (18 at the time of the incident); past history of sexual abuse; ongoing, significant emotional and psychological problems; traumatic family life; history of drug abuse; past relationship with the victim; remorse; and cooperation with law enforcement officials."

6.9.6 DEFENDANT'S LACK OF INTENT TO KILL

This mitigating circumstance usually applies to a codefendant accused of felony-murder who did not actually kill the victim but who is not excluded by *Enmund/Tison*. However, it can easily apply to a case where an armed robbery goes bad, and the defendant accidentally or purposely kills someone without premeditation. Because of its ongoing controversy and general disrepute among legal scholars, trial judges need to be aware of the problems and limitations of the felony-murder rule.

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[653]Bevel v. State, 893 So. 2d 505 (Fla. 2008).

[654]Wilkerson v. Collins, 950 F. 2d 1054 (5th Cir.1992).

[655]Caruthers v. State, 465 So. 2d 496 (Fla. 1985).

[656]*Id*. at 498.

[657]*Boyett*, 688 So. 2d at 310.

The case of *Aaron v. State*[658] traces the unfortunate historical events that created the artificial concept that has been known for centuries as the felony-murder rule. The felony-murder rule is a harsh rule that requires a presumption of premeditation if a homicide occurs during the course of certain felonies. Application of the rule automatically raises a homicide that would otherwise be second-degree murder or manslaughter to first-degree murder. In Florida, the felony-murder rule has been taken to its outermost limits. The Florida Legislature has enhanced criminal responsibility through the use of the rule in second-degree murder and third-degree murder cases, as well as first-degree murder.[659] There is even a "felony-causing-injury" statute that criminalizes "attempted felony-murder," a nonsensical, illogical crime.[660]

The felony-murder rule has questionable origins and has certainly outlasted its usefulness. Many courts have condemned it as an outmoded throwback to medieval times. The English Parliament abolished it in that country in 1957.[661]

Courts and commentators in this country have also taken the felony-murder rule to task. For instance,

> Felony-murder has never been a static, well-defined rule at common law, but throughout its history has been characterized by judicial reinterpretation to limit the harshness of the application of the rule. Historians and commentators have concluded that the rule is of questionable origin and that the reasons for the rule no longer exist, making it an anachronistic remnant, "a historic survivor for which there is no logical or practical basis for existence in modern law. [662]

In *People v. Phillips*,[663] the Court stated:

> We have thus recognized that the felony-murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application. Indeed, the rule itself has been abandoned by the courts of England, where it had its inception. It has been subjected to severe and sweeping criticism.

The use of the felony-murder rule as an aggravating factor in capital murder cases is discussed in § 6.7.5 of these materials. However, balancing this aggravator against the mitigating circumstance of "lack of intent to kill" continues to be a problem for trial judges, as well as for the Supreme Court.

The fact that a homicide occurred during the commission of certain felonies automatically establishes an aggravating circumstance. This, of course, is not necessarily true in cases of premeditated murder. Not all premeditated murders meet the test of being cold, calculated and

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[658]Aaron v. State, 299 N.W.2d 304 (Mich. 1980).

[659]FLA STAT. § 782.04.

[660]FLA. STAT. § 782.051.

[661]England's Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 1.

[662]Moreland, *Kentucky Homicide Law With Recommendations*, 51 Ky. L.J. 59, 82 (1962). *See also*, Fletcher, *Reflections on Felony-murder*, 12 Sw. U. L. Rev. 413 (1980-1981); Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 N. Y. L. Forum 565, 586 (1966).

[663]People v. Phillips, 64 Cal.2d 574, 582-583, 51 Cal.Rptr. 225, 414 P.2d 353, 360 (1966).

premeditated. Nevertheless, the Supreme Court of Florida has upheld the constitutionality of the felony-murder aggravator.[664] Courts in other states do not agree.[665]

One of the obvious problems in applying the felony-murder rule as an aggravating circumstance is the fact it often can be countered with the mitigating circumstance of "lack of intent to kill." Normally, one would think these two factors would cancel each other out since the felony-murder rule has already raised the homicide from a lesser offense to first-degree murder. But that is not always the case. Emotional reaction to some of these cases tends to cloud the judicial process.[666]

First-degree murder cases are not pretty. There is at least one dead body in every case, usually accompanied by gory details of a senseless killing. It is hard to remain objective when the facts are horrendous, as they usually are. Child killings are particularly troublesome because of the loss of innocent life and the fact the felony-murder rule applies to every killing involving aggravated child abuse. The Supreme Court of Florida has provided a curious analysis of the weight to be given when aggravated child abuse is the felony that must be balanced against "lack of intent to kill."

In *Lukehart v. State*,[667] the defendant killed a five-month-old child while living with the child's mother. The circumstances surrounding the death are somewhat obscure, but the evidence did not establish the defendant intended the death of the child. The felony-murder aggravator was established during the penalty phase, as well as the prior violent felony of aggravated child abuse of a former girl friend's baby, and the fact the defendant was on probation for that offense at the time of the homicide.[668] The trial court imposed the death sentence.

On appeal, Lukehart argued the death penalty was disproportionate because most child murder cases in which the death penalty has been imposed included either sexual battery or were heinous, atrocious or cruel. However, the Court reasoned that "this case is significantly aggravated by the existence of the prior conviction for felony-child abuse" and affirmed.[669]

Justice Anstead dissented and pointed out the Court's proportionality review requires a determination of whether a case is among the most aggravated and least mitigated of murder cases. He went on to state, "A review of the majority opinion reflects that it has erroneously focused only on the first prong of this analysis. Further, it appears that based solely upon the fact that the victim in this case was a five-month-old child, the majority has established a rule that death is automatically the appropriate penalty without regard to the balance of aggravation and mitigation that is required."[670]

A couple of months after *Lukehart* was decided, the Court was called upon to review the

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[664]Atwater v. State, 788 So. 2d 223 (Fla. 2001).

[665]Tennessee v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992); Enberg v. Meyer, 820 P.2d 70 (Wyo. 1991); State v. Cherry, 257 S.E.2d 551 (N.C. 1979).

[666]Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

[667]Lukehart v. State, 776 So. 2d 906 (Fla. 2001).

[668]The "felony probation" aggravator was stricken on appeal as being applied ex post facto, but the Supreme Court found its consideration by the trial court to be harmless error in light of the fact it was merged with the prior violent felony aggravator.

[669]Lukehart, *supra* note 510, at 926.

[670]*Id*. at 928.

death sentence in another case involving a child victim. In *Stephens v. State*,[671] the defendant and other unknown individuals broke into a house in the afternoon while a number of people were present. The defendant was armed with a 9mm automatic pistol. He stood near the three-year-old victim and, upon seeing the weapon, the child's mother physically confronted him. The defendant struck the victim's mother on the bridge of the nose and demanded "money and weed" from the others present. After the occupants of the house were robbed, they were placed in the bathroom while the defendant and his companions made their escape in an automobile stolen from one of the victims. The child victim was taken along as "insurance." The automobile was a Kia with roll-down windows and pull-up locks on the doors. The Kia was abandoned some distance from the crime scene in the sunshine, with the windows rolled up and the doors closed, but unlocked. The temperature was in the low 80's. The child victim died in the automobile of asphyxiation or hyperthermia. The trial judge imposed the death penalty and the Supreme Court, in a 4-3 decision, affirmed.

Justice Anstead, joined by Justices Shaw and Pariente, dissented. Justice Anstead pointed out that, but for the felony-murder rule, the defendant would have probably been guilty of manslaughter.[672] He stated:

> Importantly, it is undisputed here that neither the jury nor the trial judge could conclude that the defendant intended to kill the child. Indeed, in an unusual, but significant gesture, the State agreed that the trial court could consider in mitigation statements made by the jury foreman "that the jury generally did not believe that the Defendant intended to kill." In addition to recording this agreement in its sentencing order the trial court also concluded under its analysis of "Nonstatutory Mitigating Factors" that because "the Court cannot, beyond a reasonable doubt, find that the defendant intended to kill, requires the Court to give this factor significant weight, which it has done."
>
> However, the majority has chosen to ignore this critical factor of lack of an intent to kill even while relying solely on a theory of felony-murder to sustain the conviction for first-degree murder. While the legal fiction of substituting the commission of a felony in place of intent may technically qualify this case as a first-degree murder case, it still leaves us with a death under circumstances that Florida courts have consistently treated as manslaughter or some other lesser degree of homicide. *See, Mudd*. We should hesitate before making such a giant leap and elevating a crime ordinarily characterized as culpable negligence and prosecuted as manslaughter, to one deserving of the death penalty. Having done so, for example, we will be hard pressed in the future not to extend this reasoning to other comparable circumstances, such as reckless driving in flight from a robbery.[673]

The fact the defendant did not intend to kill is probably the underlying basis for disapproving death sentences when the facts only support the felony-murder aggravator. But even when there are other aggravating circumstances present, the lack of intent to kill should be discussed in the sentencing order and given appropriate weight. Trial judges should be prepared to justify it in the

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[671]Stephens v. State, 787 So. 2d 747 (Fla. 2001).

[672]*Cf.* Mudd v. State, 638 So. 2d 124 (Fla. 1st DCA 1994).

[673]Stephens, 787 So. 2d at 763.

sentencing order if more weight is given to the felony-murder aggravator than to the "lack of intent to kill" mitigator.

The felony-murder rule controversy has recently caused legislative displeasure. The subject was the definition of burglary.

At common law, Burglary was defined as "breaking and entering the dwelling house of another at night with the intent to commit a felony therein."[674] The Florida Legislature has, over the years, broadened the definition of burglary to encompass numerous property crimes. Until recently, the definition of burglary in Florida was "entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain."[675] The definition has now been expanded to clarify what the Legislature meant by the phrase "licensed or invited to enter or remain."[676]

On August 24, 2000, the Supreme Court issued an opinion in *Delgado v. State*.[677] Delgado and a business partner named Lamellas bought a dry-cleaning business from Thomas and Violetta Rodriguez. Delgado became dissatisfied with the transaction and went to the Rodriguez' home to discuss the matter. He was invited into the home where an altercation occurred that resulted in the death of both Mr. and Mrs. Rodriguez. The State prosecuted on the basis of felony-murder, the underlying felony being burglary, theorizing that Delgado had "remained" in the dwelling after permission had been withdrawn expressly or by implication. The jury convicted Delgado, and the trial judge sentenced him to death.

The Supreme Court reviewed the history of the crime of burglary, considered the effect of the "remaining in" language in other jurisdictions, including the Model Penal Code, and receded from several reported cases. The Court held that before "remaining in" can become burglary, it must be done "surreptitiously." This perfectly reasonable interpretation has the effect of excluding many minor altercations between neighbors or intoxicated guests and their hosts and recognizes the narrow construction the felony-murder rule deserves.

The Florida Legislature immediately took steps to specifically overrule *Delgado*. During the 2001 Legislative Session, the statute was amended as follows:

> Be It Enacted by the Legislature of the State of Florida:
> Section 1. Section 810.015, Florida Statutes, is created to read:
> 810.015. Legislative findings and intent; burglary
>
> (1) The Legislature finds that the case of Delgado v. State, Slip Opinion No. SC88638 (Fla. 2000) was decided contrary to legislative intent and the case law of this state relating to burglary prior to Delgado v. State. The Legislature finds that in order for a burglary to occur, it is not necessary for the licensed or invited person to remain in the dwelling, structure, or conveyance surreptitiously.
>
> (2) It is the intent of the Legislature that the holding in Delgado v. State, Slip Opinion No. SC88638 be nullified. It is further the intent of the Legislature

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[674]Drew v. State, 773 So. 2d 46. (Fla. 2000); *See* 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 8.13, at 464 (1986).

[675]Fla. Stat. ch. 810.02 (1999).

[676]*Id*. Fla. Stat. 810.015 (2004).

[677]Delgado v. State, 776 So. 2d 233 (Fla. 2000).

> that s. 810.02 (1)(a) be construed in conformity with Raleigh v. State, 705 So. 2d 1324(Fla. 1997); Jimenez v. State, 703 So. 2d 437(Fla. 1997); Robertson v. State, 699 So. 2d 1343(Fla. 1997); Routly v. State, 440 So. 2d 1257(Fla. 1983); and Ray v. State, 522 So. 2d 963(Fla. 3rd DCA, 1988). This subsection shall operate retroactively to February 1, 2000.
>
> (3) It is further the intent of the Legislature that consent remain an affirmative defense to burglary and that the lack of consent may be proven by circumstantial evidence.[678]

So, now that the Legislature has decided to show it intends for some of the most minor conduct to become serious felonies, what are trial judges to do about it? Trial judges are supposed to follow the law, including legislation, wise or otherwise. But the Supreme Court of Florida has ruled the language of the statute means something different than the Legislature says it means.

This problem was addressed by the Court in *State v. Ruiz*.[679] The court held that, by its terms, the amended statute does not apply to cases arising prior to February 1, 2000. However, the Court declined to recede from *Delgado* and held that "a crime committed inside a dwelling, structure or conveyance of another cannot, in and of itself, establish the crime of burglary." Stated differently, the State cannot use "the criminal act to prove both intent and revocation of the consent to enter."[680]

This holding avoids absurd results such as charging someone with burglary for smoking marijuana, gambling, or writing a bad check while an invitee within a residence. It also restricts the opportunity to expand the use of the felony-murder rule to an invitee who commits second-degree murder.

6.9.7 THE DEFENDANT HAS THE SUPPORT OF FRIENDS AND FAMILY

Evidence of positive "family relationships and the support (the defendant) provided his family are admissible as nonstatutory mitigation."[681] It is error not to consider this mitigation, but the error may be harmless if these factors are otherwise considered.[682] The reverse, negative family relations such as abandonment as a child, are not always mitigating.[683]

6.9.8 THE DEFENDANT HAS ARTISTIC ABILITY

While this has been recognized as a nonstatutory mitigating factor, it is not "compelling" and may receive little weight.[684]

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[678]Fla. Stat. ch. 810.015 (2004).

[679]State v. Ruiz, 863 So. 2d 1205 (Fla. 2003).

[680]*Id*. at 1211.

[681]Brown v. State, 755 So. 2d 616, 637 (Fla. 2000).

[682]Card v. State, 803 So. 2d 613 (Fla. 2001).

[683]See Franqui v. State, 804 So. 2d 1185, 1196 (Fla. 2001).

[684]Evans v. State, 808 So. 2d 92 (Fla. 2002).

6.10.0 CIRCUMSTANCES NOT CONSIDERED MITIGATING

The following factors have been determined *not* to constitute mitigating factors:

6.10.1 RESIDUAL OR LINGERING DOUBT

In *Oregon v. Guzek*,[685] the United States Supreme Court held there is no Eighth or Fourteenth Amendment right to present evidence of "residual doubt." In an opinion by Justice Breyer, the Court stated:

> That evidence is *inconsistent* with Guzek's prior conviction. It sheds no light on *the manner* in which he committed the crime for which he has been convicted. Nor is it evidence that Guzek contends was unavailable to him at the time of the original trial. And, to the extent it is evidence he introduced at that time, he is free to introduce it now, albeit in transcript form. Ore.Rev.Stat. § 138.012(2)(b) (2003). We can find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right to introduce new evidence of this kind at sentencing.

Justice Breyer's opinion sets forth three reasons why "residual doubt" evidence is not allowed in the penalty phase. The first reason is sentencing traditionally focuses on "how" and not "whether" the defendant committed the crime. Second, "the parties previously litigated the issue to which the evidence is relevant-whether the defendant committed the basic crime. The evidence thereby attacks a previously determined matter in a proceeding at which, in principle, that matter is not at issue. The law typically discourages collateral attacks of this kind." The third reason given is peculiar to Oregon law. In Oregon, the defendant may introduce any portion of the transcript of the guilt phase trial into evidence in the penalty phase.[686] Therefore, if evidence of alibi, self defense or any other defense was presented to the jury, this evidence can be reconsidered by the jury.

This aspect of the opinion drew criticism from Justice Scalia. He would reject all Eighth Amendment residual doubt claims. He also rejected the third reason in the Court's opinion. He referred to it as "an analytical misfit in the company of the other two." He stated that if a third reason was needed "a better candidate would be the claim we consider here finds no support in our Nation's legal history and traditions." Justice Scalia then quoted Justice Marshall's 1986 dissent where he stated, "few times in which any legitimacy has been given to the power of a convicted capital defendant facing the possibility of a death sentence to argue as a mitigating factor the chance that he might be innocent."[687]

Prior to *Oregon v. Guzek*, the Supreme Court of Florida repeatedly held that "lingering doubt" is not a mitigating factor.[688] The Court has recently reaffirmed that position.[689] A jury

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[685]546 U. S. 517, 126 S. Ct. 1226, 163 L. Ed. 2d 1112 (2006).

[686]Ore.Rev.Stat. § 138.012(2)(b) (2003).

[687]Lockhart v. McCree, 476 U. S. 162,205, 106 S. Ct. 1758, 90 L. Ed. 2d 155 (1986) (dissenting opinion).

[688]Franklin v. Lynaugh, 487 U.S. 164 , 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988); King v. State, 514 So. 2d 354 (Fla. 1987); Way v. State, 760 So. 2d 903 (Fla. 2000); Darling v. State, 808 So. 2d 145 (Fla. 2002); Duest v. State, 855 So. 2d 33 (Fla. 2003).

[689]Reynolds v. State, 934 So. 2d 1128 (Fla. 2006).

instruction on lingering doubt is not allowed.[690]

The Supreme Court of Florida did not reject "lingering doubt" as a mitigating factor by unanimous decision. In *Way v. State*,[691] Justice Pariente stated,

> I write separately to address Way's point on appeal that this Court should recede from its prior decisions that preclude the consideration of "lingering" or "residual" doubt as a nonstatutory mitigator--especially because this was a resentencing proceeding in which the jury did not decide the issue of guilt.
>
> Many of the concerns over the death penalty have focused on the possibility of executing an innocent person--a spectre that runs contrary to the interests of justice. Although the United States Supreme Court has rejected the argument that the Eighth Amendment requires that a capital sentencing jury be instructed that it can consider lingering doubt evidence in mitigation, see Franklin v. Lynaugh, 487 U.S. 164, 173-74, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988), in view of the finality of the death penalty, there are some important reasons why our responsibility to independently review death sentences might extend to an evaluation of the evidence supporting guilt. As then-Justice Barkett noted in her specially concurring opinion in Melendez v. State, 498 So. 2d 1258, 1262 (Fla.1986). While a jury verdict of guilt based on competent substantial evidence is sufficient for upholding convictions and prison sentences, I do not believe it is always enough for upholding a death sentence. There are cases, albeit not many, when a review of the evidence in the record leaves one with the fear that an execution would perhaps be terminating the life of an innocent person.[692]

Earlier, Justice Thurgood Marshall made similar observations:

> There is certainly nothing irrational--indeed, there is nothing novel--about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake. The horror of sending an innocent defendant to death is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice. As such it has been raised as a valid basis for mitigation by a variety of authorities.[693]

Some states, notably Tennessee, include lingering doubt among nonstatutory mitigating circumstances.[694]

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[690]Franklin v. Lynaugh, 487 U.S. 164 , 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988); Duest v. State, 855 So. 2d 33 (Fla. 2003).

[691]Way v. State, 760 So. 2d 903 (Fla. 2001).

[692]*Id*. at 922.

[693]Heiney v. Florida, 469 U.S. 920, 921-22, 105 S. Ct. 303, 83 L. Ed.2d 237(1984) (dissenting from denial of certiorari).

[694]Hartman v. State, 42 S.W.3d 44 (Tenn. 2001).

The Supreme Court of Florida has tacitly recognized the "lingering doubt" concept on several occasions by calling it "newly discovered evidence." Usually, "newly discovered evidence" issues are brought in postconviction-relief proceedings.

The state attorneys wish that every homicide would occur in the presence of two innocent, uninterested eyewitnesses who are the pillars of the community. Unfortunately, it never happens that way. Often the quality of the evidence rather than the quantity of it hinders making a case. For instance, forensic evidence may become less than trustworthy due to mistake, fraud or unavailability. Witnesses die or disappear and memories fade over time. When this happens, prosecutors have to make concessions or use evidence that has questionable reliability. Accomplices are given plea bargains in return for their testimony, confessions taken under less than ideal circumstances are introduced, and jailhouse snitches save their skins by testifying.[695]

Consider the case of Gregory Mills, who was convicted of a murder that occurred during a residential burglary. His accomplice was Vincent Leroy Ashley. The state attorney gave Ashley complete immunity to testify against Mills. Ashley testified that Mills crawled into the window of the residence while he remained outside as a lookout. Ashley had serious credibility problems and the jury recommended a life sentence. The trial judge overrode the jury and sentenced Mills to death.[696] The critical question in the case was, "Who did the shooting?" It took over 20 years to decide that no one would ever know. But Ashley's statement ultimately came to be questioned by another witness who heard him state the opposite. Mills ultimately received a life sentence.[697] Mills' case was reviewed by the Supreme Court of Florida four times, the Eleventh Circuit Court of Appeals twice and by the United States Supreme Court twice. It was the quality of the evidence that doomed the State's case.

Newly discovered evidence usually comes in two forms: recanted testimony and testimony or other evidence that was unknown at the time and could not reasonably have been discovered.

The seminal Florida case that explains recanted testimony is *Armstrong v. State*.[698] In *Armstrong*, the Court explained:

> Recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial. In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial. "Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recantation involves a confession of perjury." Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted.[699]

Recanted testimony becomes an issue in death penalty cases with surprising regularity. Usually it involves jailhouse snitches or other state witnesses who had credibility problems to begin

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[695]*See, e.g.,* Morris v. State, 811 So. 2d 661 (Fla. 2002).

[696]Mills v. State, 476 So. 2d 172 (Fla. 1985).

[697]State v. Mills, 788 So. 2d 249 (Fla. 2001).

[698]Armstrong v. State, 642 So. 2d 730 (Fla. 1994).

[699]*Id*. at 735.

with.[700]

The type of newly discovered evidence most frequently encountered involves the discovery of a new witness or a new exhibit. This evidence usually comes up as a result of additional post judgment investigation. But newly discovered evidence of this sort must be more than just new. The evidence must also be "of such nature that it would probably produce an acquittal on retrial."[701]

Brady violations are different. In *Strickler v. Greene*,[702] the Court summarized the important constitutional principles arising from the State's failure to disclose material evidence to the defendant:

> In *Brady*, this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence. . . . In order to comply with Brady, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police."
>
> These cases, together with earlier cases condemning the knowing use of perjured testimony, illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[703]

The principle necessitating reversal when the State fails to disclose to the defense material favorable evidence was espoused in *Brady* itself:

> The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport

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[700]Sweet v. State, 810 So. 2d 854 (Fla. 2000); Brooks v. State, 787 So. 2d 765 (Fla. 2001) (snitch and a second state witness recanted.); Knight v. State, 784 So. 2d 396 (Fla. 2001) (snitch recanted and claimed the State attorney knew the testimony was false.); Johnson v. State, 769 So. 2d 990 (Fla. 2000); Robinson v. State, 707 So. 2d 688 (Fla. 1998); Spaziano v. State, 692 So. 2d 174 (Fla. 1997) (only witness who could connect the defendant to the crime recanted).

[701]Jones v. State, 709 So. 2d 512, 521 (Fla.1998). *See,* Vining v. State, 827 So. 2d 201(Fla. 2002); Johnson v. State, 804 So. 2d 1218 (Fla. 2001).

[702]Strickler v. Greene, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

[703]*Id.* at 527 U.S. at 280-81 (citations and footnote omitted).

with standards of justice . . . .[704]

As was stated in *Rogers v. State*,[705] "errors involving the suppression of evidence in violation of *Brady* raise issues of constitutional magnitude." In order to establish a *Brady* violation, a defendant must prove:

> (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and, (3) prejudice must have ensued.[706]

Not every instance where the State withholds favorable evidence will rise to the level of a *Brady* violation necessitating the granting of a new trial, but only those where there is a determination the favorable evidence that was withheld resulted in prejudice. In *Kyles v. Whitley*, the Court stated:

> "The materiality of the inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"[707]

The determination of whether a *Brady* violation has occurred is subject to independent appellate review.[708] Further, the cumulative effect of the suppressed evidence must be considered when determining materiality.[709] The fact that a witness is discredited or impeached on one matter does not necessarily render additional impeachment cumulative.[710] The case of *State v. Cardona*[711] involved the prolonged depravation and torture of an innocent three-year-old boy by his mother (Cardona) and her female roommate (Gonzalez). Gonzalez was given a plea to second-degree murder in exchange for her testimony against Cardona in which she painted Cardona as the more culpable of the two. The state attorney failed to disclose reports of interviews of Gonzalez that

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[704]Brady v. Maryland, 373 U.S. 83 at 87-88, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[705]Rogers v. State, 782 So. 2d 373, 376-77 (Fla. 2003); Huggins v. State, 788 So. 2d 238 (Fla 2001).

[706]Elledge v. State, 911 So.2d 57 (Fla. 2005); Rogers v. State, 782 So. 2d 373, 376-77 (Fla. 2001); *See* Way v. State, 760 So. 2d 903, 910 (Fla. 2000) (quoting Strickler v. Greene, 527 U.S. 263, 281-82 (1999)); Butler v. State, 842 So. 2d 817 (Fla. 2003).

[707]Kyles v. Whitley, 514 U.S. 419 at 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

[708]*See* Rogers v. State, 782 So. 2d 373, 377 (Fla. 2001); Way v. State, 760 So. 2d 903, 913 (Fla. 2000).

[709]*Way*, 760 So. 2d 903.

[710]Brown v. Wainwright, 785 F. 2d 1457, 1466 (11th Cir. 1986); United States v. Rivera Pedin, 861 F. 2d 1522, 1530 (11th Cir. 1988).

[711]State v. Cardona, 826 So. 2d 968 (Fla. 2002).

contained "material inconsistencies on several key points not addressed at trial that could have seriously undermined Gonzalez' credibility." They also disclosed that Gonzalez had been "coached" to make her testimony more probative.

In its opinion, the majority stated, "If the jury had disbelieved Gonzalez, this would have affected not only the jury's evaluation of guilt, but also its recommendation of death. Even without this devastating impeachment evidence, the vote was only eight to four in favor of death. Further, the trial court's assessment of the weight to be given HAC in relation to the mitigators could have been affected by serious doubt as to Gonzalez' veracity."[712] Is this statement anything other than a recognition of the existence of "lingering doubt"?

The Supreme Court, in a 4-3 opinion, ordered a new trial. The *Cardona* case is worth reading to see how much easier it is for the defendant to receive a new trial as a result of a *Brady* violation as opposed to newly discovered evidence.

Prejudice to the defendant can be established more easily in cases involving the State's reliance upon the testimony of a single witness, especially a witness who is somehow involved with the murder. In *Mordenti v. State*,[713] the defendant's former wife testified she recruited the defendant to murder the victim on behest of the victim's husband, who committed suicide after the murder. The state had a "date book" that was never disclosed that contained impeaching information including dates of events that were different than the dates to which the witness testified, as well as information that may link the witness' present boy friend as the killer instead of the defendant. In ordering a new trial, the Supreme Court discussed the issue of prejudice. The Court held that the withheld evidence must be "material." Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[714] A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome,"[715]a fairly low standard for allowing relief.

6.10.2 EXTRANEOUS EMOTIONAL FACTORS

The United States Supreme Court has stated that "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling," are not mitigating factors for the jury to consider.[716]

6.10.3 DESCRIPTIONS OF EXECUTIONS

In *Johnson v. Thigpen*,[717] the Court held that the description of an execution and the issue of whether imposing a sentence of death is morally equivalent to killing did not bear on petitioner's character, prior record, or circumstances of his offense, and petitioner could not have presented evidence to jury on such issues.

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[712]826 So. 2d 968 at 981.

[713]Mordenti v. State, 894 So. 2d 161 (Fla. 2005).

[714]*Id*. at 170.

[715]Strickler v. Greene, 527 U. S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1985).

[716]California v. Brown, 479 U.S. 538 at 543, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987).

[717]Johnson v. Thigpen, 806 F. 2d 1243 (5th Cir.1986).

6.10.4 EVIDENCE OF THE CHURCH'S OPPOSITION TO THE DEATH PENALTY

In *Glass v. Butler*,[718] a Louisiana case, the defendant presented testimony from an Episcopal priest who was called to testify, among other things, that the "mainline" churches oppose the death penalty, alluding to a difference in the Old Testament and New Testament in that regard. The trial court excluded that testimony, apparently on relevancy grounds, and the court affirmed.

6.10.5 EVIDENCE THAT THE DEATH PENALTY IS NOT A DETERRENT; COST OF EXECUTIONS COMPARED TO COST OF IMPRISONMENT; OFFER OF LIFE SENTENCE FOR GUILTY PLEA

In *Hitchcock v. State*, the defendant sought to present the testimony of a sociologist. The sociologist wanted to present theories that (a) Hitchcock's execution would not deter others from committing murder, (b) it would cost less to imprison Hitchcock for life than to execute him, (c) lingering doubt as to Hitchcock's confession, (d) the conditions Hitchcock would face under a sentence of life imprisonment, and (e) the level of premeditation in the murder in light of Hitchcock's educational level.[719] The Court held this evidence to be irrelevant. The Eleventh Circuit Court of Appeals has held that exclusion of this type of evidence does not violate the Eighth Amendment.[720] Hitchcock also wanted to let the jury know he had been offered a life sentence in return for a plea of guilty. The Court held that information to be irrelevant because the offer was rejected and was therefore a nullity.

6.10.6 TESTIMONY OF RELATIVES OF THE VICTIM REQUESTING THE DEATH PENALTY NOT BE IMPOSED; TESTIMONY THE VICTIM WAS OPPOSED TO THE DEATH PENALTY

In *Robinson v. Maryland*, the defendant contended,

> . . . that one of the reasons underlying imposition of the death penalty is the sanction of retribution. Assuming the validity of that contention, Petitioner argues testimony of a family member of the victim urging the jury to reject the death penalty would have been strong evidence mitigating that sanction.
>
> In our view, the answer to this issue turns upon the relevancy of the evidence in the context in which it would have been presented. Additionally, we are disinclined towards Petitioner's argument because the obvious consequence of allowing this kind of testimony by the defense would be to permit the State to present witnesses who would testify the penalty should be imposed, thus reducing the trial to a contest of irrelevant opinions.[721]

Florida cases have held it either not to be an abuse of discretion to exclude this testimony or that the testimony was irrelevant because it had nothing to do with defendant's character or record

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[718]Glass v. Butler, 820 F. 2d 112 (5th Cir. 1987).

[719]Hitchcock v. State, 578 So. 2d 685, 690 (Fla. 1990), *rev'd on other grounds*, 505 U.S. 1215 (1992).

[720]Martin v. Wainwright, 770 F. 2d 918 (llth Cir. 1985).

[721]Robinson v. Maryland, 829 F. 2d 1501, 1503 (l0th Cir. 1987).

or circumstances of crime.[722]

6.10.7 EVIDENCE OF LIKELIHOOD OF PAROLE

Testimony of prison officials as to the unlikelihood of the defendant being paroled is inadmissible because such evidence can be argued to be "wildly speculative."[723] Likewise, testimony concerning the philosophy of the then-existing parole commission not to grant parole to defendants convicted of a capital offense is inadmissible because it was "probable that none of the present parole commission would be serving at the time the defendant is eligible for parole in twenty-five years."[724] Testimony by the Executive Director of the Florida Parole and Probation Commission that a life sentence for first-degree murder includes a minimum mandatory sentence of 25 years is inadmissible because it is not relevant to the defendant's character.[725] There is no error to refuse to allow testimony that the defendant would not be paroled if sentenced to life.[726]

Prior to May 25, 1994, a sentence of life imprisonment was with a minimum mandatory sentence of 25 years. The jury should be informed of this minimum mandatory sentence if the homicide occurred before that date.[727] If such a case occurs, and the defendant is charged with a double homicide, it is error not to allow the defendant to argue that he could receive a 50-year minimum mandatory sentence.[728]

6.10.8 MISCELLANEOUS - UNUSUAL FACTS OF THE CRIME

The fact the defendant did not know the victim was still alive when he left the scene, coupled with the fact the victim died from complications during recovery from surgery required by the wounds inflicted by the defendant, has been held not to be mitigating.[729]

6.11.0 PROOF PROBLEMS WITH MITIGATING CIRCUMSTANCES

Mitigating circumstance present their own problems when it comes to proof.

6.11.1 EXPERT TESTIMONY

Several of Florida's statutory mitigating factors and a host of nonstatutory mitigating factors require expert assistance. If defense counsel properly requests a psychologist or psychiatrist or special testing to determine brain damage to assist him or her in the sentencing stage, it is error not

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[722]Floyd v. State, 569 So. 2d 1225 (Fla. 1990); Campbell v. State, 679 So. 2d 720 (Fla. 1996).

[723]Merck v. State, 975 So. 2d 1054 (Fla. 2008).

[724]Jackson v. State, 530 So. 2d 269 (Fla. 1988).

[725]Hartley v. State, 686 So. 2d 1316 (Fla. 1996); King v. Dugger, 555 So. 2d 355, 359 (Fla. 1990).

[726]Lucas v. State, 568 So. 2d 18, 20 n. 2. (Fla. 1990).

[727]See, Fla Standard Jury Instructions, Criminal Cases, §7.11.

[728]Jones v. State, 569 So. 2d 1234 (Fla. 1990); Turner v. State, 645 So. 2d 444 (Fla. 1994).

[729]Pope v. State, 679 So. 2d 710 (Fla. 1996).

to grant the request.[730]

The State may also call experts to rebut mitigating circumstances testified to by defendant's experts.[731] The Rules of Criminal Procedure contain notice requirements for the examination of the defendant by State experts and contain sanctions for the defendant's refusal to cooperate.[732]

The defendant is not entitled to a blanket request for appointment of experts. For instance, the Court does not have to provide the defendant with a jury-selection expert.[733] Nor does the Court have to provide the defendant with a PET-Scan.[734] The Court has established a two-part test to determine whether the refusal to grant funds for the appointment of an expert to an indigent defendant is an abuse of discretion. The test is as follows: (1) whether the defendant made a particularized showing of need, and (2) whether the defendant was prejudiced by the Court's denial of the motion requesting expert assistance.[735]

6.11.2 IRRELEVANT MITIGATING CIRCUMSTANCES

If the defendant does not intend to rely upon a certain mitigating circumstance, neither the State nor defendant may present any evidence about it.[736] However, evidence of that circumstance may become admissible as impeachment.[737] But the evidence must be proper impeachment. *In Gerald v. State*,[738] the defendant promised not to rely upon absence of a significant prior record as a mitigating circumstance. A defense witness testified that the defendant had played with witness's children, and the witness and the defendant had never had a confrontation. The prosecutor seized this as an opportunity to bring out the defendant's criminal record, including the defendant's eight nonviolent prior felonies. The Court held that the defendant had not "opened the door" and reversed for a new penalty phase proceeding.

6.11.3 WEIGHT TO BE GIVEN TO MITIGATION

The trial judge may determine the weight to be given to relevant mitigating evidence. The Supreme Court uses the "abuse of discretion" standard to review the weight given.[739] A number of

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[730]Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985); Hoskins v. State, 702 So. 2d 202 (Fla. 1997); Hoskins v. State, 735 So. 2d 1281 (Fla. 1999).

[731]Davis v. State, 698 So. 2d 1182 (Fla. 1997).

[732]Fla.R. Crim. P. 3.202.

[733]San Martin v. State, 705 So. 2d 1337 (Fla. 1998).

[734]Rogers v. State, 783 So. 2d 980 (Fla. 2001).

[735]*Id*.; *Martin*, 705 So. 2d 1337.

[736]Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1986).

[737]Smith v. State, 515 So. 2d 182 (Fla. 1987); Bonifay v. State, 626 So. 2d 1310 (1993).

[738]Gerald v. State, 601 So. 2d 1157 (Fla. 1992).

[739]Blanco v. State, 706 So. 2d 7 (Fla. 1997).

Florida cases hold that, once a mitigating factor is found, it must be given at least *some* weight.[740] However, in *Trease v. State,*[741] the Court receded from prior decisions and approved assigning no weight to a mitigating circumstance. Still, it is better practice for the trial judge to assign appropriate weight to each mitigator and avoid an "abuse of discretion" review. In one case, the Court found the sentencing judge abused his discretion by assigning "little weight" to two statutory mitigating circumstances.[742]

6.11.4 DISCOVERY PROBLEMS

The Supreme Court of Florida adopted Fla. R. Crim. P. 3.202, which governs the procedure to be followed when the defendant plans to rely on testimony from mental health experts in the penalty phase of the trial. The rule will, of necessity, cause some delay in the penalty phase of the trial. The Supreme Court of Florida rejected a rule that would require the State and defense to disclose the aggravating and mitigating circumstances relied upon; but, in light of the regular discovery rule, which, among other things, requires disclosure of all witnesses, tangible evidence and statements of the defendant -- both the State and defense should be prepared for the penalty phase either immediately after, or very soon after, the guilt phase of the trial.

6.12.0 THE DEFENDANT WHO WANTS THE DEATH PENALTY OR INSISTS THAT NO MITIGATION BE PRESENTED

Usually, the defendant will want to escape the death penalty. But what if the defendant wants to be executed or insists on presenting no mitigating evidence and no closing argument? These cases are more numerous than might be expected, and they provide instructions to trial judges on how to deal with this problem.

An early case is *Hamblen v. State*,[743] in which the Court ruled the defendant had the right to represent himself and control his own destiny. In *Anderson v. State*,[744] the defendant had counsel but directed him to present no testimony at the penalty phase. His death penalty was upheld.

In *Klokoc v. State*,[745] the defendant refused to allow his attorney to participate in the penalty phase, indicating he wanted to die. The trial court appointed special counsel to represent the "public interest" in bringing forth mitigating factors to be considered by the Court. Even though the trial court sentenced the defendant to die, the Supreme Court of Florida, after rejecting defendant's request to dismiss the appeal, reduced the death sentence to life imprisonment based on the mitigation presented by the special counsel. Appointment of special counsel is not yet required.[746]

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[740]Knowles v. State, 632 So. 2d 62 (Fla. 1993); Campbell v. State, 571 So. 2d 415 (Fla. 1990).

[741]Trease v. State. 768 So. 2d 1050 (Fla. 2000).

[742]Ramirez v. State, 739 So. 2d 568 (Fla. 1999).

[743]Hamblen v. State, 527 So. 2d 800 (Fla. 1988).

[744]Anderson v. State, 574 So. 2d 87 (Fla. 1991).

[745]Klokoc v. State, 589 So. 2d 219 (Fla. 1991); see also, Rogers v. State, 2009 WL 259625 (Fla. Feb.5, 2009)..

[746]Farr v. State, 621 So. 2d 1368 (Fla. 1993); Durocher v. State, 604 So. 2d 810 (Fla. 1992); Farr v. State, 656 So. 2d 448 (Fla. 1995).

However, the Court may be heading in that direction.[747]

In *Muhammad v. State*,[748] the Court Stated that the trial court could call mitigation witnesses as its own witnesses, appoint counsel for that purpose, or if standby counsel has been appointed when the defendant is representing himself, use standby counsel for this purpose. The trial judge can even appoint the State attorney to present mitigation, although this should probably be the last option considered and should be selected only if a qualified lawyer is not available.[749] A presentence investigation (PSI) is now required to be ordered in these cases to assist the judge in discovering mitigation.[750] In fact, four justices have suggested the Court consider a uniform rule requiring presentence investigation reports in *all* cases involving the death penalty.[751] If a presentence investigation report is ordered, the entire contents of the report must be disclosed to the defendant.[752]

There is no doubt the Court must consider all mitigation in the record, including that in the presentence investigation report, even if no mitigation is presented to the jury, and the defendant asks the judge not to consider any mitigation. Failure to do so will result in a new penalty phase being ordered.[753] Proffered mitigation that counsel suggests could be proved, if the defendant allowed it, is not evidence and need not be considered by the trial court.[754] "Proffered evidence" by counsel is merely a representation of what evidence the defendant proposes to present and is not actual evidence.[755]

When the defendant presents no mitigation to the jury and the jury recommends a death sentence, it is reversible error for the judge to give the recommendation great weight. The fact the recommendation is given less weight should be clearly Stated in the sentencing order.[756]

The Supreme Court of Florida now has a rule governing the procedure to be followed when the defendant wants to waive mitigation.[757] The procedure is as follows:

(1) Defendant's counsel must inform the Court the defendant is requesting to waive mitigation;

(2) Defendant's counsel must inform the Court what mitigation could be presented; and,

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[747]Houser v. State, 701 So. 2d 329 (Fla. 1997); Muhammad v. State, 782 So. 2d 343, 368, (Fla. 2001), Pariente, J., specially concurring.

[748]Muhammad, 782 So. 2d 343.

[749]Fitzpatrick v. State, 900 So. 2d 495 (Fla. 2005).

[750]*Id*. at 364; Fitzpatrick v. State, 900 So. 2d 495 (Fla. 2005).

[751]Nelson v. State, 748 So. 2d 237 (Fla. 1999) (Pariente, J., specially concurring).

[752]Garner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

[753]Farr v. State, 621 So. 2d 1368 (Fla. 1993); Robinson v. State, 684 So. 2d 175 (Fla. 1996); Muhammad v. State, 782 So. 2d 343 (Fla. 2001).

[754]Lamarca v. State, 785 So. 2d 1209 (Fla. 2001).

[755]Grim v. State, 841 So. 2d 455 (Fla. 2003).

[756]Muhammad v. State, 782 So. 2d 343, 361 (Fla. 2001).

[757]Koon v. Duggar, 619 So. 2d 246 (Fla. 1993); Spann v. State, 857 So. 2d 845 (Fla. 2003).

(3) The trial court must have the defendant knowingly and voluntarily waive the presentation of this mitigation.

Before the trial court may waive a defendant's right to present mitigation evidence, the trial court is obligated to ensure the defendant's waiver is knowing, uncoerced, and not due to defense counsel's failure to fully investigate for mitigating evidence.[758]

Florida has not yet allowed a defendant to forego a direct appeal, even when the defendant requests it.[759]

In *Overton v. State*,[760] the trial judge followed the procedure outlined above and, in addition, conducted a hearing during which the defendant was advised to present mitigation. After the defendant declined, the trial judge went on to other matters and came back and advised the defendant again. At the *Spencer* hearing, the judge again advised the defendant to present mitigation and he declined. A presentence investigation report was ordered although the defendant refused to cooperate with the Department of Corrections. The judge addressed the statutory and nonstatutory mitigating circumstances known, including the defendant's demeanor in the courtroom. The sentencing order is set out in part in the opinion.

A competent defendant may waive the right to present mitigation. This right is not altered when the defendant is represented by counsel.[761] This right to control the presentation of evidence at trial is apparently in addition to the rights recognized by the United States Supreme Court in *Florida v. Nixon,*[762] which include the defendants's right to make decisions as to whether to plead guilty, waive a jury, testify on his own behalf, and take an appeal.

Forcing a defendant to present mitigating circumstances is error, and a new penalty phase trial will likely be ordered.[763]

6.13.0 CLOSING ARGUMENTS

Both the State and defense have the right to make a closing argument. Each side is entitled to one argument.[764] The State argues first. Failure to give the defendant the final closing argument is *fundamental* error and will cause the case to be reversed. The defendant *always* has the right of last closing in the penalty phase.[765]

Improper closing arguments have presented an enormous amount of issues on appeal in death cases. Why is this so? The State usually has a dead body with accompanying gory photographs, witnesses who at least place the defendant on the scene, forensic evidence that stacks the cards conclusively against the defendant, a jail house snitch and, last but not least, a confession.

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[758]*Spann*, 857 So. 2d 845.

[759]Klokoc v. State, 589 So. 2d 219 (Fla. 1991); Farr v. State, 656 So. 2d 448 (Fla. 1995).

[760]Overton v. State, 801 So. 2d 877 (Fla. 2001).

[761]Boyd v. State, 910 So.2d 167 (Fla. 2005).

[762]543 U. S. 175, 125 S.Ct. 551, 160 L. Ed.2d 565 (2004).

[763]Mora v. State, 814 So. 2d 322 (Fla. 2002).

[764]Fla. R. of Crim. P. 3.780.

[765]Wike v. State, 648 So. 2d 683 (Fla. 1994).

Additionally, during the guilt and penalty phases of the trial, the defendant usually declines to testify. With all of this evidence and testimony, why do prosecutors insist on jeopardizing a sure conviction with a reversal years later because of some unnecessary, vindictive or otherwise unprofessional argument? Immaturity? Lack of training? It is hard to tell. However, trial judges have an affirmative responsibility to insist on final arguments remaining within ethical and evidentiary limits and--they risk reversal if they fail.

Normally, failure to object to an improper argument amounts to a waiver of the objection. The Supreme Court of Florida has been reluctant to find an improper final argument to be fundamental error, especially when there is no objection and motion for mistrial. "Fundamental error" justifying reversal based upon unpreserved error is error that reached down into the validity of the trial itself to the extent the verdict of guilty or the recommendation of death could not have been obtained without the assistance of the alleged error.[766] The Supreme Court has repeatedly stated that it reviews the decision not to grant a mistrial with the "abuse of discretion" standard.[767] However, with timely objection, the Court has reversed and remanded for a new trial on the merits due to an improper peremptory challenge combined with an inappropriate "show the defendant no mercy" final argument.[768]

Unfortunately, defense lawyers are not much better. Because the defense lawyer has the final argument in penalty phase hearings, it is often too great a temptation to interject an improper argument that cannot be rebutted. Trial judges need to watch for these defense arguments as carefully as they watch the State's argument in order to preserve a fair trial for both sides.

One improper argument that is frequently heard is the "bolstering of witnesses argument" during which the lawyer personally vouches for the credibility of a witness. As discussed below in sec. 6.14.2, argument on the credibility of witnesses must be based upon the evidence and not the personal opinion of counsel.[769]

6.13.1 APPROPRIATE ARGUMENT BY STATE

The State may argue the evidence that tends to prove a statutory aggravating circumstance or that tends to disprove a statutory or nonstatutory mitigating circumstance. Argument dealing with the weighing of the circumstances or other aspects of the law the jury will be given, is also appropriate. For instance, it is proper to argue that a mitigating circumstance such as a traumatic childhood can be put in proper context if it occurred years ago. This argument conveys the concept that, while the mitigator may be valid, its weight should be lessened.[770]

In *Brooks v. Kemp*,[771] the Court went to great lengths to explain proper and improper prosecutorial arguments. The *Brooks* case is a Georgia case, so some of the information in the case does not apply to Florida. However, a great deal of it does. In *Brooks*, the Court pointed out the dangers of prosecutorial argument by stating:

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[766]Poole v. State, 994 So. 2d 1094 (Fla. 2008).

[767]Salazar v. State, 991 So. 2d 364 (Fla. 2008).

[768]Nowell v. State, 2008 WL 5396698 (Fla. Dec. 30, 2008).

[769]Miller v. State, 946 So. 2d 1243 (Fla. 2006); .

[770]Cox v. State, 819 So. 2d 705 (Fla. 2002).

[771]Brooks v. Kemp, 762 F. 2d 1383 (llth Cir. 1985), *opinion reinstated after remand,* 809 F. 2d 700 (llth Cir. 1987).

It has long been recognized that misconduct by a prosecuting attorney in closing argument may be grounds for reversing a conviction. Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L.Ed. 1314 (1934). Part of this recognition stems from a systemic belief that a prosecutor, while an advocate, is also a public servant "whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." 295 U.S. at 88, 55 S. Ct. at 633.

Beyond a concern with the inherent role of the prosecuting attorney, courts have also noted that prosecutorial misconduct is particularly dangerous because of its likely influence on the jury. Speaking of the prosecutor's duty to seek justice, the Berger Court stated:

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge, are apt to carry much weight against the accused when they should properly carry none.[772]

Of course, as is stated in *Brooks*, information about the defendant and the circumstances of the offense made known to the jury are proper subjects for final argument. The defendant's character is a proper subject in a penalty phase final argument so long as the defendant's character has been made an issue by evidence.

6.13.2 INAPPROPRIATE ARGUMENT BY STATE

Rule 4-3.4. of the Code of Professional Conduct provides,

A lawyer shall not:

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

The rule has been repeatedly cited in improper final argument cases.[773]

Most prosecutors have never read Rule 4-3.4. When they read it, they invariably wonder what is left to argue. For some reason, the idea about arguing the facts and the law escapes them. So, they argue other things that are inappropriate. Examples of inappropriate arguments are as follows:

6.13.3 DENIGRATION OF THE ROLE OF THE JURY ARGUMENT[774]

The prosecutor may not tell the jury in a jurisdiction where the judge makes the sentencing

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[772]762 F. 2d at 1399.

[773]Grant v. State, 171 So. 2d 361 (Fla. 1965); Coleman v. State, 215 So. 2d 96 (Fla 4th DCA 1968); Riley v. State, 560 So. 2d 279 (Fla. 3d DCA 1990); Pacifico v. State, 642 So. 2d 1178 (Fla. 1st DCA 1994); Kelly v. State, 842 So. 2d 223 (Fla.1st DCA 2003).

[774]See sec. 6.14.6.

decision that the jury's recommendation is a recommendation only which the judge can accept or reject. The jury is entitled to know the recommendation must be given great weight and their recommendation can be overturned only in very limited circumstances. Neither can the prosecutor minimize the jury's role by arguing the appellate courts will review the sentence and can overturn it if it is incorrect.[775]

6.13.4 ARGUING AGGRAVATING FACTORS NOT LISTED IN THE STATUTE

A good example of this improper argument is a defendant's lack of remorse. Lack of remorse cannot be considered in aggravation.[776] Prosecutors should not argue this or any other non-listed aggravating factor in their closing. They can argue against a mitigating factor. So, if the defendant is going to argue remorse as a mitigating factor, the prosecutor can argue against remorse being considered in mitigation, but the argument cannot suggest aggravation. One situation that has been reported is the case where the prosecutor argued that mental mitigation was actually aggravation.[777] This argument was clearly improper and contributed to the reversal of the death penalty. In the same case, the prosecutor improperly attempted to interject "future dangerousness" as an aggravating circumstance in the evidence.

Victim-impact evidence is not considered an aggravating factor, and it is improper argument to suggest the jury can consider it as such.[778] If victim-impact evidence has been presented to the jury, the prosecutor should not mention it in final argument.[779] In one case, the prosecutor argued that "the defense wants the jury to hear about the defendant's background, but that he doesn't care that the victim had a wife and child."[780] This argument comes close to arguing victim impact as an aggravator and should not be allowed.

6.13.5 ARGUING THE DETERRENT EFFECT OF THE DEATH PENALTY

There is no aggravating factor dealing with the deterrent effect of the death penalty. (Neither is there any concrete statistical evidence of this.) Accordingly, it cannot be argued, except as it might relate in an appropriate case to a particular defendant, such as one who had previously been convicted of murder.

6.13.6 SEND A MESSAGE TO THE COMMUNITY/"CONSCIENCE OF THE COMMUNITY" ARGUMENT

It is improper for the prosecutor to ask the jury to "send a message" or to recommend the

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[775]Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1988); Mann v. Dugger, 844 F. 2d 1446 (llth Cir. 1988); *compare*, Harich v. Dugger, 844 F. 2d 1464 (llth Cir. 1988); Blackwell v. State, 76 Fla. 124, 79 So. 731 (Fla. 1918).

[776]Pope v. State, 441 So. 2d 1073 (Fla. 1983), and Shellito v. State, 701 So. 2d 837 (Fla. 1997).

[777]Walker v. State, 707 So. 2d 300 (Fla. 1997).

[778]Card v. State, 803 So. 2d 613 (Fla. 2001).

[779]Sec. 921.141(7) purports to allow the state to argue victim impact evidence. This statute is procedural and should not be relied upon. It is unlikely that an argument can be made that does not treat victim impact evidence as an aggravating factor or use it to rebut a mitigating factor.

[780]Miller v. State, 926 So. 2d 1243 (Fla. 2006).

death penalty as the "conscience of the community."[781]

In a recent federal case,[782] the prosecutor made the following argument, which is set forth in its entirety to show the argument was not just a passing statement, but the grounds upon which the prosecutor wanted the jury to base the death sentence:

> So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that. But that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty.
>
> * * * *
>
> Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it?
>
> * * * *
>
> I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in the pile of goo that a moment before was your best friend's face, you'll know what to do.
>
> * * * *
>
> It strikes right at the heart of our system. You've got to look beyond William Weaver. This isn't personal. This is business. You people represent the entire community. You represent society. You have to give a message here. You have to tell the Williams Weavers and the Daryl Shurns of the world, and you have to be willing to look them right in the eye when you do it, that there's a point at which we won't allow you to go. And when you do, prison's too good. It's the death penalty.
>
> Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been self-defense. Well, it was right to kill then and it's right to kill him now.
>
> This case-I guess it's the one that just cries out to you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases.

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[781]Bertolotti v. State, 476 So. 2d 130 (Fla. 1985); Campbell v. State, 679 So. 2d 720 (Fla. 1996); Urbin v. State, 714 So. 2d 411 (Fla. 1998); Hawk v. State, 718 So. 2d 159 (Fla. 1998); Card v. State, 803 So. 2d 613 (Fla. 2001) (harmless error where argument was isolated and prosecutor did not continue it after objection).

[782]Weaver v. Bowersox, 438 F. 3d 832 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 763, 166 L. Ed. 2d 590.

It applies in this case.

When it comes time after [defense counsel] talks to you, I'll talk to you again briefly, and then you've got to go to the jury room and you've just got to toughen up and do what's right, even though it's going to be tough. You've got to say this is bigger than William Weaver. It's not personal; it's business.

* * * *

And I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message instead of the wrong message. The right message is life? For an execution? That's the right message? That's the message you want to send to the drug dealers, the dope peddlers and the hit men they hire to do their dirty deeds: Life in prison is what you get when we catch you and convict you. Life in prison? That's the message you want to send to the scum of the world? That when we catch you and we're convinced you're guilty, we're going to give you life in prison? That's not the right message.

* * * *

The message has to be death for these types of people. That's the only message they are going to understand.

The one thing you've got to get into your head, this is far more important than William Weaver. This case goes far beyond William Weaver. This touches all the dope peddlers and the murderers in the world. That's the message you have to send. It doesn't just pertain to William Weaver. It pertains to all of us, the community. They are our streets, our neighborhoods, our family. The message is death, not life. And you've just got to geer [sic] yourself to that.

* * * *

You've got to think beyond William Weaver. As I told you earlier, this is our worst nightmare. This is society's worst nightmare. If they could kill witnesses and we don't execute them in exchange, then there's no deterrence. Then the whole system fails and then chaos reigns and our streets are never safe. The dope peddlers reign and people like William Weaver do.

* * * *

It's bigger than William Weaver. And you've got to have the guts to do it. I'm the Prosecuting Attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't.

The District Court granted relief as result of these arguments and the Eighth Circuit affirmed the decision, stating that "A prosecutor's argument violates due process if it infects the trial with unfairness. This case serves as an example of a final argument that contains numerous examples of how to get a death sentence reversed. The Court noted that the argument could be divided into various types of improper arguments:

1. An analogy that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill.

The Court stated that this argument, while factually unique, is an example of an argument that "eviscerates the concept of discretion afforded to a jury as required by the Eighth Amendment."

The Court stated that not only was the main thrust of the prosecutor's argument diametrically opposed to the requirement that capital sentencing be in the jury's discretion, it also diminished the jury's sense of responsibility for imposing the death sentence.

2. Statements by the prosecutor about his personal belief in the death penalty.

Statements about the prosecutor's personal belief in the death penalty are inappropriate and contrary to a reasoned opinion by the jury.[783] These statements place emphasis on the prosecutor's position of authority in making the decision to seek the death penalty and may encourage the jury to defer to the prosecutor's judgment.[784]

3. Statements that executing the defendant was necessary to sustain a societal effort as part of the "war on drugs."

This argument is improper because it invites the jury to ignore its responsibility to provide an individualized sentence upon the defendant. "In order for a capital sentencing scheme to pass constitutional muster, it must perform a narrowing function with respect to the class of persons eligible for the death penalty and must ensure that capital sentencing decisions rest upon an individualized inquiry."[785] Arguing that a signal must be sent in one case to affect other cases puts an improper burden on the defendant because it prevents an individual determination of the appropriateness of capital punishment.[786]

4. Assertions that the prosecutor had a special position of authority and decided whether to seek the death penalty.

5. Arguments that were designed to appeal to the emotions of the jury (culminating in a statement that the jujry should "kill (defendant) now."

Arguments in categories 2, 4, and 5 are improperly inflammatory for several reasons:

Statements about a prosecutor's personal belief in the death penalty are contrary to a reasoned opinion by the jury.[787]

Arguments that encourage the jury to ignore the rational decision making process such as imploring the jury to kill the defendant immediately are, to say the least, contrary to a fail proceeding.[788]

A variation of the "send a message" argument is the "white hat" argument. The prosecutor's statement "I stand before you again today on behalf of the decent law-abiding people of this community and this state, whom I represent" is on the edge of impropriety but does not cross over. This statement is only to show who the prosecutor represents, "albeit in a somewhat grandiose manner."[789]

6.13.7 PERSONAL OPINIONS, EXPERTISE, OR SELECTIVE REQUESTS OF THE PROSECUTOR AS TO WHICH CASES DESERVE THE DEATH PENALTY

In *Brooks v. Kemp*,[790] (a case that was tried in Georgia) the prosecutor expressed his personal belief in capital punishment, his policy of rarely seeking the death penalty (the prosecutor's expertise

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[783]Miller v. Lockhart, 65 F. 3d 676, 684-85 (8th Cir. 1995).

[784]Newton v. Armontrout, 885 F. 2d 1328, 1335-37 (8th Cir. 1989).

[785]Jones v. United States, 527 U. S. 373, 381, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999).

[786]Sublett v. Dormire, 217 F. 3d 598, 600-01 (8th Cir. 2000).

[787]Miller v. Lockhart, 65 F. 3d 676, 684-85 (8th Cir. 1995).

[788]*Newton*, at 1336-37.

[789]Cox v. State, 819 So. 2d 705 (Fla. 2003).

[790]Brooks v. Kemp, 762 F. 2d 1383 (llth Cir. 1985), *opinion reinstated after remand,* 809 F. 2d 700 (llth Cir. 1987).

argument), claimed sentencing the defendant to death would save the tax-payers money and gave the jury a "war-on-crime speech." All of these arguments were improper.

The Eleventh Circuit Court of Appeals will not reverse a death sentence because of improper final argument unless (1) the argument must have encouraged the jury to take into account matters that are not legitimate sentencing considerations and (2) the argument must have been so prejudicial, when viewed in the context of the entire sentencing proceeding, as to have rendered that proceeding "fundamentally unfair."[791]

6.13.8 CALLING THE DEFENDANT A LIAR

Generally, it is improper for counsel to disparage an opponent by calling the opponent a liar.[792] There is an exception to that rule that counsel should use cautiously. "When it is understood from the context of the argument that the charge [of untruthfulness] is made with reference to the evidence, the prosecutor is merely submitting to the jury a conclusion that he or she is arguing can be drawn from the evidence."[793]

6.13.9 ARGUMENTS THAT APPEAL TO SYMPATHY, EMOTIONS OR FEAR [794]

The prosecutor may not appeal to sympathy, emotions, or fear. Telling jurors they will be "as evil as the defendant" if they fail to vote in accordance with the State's view of the evidence is improper.[795] And the prosecutor may not use scare tactics by asking the jury, "Do you want to give this man less than first-degree murder and the electric chair and have him get out and come back and kill somebody else, maybe you?"[796]

In *Pait v. State*[797] the prosecutor made the comment that, although the defendant had a right to appeal the jury's decision, the State was unable to do so, and that the prosecutor and his staff considered the death penalty appropriate. This comment was held to be reversible error.

A number of improper final arguments have been held to be fundamental error. In most of these examples, the trial court was found to have erred for not granting a mistrial. For instance, prosecutors are not allowed to disparage a legitimate defense, such as insanity;[798] they are not allowed to argue that the people of the State have determined the death penalty is necessary to deter

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[791]Johnson v. Wainwright, 778 F. 2d 623 (llth Cir. 1985).

[792]Rule 4-3.4. A lawyer shall not: . . . (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of the facts in issue except when testifying as a witness, or state a personal opinion as to the justice of the cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

[793]Lugo v. State, 845 So. 2d 74 (Fla. 2003); Davis v. State, 698 So. 2d 1182 (Fla. 1997). See also, State v. Davis, 61 P.3d 701 (Kan. 2003).

[794]See sec. 6.14.6.

[795]King v. State, 623 So. 2d 486 (Fla. 1993).

[796]Grant v. State, 194 So. 2d 612, 613 (Fla. 1967).

[797]Pait v. State, 112 So. 2d 380 (Fla.1959).

[798]Rosso v. State, 505 So. 2d 611 (Fla. 3d DCA1987).

people from walking down the streets gunning other people down;[799] they are not allowed to ask the jury to imagine the pain the victim suffered;[800] they are not allowed to argue that, when the number of aggravators outnumber the number of mitigators, the death penalty is appropriate;[801] they are not allowed to speculate on what punishment the victim would want if he or she were here;[802] they are not allowed to ask the jury to listen to the screams of the victim and to his or her desires for punishment;[803] nor can they ask the jury to "bring back a recommendation that will tell the people of Florida, that will deter people from permitting (lawlessness, murder, etc.)"[804]

Prosecutors may not make an "emotional portrayal of the victim's agony" to the jury unless the portrayal is supported by the evidence.[805] Nor may the prosecutor characterize defendants as persons of "true deep-seated, violent character;" "people of longstanding violence;" "they commit violent, brutal crimes of violence;" "it's a character of violence;" "both of these defendants are men of longstanding violence, deep-seated violence, vicious violence, brutal violence, hard violence . . those defendants are violent to the core, violent in every atom of their body."[806]

This type of argument includes arguing that evidence establishes a particular fact when the evidence was admitted for a limited purpose to establish a different fact. For instance, it is inappropriate to point out similarities between a subsequent burglary allegedly committed by a defendant when the evidence of the subsequent burglary was admitted because it was inextricably intertwined with crime for which the defendant was on trial and not for Williams Rule purposes.[807]

6.13.10 LIFE IS NOT LIFE ARGUMENT

It is inappropriate for the prosecutor, who is seeking the death penalty, to invite the jury to disregard the law whereby asserting that if defendant received a no-parole life sentence, he could still be released some day because "we all know that in the future laws can change." This comment was held to be particularly egregious because it invited jury to disregard the law as it was written by the Legislature to prohibit parole for the covered offenses.[808]

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[799]Urbin v. State, 714 So. 2d 411 (Fla. 1998).

[800]*Id.*

[801]*Id.*

[802]*Id*.

[803]*Id*.

[804]*Id.*

[805]Brooks v. State, 762 So. 2d 879 (Fla. 2000).

[806]*Id.* See also, two other cases where the Court took prosecutors to task for prosecutorial misconduct in their penalty closing argument. Hawk v. State, 718 So. 2d 159 (Fla. 1998); Ruiz v. State, 743 So. 2d 1 (Fla. 1999).

[807]Consalvo v. State, 697 So. 2d 805 (Fla. 1997).

[808]Urbin v. State, 714 So. 2d 411 (Fla. 1998).

The error may be harmless error if strong curative instructions are given to the jury.[809]

At least one state, Georgia, has prohibited the "life is not life argument" by statute. The statute provides "No attorney at law in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted, man not be required to suffer the full penalty imposed by the court or jury, because pardon, parole, or clemency of any nature may be granted by the Governor, State Board of Pardons and Paroles, of other proper authority vested with the right to grant clemency." The statute requires a mandatory mistrial if the argument is made.[810]

6.13.11 ARGUING THAT THE JURY MUST RETURN A RECOMMENDATION OF DEATH IF THE AGGRAVATING CIRCUMSTANCES OUTWEIGH THE MITIGATING CIRCUMSTANCES

This argument is a gross misstatement of the law. The Supreme Court of Florida has "declared many times that 'a jury is neither compelled nor required to recommend death where the aggravating factors outweigh the mitigating factors.'"[811]

A related argument, also improper, is to argue that any juror's vote for a life sentence would be irresponsible and a violation of the juror's lawful duty.[812]

The standard instruction in effect on the date of these materials is insufficient. A model set of penalty phase instructions is included with these materials.

6.13.12 COST OF LIFE IMPRISONMENT vs. DEATH ARGUMENT

The argument that a death sentence costs less than a life sentence is both inaccurate and irrelevant to any issue before the court or the jury.[813]

6.13.13 RELIGIOUS ARGUMENTS

Religious arguments have no place in a criminal trial, much less in the penalty phase of a capital trial. It has been held to be fundamental error for a prosecutor to argue, "There, ladies and gentlemen, is a man who forgot the fifth commandment, which was codified in the laws of the State of Florida against murder: Thou shalt not kill."[814]

Not all cases involving religious arguments rise to the level of fundamental error.[815] However, the Supreme Court of Florida has admonished prosecutors from using these arguments and

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[809]Card v. State, 803 So. 2d 613 (Fla. 2001).

[810]GA CODE ANN 27-2206; Gilreath v. State, 279 S. E. 2d 650 (Ga. 1981).

[811]Henyard v. State, 689 So. 2d 239, 249-50 (Fla. 1996); Franqui v. State, 804 So. 2d 1185, 1194 (Fla. 2001); Cox v. State, 819 So. 2d 705 (Fla. 2002). See, also, Gonzales v. State, 990 So. 2d 1017 (Fla. 2008).

[812]Urbin v. State, 714 So. 2d 411 (Fla. 1998).

[813]*Brooks*, 762 F. 2d 1383.

[814]Meade v. State, 431 So. 2d 1031, 1031 (Fla. 4th DCA 1983), (finding reversible error despite defense's failure to object immediately to prosecutor's argument), *review denied*, 441 So. 2d 633 (Fla.1983).

[815]Lugo v. State, 845 So. 2d 74 (Fla. 2003).

dehumanizing the defendant. The Court has stated, "We do, however, caution against the use or approval of arguments which use references to divine law because argument which invokes religion can easily cross the boundary of proper argument and become prejudicial argument. Further, we do find that the use of the word "exterminate" or any similar term which tends to dehumanize a capital defendant to be improper. We condemn such argument and caution prosecutors against arguments using such terms."[816]

In *Ferrell v. State*,[817] the Court discussed the problem with a prosecutor quoting the commandment "Thou Shalt Not Kill." It also discusses error being committed when a judge discusses religious philosophy, or quotes from the Bible. The Court warned that, without question, trial judges and attorneys should refrain from discussing religious philosophy in Court proceedings. The Court then quoted as follows:

> This is precisely the sort of appeal to religious principles that we have repeatedly held to be improper. As we explained recently in [People v. Sandoval, 4 Cal.4th 155, 14 Cal.Rptr.2d 342, 362-64, 841 P.2d 862, 883-84 (1992), affirmed sub nom. Victor v. Nebraska, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)]: "What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority."
> . . . The primary vice in referring to the Bible and other religious authority is that such argument may "diminish the jury's sense of responsibility for its verdict and ... imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions." [People v. Wrest, 3 Cal.4th 1088, 13 Cal.Rptr.2d 511, 519, 839 P.2d 1020, 1028 (1992), cert. denied, 510 U.S. 848, 114 S. Ct. 144, 126 L. Ed. 2d 106 (1993)]. The prosecutor here invoked the Bible to demonstrate the legitimacy of capital punishment, and even implied that defendant deserved death under God's law: "God recognized there'd be people like Mr. Wash . . . Who must be punished for what they have done . . . must forfeit their lives for what he's done." This was improper.

6.13.14 SHOW THE DEFENDANT NO MERCY ARGUMENT

The Supreme Court will not tolerate the State's argument that suggests the defendant should be shown the same mercy that was shown the victim of the murder.[818] It appears that prosecutors will never learn to refrain from using this argument, which improperly appeals to the sympathies of the jurors.[819]

6.13.15 THE GOLDEN RULE ARGUMENT

> "While we deny relief based upon the remarks which were made without objection, we would be remiss if we did not again remind officers of the State that

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[816]Bonifay v. State, 680 So. 2d 413 (Fla. 1996); Lawrence v. State, 691 So. 2d 1068 (Fla. 1997).

[817]Ferrell v. State, 686 So. 2d 1324 (Fla. 1996). For an example of a wholly inappropriate use of religious law see Farina v. State, 937 So. 2d 612, 638 (Fla. 2006) (Anstead, J, concurring in part and dissenting in part.)

[818]Urbin v. State, 714 So. 2d 411 (Fla. 1998); Brooks v. State, 762 So. 2d 879 (Fla. 2000).

[819]Nowell v. State, 998 So. 2d 597 (Fla. 2008).

> we will not condone improper closing arguments. Here, there was absolutely no need for experienced counsel to walk the line of reversible error by flirting with a "Golden Rule" argument. Even first-year trial attorneys know better than to engage in such behavior, yet a significant case involving enormous judicial and state resources was jeopardized by such foolish remarks. The evidence here was overwhelming but a prosecutor unnecessarily elected to walk a thin line."[820]

In *Hodges v. State*,[821] the prosecutor asked the jury to put themselves in the shoes of the victim by asking questions such as "What about life imprisonment? What can a person do in jail for life? You can cry. You can read. You can watch TV. You can listen to the radio. You can talk to people. In short, you are alive. People want to live. You are living. Alright? If she had had a choice between spending life in prison or lying on that pavement in her own blood, what choice would she have made?"

Similarly, in *Jackson v. State*,[822] the prosecutor argued that the victims could no longer read books, visit their families, or see the sun rise, while the defendant would be able to do these things if sentenced to life in prison.

In *Garron v. State*,[823] the prosecutor implied that the victim would want the defendant to be sentenced to death. The prosecutor stated, "If Le Thi were here, she would probably argue the defendant should be punished for what he did." He then asked the jurors to listen to the victim's screams and her desire for punishment.

All of these arguments are variations on the Golden Rule and are improper.

6.13.16 ARGUMENT THAT PROSECUTOR HAS EVIDENCE NOT PRODUCED

The prosecutor's closing argument expressing his view as to the credibility of two government witnesses and implying the prosecution would not have been commenced unless it had already been determined that defendant was guilty amounted to plain error.[824]

6.13.17 ARGUING FACTS NOT IN EVIDENCE (EXCEPT FACTS WITHIN COMMON KNOWLEDGE)

Portions of a prosecutor's argument, in which he referred to his prior criminal experience and the frequency he had sought the death penalty, were improper comments on facts not in evidence.[825] It is improper for either counsel to compare the defendant on trial with other murderers.[826]

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[820]Lugo v. State, 845 So. 2d 74 (Fla. 2003).

[821]Hodges v. State, 595 So. 2d 929 (Fla. 1992), *rev. on other grounds,* 506 U. S. 803, 113 S. Ct. 33, 121 L. Ed. 2d 6.

[822]Jackson v. State, 522 So. 2d 802 (Fla. 1988).

[823]Garron v. State, 528 So. 2d 353 (Fla. 1988).

[824]United States v. Garza, 608 F. 2d 659 (5th Cir. 1979).

[825]Conner v. State, 303 S.E.2d 266, cert. den., 464 U.S. 865 (1983).

[826]Hess v. State, 794 So. 2d 1249 (Fla. 2001).

6.13.18 LACK OF REMORSE ARGUMENTS

The Supreme Court of Florida has unequivocally held lack of remorse arguments to be improper. In *Pope v. State*,[827] the Court stated, "for these reasons, we hold that henceforth lack of remorse should have no place in the consideration of the aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor or as an enhancement of an aggravating factor."

Prosecutors did not take the Pope case seriously and were taken to task by the Supreme Court on more than one occasion.

In *Robinson v. State*,[828] the prosecutor discussed the testimony of an expert witness and stated, "One thing to know about Dr. Krop's testimony is the defendant suffers from antisocial tendencies. He has a total indifference to who he's hurt as to killing (victim). He really doesn't care that much. He showed no remorse, according to Dr. Krop." This argument was held to be improper.

In *Colina v.State*,[829] the prosecutor introduced into evidence the T-shirt the defendant was wearing when he was arrested. The trial judge described the shirt as follows: "It contains the printing on the front of the representation is that of a semi-nude young lady on top of a partial skull. The young lady-and the words on the right-hand side of the T-shirt would be "sweet," and on the other side of the T-shirt would be "death," they're in a kind of a fluorescent white and surrounded by red streaks."[830] The prosecutor also solicited "no remorse" testimony from an investigator. The Supreme Court stated, "We clearly and unequivocally said almost four years before the trial of this case that 'lack of remorse should have no place in the consideration of aggravating factors."

Of course, lack of remorse is admissible to rebut remorse as a mitigating factor or some other mitigation, such as rehabilitation.[831]

A few cases have held a brief mention of lack of remorse to be harmless error.[832] The Court seems to be more reluctant to reverse a death sentence if lack of remorse comes up briefly either in testimony or in final argument, but not both.

6.13.19 ARGUING MITIGATION AS AGGRAVATION

It is improper to turn mitigating circumstances into aggravation. The only aggravating circumstances allowed are listed in the statute. In *James v. State*,[833] the prosecutor seized upon the defendant's mitigation of impairment from use of drugs and alcohol by arguing "What the defendant is saying is give me the more lenient of the only two possible penalties for this, these two felonies, capital felonies, because I've committed another felony, i.e., the use and possession of illegal drugs."

There is an old story about a child who killed both parents and then argued for leniency

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[827]Pope v. State, 441 So. 2d 1073 (Fla. 1983).

[828]Robinson v. State, 520 So. 2d 1 (Fla. 1988).

[829]Colina v. State, 570 So. 2d 929 (Fla. 1990).

[830]570 So. 2d at 932.

[831]Derrick v. State, 581 So. 2d 31 (Fla. 1991); Singleton v. State, 783 So. 2d 970 (Fla. 2001).

[832]Floyd v. State, 800 So. 2d 175 (Fla. 2002); Smithers v. State, 826 So. 2d 916 (Fla. 2002).

[833]James v. State, 695 So. 2d 1229 (Fla. 1997).

because he was a orphan. That was the basic theme of the defense argument in *Hamilton v. State*.[834] In that case, the prosecutor argued, "And, you know, it occurred to me that someone else argued a mitigating circumstance very similar to that back on April the 27th, when Carmen Gayheart was kidnapped, and she said, 'Please don't kill me, I'm a wife and I'm a mother.'" The defense objected and the trial court gave a curative instruction to the jury. The Supreme Court found no error as a result.

6.13.20 ARGUING FUTURE DANGEROUSNESS

The State may not argue that a defendant should not receive a life sentence because, if released, he would be a danger to the community.[835]

6.13.21 ARGUMENT EXCEEDING THE SCOPE OF EVIDENCE ADMITTED FOR A LIMITED PURPOSE

It is not unusual for evidence to be admitted for a limited purpose. It is improper for the prosecutor to argue such evidence as proof of a fact that exceeds the limited purpose for which the evidence was admitted. In *Consalvo v. State,*[836] the defendant committed a murder during a burglary. The trial court admitted evidence of a prior burglary because it was "inextricably intertwined" with the burglary during which the murder occurred. During final argument, the prosecutor pointed out the similarities between the burglary. The Supreme Court held this argument to be improper because the evidence was not admitted to show similar facts.

6.13.22 APPROPRIATE ARGUMENT BY THE DEFENSE

Any argument that shows the lack of an aggravating circumstance or the existence of a statutory or nonstatutory mitigating circumstance is appropriate. Any argument that deals with the law the jury will be given is also appropriate. Suggestions as to the weighing process and the suggested weight to be given to aggravating and mitigating circumstances is allowed.

6.13.23 INAPPROPRIATE ARGUMENT BY THE DEFENSE

Rule 4-3.4 of the Rules of Professional Conduct applies to defense counsel as well as to the state attorney. See §6.13.2, above.

6.13.24 ARGUMENTS DESIGNED TO SET UP INEFFECTIVE ASSISTANCE

Judges must be careful that defense attorneys do not make comments in their arguments that will be so prejudicial to the defendant that counsel will be deemed to be ineffective at a later collateral proceeding.[837] A recent Supreme Court of Florida case lists nine excerpts from counsel's

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[834]Hamilton v. State, 703 So. 2d 1038 (Fla. 1997).

[835]State v. Fortin, 843 A.2d 974 (N. J. 2004).

[836]Consalvo v. State, 697 So. 2d 805 (Fla. 1997).

[837]*See* Osborne v. Shillinger, 861 F. 2d 612 (10th Cir. 1988). *See also* King v. Strickland, 714 F. 2d 1481 (11th Cir. 1983), *cert. granted and judgment vacated,* 467 U.S. 1211 (1984), on remand, 748 F. 2d 1492 (llth Cir. 1984); Horton *v. Zant*, 941 F. 2d 1449 (11th Cir. 1991). *See* Douglas v.

closing argument that constituted ineffective assistance of defense counsel at the penalty phase trial and these comments resulted in a reversal for a new penalty phase 16 years after the original crime.[838] The nine excerpts are as follows:

[1] I[n] the years I have been practicing law in Florida, this is the fourth time I have argued for a person's life. I must confess to you, this is the most difficult case that I have ever had in terms of making the argument on the death penalty.

[2] Now, in arguing the death penalty in this fashion, as I am required to do, sometimes I just speak about subjects which I wouldn't normally speak about.

[3] Now, I hope I do not seem to you to be a gouhl [sic], but I have no choice.

[4] [Clark] therefore is far from being a good person, and, therefore, must be classified as a bad person . . .

[5] [Clark] is one of those people from the underbelly of society who, for whatever reason of background and upbringing, is unable to fully abide by the laws that the rest of us abide by.

[6] We have a crime problem in this country, and perhaps Mr. Clark comes from that group of people who create that problem.

[7] I agree that people like Mr. Clark should be stopped.

[8] I am not condoning Mr. Clark's activities or actions. I, myself, certainly appreciate the seriousness of this offense, and I, myself, certainly feel the horror that a death has occurred.

[9] Don't ask me, because I have no answer. What possesses anyone to go into a place of business with a firearm to steal one hundred dollars, and apparently to be prepared to use the firearms to steal one hundred dollars. I don't know the answer . . . The problem is that it happens all the time with these type of people. . .

The Court stated:

> Prejudice is established here because Clark's counsel essentially offered the jury no alternative but to impose a sentence of death. In fact, we find that portions of counsel's argument had the effect of encouraging the jury to impose the death penalty. See Horton v. Zant, 941 F. 2d 1449, 1463 (11th Cir.1991). Additionally, counsel's attacks on Clark's character and counsel's attempts to distance himself from his client could only have hurt Clark's cause. *Id*. We find that counsel's deficiencies during the sentencing caused an unreliable result, and therefore counsel's deficient performance was prejudicial to Clark.[839]

6.13.25 RESIDUAL OR LINGERING DOUBT

See section 6.10.1. The defendant may not argue there is residual or lingering doubt about the guilt of the defendant.[840]

6.13.26 ARGUING THE AGGRAVATING CIRCUMSTANCES LAUNDRY LIST

The trial judge does not have to inform the jury of aggravating circumstances that are not

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Wainwright, 714 F. 2d 1532 (llth Cir. 1983)(defense counsel's comments *to the Court* prior to a sentencing hearing rendered counsel ineffective even where the jury recommended life).

[838]Clark v. State, 690 So. 2d 1280 (Fla. 1997).

[839]690 So. 2d at 1282.

[840]Oregon v. Guzek, 546 U. S. 517, 126 S. Ct. 1226, 163 L. Ed. 2d 1112 (2006); Reynolds v. State, 934 So. 2d 1128 (Fla. 2006); King v. State, 514 So. 2d 354 (Fla. 1987).

applicable to the evidence at trial. Defense counsel is not permitted to argue to the jury that the crime is not worthy of the death penalty because only two or three of the fourteen potential aggravating circumstances apply.[841]

The opposite is also true. The State may not the review all of the possible mitigating factors during closing argument to show the case lacks mitigation. Argument should be limited to aggravating and mitigating factors for which some evidence has been presented and that are contained in the jury instructions.

6.13.27 COMPARE THE DEFENDANT TO WORSE KILLERS ARGUMENT

It is inappropriate for a defendant to argue that his murder is not so bad if compared to those of Ted Bundy, Jeffrey Dahmer, Charles Manson, or some other notorious killer. The Court has stated, ". . . defense counsel's argument to the jury regarding the sentences of specifically identified killers in other capital cases was not relevant to the determination of the appropriate sentence for appellant's role in the instant murder."[842]

6.14.0 JURY INSTRUCTIONS

Unique problems arise in providing accurate jury instructions for the penalty phase of a capital case. The Standard Jury Instructions are generally accurate, but there are gaps and problems here and there with them. A set of proposed Penalty Phase Instructions are included in "Appendix F" in these materials. These instructions have not been approved by the Supreme Court of Florida as of this writing, but they include instructions contemplated by recent decisions not covered in the Standard Jury Instructions and are presently under consideration by the Supreme Court.

6.14.1 *CALDWELL* PROBLEM--DENIGRATING THE ROLE OF THE JURY

Neither the Court nor counsel may minimize the role of the jury.[843] Florida's jury instructions have been upheld by the Supreme Court of Florida and the United States Supreme Court many times. However, challenges to Florida's present jury instructions may be successfully made in the future.[844] But a clear reading of *Adams* and *Caldwell* can leave little doubt that any instructions that "minimizes the jury's sense of responsibility for determining the appropriateness of death" may require a new sentencing proceeding. The Supreme Court of Florida does not believe *Caldwell* applies to Florida.[845] But both the Eleventh Circuit and the United States Supreme Court may disagree. Until this issue is finally decided, it is far better to be safe than sorry.

The Standard Jury Instruction on this subject could be improved upon. A better instruction is as follows:

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[841]Floyd v. State, 569 So. 2d 1225 (Fla. 1990).

[842]Hess v. State, 794 So. 2d 1249 (Fla. 2001).

[843]Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1988); Mann v. Dugger, 844 F. 2d 1446 (llth Cir. 1988).

[844]See also Dugger v. Adams, 489 U.S. 401 (1989). (procedural default precluded consideration of the issue).

[845]Combs v. State, 525 So. 2d 853 (Fla. 1988); King v. State, 555 So. 2d 355 (Fla. 1990).

"Your advisory sentence as to which punishment should be imposed on this defendant is entitled by law and must be given great weight by this court in determining what sentence to impose in this case. It is only under rare circumstances that this court could impose a sentence other than what you recommend."

6.14.2 SHIFTING THE BURDEN OF PROOF

There has been considerable litigation involving "mandatory" death instructions and "weighing" of aggravating and mitigating jury instructions.[846] Florida's Standard Jury Instructions direct the jury to determine if the mitigating factors outweigh the aggravating factors. The United States Supreme Court has not addressed the exact language of this instruction. Shifting the burden of proof to the defendant is dangerous.[847] The Eleventh Circuit Court of Appeals reviewed this instruction and found that not to be offensive.[848] The Supreme Court of Florida has also addressed this instruction and has approved it.[849]

In *Kansas v. Marsh*,[850] the United States Supreme Court came close to validating the Florida statute. In Kansas, the death penalty is appropriate if the aggravating and mitigating factors are found to be "in equipose" (equal). The Kansas statute requires the imposition of the death penalty if the jury (unanimously) finds the existence of aggravating circumstances and that such aggravating circumstances are not outweighed by mitigating circumstances found to exist.[851] The Court approved this procedure. In dicta, the Court stated that as long as the sentencer is not precluded from considering relevant mitigating circumstances, a capital sentencing statute cannot be said to impermissibly, much less automatically, impose the death penalty.[852]

The Florida statute is very similar to the Kansas statute. Under the Florida statute, it is entirely possible for the jury to recommend the death penalty while finding the aggravating and mitigating circumstances to be equal, although neither the jury or the Court will ever know it because the jury will not disclose its findings. In Kansas, the jury must make a unanimous decision and disclose the aggravating factors found.[853] The continuing difficulty with the Florida scheme involves the fact that the jury may return a death recommendation without a majority of the jury agreeing on a single aggravating factor. Accordingly, the burden shifting issue becomes more complicated in Florida than in a Georgia-scheme state like Kansas, where the jury verdict must be unanimous.

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[846]*See* Sumner v. Shuman, 483 U.S. 66 (1987); Penry v. Lynaugh, 492 U.S. 302 (1989); Blystone v. Pennsylvania, 494 U.S. 299 (1990); Boyde v. California, 494 U.S. 370 (1990); Walton v. Arizona, 497 U.S. 639 (1990).

[847]Jackson v. Dugger, 837 F. 2d 1469 (11th Cir. 1988).

[848]Bertolotti v. Dugger, 883 F. 2d 1503 (11th Cir. 1989).

[849]Stewart v. State, 549 So. 2d 171 (Fla. 1989); Shellito v. State, 701 So. 2d 837 (Fla. 1997); San Martin v. State, 717 So. 2d 462 (Fla. 1998); Reynolds v. State, 934 So. 2d 1128 (Fla. 2006); Taylor v. State, 937 So. 2d 590 (Fla. 2006).

[850]548 U. S.163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006).

[851]KS ST § 21-4624.

[852]*Id.*

[853]*Id.*

6.14.3 DEFINE VAGUE TERMS

Ordinarily, the jury-sentencing recommendation must be given great weight by the sentencing judge. Vague terms such as heinous, atrocious, cruel and cold, calculated, and premeditated without any pretense of moral or legal justification need to be defined.[854]

The current Standard Jury Instruction defining "especially heinous, atrocious, or cruel" may not satisfy the United States Supreme Court, although it has been approved by the Supreme Court of Florida.[855]

The Supreme Court of Florida has recognized that the pre-1995 Standard Instruction on CCP is unconstitutionally vague.[856] The terms "cold, calculated and premeditated" and "without any pretense of moral or legal justification" also need to be defined. The current Standard Jury Instruction on CCP has been approved and should be read to the jury in its entirety.[857]

There are other vague terms in the current instructions, such as "elderly person" and "advanced age." In *Francis v. State*,[858] the Court had the opportunity to review the "particularly vulnerable victim aggravator." The case involved twin sisters who were 66 years of age. They appeared to be in reasonable health for their age with no disabilities. The Court ruled that these terms were terms of common usage and need no definition. However, the Court quoted several authorities for the definition of these common terms, and judges should exercise their discretion to define them if this aggravating circumstance is an issue in a trial.[859]

"Circumstantial evidence" is not a vague term. It is not an abuse of discretion for the trial judge to refuse to give a circumstantial evidence instruction because the Supreme Court has deleted the instruction from the standard instructions.[860]

6.14.4 INSTRUCTION ON AGGRAVATING AND MITIGATING CIRCUMSTANCES

1. The Court should allow the jury to only consider the aggravating circumstances for which evidence has been presented in the guilt or penalty phases.[861] The United States Supreme Court has not held the Sixth Amendment to require a jury in Florida to specify which aggravating factors have been found beyond a reasonable doubt.[862] Giving the jury aggravating factors to consider that do not apply in a case may result in a new sentencing hearing before a new jury,

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[854]Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992).

[855]Sochor v. Florida, 504 U.S. 527, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992); Preston v. State, 607 So. 2d 404 (Fla. 1992).

[856]*Jackson*, 648 So. 2d 85.

[857]Francis v. State, 808 So. 2d 10 (Fla. 2001).

[858]*Id.*

[859]See § 6.7.14.

[860]Huggins v. State, 889 So. 2d 743 (Fla. 2004).

[861]Stewart v. State, 549 So. 2d 171 (Fla.1989).

[862]Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989).

especially if the aggravating circumstances are HAC or CCP.[863]

2. The Court should not give the jury two aggravating circumstances that would constitute doubling (i.e., homicide committed during course of a robbery and pecuniary gain) without an appropriate instruction. In one case, the Court reversed a death sentence when the defense requested a "doubling instruction" that was refused.[864] One way to solve this problem is to give the prosecutor the choice and read only one of the cumulative aggravating circumstances to the jury. The Florida Standard Jury Instructions now include a "doubling" instruction that should be given, if requested.

3. The jury must be instructed that, in addition to the mitigating circumstances urged by the defendant, they may consider "all other evidence presented during the trial or the penalty phase proceeding which you find mitigating."[865] The Standard Jury Instructions appear to be sufficient to satisfy this requirement.

4. Statutory mitigating circumstances must be read to the jury to consider if any evidence regarding them is in the record. It is reversible error not to do so. In *Robinson v. State*,[866] the Court stated:

> Regarding mitigating evidence and instructions, we encourage the trial court to err on the side of caution and to permit the jury to receive such rather than being too restrictive.

5. The trial judge should give the "age" instruction if the defendant requests it.[867] The lawyers will know how to put the defendant's age in perspective. In *Smith v. State*,[868] the Court held it was error not to give the age instruction when requested. In *Smith*, the defendant was 20 years of age.

6. The instructions must not suggest that all the jurors must find a mitigating circumstance unanimously before it can be considered. This implication is error that will require a new penalty phase hearing.[869]

7. Mitigating circumstances dealing with the defendant's character, record, or background, and any circumstances of the offense do not have to be individually listed for the jury.[870]

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[863]Omelus v. State, 584 So. 2d 563 (Fla. 1991); Bonifay v. State, 626 So. 2d 1310 (Fla. 1993); Padilla v. State, 618 So. 2d 165 (Fla. 1993).

[864]Castro v. State, 597 So. 2d 259 (Fla.1992). *See also*, Monlyn v. State, 705 So. 2d 1 (Fla. 1997).

[865]Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); Floyd v. State, 497 So. 2d 1211 (Fla. 1986).

[866]Robinson v. State, 487 So. 2d 1040, 1043 (Fla. 1986). *See also* Smith v. State, 492 So. 2d 1063 (Fla. 1986); Stewart V. State, 558 So. 2d 416 (Fla. 1990).

[867]Archer v. State, 673 So. 2d 17 (Fla. 1996), Campbell v. State, 679 So. 2d 720 (Fla. 1996), and Blackwood v. State, 777 So. 2d 399 (Fla. 2000).

[868]*Id.*

[869]Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988); McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

[870]*Jackson*, 530 So. 2d 269; Jones v. State, 612 So. 2d 1370 (Fla. 1992); Ferrell v. State, 653 So. 2d 367 (Fla. 1995); James v. State, 695 So. 2d 1229 (Fla. 1997); Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998); Franqui v. State, 804 So. 2d 1185, 1196 (Fla. 2002).

There is nothing to prohibit the trial judge from listing the nonstatutory mitigating circumstances in the jury instructions. Listing them will assist the jury in making sure each of them is considered. The case law simply does not require each mitigator to be listed.

8. Read all of the Standard Jury Instructions that are applicable. At least one copy of the written instructions must be given to the jury.[871] It is permissible to give each juror a copy.

In *Guzman v. State*,[872] trial judges were instructed by the Supreme Court of Florida as follows:

> By this opinion we direct that trial judges fully instruct death penalty juries on all applicable jury instructions set forth in the Florida Standard Jury Instructions unless a legal justification exists to modify an instruction. If a legal need to modify an instruction exists, that need should be fully reflected in the record in accordance with Florida Rules of Criminal Procedure 3.985.

The Standard Jury Instructions on mitigation have been held to be sufficient.[873]

A legal justification to modify the standard instructions was discovered in *Franqui v. State*.[874] In *Franqui,* the trial judge initially instructed the jury, "If you believe that the aggravating factors outweigh the mitigating factors, then the law requires that you recommend a sentence of death." This misstatement of the law caused the Court to remind trial judges that "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors."[875] The Court referred to the pattern instruction used by the Eleventh Circuit Court of Appeals and requested the Committee on Standard Jury Instructions in Criminal Cases consider whether changes should be made to the Standard Jury Instructions. The changes are suggested in the Model Penalty Phase Instructions presently under consideration by the Supreme Court.[876] The *Franqui* case contains several other examples of instructions from other jurisdictions such as California, Nevada, New York, New Hampshire and Missouri.

6.14.5 ANTI-SYMPATHY INSTRUCTIONS

Anti-sympathy instructions can cause problems.[877] The problem can occur during a resentencing when various standard jury instructions are given in addition to the standard penalty phase instructions. (*e.g*., the "prejudice, bias, and *sympathy*" instruction.) In the penalty phase, the "verdict" is the advisory sentence and many of the mitigating circumstances typically offered call

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[871]Fla. R. Crim. P. 3.400(b).

[872]Guzman v. State, 644 So. 2d 996 (Fla. 1994).

[873]*See* Davis v. State, 698 So. 2d 1182, 1192 (Fla. 1997); Bowles v. State, 804 So. 2d 1173, 1177 (Fla. 2002).

[874]Franqui v. State, 804 So. 2d 1185 (Fla. 2002); *See*, State v. Dicks, 615 S. W. 2d 126 (Tenn. 1981).

[875]Henyard v. State, 689 So. 2d 239, 249-250 (Fla. 1996).

[876]http://www.flcourts18.org/eaton_death-penalty-mat.php

[877]California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987); Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990).

for "sympathy." Care must be taken not to give instructions that devaluate mitigating circumstances. The Model Penalty Phase Instructions leave out the word "sympathy" in order to avoid this confusion.

6.14.6 JURY DISCRETION NOT TO IMPOSE THE DEATH PENALTY

The jury need not be instructed on a "jury pardon" in the penalty phase.[878] While this general rule is true, it is not totally accurate. In *Franqui v. State*,[879] the Court repeated the rule that "a jury is neither compelled nor required to recommend death where the aggravating factors outweigh the mitigating factors." At least one state court of last resort has ruled the existence of this discretion to be mandatory in order for the death penalty to be constitutional.[880] Some federal courts have recognized jury discretion to impose a life sentence.[881] The State of Georgia recognizes this jury discretion by statute.[882]

In *Henyard v. State*,[883] and some of the other cases cited below, the question of jury discretion arose because, during voir dire, the prosecutor tried to elicit a promise from the jurors that they would vote for the death penalty if the aggravating circumstances outweighed the mitigating circumstances. Prosecutors oppose the jury being told of the discretion not to impose the death penalty. Prosecutors have argued that the jury should only be told of this aspect of the law if prosecutors make an issue of it at trial. Otherwise, they claim, the court would approve a "jury pardon." This argument is, of course, specious, since juror discretion not to recommend the death penalty has nothing to do with a "jury pardon." Juries sometimes return a verdict for a lesser included offense or find a defendant not guilty in spite of overwhelming evidence to the contrary. This is a "jury pardon." It has nothing to do with the traditional discretionary role that comes to play in sentencing. Moreover, if the prosecutors agree the instruction should be given in cases of prosecutorial misconduct, the instruction should be given in all cases.

It is the duty of the trial judge to instruct the jury on the law applied to the facts proven.[884] And, where the standard instructions are insufficient, the trial court must instruct the jury in accordance with the circumstances of each case.[885] Actually, the standard instructions are intended only as a guide, and not to relieve the trial judge of the responsibility to charge the jury correctly in each case.[886]

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[878]Mendyk v. State, 545 So. 2d 846 (Fla. 1989).

[879]Franqui v. State, 804 So. 2d 1185, 1192 (Fla. 2002). See, also, Smith v. State,866 So.2d 51 (Fla. 2004); Brooks v. State, 762 So. 2d 879, 902 (Fla. 2000); Garron v. State, 528 So.2d 353, 358, (Fla. 1988).

[880]State v. Dicks, 615 S. W. 2d 126 (Tenn. 1981).

[881]Weaver v. Bowsox, 438 So. 2d 832, 840 (8th Cir. 2006).

[882]GA STAT §17-10-30.1.

[883]689 So.2d 239, 249-250 (Fla. 1996).

[884]Rawlings v. State, 40 Fla. 155, 24 So. 65 (Fla. 1898); State v. Wimberly, 498 So.2d 929 (Fla. 1986).

[885]Cooper v. State, 742 So. 2d 855 (Fla. 1st DCA 1999).

[886]Steele v. State, 561 So .2d 645 (Fla. 1st DCA 1990).

The Model Penalty Phase Instructions included in the Appendix to these materials contain the instruction required by *Franqui*. An earlier case, *Dougan v. State*,[887] does not reflect the current law on this subject and should not be relied upon.

6.14.7 TERM OF A LIFE SENTENCE

If a murder was committed after May 25, 1994, the jury must be instructed that a life sentence means life without possibility of parole. If the jury asks a question about whether the defendant will be eligible for parole in such a case, repeating the Standard Jury Instruction informing the jury that the punishment is "either death or life imprisonment *without the possibility of parole*"is sufficient.[888] The prosecutor is not allowed to argue that life without parole means something less than what it says, or that the law may change some day.[889] This, of course, is mere fiction since the Governor, with the consent of the Cabinet, has the power to commute a death sentence, reduce a death sentence to a term of years or pardon the defendant completely. The Legislature also has the power to provide for the release of prisoners serving life sentences. Ignoring the obvious and hoping no juror has read the *Constitution of the State of Florida* is one of many problems with the current law.

In one case, the jury asked the trial judge whether the defendant would be given credit for time served on a life sentence without the possibility of parole for 25 years. The judge answered that the defendant was entitled to credit for time served. The trial judge also instructed the jury that there was no guarantee that the defendant would be paroled after 25 years. These instructions were approved as not being an abuse of discretion.[890]

There is no doubt that a major concern jurors have in deciding whether to recommend a life sentence is the fear that the defendant will be released. All of the studies show that jurors discuss this issue.[891] If asked, trial judges should answer this question truthfully, but cautiously.

6.14.8 VICTIM-IMPACT INSTRUCTION

If the jury has received victim-impact evidence, and the defendant requests the jury to be instructed on the use of such evidence, an instruction should be given. In *Alston v. State*,[892] the Supreme Court of Florida approved the following instruction:

> You shall not consider the *victim-impact* evidence as an aggravating circumstance, but the *victim-impact* evidence may be considered by you in making your decision.

Another instruction used by the trial court was approved by the Court in *Kearse v. State*:[893]

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[887]Dougan v. State, 595 So. 2d 1 (Fla. 1992).

[888]Whitfield v. State, 706 So. 2d 1 (Fla. 1997).

[889]Urbin v. State, 714 So. 2d 411, 420 (Fla. 1998).

[890]Green v. State, 907 So. 2d 489 (Fla. 2005).

[891]Sundby, *A Life and Death Decision - A Jury Weighs the Death Penalty,* Palgrove McMillan, 2005.

[892]Alston v. State, 723 So. 2d 148, 160 (Fla. 1998).

[893]Kearse v. State, 770 So. 2d 1119 (Fla. 2000).

> Now you have heard evidence that concerns the uniqueness of (victim) as an individual human being and the resultant loss to the community's members by the victim's death. Family members are unique to each other by reason of the relationship and role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family. While such evidence is not to be considered as establishing either an aggravating or mitigating circumstance, you may still consider it as evidence in the case.

"So why," the jury may ask, "were we given this evidence in the first place? And how are we to 'consider' it?" These are very difficult questions to answer and provide a perfect example of why victim-impact evidence should not be allowed in the first place. But, if the trial judge allows victim-impact evidence, there is a better instruction that has been used by several trial judges and, although it has not been approved by the Supreme Court, it is presently under consideration:

> You have heard testimony from the (family)(friends)(colleagues) of (decedent). This evidence is presented only to show the victim's uniqueness as an individual and the resultant loss by (decedent's) death. However, you may not consider this evidence as an aggravating circumstance. Your recommendation to the Court must be based solely on the aggravating circumstances and the mitigating circumstances upon which you have been instructed.

This instruction is contained in the Model Penalty Phase Instructions in the Appendix to these materials.

6.15.0 THE JURY RECOMMENDATION VERDICT FORM

The form of penalty phase verdict must reflect the numerical vote of the jurors. In cases involving multiple counts of murder, it is reversible error to submit a verdict that contains a single, undifferentiated death recommendation. There must be a recommendation for each count of murder found by the jury in the guilt phase of the trial.[894]

The Jury Recommendation Verdict Form approved by the Supreme Court of Florida does not contain any interrogatories that disclose the vote of the jurors showing how many jurors voted for each aggravating and mitigating circumstance submitted. The Court has ruled this type of interrogatory is not authorized under §921.141, Florida Statutes. The Court reasoned that such an interrogatory verdict is substantive, rather than procedural.[895] However, the Court has held in several cases that use of a "special verdict," while error, is subject to harmless error analysis and use of such a verdict form will not cause reversal unless prejudice is shown.[896]

The decision prohibiting the use of interrogatories on the verdict form has met with some criticism. One trial judge likened the use of the present verdict form to "fishing in the dark."[897] Another trial judge expressed general frustration with the verdict form and explained the problems

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[894]Snelgrove v. State, 921 So. 2d 560 (Fla. 2005); Pangburn v. State, 661 So. 2d 1182, 1188 (Fla. 1995).

[895]Steele v. State, 931 So. 2d 538 (Fla. 2005).

[896]See, Franklin v. State, 965 So. 2d 79, 102 (Fla. 2006); Rogers v. State, 948 So. 2d 655, 673 (Fla. 2006); Huggins v. State, 889 So. 2d 743, 772 (Fla. 2004); Lebron v. State, 2008 WL 1901470 (Fla. May 1, 2008).

[897]Lebron v. State, 982 So. 2d 649, 671 (Fla. 2008).

with not allowing interrogatories as follows:

> Florida's death penalty scheme places certain duties upon the trial judge in determining whether to impose the death penalty or a sentence of life imprisonment without possibility of parole.
>
> One of the duties placed upon the trial judge is to give the recommendation of the jury "great weight," unless circumstances not applicable here allow lesser weight. *See Muhammad v. State,* 782 So.2d 343 (Fla.2001). However, a definition of this subjective term, "great weight," is not contained in the statute or the case law. The most that can be said about the guidance the Supreme Court of Florida has given to the trial courts in applying this term is that when a jury returns a life recommendation, "great weight" almost always precludes the imposition of a death sentence, *Smith v. State,* 866 So.2d 650 (Fla.2004), while "great weight" does not preclude the trial judge from disagreeing with a death recommendation and imposing a life sentence. *Tompkins v. State,* 872 So.2d 230 (Fla.2003).
>
> How "great" is the weight when the members of the jury cannot agree unanimously on the recommended sentence? Should a seven to five vote for death be given the same weight as a unanimous vote? These are issues the trial courts deal with in capital cases.
>
> The role of the jury during the penalty phase under the Florida death penalty scheme has always been confusing. The jury makes no findings of fact as to the existence of aggravating or mitigating circumstances, nor what weight should be given to them, when making its sentencing recommendation. The jury is not required to unanimously find a particular aggravating circumstance exists beyond a reasonable doubt. It makes the recommendation by majority vote, and it is possible that none of the jurors agreed that a particular aggravating circumstance submitted to them was proven beyond a reasonable doubt. The jury recommendation does not contain any interrogatories setting forth which aggravating factors were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no one will ever know if one, more than one, any, or all of the jurors agreed on any of the aggravating and mitigating circumstances. It is possible, in a case such as this one where several aggravating circumstances are submitted, that none of them received a majority vote. This places the court in the position of not knowing which aggravating and mitigating circumstances the jury considered to be proven and provides little, if any, guidance in determining a sentence. In fact, the trial judge is prohibited by law from requiring the jury to make findings through a verdict containing special interrogatories. *State v. Steele*, 921 So.2d 538 (Fla.2006). Accordingly, absent a recommendation for life, the jury recommendation is essentially meaningless to the trial judge, especially if the parties present additional aggravating and mitigating circumstances at the *Spencer* hearing.
>
> After the jury renders its recommendation, the trial judge is required by law to independently find the existence of aggravating and mitigating circumstances. The statute provides, "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is imposed."Sec. 921.141, Fla. Stat. (2005).
>
> There is no question about the trial court's duty to make findings independent from those made by the jury. The Supreme Court of Florida has made that clear on a number of occasions. Recently, the Court stated, "[h]owever, we remind judges of their duty to independently weigh aggravating and mitigating circumstances. A sentencing order should reflect the trial judge's independent judgment about the

existence of aggravating and mitigating factors and the weight each should receive." *Blackwater v. State*, 851 So.2d 650, 653 (Fla.2003).

Since the jury makes no findings whatsoever, and only delivers a sentence recommendation, the question arises as to what "great weight" truly means. The Court concludes that, when a jury returns a recommendation for the death penalty, "great weight" simply means the trial judge is not precluded from considering that option. As has been observed by the United States Supreme Court, "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona,* 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

Florida trial judges are bound to follow the precedent laid down by the Supreme Court of Florida. That Court has taken the position that the Florida capital punishment scheme is constitutionally valid unless and until the United States Supreme Court declares otherwise. *Marshal v. Crosby,* 911 So.2d 1129 (Fla.2005). Following that precedent, knowing the obvious due process problems with Florida's death penalty scheme, certainly tests the resolve of trial judges, who must decide who will live and who will die. *See Ring v. Ariz.,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).[898]

6.16.0 JUDGE'S ROLE AFTER RECEIVING THE JURY'S RECOMMENDATION

The judge has several duties that must be discharged after receiving the jury's recommendation to impose the death penalty. First, there must be a *Spencer* hearing. Second, the attorneys must submit written memoranda of law. Third, the trial judge must prepare the sentencing order. Finally, the judge must impose the sentence.

6.16.1 CONDUCT A *SPENCER* HEARING

There is nothing in *Florida* law that suggests the attorneys cannot present additional evidence to the judge alone that has not been presented to the jury. Accordingly, a separate hearing must be conducted prior to pronouncing sentence. This hearing is mandatory.[899] Clever defense counsel will hold back one or more strong mitigating circumstances for presentation at the *Spencer* hearing. This tactic gives the defense two chances for a life sentence. If the jury returns a life recommendation, the defense wins. If the judge is swayed because of the additional mitigation presented, the defense wins. Both sides must be allowed to present additional evidence and argument at this hearing. However, the trial judge should not allow the State to present evidence of an aggravating circumstance that has not previously been argued to the jury.[900] When this hearing has been concluded, the trial judge should recess to prepare the sentencing order. A separate date should be scheduled for the hearing during which sentence will be pronounced.

6.16.2 SENTENCING MEMORANDA

The trial judge should request sentencing memoranda from each side to be delivered prior to the sentencing date. The memorandum is not required, but it is helpful to use as an outline to

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[898]Aguirre-Jarquin v. State, 2009 WL 775388 (March 26, 2009) (Pariente, J., concurring).

[899]Spencer v. State, 615 So. 2d 688 (Fla. 1993); Phillips v. State, 705 So. 2d 1320 (Fla. 1997).

[900]*Ring*, 536 U.S. 584.

cover each aggravating and mitigating circumstance, including circumstances not presented to the jury. The trial judge should not have either side prepare the sentencing order.

Both the prosecutor and defense counsel should be required to list all the circumstances relied upon in the case and the reasons why the opponent's circumstances have not been established or the weight that should be given to them.[901] Both sides should be encouraged to provide authority for their positions and justify the weight suggested to each aggravating and mitigating circumstance.

Trial judges are required to address all aggravation presented by the prosecutor and all mitigation presented by the defendant. Although the aggravating circumstances may be fairly obvious, the mitigators are less so and the listed mitigators are the only ones that need to be addressed in the sentencing order.[902] There is authority for the trial judge to find an aggravating circumstance that was not argued to the jury or in the sentencing memorandum.[903] This authority is no longer valid because of the requirement that the jury find aggravating circumstances.[904] The decision in *Ring* does not preclude the trial judge from finding mitigating circumstances that were not argued or presented to the jury.[905]

There are additional problems whether the Court finds an aggravating circumstance that was not argued to the jury or if the State argues for one in the sentencing memorandum. The defendant will immediately move to reopen the case in order to rebut the new aggravating circumstance. It is not permissible to reopen the case after it has been submitted to the trier of fact.[906] Trial judges should not consider additional aggravating circumstances that have not been argued to the jury (or to the court if a jury has been waived). If the State suggests a new aggravating circumstance in the sentencing memorandum, the trial judge should either enter an order striking it from the memorandum or clearly state that it has not been considered in the sentencing order.

6.16.3 TRIAL JUDGE MUST PERSONALLY PREPARE THE SENTENCING ORDER

The findings of the trial judge (not the state attorney) of aggravation and mitigation must be in writing, and the order must be prepared by the judge. It is error to request the state attorney to prepare the order. The request itself is an improper ex parte communication.[907] In *Blackwelder v. State*,[908] the Court held that it is improper for the trial judge to ask the parties to submit proposed orders and adopt one verbatim without a showing that the trial court independently weighed the

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[901]Lucas v. State, 568 So. 2d 18 (Fla. 1990); Hodges v. State, 595 So. 2d 929 (Fla. 1992), rev'd on other grounds, Hodges v. Florida, 113 S. Ct. 33 (1992); Consalvo v. State, 697 So. 2d 805 (Fla. 1996).

[902]Consalvo v. State, 697 So. 2d 805 (Fla. 1996); Nelson v. State, 748 So. 2d 237 (Fla. 1999); Holland v. State, 773 So. 2d 1065, 1076 (Fla. 2000).

[903]Davis v. State, 703 So. 2d 1055 (Fla. 1997).

[904]*Ring*, 536 U.S. 584.

[905]Lugo v. State, 845 So. 2d 74 (Fla. 2003).

[906]Fla. R. Crim. P. 3.430.

[907]Spencer v. State, 615 So. 2d 688 (Fla. 1993); State vs. Riechmann, 777 So. 2d 342 (Fla. 2000).

[908]Blackwelder v. State, 851 So. 2d 650 (Fla. 2003). *See also*, Valle v. State, 778 So. 2d 960, 965 and Spencer v. State, 625 So. 2d 688 (Fla. 1993).

aggravating and mitigating circumstances. The Court stated:

> However, we remind judges of their duty to independently weigh aggravating and mitigating circumstances. A sentencing order should reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors and the weight each should receive. When a judge simply copies verbatim the State's submission, whether it is designated a "sentencing order" or a "sentencing memorandum," the judge abdicates that responsibility. Moreover, such verbatim copying renders more difficult, if not impossible, our own duty to determine whether the trial court fulfilled its sentencing responsibility. Therefore, we warn trial judges that they should avoid copying verbatim a State's sentencing memorandum. While we recognize the efficiency modern computer technology affords in drafting orders, efficiency cannot substitute for independent consideration of the evidence.

In *Card v. State,*[909] a motion for postconviction relief was returned for an evidentiary hearing to determine possible improprieties regarding the sentencing order that was prepared for the judge by the state attorney. The death penalty was originally affirmed in 1984. After the evidentiary hearing was concluded, the trial court ordered a new penalty phase hearing, and the defendant was again sentenced to death. The Supreme Court affirmed this sentence in 2001.[910] This waste of time and resources would have been avoided if the judge had prepared the sentencing order. Trial judges should not adopt a portion of the state attorney's sentencing memorandum verbatim because, even though the order shows independent weighing of aggravating and mitigating circumstances, it can create an unnecessary issue on appeal.[911]

In *Smith v. State*,[912] the death sentence was affirmed by the Court in 1987. The case was remanded for a new evidentiary hearing on postconviction relief in 1998 when the Court decided the judge had entered into three improper ex parte communications with the State when he asked the State to prepare his order denying relief of a 3.850 motion.

Error is invited when a successor judge adopts a substantial portion of a prior judge's sentencing order. The sentencing order must be the product of the author, so the Supreme Court of Florida can review the author's thought processes.[913] In *Hodges v. State*,[914] the successor judge's staff attorney asked both the State and the defense to participate in preparing an order that reflected the prior ruling of the original judge at a *Huff* hearing. The Court found no fault with this procedure, although the better course of action would have been to rehear the Huff hearing and avoid the issue on appeal.

6.16.4 FINDING AGGRAVATING CIRCUMSTANCES NOT SUBMITTED TO THE JURY

The question of whether the sentencing judge can consider an aggravating circumstance

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[909]Card v. State, 652 So. 2d 344 (Fla. 1995).

[910]Card v. State, 803 So. 2d 613 (Fla. 2001).

[911]Bevel v. State, 893 So. 2d 505 (Fla. 2008)).

[912]Smith v. State, 708 So. 2d 253 (Fla. 1998).

[913]Morton v. State, 789 So. 2d 324 (Fla. 2001).

[914]885 So. 2d 338 (Fla. 2004).

that was not considered by the jury, or an aggravating circumstance that was not only not considered by the jury but also not argued by the state, has been discussed by the Supreme Court on several occasions.

In *Fitzpatrick v. State*,[915] the trial judge found the aggravating circumstance of previous conviction of a felony involving threat or use of violence to another person, although the jury was not instructed on this aggravating circumstance.[916] The finding was based upon the contemporaneous convictions for kidnapping and attempted murder. The court held this to be proper.

In *Engle v. State*,[917] the state argued two aggravating factors that had not been submitted to the jury. The court approved this practice stating:

> Appellant also asserts that his due process rights were violated when the appellee was permitted to argue before the trial judge at sentencing for the applicability of two aggravating factors that had not been argued before the jury. He contends that he should be allowed "to have the existence and validity of aggravating circumstances determined as they were placed before the jury." The trial judge, however, is not limited in sentencing to consideration of only that material put before the jury, is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence. Prior cases make it clear that during sentencing, evidence may be presented as to any matters deemed relevant, and that a trial judge may consider information, such as presentence and psychological reports, which were not considered by the jury during its sentencing deliberations. Furthermore, the record indicates that the trial judge ordered the presentence investigation report on appellant, after the jury's recommendation had been received, at the request of appellant's trial counsel. Use of said information, with counsel being appraised thereof, was not improper and did not violate Garner v. Florida, 430 U. S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).(Other citations omitted.)

One early case, *Hoffman v. State*,[918] approved the finding that the murder was especially heinous, atrocious, or cruel, "even though the jury was not instructed on the particular aggravating circumstance. We fail to see how the jury's not being instructed on the aggravating circumstance has worked to appellant's disadvantage and therefore find this argument to be without merit."

In *Davis v. State*, [919] the HAC aggravating circumstance was found by the court although the jury was not instructed on it. In *Davis*, the state raised the aggravator in its sentencing memorandum. The defendant did not object to raising the aggravator after the jury made its recommendation; he only argued that the evidence did not support it. The Court held that the issue was not properly preserved on appeal. However, citing *Hoffman*, *Fitzpatrick,* and *Engle,* the court reiterated that "the trial judge is not limited in sentencing to consideration of only that material put before the jury, is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence."

In view of the fact that the Supreme Court has repeatedly held the Florida sentencing scheme not to violate the principles of *Apprendi* and *Ring*, and, since the above cases have not been

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[915]437 So. 2d 1072 (Fla. 1983).

[916]*Id*. at 1078.

[917]438 So. 2d 803 (Fla. 1983).

[918]474 So. 2d 1178 (Fla. 1985).

[919]703 So. 2d 1055 (Fla. 1998).

overruled, it is apparently permissible for the trial judge to consider aggravating factors that have neither been submitted to the jury nor argued by the state. Prudence would suggest that trial judges should use caution in considering these aggravating factors and at least put the defendant on notice that they are being considered in order to give the defendant an opportunity to be heard.

6.16.5 WEIGHT TO BE GIVEN TO JURY RECOMMENDATION - JURY OVERRIDES

1. Life Recommendation and Jury Overrides

The role of the jury during the penalty phase under the Florida death penalty scheme has always been confusing. The jury makes no findings of fact as to the existence of aggravating or mitigating circumstances, nor what weight should be given to them, when making its sentencing recommendation. It is not required to unanimously find a particular aggravating circumstance exists beyond a reasonable doubt. It makes the recommendation by majority vote, so it is possible that only a minority of jurors agree on any or all aggravating and mitigating circumstances. However, if the jury recommends the defendant be put to death, the trial judge must give this recommendation "great weight" except in the most unusual circumstances. The final sentencing decision is up to the trial judge and if a life sentence is imposed, even in a case of great aggravation and little mitigation, no reviewing court may reexamine the decision.

But what if the jury recommends the defendant be sentenced to life in prison without the possibility of parole and the trial judge disagrees with that recommendation? That situation arose before the United States Supreme Court in *Spaziano v. Florida.*[920] In Spaziano, the defendant was convicted of first-degree murder on the thinnest of circumstantial evidence. The jury recommended he receive a life sentence, and the trial judge overrode that recommendation and sentenced Spaziano to death. Spaziano argued he was entitled to be sentenced by a jury for a capital crime. The Court disagreed and approved the override noting, "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. It must also allow the sentencer to consider the individual circumstances of the defendant, his background, and his crime." The Court went on to state, "Nothing in those twin objectives suggests that the sentence must or should be imposed by a jury." In answer to Spaziano's argument that 30 out of 37 jurisdictions at the time required jury sentencing in death cases, the Court stated, "The fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws."[921]

Earlier, the Supreme Court of Florida had addressed the effect of a jury's life recommendation. In *Tedder v. State*,[922] the Court set forth the rule as follows: "A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."[923] "In other words," the Court has said, " the Court must reverse the override if there is a

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[920]Spaziano v. Fla., 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984).

[921]*Spaziano*, 468 U.S. at 460-464.

[922]Tedder v. State, 322 So. 2d 908 (Fla. 1975).

[923]*Tedder*, 322 So. 2d at 909.

reasonable basis in the record to support the jury's recommendation of life."[924]

Since the *Tedder* decision, a number of jury override cases have been reported. The vast majority of them have resulted in a reversal of the death sentence. In fact, during the last decade, the author could find only one jury override that was affirmed.[925] In Zakrzewski's case, the defendant was having marital problems and told a neighbor he would kill his family rather than go through a divorce. He purchased a machete and hid it in the bathroom after he arrived home. He struck his wife at least twice over the head with a crow bar, dragged her into the bedroom, hit her again and then strangled her with a rope. He then systematically called his two children, one at a time, into the bathroom where he murdered them with the machete. The jury recommended death for the murder of the wife and the first child, but recommended life for the second child. The trial judge overrode that recommendation and sentenced the defendant to death for the murder of the second child. The Supreme Court approved the override on the basis that the same aggravating and mitigating circumstances existed in all three murders and "no reasonable person could differ" as to the penalty.[926]

Admittedly, the facts of the Zakrzewski case are extreme. Most often, the jury override is not approved for reasons in the record (but not because the Court knows how the jury weighed them) such as:

(1) the defendant's physical and sexual abuse by his stepfather, combined with bipolar disorder;[927]

(2) disparate treatment of a codefendant, along with other mitigating evidence,[928]

(3) the age of the defendant coupled with sexual abuse, emotional and psychological problems, traumatic family life, drug abuse, past relationship with the victim, remorse and cooperation with law enforcement;[929]

(4) neurological impairment, attention deficit disorder, age, drug abuse, emotional abuse as a child, credibility problems with codefendant who testified and received a life sentence;[930]

(5) intoxication on the day of the murder, drug abuse, codefendant planned the murders, cooperation with law enforcement and 50-year minimum mandatory sentence;[931]

(6) defendant struck out impulsively and had dysfunctional family background including lack of parenting, physical and mental abuse;[932]

(7) defendant has borderline intelligence, a lesion on his brain, and was only an active participant in the robbery but was not armed;[933]

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[924]San Martin v. State, 717 So. 2d 462, 471 (Fla 1998).

[925]Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998).

[926]*Zakrzewski*, 717 So. 2d at 494.

[927]Strausser v. State, 682 So. 2d 539 (Fla. 1996).

[928]Craig v. State, 685 So. 2d 1224 (Fla. 1997).

[929]Boyett v. State, 688 So. 2d 308 (Fla 1997).

[930]Pomeranz v. State, 703 So. 2d 465 (Fla. 1997).

[931]Marta-Rodriguez v. State, 699 So. 2d 1010 (Fla. 1997).

[932]Mahn v. State, 714 So. 2d 391 (Fla. 1998).

[933]San Martin v. State, 717 So. 2d 462 (Fla. 1998).

(8) sexual abuse as a child, physical abuse by a mentally ill father, and defendant's role as a source of emotional support for his siblings, wife and children;[934]

(9) defendant's caring behavior, good work habits and first violent offense.[935]

The question of whether a jury has the right to recommend a life sentence that is safe from being overridden, even if the aggravating circumstances outweigh the mitigating circumstances, was considered by the Supreme Court over three years after *Zakrzewski* was decided. In *Franqui v. State*,[936] the prosecutor argued to the jury that it must recommend death if the aggravating circumstances outweigh the mitigating circumstances. The Court held that statement to be a misstatement of the law because, "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." In the *Franqui* opinion, the Court asked the Jury Instruction Committee to review the standard instructions to determine if they are adequate on this issue.

THE OVERRIDE TEST

The test to apply when the jury recommends a life sentence does not involve the same "weighing process" as when a death sentence is recommended. In fact, it is error to engage in such a "weighing process."[937] The singular focus under Tedder is not whether the aggravating circumstances appear to outweigh the mitigating circumstances in the mind of the trial judge, but whether there is a "reasonable basis" in the record to support the jury's recommendation. The "reasonable basis" standard does not demand that the trial judge agree with the jury's conclusion.[938]

The obvious difficulty in justifying a jury override is in the test itself. Under the Tedder standard, a jury override is justified and will be sustained only if "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."[939] Trial judges need to remember that the jury, composed of 12 qualified citizens of the county, has listened to the evidence in the guilt phase and has found the defendant to be guilty of capital murder beyond a reasonable doubt. These jurors were reasonable enough to accomplish that task. In order to justify overriding the same jury's decision to recommend life in prison, the trial judge will have to find that at least six juror's who were reasonable enough to find the defendant guilty have become unreasonable in recommending the sentence.

Assuming the trial judge determines there is no reasonable basis in the record for a life sentence, the sentencing order should proceed from the premise that the jury assigned great weight to the mitigating factors presented and, if so, whether such weighty mitigation could have justified a life recommendation.[940] In other words, the sentencing order should focus on why the jury was unreasonable instead of the traditional weighing analysis.

The slim chance that a jury override will be sustained on appeal is diminished further by the Supreme Court's pronouncement in *Franqui* that "a jury is neither compelled nor required to

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[934]Ramirez v. State, 810 So. 2d 836 (Fla. 2002).

[935]Weaver v. State, 894 So. 2d 178 (Fla. 2004).

[936]Franqui v. State, 804 So. 2d 1185 (Fla. 2002).

[937]*Weaver,* 894 So. 2d at 199.

[938]*Id.*

[939]*Tedder*, 322 So. 2d at 910.

[940]*Weaver*, 894 So. 2d at 200.

recommend death where aggravating factors outweigh mitigating factors."[941]

Over 90 percent of the cases involving jury overrides have been reversed.[942] The safe course of action for the trial judge to take after receiving a jury recommendation of life in prison is to determine the credit for time served and impose the sentence recommended by the jury.

Errors involved in overriding a jury recommendation of life imprisonment must be made on direct appeal and cannot first be raised on collateral attack.[943]

2. Death Recommendations

The jury's verdict containing a death recommendation will show the vote of the jurors but will not include any interrogatories setting forth which aggravating circumstances were found, and by what vote; which mitigating circumstances were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no one will ever know if one, more than one, any, or all of the jurors agreed on any of the aggravating or mitigating circumstances. Nor will anyone ever know if the jury's recommendation was based upon passion or prejudice, or was simply arbitrary.[944] Accordingly, the jury recommendation (unless it is for life) is meaningless to the trial judge, *who has the ultimate responsibility to both find the facts and impose the sentence.* It is not possible to reconcile such a system with *Ring* and *Apprendi*.[945]

Since the trial judge does not know which aggravating circumstances were considered proven beyond a reasonable doubt by the jury, and the vote as to each, the trial judge can only consider the recommendation generally and not as a binding finding of fact. Yet, the trial judge is required to give "great weight" to the jury recommendation in most cases.[946]

The "great weight" requirement can cause serious problems due to the lack of information on how the jury viewed the evidence. For instance, if an aggravating circumstance is determined to be invalid, or not proven beyond a reasonable doubt on review by the Supreme Court, it will be "presumed" that the jury found the defective aggravating circumstance and, therefore, the trial judge will have "indirectly" included the invalid aggravator in giving the recommendation "great weight."[947]

A definition of the subjective term "great weight" is not contained in the statute or the case law. The most that can be said about the guidance the Supreme Court of Florida has given to the trial courts in applying this term is that when a jury returns a life recommendation, "great weight"

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[941]*Franqui*, 804 So. 2d at 1192.

[942]Amazon v. State, 487 So. 2d 8 (Fla. 1986); Ferry v. State, 507 So. 2d 1373 (Fla.1987); Hegwood v. State, 575 So. 2d 170 (Fla. 1991); Stein v. State, 632 So. 2d 1361 (Fla. 1994); Esty v. State, 642 So. 2d 1074 (Fla. 1980); Parker v. State, 643 So. 2d 1032, (Fla. 1994); Caruso v. State, 645 So. 2d 389 (Fla.1994); Strausser v. State, 682 So. 2d 539 (Fla. 1996); Boyett v. State, 688 So. 2d 308 (Fla. 1996); Jenkins v. State, 692 So. 2d 893 (Fla. 1997); Pomeranz v. State, 703 So. 2d 465 (Fla. 1997); San Martin v. State 717 So. 2d 462 (Fla. 1998); Keen v. State, 775 So. 2d 263 (Fla. 2000); and Weaver v. State, 894 So. 2d 178 (Fla. 2004).

[943]Washington v. State, 907 So.2d 512 (Fla. 2005).

[944]*See* State v. Steele, 921 So. 2d 538 (Fla. 2006); Ibar v. State, 938 So. 2d 451 (Fla. 2006)

[945]*See* Section 6.1.5.

[946]Jackson v. State, 648 So. 2d 85, 88 (Fla. 1994).

[947]Id.

almost always precludes the imposition of a death sentence,[948] while "great weight" does not preclude the trial judge from disagreeing with a death recommendation and imposing a life sentence.[949] What is the effect of a death recommendation? Does it create a presumption that a death sentence is appropriate or is it something less than a presumption?

Trial judges are responsible for deciding who will live and who will die. And since the ultimate penalty is a final determination that a defendant's life be forfeited, the decision should be accompanied by findings that justify such a sentence. Since "great weight" almost always precludes the imposition of a death sentence when the jury recommends life, and since the jury's recommendation of death never precludes the trial judge from imposing a sentence of life, it is difficult to justify concluding a death recommendation amounts to a presumption in favor of that penalty. It can be argued that the jury's death recommendation simply makes the defendant "death eligible" and nothing more. It is then the trial judge's responsibility to make findings that will support a death sentence if the judge believes death is the proper sentence under the facts and circumstances of the case.

How "great" is the weight when the members of the jury cannot agree unanimously on the recommended sentence? Should a seven-to-five vote for death be given the same weight as a unanimous vote? The Supreme Court has not given trial judges any guidance on this issue, but judges often take the vote into consideration without knowing why the jury voted the way it did. This is an invitation to arbitrary sentencing in unanimous cases and an invitation to misconstrue the view of the jurors in less than unanimous cases. Perhaps the best course is to simply consider a death recommendation as making the defendant death eligible.

3. Weight to be Given to a Death Recommendation After a Spencer Hearing

Normally, the trial judge must give the jury recommendation "great weight." However, additional evidence introduced at the *Spencer* hearing may reduce the weight to be given to the recommendation, and it may be appropriate to give the recommendation little, if any, weight if the defendant has refused to allow the presentation of mitigating evidence to the jury and mitigation has been developed subsequent to the recommendation.[950] The weight given to the jury's recommendation should be stated in the sentencing order and fully justified.

4. Appellate Review by the Supreme Court of Florida

The Supreme Court of Florida's function in providing appellate review of death sentences is to (1) determine if the jury and judge acted with procedural rectitude in applying section 921.141 and the applicable case law, and (2) to ensure relative proportionality among death sentences, which have been approved statewide.[951] It is not the Supreme Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt--that

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[948]Smith v. State, 866 So. 2d 650 (Fla. 2004).

[949]Tompkins v. State, 872 So. 2d 230 (Fla. 2003).

[950]Muhammad v. State, 782 So. 2d 343 (Fla. 2001).

[951]Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). The origins of this case do not provide a glimpse of the Supreme Court of Florida's finest hour. The court was accused of having access to ex parte psychological reports on death-sentenced inmates. Von Drehle, *Among the Lowest of the Dead*, 167-187.

is the trial court's job.[952] The Supreme Court applies the "abuse of discretion" standard of review.[953]

The questions to be answered when trial judges are tempted to override a jury recommendation for a life sentence are these: Are there any statutory mitigating circumstances? If so, an override will probably not be sustained. Are there nonstatutory mitigating circumstances that are more than inconsequential? If so, an override will probably not be sustained. However, if there are valid aggravating factors, and *no* statutory mitigating circumstances and either *no* nonstatutory mitigating circumstances, *or* only inconsequential ones, the override may be affirmed.

A jury override was sustained in *Zakrzewski v. State.*[954] There was extensive mitigation in that case, and it is probably an aberration of the Court's previous and numerous decisions reversing overrides. The dissenting opinion has an excellent discussion of this issue. This case should be considered to be fact-specific and not reliable as precedent. In a later case, *Keen v. State*,[955] the Court reversed an override citing all the other cases forbidding overrides, but *Zakrzewski* was not mentioned.

In reversing an override in one case, a justice was critical of the trial judge's decision, calling it "a case that should never have reached this Court."[956]

6.16.6 WEIGHT TO BE GIVEN TO AGGRAVATING AND MITIGATING CIRCUMSTANCES

1. Aggravating Circumstances

The Supreme Court has given some guidance on how much weight to give various aggravating circumstances.

(a) HAC

This aggravator is so "strong" that a death sentence can be upheld on it alone.[957] However, it can be outweighed by two mental health mitigating circumstances and lack of an aggravating motive.[958]

(b) Prior violent felony

This is a "strong" aggravator. The death sentence has been upheld when this aggravator is

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[952]Owen v. State, 862 So. 2d 687 (Fla. 2003).

[953]Blanco v. State, 706 So. 2d 7 (Fla. 1998); Caballero v. State, 851 So. 2d 655 (Fla. 2003). The correctness of the "abuse of discretion" standard could be debated. There is either competent, substantial evidence in the record to support the trial court's finding or there is error.

[954]Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998).

[955]Keen v. State, 775 So. 2d 263, 282 (Fla. 2000).

[956]Pomeranz v. State, 703 So. 2d 465, 472 (Fla. 1997).

[957]Blackwood v. State, 777 So. 2d 399 (Fla. 2000); Butler v. State, 842 So. 2d 817 (Fla. 2003); Douglas v. State, 878 So. 2d 1246 (Fla. 2004).

[958]Offord v. State, 959 So. 2d 187 (Fla. 2007). (The Court noted the lack of pecuniary gain or avoid arrest as motives as well as the lack of prior violent felony.)

the only one present.[959] However, this aggravator alone is insufficient to justify a death sentence where there is significant mitigation, such as no significant prior criminal history; the murder was committed while under extreme mental or emotional disturbance; the capacity of the defendant to appreciate the criminality of his conduct was substantially impaired; and .the defendant acted under extreme duress or under the substantial domination of another person.[960]

The felony-murder aggravator, when combined with the prior-violent-felony aggravator, is not as weighty when the defendant receives a separate sentence for the underlying felony, the violent felonies occurred after the murder, and the defendant was sentenced for them. This case may encourage prosecutors to resist charging the felony involved in the homicide to avoid it receiving less weight.[961]

If the prior violent felony relied upon is quite old, and the defendant has led a "comparatively crime free" life in the interim, this aggravator does not carry the same weight as it would otherwise.[962]

The defendant will likely produce evidence tending to mitigate the prior violent felony aggravator. For instance, if the prior violent felony is a burglary, the defendant may wish to introduce facts to show the burglary was more akin to a trespass than a "generic burglary."

The term, "generic burglary" comes from Federal cases involving the Armed Career Criminal Act (ACCA).[963] While these cases do not directly apply to death penalty procedures under Florida law, they are instructive in that they differentiate between burglaries that involve the unlawful entry of a building or structure and those that would have been mere trespass but for legislative expansion of the definition of burglary.

Trial judges should pay careful attention when the defendant insists on providing the facts of a prior felony. Reaching into an open automobile and stealing something in plain view is burglary under Florida law, but such an act does not come close to common law burglary and should be weighed accordingly.[964] Likewise, under Florida law, a theft conviction does not require the asportation of goods[965] and a robbery can occur after an act of theft has been completed.[966] These offenses should be given less weight than crimes that would be punishable at common law.

1. Mitigating Circumstances

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[959]Ferrell v. State, 680 So. 2d 390 (Fla. 1996); Duncan v. State, 619 So. 2d 279 (Fla. 1993); Lamarca v. State, 785 So. 2d 1209 (Fla. 2001).

[960]Green v. State, 975 So. 2d 1081 (Fla. 20008).

[961]Hess, 794 So. 2d 1249.

[962]Larkins v. State, 739 So. 2d 90 (Fla. 1999).

[963]18 U. S. C. A. §921 et. seq.; U. S. v. Cordova-Arevalo, 456 F. 3d 1229 (10th Cir. 2006); U. S. v. Caruthers, 458 F. 3d 459 (6th Cir. 2006); U. S. v. McGee, 460 F.3d 667 (5th Cir. 2006).

[964]At common law, "burglary" was defined as the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony. State v. Bonebright, 742 So. 2d 290 (Fla. 1st DCA 1998).

[965]FLA. STAT. 812.014(1) (2005).

[966]FLA. STAT. 812.13(1) (2005).

In *Ford v. State*,[967] the Court explained how to weigh mitigating circumstances. The Court stated:

> (W)hen a court is confronted with a factor that is proposed as a mitigating circumstance, the court first must determine whether the factor is mitigating in nature. A factor is mitigating in nature if it falls within a statutory category or otherwise meets the definition of a mitigating circumstance. The court next must determine whether the factor is mitigating under the facts in the case at hand. *If a proposed factor falls within a statutory category, it necessarily is mitigating in any case in which it is present.* If a factor does not fall within a statutory category but nevertheless meets the definition of mitigating circumstance, it must be shown to be mitigating in each case, not merely present. If a proposed factor is mitigating under the facts in the case at hand, it must be accorded some weight; the amount of weight is within the trial court's discretion. (Footnotes omitted.) (Emphasis supplied.)

Among other definitions, the Supreme Court of Florida has defined "mitigating circumstance" to be "(A)ny aspect of a defendant's character or record and any of the circumstances of the offense that reasonably may serve as a basis for imposing a sentence less than death."[968]

In 2000, the Court receded from *Campbell* to the extent that there may be situations where a mitigating circumstance may be found, but accorded no weight.[969] This holding in no way minimizes the importance of following the dictates of *Campbell* in analyzing mitigation. In fact, despite *Trease* and *Bowles*, it is too dangerous for a trial judge to fail to give a mitigating circumstance at least some weight. Assigning some weight to the mitigating circumstance eliminates the issue of whether the circumstance is truly mitigating on appeal.[970]

In the *Ford* case, the Court held it to be error not to consider the following as mitigating circumstances: (a) a family history of alcoholism; (b) a medical history of diabetes; (c) the lack of sociopathic or psychopathic tendencies, and (d) the absence of antisocial tendencies. Each of these was held to be mitigating in nature in that each relates to a defendant's character or record or the circumstances of the offense and reasonably may serve as a basis for imposing a sentence less than death. While these factors are mitigating in nature, they may or may not be mitigating under the facts in the case at hand (that is for the trial court to determine.)[971]

The Court also held it to be error for the trial judge not to consider as mitigating the fact that the alternative punishment is life imprisonment without parole. The Court stated that parole ineligibility is mitigating in nature because it relates to the circumstances of the offense and reasonably may serve as a basis for imposing a sentence less than death.[972] At first glance, this last statement is difficult to understand. However, its application to particular facts makes it more apparent. For instance, in a felony-murder case that has little other aggravation, the homicide is already raised from manslaughter or second-degree murder to first-degree murder and that

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[967]Ford v. State, 802 So. 2d 1121 (Fla. 2001).

[968]Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990).

[969]Trease v. State, 768 So. 2d 1050 (Fla. 2000). *See also,* Bowles v. State, 804 So. 2d 1173 (Fla. 2002).

[970]*See,* Ford v. State, 802 So. 2d 1121, 1136, Pariente, J., concurring in the result only.

[971]*Id*. at 1135-36.

[972]*Id*. at 1136.

"circumstance of the offense" requires serious consideration and significant weight considering that no death sentence has been upheld in Florida with only the felony-murder aggravator present.

The weight to be given aggravating and mitigating factors is within the discretion of the trial court subject only to the "abuse of discretion standard" (no reasonable judge could have assigned the weight given.) The Supreme Court of Florida will not second-guess the trial judge absent an abuse of discretion.[973] It may be appropriate to find that an established mitigating circumstance is entitled to no weight for reasons unique to the case.[974] However, giving no weight to a mitigating circumstance is not recommended and should occur only in limited situations. The Court has held it to be an abuse of discretion to assign "little weight" to the age mitigator, and in diminishing the "significant weight" the Court obviously felt should be given to the defendant's lack of significant history of prior criminal activity.[975]

The Court has expressed its views on the weight that should be given various aggravating and mitigating factors upon occasion. Some examples are as follows:

(a) No significant history of prior criminal activity

This mitigating circumstance should be given careful consideration and, because the defendant has had a crime-free past, given significant weight. It is error not to find the existence of this circumstance if the evidence supports it.[976] Crimes committed contemporaneous with or after the commission of the capital felony cannot be considered in determining the existence of this mitigating factor.[977]

(b) Disparate sentences

When the evidence shows the more culpable codefendant received a life sentence, the least culpable codefendant should receive the same sentence.[978]

(c) Age

"For a court to give a non-minor defendant's age significant weight as a mitigating circumstance at the sentencing phase of a capital murder case, the defendant's age must be linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems."[979] But the closer the defendant is to age 17, the weightier this mitigator becomes.[980]

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[973]Blanco v. State, 706 So. 2d 7 (Fla. 1998); Kearse v. State, 770 So. 2d 1119 (Fla. 2000); Cox v. State, 819 So. 2d 705 (Fla. 2002).

[974]Douglas v. State, 878 So. 2d 1246 (Fla. 2004).

[975]Ramirez v. State, 739 So. 2d 568 (Fla. 1999).

[976]Hess v. State, 794 So. 2d 1249 (Fla. 2001).

[977]*Id*.

[978]Ray v. State, 775 So. 2d 604 (Fla. 2000).

[979]Hurst v. State, 819 So. 2d 689 (Fla. 2002).

[980]Urbin v. State, 739 So. 2d 568 (Fla. 1999). The age is probably 18 now.

(d) Brain damage is a "significant" mitigating circumstance.[981]

(e) Defendant's artistic ability. This circumstance has been recognized as mitigating, but it is not "compelling."[982]

The trial court is not required to impose a death sentence in any case, even if the aggravating factors far outweigh the mitigating factors.

Florida's death penalty statute contemplates that the trial jury, the trial judge and the Supreme Court will exercise reasoned judgment as to which factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances presented. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or the Supreme Court from exercising reasoned judgment in reducing the sentence to life imprisonment.[983]

The Supreme Court recently had the opportunity to review the decisions holding that the jury is never required to recommend a death sentence in the case of *Ibar v. State.*[984] In *Ibar*, defense counsel was prohibited from asking the jury for mercy, asking for a jury pardon, discussing whether the jury had lingering doubt, or eliciting personal opinions about the death penalty from witnesses. The Court focused on the "lingering doubt" argument and simply did not discuss the other issues.

6.16.7 THE WRITTEN ORDER MUST BE PREPARED PRIOR TO AND FILED CONTEMPORANEOUS WITH THE ORAL PRONOUNCEMENT OF THE DEATH SENTENCE

The sentencing order must be in writing and prepared prior to and filed contemporaneously with the orally pronounced death sentence.[985] The Court has made it clear that failure to provide timely written findings in a sentencing proceeding will result in a remand for the imposition of a life sentence.[986] In *Perez v. State,*[987] the trial judge directed the court reporter to transcribe his oral findings and submit them for inclusion in the court file instead of doing a written order,. The Court held this did not satisfy the required contemporaneous *written* order requirement and remanded for a life sentence. One justice has gone so far as to suggest that judges who ignore this requirement should be disciplined.[988]

The 1996 Legislature tried to give trial judges some extra time to prepare the sentencing order by amending the statute to allow the judge's written order supporting the death sentence to be filed

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[981]Crook v. State, 813 So. 2d 68 (Fla. 2002).

[982]Evans v. State, 808 So. 2d 92 (Fla. 2002).

[983]Alvord v. State, 322 So. 2d 533 (Fla. 1975); Smith v. State, 866 So. 2d 51 (Fla. 2004).

[984]938 So. 2d 451 (Fla. 2006).

[985]Grossman v. State, 525 So. 2d 833 (Fla. 1988).

[986]Stewart v. State, 549 So. 2d 171 (Fla. 1989); Christopher v. State, 583 So. 2d 643 (Fla. 1991); Hernandez v. State, 621 So. 2d 1353 (Fla. 1993).

[987]Perez v. State, 648 So. 2d 715 (Fla. 1995).

[988]Gibson v. State, 661 So. 2d 288 (Fla. 1995); Landry v. State, 666 So. 2d 121 (Fla. 1995).

within 30 days after the rendition of the judgment and sentence.[989]

A danger exists here. In *Grossman v. State,*[990] the Court has stated it was establishing a "procedural rule" requiring all written orders imposing a death sentence be prepared prior to the actual sentencing and be filed contemporaneously. In *Perez v. State*,[991] the Court stated the purpose of the contemporaneous filing requirement is ". . . to reinforce the Court's obligation to think through its sentencing decision and to ensure that written reasons are not merely an after-the-fact rationalization for a hastily reasoned initial decision imposing death."

The Legislature can repeal a rule of criminal procedure but cannot amend one.[992] An unanswered question is whether the 1996 Legislature "amended" or "repealed" a "rule," or whether the Court's "rule" reflected the law at the time it was enacted. Until the Court answers this question, trial judges should file written sentencing orders contemporaneously with the oral pronouncement of the sentence.

6.16.8 SET THE SENTENCING DATE AFTER THE *SPENCER* HEARING.

Since both the state attorney and defense counsel may make an oral presentation to the judge before sentencing (at the *Spencer* hearing), it is proper procedure to hear oral arguments and then set the sentencing later--on a different date--where the only order of business is the judge's pronouncement of sentence and the reading and filing of the sentencing order, if the sentence is one of death. This procedure is mandatory.[993] The entire order does not have to be read, but at least the basis for the decision to impose the death sentence should be announced. Of course, it is proper to read the entire order for the benefit of the defendant and others who are present.

6.16.9 CONTENT OF THE SENTENCING ORDER

The sentencing order should not include aggravating circumstances that are not listed in the statute as justification for imposing a death sentence. For instance, connecting the death penalty decision to the future dangerousness of the defendant is error.[994] However, future dangerousness may be considered in assigning little weight to mental mitigation. The Supreme Court has held that the sentencing judge may find that the defendant's mental condition "contributed to a combination of antisocial personality features and borderline personality features which have coalesced over time into a conduct disorder that now makes (defendant) a dangerous person."[995]

The sentencing order should not include any information outside of the record of the trial, unless the defendant is advised in advance and given an opportunity to rebut it.[996]

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[989]Fla. Stat. ch. 921.141(3).

[990]*Grossman*, 525 So. 2d 833 (Fla. 1988).

[991]Perez v. State, 648 So. 2d 715, 720 (Fla. 1995).

[992]In re Clarification of Fla. Rules of Practice and Procedure, Fla. Constitution, Article V, section 2(a), 281 So. 2d 204 (Fla. 1973).

[993]Spencer v. State, 615 So. 2d 688 (Fla. 1993).

[994]Perez v. State, 919 So. 2d 347 (Fla. 2005).

[995]*Id.*

[996]Porter v. State, 400 So. 2d 5 (Fla. 1981); Consalvo v. State, 697 So. 2d 805 (Fla. 1996).

Present law allows an aggravating factor that has not been submitted to the jury to be included in the sentencing order.[997] This procedure is likely to not pass Sixth Amendment scrutiny after *Ring v. Arizona.*[998]

The sentencing order should not include findings that are not supported by the record. Trial judges who make improper findings will read about it when the case is reviewed on appeal.[999]

All statutory and nonstatutory mitigating circumstances presented by the defense must be considered and weighed by the trial judge in the sentencing order. Failure to adequately consider and weigh mitigating circumstances can result in the imposition of a life sentence by the Supreme Court of Florida.[1000]

Campbell v. State[1001] is the landmark case from the Supreme Court of Florida on how to address mitigating circumstances in the sentencing order. It is extremely important that the requirements of *Campbell* are followed in addressing mitigation in the sentencing order.

In *Ferrell v. State*,[1002] the Court spelled out the requirements of an acceptable sentencing order as follows:

> The sentencing judge must expressly evaluate in his or her written sentencing order each statutory and non-statutory mitigating circumstance proposed by the defendant. This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.

In the *Ferrell* case, the Court determined the order was inadequate and remanded for a new sentencing order.[1003] The full text of the inadequate sentencing order is set out in the opinion.

The Court is getting annoyed with sentencing orders that fail to measure up to the clear requirements announced in *Campbell*. In one case, the Court remanded a death sentence for a new sentencing order because the order failed "to expressly evaluate each mitigating circumstance, fail(ed) to determine whether these mitigators are truly mitigating, and fail(ed) to provide a detailed

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[997]Davis v. State, 703 So. 2d 1055 (Fla. 1997).

[998]*Ring*, 536 U.S. 584.

[999]Dennis v. State, 690 So. 2d 1280 (Fla. 1997); Douglas v. State, 878 So. 2d 1246 (Fla. 2004).

[1000]Crook v. State, 908 So. 2d 350 (Fla. 2005).

[1001]Campbell v. State, 571 So. 2d 415 (Fla. 1990).

[1002]Ferrell v. State, 653 So. 2d 367 (Fla. 1995).

[1003]*See also*, Reese v. State, 694 So. 2d 678 (Fla. 1997); Crump v. State, 697 So. 2d 1211 (Fla. 1997); Walker v. State, 707 So. 2d 300 (Fla. 1997); *Jackson*, 704 So. 2d 500; Hudson v. State, 708 So. 2d 256 (Fla. 1998); Merck v. State, 763 So. 2d 295 (Fla. 2000).

explanation of the result of the weighing process."[1004]

In 2000, the Court receded from *Campbell* to the extent that there may be rare circumstances where a mitigating circumstance may be found, but accorded no weight.[1005] This holding in no way minimizes the importance of following the requirements of *Campbell* in analyzing mitigation. The instance of affording a mitigating circumstance no weight should be rare, and it is better practice for the trial judge to give each mitigating factor appropriate weight.

An example of a case in which the trial judge successfully rejected mitigation as unproven and rejected mitigation as not mitigating in nature is *Douglas v. State.*[1006]

In Douglas, the defendant put forth testimony that he loved his children, is a good father, is an upbeat and positive person and has an outgoing and friendly personality. However, on cross examination, the witnesses did not even know the number of children the defendant had. Nor did they know if the defendant had supported the children. None of the mothers of the four children testified that the defendant "did anything worthwhile or beneficial for any of his children on a regular basis." Thus, the trial judge was able to reject the testimony as unreliable.

Additionally, Douglas solicited testimony that his father was removed from the home when he was age 9, that he worked at several jobs and that he was impaired by alcohol at the time of the crime. The trial judge rejected this testimony as not mitigating because the father's departure from the home was beneficial rather than detrimental, there was no evidence the defendant maintained steady employment and, while there was evidence that the defendant had been drinking alcohol, the extent of impairment was not proven. Indeed, he was able to drive a manual transmission automobile throughout the evening of the murder and conversed with one witness shortly after the killing occurred. Additionally, there was no evidence of chronic or long-term alcohol or drug abuse.

6.17.0 RESENTENCINGS

The Supreme Court may order resentencing due to an error in analysis of evidence of aggravating and mitigating circumstances (*Campbell* error) or because the penalty phase hearing has been reversed on its merits.

A resentencing hearing is a *de novo* proceeding. It is error for the trial judge to consider evidence that was presented at the original penalty phase trial unless it is presented during the new penalty phase trial[1007].

The defendant has the right to be present at resentencing, even if it is only for the purpose of correcting a *Campbell* error such as failure to discuss a mitigating circumstance and assign weight to it. Additionally, upon remand, the court must conduct a new hearing, giving both parties an opportunity to present argument and submitting sentencing memoranda before determining the appropriate sentence.[1008]

6.17.1 RESENTENCING AFTER REMAND DUE TO *CAMPBELL* ERROR

If the case is remanded for a new sentencing order due to a *Campbell* error in analyzing

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[1004]Woodel v. State, 804 So. 2d 316 (Fla. 2001).

[1005]Trease v. State. 768 So. 2d 1050 (Fla. 2000). *See also,* Bowles v. State, 804 So. 2d 1173 (Fla. 2002).

[1006]*Douglas*, 878 So.2d 1246 (Fla. 2004).

[1007]Lebron v. State, 982 So. 2d 649 (Fla. 2008).

[1008]Jackson v. State, 767 So. 2d 1156 (Fla. 2000).

mitigating circumstances, the proper procedure to follow on remand is to conduct a new hearing, giving both parties an opportunity to present argument and submit sentencing memoranda before the trial court determines the appropriate sentence. No new evidence need be introduced at the hearing.[1009] The defendant must be present at the hearing.[1010]

*S*everal sentencing orders that have been discussed by the Supreme Court of Florida are included with these materials.

Appendix A is an Order prepared in *State of Florida v. Oba Chandler*. The Supreme Court of Florida stated in part, "Contrary to Chandler's assertion, the sentencing order in this case not only complies with the approved procedure, but is, indeed, a textbook example of how thoughtful, deliberative sentencing orders should be written."[1011]

Appendix B is a sentencing order prepared in the case of *State of Florida v. Leonardo Franqui*. The Supreme Court of Florida complimented this order by stating, "In this case we note that the trial court's detailed sentencing order stands as a model of compliance with the *Campbell* requirement. In short, it is the epitome of what should be done by a trial court in order to determine an appropriate sentence."[1012]

Appendix C is a sentencing order prepared in the case of *State of Florida vs. Ricardo Gonzalez*. The trial judge conducted a lengthy analysis of the mitigator of the defendant being under the influence of "extreme mental or emotional disturbance." The judge rejected the mitigator and the Court agreed. Justice Pariente commended the judge's "comprehensive and well-reasoned sentencing order." She also stated that his "detailed evaluation of the evidence related to statutory mitigation and his explanation as to why he did not find the testimony established the mitigating circumstance . . . greatly assisted this Court in our review of the death sentence in this case."[1013] If the analysis in any of these orders is followed, a sentencing order should pass the review of the Supreme Court of Florida.

Appendix D is a sentencing order prepared in the case of *State of Florida v. Richard Lynch*. The order discusses HAC in a double homicide involving shootings and has an extensive discussion of weighing the felony-murder rule when CCP is an aggravating circumstance. The order was approved by the Court.[1014] (The report of the case also contains a plea colloquy for a guilty plea to first-degree murder.)

If the case has an *Enmund/Tison* issue, the sentencing order must address and make findings supporting the *Enmund/Tison* culpability requirement.[1015]

6.17.2 RESENTENCINGS AFTER NEW PENALTY PHASE IS ORDERED

New problems are presented when a new penalty phase trial is ordered.

A. No Mention of Prior Death Sentence.

[1009]Reese v. State, 728 So. 2d 727 (Fla. 1999).

[1010]Jackson v. State, 767 So. 2d 1156 (Fla. 2000); Woodel v. State, 985 So. 2d 524 (Fla. 2008).

[1011]Chandler v. State, 702 So. 2d 186, 200 (Fla. 1997).

[1012]Franqui v. State, 699 So. 2d 1312, 1328 (Fla. 1997).

[1013]Gonzalez v. State, 786 So. 2d 559, 570 (Fla. 2001), Pariente, J. concurring.

[1014]Lynch v. State, 841 So. 2d 362 (Fla. 2003).

[1015]Benedith v. State, 717 So. 2d 472 (Fla. 1998); *See*, sec. 6.2.2.

The jury will be instructed that the defendant has already been convicted of murder in the first degree, so their responsibility is not to determine the issue of guilt. However, neither the trial judge nor the prosecutor may tell the jury the defendant was previously sentenced to death.[1016] The Standard Jury Instructions adequately cover this subject. The Model Penalty Phase Jury Instructions contain an explanation for the delay involved between verdict and sentencing.

B. Preliminary Jury Instructions.

The jury should receive preliminary instructions after being sworn and before opening statements are made. Copies of the instructions can be given to each of the jurors for reference during the trial.

C. State's Evidence to be Admitted.

The prosecutor is not permitted to retry the entire guilt phase of the case. The only evidence that should be offered is that which is necessary to prove aggravating circumstances, to familiarize the jury with the facts of the case and to present victim-impact evidence.[1017] Permitting the State to introduce other evidence invites reversal.[1018]

D. New Aggravating Factors.

With the exception explained below, the prosecutor is entitled to introduce evidence of new aggravating factors to the jury during a new penalty phase trial. Offering new aggravating factors is not a violation of the Double Jeopardy Clause of the Constitution.[1019] The new aggravating factors should be given to the jury if sufficient evidence is presented and, if the death sentence is to be imposed, discussed in the sentencing order.

Newly enacted aggravating factors may be pursued by the prosecutor unless there is a violation of the Ex Post Facto clause of the Constitution. Ex Post Facto problems are discussed above in the sections on each aggravating factor. The trial judge can determine an aggravating factor exists at a new penalty phase trial, even if it was not found to exist at the original trial.[1020] However, after Ring v. Arizona, it is error to find the existence of an aggravating circumstance that has not been submitted to the jury.[1021]

There is an exception to the rule allowing new aggravating circumstances. If the original jury recommended life, and the case is remanded for resentencing, the trial judge cannot consider any additional aggravating circumstances the original jury did not consider (unless the original jury did

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[1016]People v. Wooley, 205 Ill. 2d 296, 793 N. E. 2d 519 (Ill. 2002).

[1017]Floyd v. State, 569 So. 2d 1225 (Fla. 1990); Bonifay v. State, 680 So. 2d 413, 419 (Fla. 1996); Teffeteller v. State, 495 So. 2d 744 (Fla. 1986); Windom v. State, 656 So. 2d 432 (Fla. 1995).

[1018]Hitchcock v. State, 673 So. 2d 859 (Fla. 1996).

[1019]Poland v. Arizona, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986); Preston v. State, 607 So. 2d 404 (Fla. 1992).

[1020]Phillips v. State, 705 So. 2d 1320 (Fla. 1997).

[1021]*Ring*, 536 U.S. 584.

not consider an aggravator due to legal error.)[1022]

E. New Mitigating Factors.

The Double Jeopardy Clause and the Ex Post Facto Clause are for the benefit of the defendant. Therefore, during a new penalty phase trial the defendant may present all mitigation that exists whether it existed at the time of the original penalty phase trial (such as good jail conduct, a codefendant sentenced to life subsequent to the original sentence, etc.) and the jury and the trial judge must consider all of it in determining the appropriate sentence.[1023] If a mitigating circumstance has been changed from a nonstatutory one to a statutory one, such as the defendant's background was in 1966, the judge should give the mitigation its new classification in the sentencing order.

F. Additional Closing Argument Problem.

The Supreme Court of Florida has prohibited the prosecutor from suggesting during closing argument that, if the jury recommends life, the defendant will be eligible for parole after 25 years.[1024] This situation will only occur in very old cases.

G. Jury Instructions.

At least one copy of the written instructions must be given to the jury during deliberations. It is permissible to give each juror a copy.

Trial judges need to remember that the jury has not had the benefit of the Standard Instructions that would normally have been given at the end of the guilt phase of a trial.

The jury should be instructed on credibility of witnesses, expert witnesses, the defendant testifying or not, and other instructions that may be appropriate.[1025] It is error not to give the "defendant not testifying" instruction if the defendant requests it.

The jury should also be instructed that the State must prove aggravating circumstances beyond a reasonable doubt, while the jury need only be reasonably convinced that mitigating circumstances exist. Reasonable doubt should be defined.

Two recent cases have rejected the defendant's claim that failure to instruct the jury on reasonable doubt was *fundamental* error.[1026] These decisions probably mean that it is the defendant's burden to request an instruction. In *Lawrence*, the Supreme Court of Florida recommended that the Supreme Court Committee on Standard Jury Instructions in Criminal Cases "consider, and, if it finds necessary, propose a new sentencing-phase instruction which defines this term."[1027] The new instruction must now be given to the jury.

The trial court should review the instructions carefully to make sure they are accurate and complete. Every effort should be made to ensure a jury instruction issue does not find its way into the trial.

[1022]Craig v. State, 685 So. 2d 1230 (Fla. 1996).

[1023]*Id.*; Clark v. State, 690 So. 2d 1280 (Fla. 1997).

[1024]Hitchcock v. State, 673 So. 2d 859, 863 (Fla. 1996).

[1025]Burns v. State, 699 So. 2d 646 (Fla. 1997).

[1026]Archer v. State, 673 So. 2d 17 (Fla. 1996); Lawrence v. State, 691 So. 2d 1068 (Fla. 1997).

[1027]691 So. 2d at 1072, n 5.

H. Resentencing Order.

The trial judge must prepare a new sentencing order. The new order must not use substantial portions of the previous sentencing order. The resentencing is a new proceeding, and it requires a new order that is an original work.[1028]

I. Resentencing Without a Jury.

The trial judge should follow the specific directions of the Court if a case is remanded for resentencing, but additional evidence is not to be presented. The Court has given specific directions about the type and number of hearings that must be conducted and what issues are to be considered. The defendant must be present at any hearings.[1029]

J. Res Judicata.

A new penalty phase trial after remand from a postconviction-relief motion is not a "new and different case for res judicata purposes" and failure to raise an issue such as denial of a motion to suppress evidence in the initial trial and appeal does not bar a defendant from raising that issue in the new penalty phase under the "clean slate doctrine." The doctrine of "res judicata" differs from the "law of the case" because "res judicata applies to different cases, while the law of the case applies to only one case.[1030]

6.18.0 DISQUALIFICATION OF JUDGE

GENERAL REQUIREMENTS AND PROCEDURE

The substantive law of judicial disqualification is contained in Florida Statutes and the Rules of Judicial Administration govern the procedure to be used..[1031] Motions for disqualification of the trial judge must be in writing and allege specifically the facts and reasons upon which the movant relies as grounds for disqualification. The motion must be sworn to by the party signing the motion or by a separate affidavit. The attorney for the party must also separately certify that the motion and the client's statements are made in good faith. The motion must be filed with the clerk and immediately served upon the judge. The motion must be filed within 10 days after discovery of the grounds for the motion. The party seeking disqualification of the trial judge waives the grounds alleged if the motion is not timely filed.[1032] Mere service of the motion is insufficient. The motion must be filed with the clerk within the 10-day period.[1033]

The procedure for an attorney to move for disqualification during a trial is basically the same

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[1028]Morton v. State, 789 So. 2d 324 (Fla. 2001).

[1029]Reese v. State, 728 So. 2d 727, 728 (Fla. 1999); *Jackson*, 767 So. 2d 1156.

[1030]Preston v. State, 607 So. 2d 404, 408-09 (Fla.1992); Parker v. State, 873 So.2d 270 (Fla. 2004).

[1031]Sec. 38.01, FLA STAT; Rule 2.330, Fla. R. Jud. Admin. (Formerly Rule 2.160); Wickham v. State, 2008 WL 5333076 (Fla. Dec. 23, 2008).

[1032]Rodriguez v. State, 919 So. 2d 1252 (Fla. 2005).

[1033]Thomas v. The Chase Manhattan Bank, 857 So. 2d 989 (Fla. 4th DCA 2000).

as before trial. The attorney must orally state the intent to file a motion for disqualification, and the trial must be suspended for a reasonable time to allow the attorney to prepare a written motion. Even though an oral motion to disqualify may cause frustration, it is not the time for the trial judge to become hostile, especially in a death penalty case.[1034] A motion to disqualify should be denied for untimeliness only when its allowance will delay the orderly progress of the case, or it is being used as a disruptive or delaying tactic.[1035] The motion will be presumed to be untimely if it is delayed until the moving party has suffered an adverse ruling.[1036] Additionally, there is authority that supports the proposition that trial judges do not have to blindly accept the obvious attempt of a defendant to manipulate the system in order to gain a delay.[1037] The judge who is the subject of a motion for disqualification may only determine if the motion is legally sufficient and may not pass upon the truth of the facts alleged.[1038] Passing on the truth of the facts alleged provides independent grounds for disqualification.[1039]

It is not unusual for the State or the defense to try to disqualify the trial judge in order to seek a perceived advantage in the trial, the penalty phase, or in postconviction-relief. The general rule for disqualification in death penalty cases is the same as in other cases. The motion to disqualify a judge is legally sufficient if the facts alleged demonstrate that the moving party has a well-grounded fear that he or she will not receive a fair trial at the hands of the judge. To determine if a motion to disqualify a judge is legally sufficient, the Supreme Court looks to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. The impartiality of the trial judge must be beyond question.[1040]

Subjective fears based upon rumor or gossip by unidentified persons are insufficient to cause the trial judge to disqualify.[1041]

Usually, the trial judge is not subject to disqualification if he or she only discusses the case in open court at a scheduled hearing with the defendant present[1042] and expresses no opinion about

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[1034]In re: Aleman, 2008 WL 4379591 (Fla. Sept. 29, 2008).

[1035]Rule 2.160(e), Fla. R. Jud. Admin.; Deren v. Williams, 521 So. 2d 150, 152 (Fla. 5th DCA 1988), rev. den., 531 So. 2d 169 (Fla. 1988); Holloman v. State, 702 So. 2d 1335 (Fla. 5th DCA 1997) (Antoon, J., concurring.).

[1036]Michaud-Berger v. Hurley, 607 So. 2d 441 (Fla. 4th DCA 1992).

[1037]Tennis v. State, 2008 WL 5170559 (Fla. Dec. 11, 2008); Tyler v. State, 945 So. 2d 662, 663-64 (Fla. 4th DCA); State v. Young, 626 So. 2d 655, 657 (Fla. 1993); Haran v. State, 625 So. 2d 875 (Fla. 5th DCA 1993). (These cases illustrate disruptive tactics such as insisting on self representation in order to obtain a delay.)

[1038]Shuler v. Green Mountain Ventures, Inc., 791 So. 2d 1213 (Fla. 5th DCA 2001).

[1039]J & J Industries, Inc. v. Carpet Showcase of Tampa Bay, Inc., 723 So. 2d 281 (Fla. 2d DCA 1998).

[1040]Roberts v. State, 480 So. 2d 962 (Fla. 2003).

[1041]Barwick v. State, 660 So. 2d 685 (Fla. 1995).

[1042]*Id.*

the merits of the case,[1043] the credibility of the witnesses,[1044] or the performance of counsel.[1045] This is true because the judge may not have any substantive communication with counsel for any party, including counsel for the State, unless such communication is expressly authorized by statute or rule.[1046] The following topics illustrate the typical grounds for recusal and how the courts consider them on review:

ADVERSE RULINGS

The fact that the moving party has received adverse rulings from the trial judge does not give cause to disqualify the judge.[1047]

JUDGE WHO IMPOSED THE DEATH SENTENCE

The trial judge is not automatically disqualified to preside over a new penalty phase proceeding or a postconviction-relief proceeding simply because the same judge originally imposed the death sentence.[1048]

PRIOR RULINGS ON CREDIBILITY OF WITNESSES; FIXED OPINION OF GUILT OF DEFENDANT

In *Kokal v. State*,[1049] the defendant moved to disqualify the trial judge from hearing postconviction evidence because, in the postconviction proceeding involving his codefendant, the judge had determined the credibility of two witnesses and found one witness credible and the other witness incredible. These two witnesses were also scheduled to testify in Kokal's hearing. The trial judge denied the motion to disqualify and the Supreme Court affirmed, stating:

> [t]he fact that a judge has previously made adverse rulings is not an adequate ground for recusal. Nor is the mere fact that a judge has previously heard the evidence a legally sufficient basis for recusal. Likewise, allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that the judge discussed his opinion with others, is generally legally insufficient to mandate disqualification.[1050]

PRIOR INVOLVEMENT IN THE CASE

[1043]State v. Ballard, 956 So. 2d 470 (Fla. 2d DCA 2007).

[1044]*Barwick*, 660 So. 2d at 693.

[1045]Correll v. State, 698 So. 2d 522 (Fla. 1997).

[1046]*Barwick*, 660 So. 2d at 692.

[1047]*Id.*; *Correll*,698 So. 2d at 525.

[1048]Willacy v. State, 696 So. 2d 693 (Fla. 1997); Mansfield v. State, 911 So.2d 1160 (Fla. 2005).

[1049]Kokal v. State, 901 So. 2d 766 (Fla. 2005).

[1050]*Id.* at 775.

A trial judge's prior role in issuing a search warrant is not grounds to require disqualification of that judge from hearing a motion to suppress evidence obtained as a result of the search warrant, absent additional circumstances.[1051]

The fact that a judge has presided over the same case previously, including the trial of codefendants, is not grounds to disqualify the judge.[1052]

SUCCESSIVE MOTIONS

Successive motions to disqualify the trial judge are reviewed by a different standard than original motions. Rule 2.330(g), *Fla. R. Jud. Admin*. provides as follows:

> **Determination-Successive Motions.** If a judge has been previously disqualified on motion for alleged prejudice or partiality under subdivision (d)(1), a successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may pass on the truth of the facts alleged in support of the motion.

If the trial judge determines that he or she can be fair and impartial, or that the matters alleged in the motion are untrue, it is sufficient for the order denying the motion to simply state: "After careful consideration of the matters raised in Defendant's Motion to Disqualify, the Court has determined that it remains, and will continue to be, an impartial arbitrator as to (defendant's) pending (trial) (motion). Specifically, the Court finds that it is not true that it 'cannot be impartial' because of (state grounds).[1053]

PRIOR EMPLOYMENT BY STATE ATTORNEY

The mere fact that the trial judge was once employed by the state attorney does not require the judge to disqualify from the case. However, disqualification is required if the judge had any prior involvement with the case while with the state attorney's office or if the judge has previously prosecuted the defendant for a crime.[1054]

COMMENT ON THE STATUS OF THE RECORD

While it is not appropriate for a judge to comment on the truth of the allegations contained in the motion, it is permissible to explain the status of the record.[1055]

HOSTILITY BETWEEN THE JUDGE AND COUNSEL

A judge may be disqualified due to prejudice toward an attorney where the prejudice is of

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[1051]Cano v. State, 884 So. 2d 131 (Fla. 2d DCA 2004).

[1052]Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992).

[1053]See, *Kokal*, 901 So. 2d at 773.

[1054]Goines v. State, 708 So. 2d 565 (Fla. 4th DCA 1998); Schoenwetter v. State, 931 So. 2d 857 (Fla. 2006).

[1055]*Barwick*, 660 So. 2d at 694.

such degree that it adversely affects the client. [1056] However, the grounds for disqualification disappear when the attorney withdraws several months before trial and another attorney is substituted.[1057] The fact that the trial judge expresses an opinion that collateral counsel was using the public records act as a delaying tactic is not grounds for disqualification.[1058]

PREJUDGING THE DEATH PENALTY

In *State v. Ballard*,[1059] the State sought the death penalty for a 65-year-old defendant. At a status conference, defense counsel informed the trial judge that he could not be ready for trial on the scheduled trial date if the State insisted on seeking the death penalty. The trial judge, noting the defendant's age, turned to defense counsel and stated, "Could be . . . . Well, you can imagine what I might be thinking." The judge then turned to the prosecutor and stated, "Okay. Is (sic) that might be a waste of the state's resources. You might want to reevaluate given his advanced age." The State filed a motion to disqualify the judge, alleging the judge had "prejudged the decision regarding the death penalty in this matter." The trial judge denied the motion and the State sought a writ of prohibition.

The District Court of Appeal applied the test of "whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." The Court admitted the remarks made by the judge could be interpreted in two ways. First, the remarks could be interpreted to "appear to have been intended to encourage the State to make a realistic assessment of the case so that the court and the attorneys could intelligently address the scheduling issue. Viewed in the context of the scheduling problem, that was the main subject of the status conference, one may reasonably interpret (the trial judge's comments) as intended to facilitate the fair and efficient administration of the case against Mr. Ballard, not as reflecting a prejudgement about whether life in prison without the possibility of parole - instead of death - would be the appropriate penalty if Mr. Ballard were convicted of first degree murder. " Second, because the judge raised the issue of the defendant's age "on her own," invited the attorneys to "imagine" what she may be thinking, and followed that statement up with the observation "that pursuing the death penalty in Mr. Ballard's case 'might be a waste of the State's resources,'" the remarks could have been interpreted as an indication that the trial judge had prejudged the case. The District Court concluded that the trial judge "instructed" the prosecutor to have the case reevaluated "given Mr. Ballard's advanced age." Using double negatives, the Court then concluded, "Under these circumstances, we cannot say that the State could not reasonably conclude that (the trial judge's) remarks reflected a prejudgment on the issue of whether it would be appropriate to impose the death penalty in Mr. Ballard's case."

This decision has brought a firestorm of criticism from trial judges throughout the state. The disqualification rule allows a movant to seek the disqualification of a judge if facts are alleged that would place a reasonably prudent person in fear of not receiving a fair and impartial trial.[1060] However, the motion for disqualification must demonstrate some actual bias or prejudice, not

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[1056]Barwick at 693; Livingston v. State, 441 So.2d 1083 (Fla.1983; State ex rel. Fuente v. Himes, 160 Fla. 757, 36 So.2d 433 (1948).

[1057]Barwick at 693.

[1058]*Correll*, 628 So. 2d at 524.

[1059]956 So. 2d 470 (Fla. 2d DCA 2007).

[1060]Downs v. Moore, 801 So. 2d 906 (Fla. 2001).

speculation or conjecture.[1061] In *Ballard*, the trial judge's remarks, which were ambiguous at best, had nothing to do with giving the State a fair trial or hearing. Also, the remarks had nothing to do with the penalty to be imposed if the trial proceeded to the penalty phase. Under Florida's death penalty scheme, the determination of the sentence is peculiarly within the province of the trial judge, not the state attorney.[1062] The trial judge in Ballard's case was an experienced judge who fully understood the role the trial judge plays in sentencing capital defendants. The trial judge must have known that the average time spent on death row before execution exceeds a decade.[1063] Therefore, the likelihood of the defendant being executed before dying of natural causes was a distinct possibility. Advanced age can be a significant mitigating circumstance, and the weight given to it is within the discretion of the trial judge.[1064] Importantly, the trial judge did not indicate how she felt Ballard's age *would be weighed against any aggravating circumstances proven to exist*. This weighing process is absolutely crucial in order to prejudge a sentence in a capital case.[1065] Accordingly, the record before the District Court was incomplete and could not support the conclusion that the judge prejudged the sentence that she would impose after the penalty phase and the trial judge should not have been disqualified.

Hopefully, the *Ballard* case will be the subject of further review. *Ballard* stands for the proposition that the state attorney alone bears responsibility to decide whether to expend scarce state resources on a capital case, and the judiciary has absolutely no ability to offer experienced guidance in that regard. Trial judges, therefore, who sit through expensive, lengthy capital trials, including penalty phase hearings, must preside as though the proceedings are not a charade, when they may know the death penalty is simply not appropriate. Interestingly, plea discussions in a non-capital case may involve the trial judge, who may inform the parties of the particular sentence that will be imposed in the event of a plea.[1066]

Trial judges must choose their words carefully when ruling or speaking from the bench during a capital trial. Comments by a trial judge about the evidence in the case or the sentence that may be imposed will cause disruption in the trial. The case of *Mansfield v. State*[1067] provides an excellent example of how a trial judge created an unnecessary problem by speaking his mind during a capital trial. Expressing judicial displeasure over the way a capital case is being prosecuted or defended invites error and, at the very least, interjects an unnecessary issue on appeal.

Inappropriate comments about the death penalty are likely to appear in the *Southern Reporter* and elsewhere. In *Arbelaez v. State*,[1068] the defendant moved to disqualify the trial judge based upon comments the judge made in another case. The motion alleged that the judge stated, "that if found competent to proceed, the Defendant would be getting a jolt of electricity which the undersigned takes to mean a sentence of death." The judge denied the motion to disqualify and that ruling was affirmed. This example of *ex cathedra* comments is presented merely as a reminder that oral

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[1061] *Id.*

[1062] See sec. 6.1.1; Rule 3.171(a), *Fla. R. Crim. P.*

[1063] http://www.dc.state.fl.us/oth/deathrow/index.html#Statistics

[1064] See sec. 6.8.8.

[1065] See sec. 6.17.8; *Ferrell*, 653 So. 2d 367 (Fla. 1995).

[1066] Rule 3.171I(d), *Fla. R. Crim. P.*

[1067] Mansfield v. State, 911 So. 2d 1160 (Fla. 2005).

[1068] Arbelaez v. State, 898 So. 2d 25 (Fla. 2005).

pronouncements from the bench often end up in print in places unintended.

A judge seldom gets into trouble by keeping his or her mouth shut. Perhaps this last piece of advice is the best way to end this subject.

6.19.0 ATTORNEY FEES IN CAPITAL CASES - CONFLICT COUNSEL

Fees for Court-Appointed Trial Counsel.

F. S. 27.5304(5)4, provides for court-appointed attorney compensation for the trial of capital cases. Basic compensation shall not exceed $15,000.00. Fees for an appeal are not to exceed $2,000.00. An additional $1,000.00 is allowed for an application for clemency. However, F. S. 27.5304(12) provides for additional fees for "a case that requires extraordinary and unusual effort."

If court-appointed counsel believes a case to be extraordinary and unusual, the Justice Administration Commission (JAC) must be provided with a copy of the intended billing, complete with supporting affidavits and other documentation, for that agency to review. If the JAC objects to the billing, or any portion thereof, or the supporting documents, it shall communicate the objections in writing to court appointed counsel. Counsel may thereafter file a motion for extraordinary fees with the trial court. The motion must specify whether the JAC objects to any portion of the billing, or the supporting documentation, and counsel must attach a copy of the letter from JAC stating the objections. A hearing on the motion may be set with at least 5 days notice to JAC. JAC may appear at the hearing on the motion by telephone, or electronically, unless otherwise ordered. The motion must be heard by the chief judge or designee. At the hearing, court appointed counsel must prove by "competent and substantial evidence" that the case required extraordinary and unusual efforts. The fact that there was a trial, without more, does not establish the case to be extraordinary or unusual. The fee awarded may be up to 200 percent of the statutory maximum ($30,000.00) unless that fee is found to be confiscatory. The fee may then be based upon $100.00 per hour up to the amount determined no longer to be confiscatory. A copy of the order must be sent to JAC. The fees for lead counsel and the second court-appointed counsel are governed by the same limitations.

Fees for Court-Appointed Collateral Counsel.

Section 27.7002, Florida Statutes, which limits the amount of attorney fees for collateral proceedings interferes with the inherent authority of the Supreme Court as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government as a way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make effective their jurisdiction. The doctrine exists because it is crucial to the survival of the judiciary as an independent branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.

The courts have the authority to grant fees in excess of those authorized by statute in light of the extraordinary circumstances of the case. Excess fees will be granted only in cases where counsel requests them and there is substantial, competent evidence to support the award.

Maas v. Olive, 2008 WL 4346431 (Fla. Sept. 25, 2008).

The statutory maximums for the services of court-appointed collateral counsel are as follows:

(a) Regardless of the stage of the proceedings, $100 per hour up to $2,500.00 after accepting the appointment and filing a notice of appearance.

(b) $100 per hour up to $20,000.00 after timely filing in the trial court the capital defendant's complete original motion for postconviction relief.

(c) $100 per hour up to $20,000.00 after timely filing in the Supreme Court the capital defendant's brief or briefs.

(d) $100 per hour up to $10,000.00 after the Supreme Court issues an order, pursuant to a

remand, which directs the trial court to hold further proceedings.

(e) $100 per hour up to $4,000.00 after the appeal of the trial court's denial of the capital defendant's motion for postconviction relief and the state petition for habeas corpus becomes final in the Supreme Court.

(f) $100 per hour up to $2,500.00 after the conclusion of the post conviction proceedings in state court, after the filing of a petition for writ of certiorari in the United States Supreme Court.

(g) $100 per hour up to $5,000.00 if at any time a death warrant is issued.

In addition, the attorney may hire one or more investigators at $40.00 per hour up to a maximum of $15,000.00 and up to a maximum of $15,000.00 for miscellaneous expenses such as costs for transcripts, expert witnesses, and copy expenses. The trial court may order expenses in excess of the $15,000.00 maximum. Additionally, the attorney may receive up to $500.00 per year for continuing legal education expenses.

6.20.0 MISCELLANEOUS

FRYE HEARINGS

In a footnote in *Sack v. State,*[1069] the Court acknowledged that "the PCR method of DNA testing is now generally accepted by the scientific community and is not subject to *Frye* testing.

[1069]911 So. 2d 1190 (Fla. 2005) ; See Lemour v. State, 802 So. 2d 402 (Fla. 3d DCA 2001).

APPENDIX A

IN THE CIRCUIT COURT IN AND FOR THE SIXTH JUDICIAL CIRCUIT, COUNTY OF PINELLAS, STATE OF FLORIDA

CRIMINAL DIVISION
CASE NO. CRC92l7438CFANO

STATE OF FLORIDA

vs. (3CTS) MURDER IN THE FIRST DEGREE

OBA CHANDLER
_____/

SENTENCING ORDER

The Defendant was tried before this Court on September 12, 1994 - September 29, 1994. The jury found the Defendant guilty of all three counts *of* Murder in the First Degree -- one for each victim, Joan Rogers (Ct. 1), Michelle Rogers (Ct. 2), and Christe Rogers (Ct. 3). On September 30, 1994, the jury recommended by a unanimous verdict (12-0) that the death sentence be imposed on the Defendant for the murder of each victim. On October 6, 1994, the State and Defendant were permitted to present additional evidence to the Court. The Defendant presented additional evidence he contended showed mitigating evidence and the State presented evidence it suggested rebutted the mitigating evidence. Additional argument was made to the Court. The Defendant was given an opportunity to be heard regarding his sentences, but he declined. Final sentencing was set for this date, November 4, 1994.

This Court has heard the evidence presented in both the guilt phase and penalty phase of the trial, has reviewed the additional evidence presented at the sentencing hearing of October 6, 1994, has had the benefit of a sentencing memoranda from the State in support of finding that the murders were committed for the purpose of avoiding or preventing a lawful arrest, and a memorandum suggesting the absence of evidence of non-statutory mitigation, and has had the benefit of a memorandum from the Defendant relating to non-statutory mitigators for the penalty phase, and has heard arguments of counsel, both in favor of and in opposition to the death penalty. The Court now finds as follows:

A. AGGRAVATING FACTORS

1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

On January 12, 1977, the Defendant was convicted of the crime of robbery. The robbery was committed with a firearm.

On July 23, 1993, the Defendant was convicted of the crime of robbery. The robbery was committed with a firearm.

On September 29, 1994, the Defendant was convicted of Three Counts of Murder in the First Degree.

Judgments and sentences were introduced as to each robbery. This Court personally adjudicated the defendant of each first degree murder on September 29, 1994.

The judgments and sentences, coupled with the testimony of the robbery victims, and the testimony in the murder trial proves beyond any doubt that as to each victim, the defendant has two prior convictions for crimes involving the use of violence -- the two previous robbery convictions, and two simultaneous convictions for first degree murder which are capital felonies.

This aggravating factor has been proven beyond all reasonable doubt.

2. The capital felony was committed while the Defendant was engaged in the commission of or attempting to commit, or escape after committing the crime of kidnapping.

The facts of this case suggest that each victim originally agreed to accompany the defendant on his boat. At some point the Defendant bound the hands of each victim, bound the feet of each victim, put tape around the mouth of each victim, put a rope around the neck of each victim, and tied the rope to a concrete block or other weighty object. Further the clothes of each victim were removed from the waist down.

Accordingly, while there may originally have been consent to be with the Defendant on his boat, to suggest this consent continued throughout the above acts would be preposterous. Clearly, at some point during the victims' ordeal, each was confined or imprisoned on the Defendant's boat against her will, without lawful authority. Further, the Defendant's acts of confinement or imprisonment were with the intent to either inflict bodily harm upon or to terrorize each victim.

The State has proved this aggravating factor beyond a reasonable doubt. *See Schwab V. State,* 636 So.2d 3 (Fla. 1994); *Sochor* v *State,* 619 So. 2d 285 (Fla. 1993); *Bedford v. State,* 589 So.24245 (Fla. 1991).

3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

This Court is well aware of the Florida Supreme Court's admonition that where the victim is not a *law enforcement* officer, the supporting evidence *must be very* strong to show that "the sole or dominant motive for the murder was the elimination of the witness." *Preston V. State,* 607 So.2d 404 Fla. 1992). However, The Supreme Court has upheld this circumstance when either the Defendant said it was his motive or when the circumstances surrounding the crime clearly show it was the motive.

There are several things in this case which suggest this was indeed the Defendant's motive:

a) The Defendant told a cell mate, when pictures of the murder victims being retrieved from the water were re-played on TV, that they couldn't pin this crime (the three murders) on him because “dead people can't talk." See *Kokal v. State,* 492 So.2d 1317 Fla. 1986); *Bottoson V. State,* 443 So.2d 963 Fla. 1983); *Johnson V. State,* 442 So.2d 185 (Fla. 1983).

b) These victims got in Chandler's boat at a boat ramp on the Courtney Campbell Causeway before dark, presumably to take pictures of the sunset. They were thrown or placed into the water from the boat a long way (a few miles off the St. Petersburg Pier) from where they got into the boat. There is little doubt that the Defendant's motive in luring these tourists aboard his boat was sexual in nature. Whatever sexual activity occurred with these three victims was easily accomplished once their hands were tied, their mouths taped, their clothes removed, and their feet tied together (then or later). Once the Defendant's sexual motives were realized, there was no reason not to take them back to the Causeway and drop them off except for his fear of detection. Instead, he either strangled them with a rope and threw them overboard dead, or threw them over alive, still taped and bound at their

hands and feet, and with a concrete block or other heavy object tied to a rope around each neck. There was absolutely no reason to kill any of these women except he knew his sexual activities, his child abuse, and his kidnapping, would be reported, and under the circumstances -- three tourists, a mother and her two daughters -- he would be pursued until caught. If caught and convicted, he knew he would probably be sent to prison for life.

c) The Defendant's actions of tying a rope around each victim's neck to a concrete block or other heavy object before he threw her off the boat clearly showed he wanted each victim to sink, perhaps never to be found. This action alone is sufficient to show his motive was to eliminate these women period. As further proof that he expected them to sink, perhaps never to be found, was his going back out on the water the following morning. The Defendant denied this when he testified, but the evidence clearly proves the contrary. One can only assume he went back near the scene of his crime in the daylight to see if any bodies had surfaced. All Defendant's actions show he murdered these women to eliminate them as witnesses to whatever sexual acts, child abuse, and kidnapping had taken place.

d) In the "Williams Rule" rape case, the Defendant made various comments to a cellmate, his daughter, and his son-in-law, that suggested if Judy Blaire's roommate had come along, the victim(s) would not have survived to tell about the rape committed against her on the Defendant's boat. Defendant's comment to Blake Leslie that the only reason Judy Blaire was left alive was the fact that someone was waiting for her on the dock is particularly telling.

e) The totality of the matters raised in Paragraphs a - d above shows the Defendant's motive for the murder was to eliminate the witnesses to his kidnappings, his aggravated child abuse, and to whatever sexual conduct took place aboard his boat.

The State has proved this aggravating factor beyond a reasonable doubt.

4. The capital felony was especially heinous, atrocious, or cruel.

Was the murder of each victim a conscienceless or pitiless crime and unnecessarily torturous to the victim? If so, it clearly meets all constitutional standards -- those of the Florida Supreme Court and those of the United States Supreme Court. Both Courts agree that "strangulation when perpetrated upon a conscious victim involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." *Sochorv. State,* 580 So.2d 595, 603 (Fla. 1991), rev'd on other grounds. *Sochor v. State,* 112 S.Ct. 2114(1992).

Strangulation with a rope on board the Defendant's boat before each victim was thrown into the dark waters of Tampa Bay is the absolute best we can hope for for each victim. Imagine the fear and anxiety of each victim with her hands and feet tied, her mouth bound by tape and a rope around her neck being pulled tight until blessed unconsciousness takes over. That would be heinous, atrocious or cruel.

The medical examiner says each victim died of asphyxia, either from ligature strangulation or drowning, or a combination of the two. If you consider the concrete block tied to the rope around two victims' necks, and a concrete block or something heavier tied to a rope around the third victim's neck, consider that each victim was bound with ropes around her hands and feet, consider that each victim bad her mouth well covered with duct tape and that each victim was nude from the waist down, the probable scenario is that this mother and her two daughters were lured aboard the Defendant's boat for a sunset cruise and picture-taking. But after sunset, they were taken against their will into the dark night on the then dark water aboard Chandler's boat. He tied their hands behind their backs to gain control. He taped their mouths to quiet their screams of terror. He

removed their clothes and some form of sexual assault occurred to one or all of the victims. (It is ludicrous to think any of these women would voluntarily remove her clothes from the waist down.) After the sexual act was over, or perhaps before, he tied each victim's feet together to totally immobilize each victim. Then, Chandler put a rope around each victim's neck, and tied the rope to a concrete block and then Chandler threw each victim, Joan, Michelle and Christe Rogers, overboard, alive, one by one, into the waters of Tampa Bay where each died from drowning or from the block causing the rope to tighten around her neck, or from a combination of drowning and strangulation. One victim was first; two watched. Imagine the fear. One victim was second; one watched. Imagine the horror. Finally the last victim, who had seen the other two disappear over the side was lifted up and thrown overboard. Imagine the terror. Chandler's torture of these three women was over. Their panic and fear in the water before their merciful deaths is unfathomable.

There can be no doubt that whatever the scenario, the murder of each victim was especially heinous, atrocious, or cruel. Each murder was indeed conscienceless, and pitiless, and was undoubtedly unnecessarily torturous to the victim. (NOTE: If anyone believes that no sexual activity occurred, or that it can't be considered, this is simply immaterial to the determination that each murder was conscienceless and pitiless and unnecessarily torturous to the victim. Take all reference to sexual activity out of the above scenario and it makes absolutely no difference to the finding of this factor having been proved beyond all reasonable doubt.)

This aggravating factor has been proved beyond all reasonable doubt.

None of the other aggravating factors enumerated by statute is applicable to this case and none other was considered by this Court.

Nothing except as indicated in Paragraphs 1 - 4 above was considered in aggravation. All letters received regarding the Defendant's sentence were kept by this Court's judicial assistant, and have not been read by this Court.

B. MITIGATING FACTORS

STATUTORY MITIGATING FACTORS

The Defendant did not request that the jury be instructed on any statutory mitigating factor, nor did he present any evidence or argument before this Court at the separate sentencing hearing to suggest any statutory mitigating factor. This Court has reviewed each statutory mitigating factor and now finds that no evidence has been presented to support any statutory mitigating factor, and none is found to exist.

NON-STATUTORY MITIGATING FACTORS

The Court asked the Defendant to prepare a memorandum suggesting all non-statutory mitigation he believed had been presented to either the jury or the Court at the separate sentencing hearing. A memorandum was prepared. Each suggestion of non-statutory mitigation will be addressed in the order addressed in Defendant's memorandum, using the terminology of the Defendant.

1. The Defendant assisted law enforcement as a confidential informant.

While cooperation with law enforcement can be a mitigating circumstance, there was very little evidence presented in this case to establish this circumstance. Whitley Azure, a Custom's

Agent, was called by the State in the guilt phase of the trial to rebut Defendant's testimony that he never asked him about the Rogers' homicide investigation. This witness said Defendant worked for him for several months as an informant and did indeed inquire on several occasions about the Rogers' investigation. The defense did not pursue whether or not the Defendant had assisted Customs, or whether he had made any cases for them. This witness was not called in the penalty phase. His trial testimony is simply insufficient to establish that the Defendant assisted law enforcement.

This mitigating factor has not been proven and thus will not be considered by this Court.

2. The Defendant has the capacity for hard work and has a good employment history. Having the capacity for hard work is not a mitigating factor. A good employment history is. While there is evidence in the record that the Defendant worked in both his own aluminum business and for others in the aluminum business, this was for a brief period of time. He was unemployed for a much longer period of time.

The record is full of the illegal moneymaking ventures of the Defendant:

1969	-	Receiving stolen goods (sentenced 1 - 7 years)	
1976	-	Armed Robbery (sentenced 10 years)	
1982	-	Counterfeiting (sentenced 7 years)	
1990	-	Drug rip-off (netting over $29,000.00)	
1992	-	Armed Robbery (sentenced 15 years; netted over worth of jewels)	$750,000.00
		Various - Illegal drug transactions; illegal gambling (See 1977 PSI)	

Thus, while the Defendant may have had the capacity to be a hard worker, the totality of the record before this Court does not establish that the Defendant has a "good employment history."

3. The Defendant is capable of forming loving relationships.

While loving relationships may be a mitigating factor, the evidence in this case is very much in conflict. This Defendant had several prior wives (5), and several children (6). The testimony established he abandoned two of his children, Kristal Mays and Valerie Troxell. None of his other children testified. Neither did his mother or his present wife. Nor did any of his sisters. The Court suggested they might testify as to mitigating circumstances, but the Defendant insisted his lawyer not call them in the penalty phase. Thus, his relationship with his family was not fully explored. There was some evidence presented that he called his mother regularly from jail, and pictures of the Defendant and his daughter, Whitney, were introduced.

It is difficult to imagine the Defendant was very fond of his present wife, Debra, and his small daughter, Whitney. It is true he may have taken them on his boat a few times for family outings, but he also took them with him to assist in his armed robbery in 1992. (See transcript of Debra Chandler in evidence at the sentencing hearing before the Court on October 6, 1994). He also abandoned them for over a month in November, 1989. He was out on a boat raping Judy Blaire almost one year to the day he married Debra Chandler, and was out with the Rogers' women sixteen to eighteen days later.

The Defendant testified he did not get along well with his family, and his son-in-law says the Defendant summed up his feelings about his family accordingly: "Family don't mean shit to me."

The totality of the evidence presented in this case does not reasonably convince this Court

of the existence of this mitigating circumstance.

4. The Defendant has the ability to be rehabilitated.

This can be a valid mitigating factor. However, to suggest that obtaining a GED and gaining some college credits while in prison in the 80's is proof of rehabilitation when the evidence before the Court suggests that since the time he received his GED and college credits and was released from prison, he participated in an armed drug rip-off of his son-in-law which could have cost Mr. Mays his life; he committed an armed robbery where he used a firearm to steal $750,000.00 worth of jewels; he raped a Canadian tourist; and he murdered a mother and her two daughters, is nothing short of preposterous.

This Court is not reasonably convinced that this mitigating factor has been proven. To the contrary, this Defendant cannot be rehabilitated.

5. & 6. The Defendant has a good prison record and has shown an ability to adapt to prison life.

Good jail conduct can be a mitigating circumstance. However, the Defendant's prison records are scant with any evidence of this. The Defendant was sent to prison in January, 1977 for ten years for the crime of robbery. He escaped on May 10, 1977, assumed another identity, and wasn't captured until he was arrested in 1982 for Federal counterfeiting charges. He served two years of a seven-year Federal sentence and was released back to State prison in 1984. He was convicted of the escape charge, and sentenced to serve six months consecutive to his ten-year robbery sentence. He was sent to Union Correctional and apparently did make an "above satisfactory adjustment" at Union and was transferred to a less secure facility. The report referred to in Defendant's memorandum to support this mitigating factor which says "Since his return to RMC he has remained discipline free and is presently not considered to be a management problem." continues "With the facts on file in the subject's institutional file, as well as the PSI Report, the subject should be considered an escape risk. Pre and post-release prognoses are guarded."

The mitigating factor of good jail conduct has not been proven.

7. The Defendant was only ten years old when his father committed suicide.

It is a mitigating factor if a Defendant has had a deprived childhood, or has suffered abuse as a child, or other matters such as this. However, a single sentence in a PSI that also discusses his mother, a stepfather, sisters and both stepbrothers and half-brothers, is not sufficient proof of a mitigating factor. The Defendant lived with his mother after his father died. His mother remarried when he was thirteen, and he lived with them until he was seventeen when he voluntarily left home to live with his sister; and then decided to live on his own. (This information is contained in the 1977 PSI).

If child abuse or a deprived childhood existed in Defendant's case, he voluntarily elected not to present any evidence of it. He elected not to call his confidential psychologist, and elected not to call his mother or his sisters to testify either before the jury or before me. Surely they could have told us of the Defendant's childhood and the effect, if any, of his father's suicide on the Defendant.

There is no proof therefore, in the record, of the mitigating factor of child abuse, or a deprived childhood.

8. The Defendant was honorably discharged from the military.

A good military record can be a valid mitigating factor. The Defendant told the Probation and Parole Department, doing an investigation into his background that he entered the Marines on December 29, 1965, and received an honorable discharge in February 1967. (The report says 1976, but this has to be transposed figures since the Defendant was sentenced to prison in 1969. Also, the Classification and Admission Summary upon his admission to prison in 1977 says date of discharge was 1967). However, he also says he was released because he had not revealed his correct juvenile record to the military. He also admits to spending time in the "brig" for refusing an order and for being AWOL for 118 days. (His prison arrests and conviction record confirms he was arrested on September 16, 1966 for desertion and was turned over to the Marines.) Accordingly, if we assume the Defendant did receive an honorable discharge, as Defendant says in his PSI of 1977, his brief tenure in the military (14 months) is far from the type military record that would qualify as a mitigating circumstance.

The Court is not reasonably convinced that this mitigating circumstance, a good military record, has been proven. If an honorable discharge, standing alone, is considered mitigating, in light of the rest of Defendant's military record, it is entitled to little weight.

9. The Defendant will be incarcerated for the rest of his life with no danger of committing any other violent act.

The length of a Defendant's mandatory sentence can be considered a mitigating circumstance. *Jones v. Stare, 569* So.2d 1234 (Fla. 1990). The fact that this Court can sentence this Defendant to three consecutive sentences, with three consecutive twenty-five year mandatories may, therefore, be mitigating. The irony of the *Jones* case is that someone who kills one victim and thus can get out of prison in twenty-five years does not have a mitigating factor, while someone like Chandler, who kills three victims, does. So while the Court has considered this as mitigation, because *Jones, supra,* suggests I should, it is given little weight.

10. The Defendant has steadfastly and unwaveringly maintained his innocence in this case.

Lingering or residual doubt is not a mitigating factor in the State of Florida. *King v. State,* 514 So.2d 354 (Fla. 1987). Lest anyone misconstrue this last statement to think this Court has such a doubt, let me make it clear that I do not. The jury had no reasonable doubt about Defendant's guilt. This Court has no doubt that the right person, Mr. Oba Chandler, has been tried, convicted, and is soon to be sentenced for his murderous acts.

The fact that the Defendant still protests his innocence is irrelevant to this procedure. It is neither aggravating nor mitigating.

This Court has now discussed all the aggravating circumstances, and mitigating circumstances. The aggravating circumstances in this case far outweigh the mitigating circumstances. Every one of the aggravating factors in this case, standing alone, would be sufficient to outweigh the paucity of mitigation that can be found in Oba Chandler's forty-eight years of existence on this earth. The unanimous decision of the jury for death was the only lawful decision each of them could have made. This Court agrees with the jury that in weighing the aggravating circumstances against the mitigating circumstances, the scales of life and death tilt unquestionably to the side of death.

OBA CHANDLER, you have not only forfeited your right to live among us, but under the laws of the State of Florida, you have forfeited your right to live at all.

Accordingly, it is hereby

ORDERED AND ADJUDGED for the murder of JOAN ROGERS, the Defendant is hereby sentenced to death. It is further

ORDERED AND ADJUDGED for the murder of MICHELLE ROGERS, the Defendant is hereby sentenced to death. It is further

ORDERED AND ADJUDGED for the murder of CHRISTE ROGERS, the Defendant is hereby sentenced to death. It is further

ORDERED AND ADJUDGED that the Defendant will be transported to the Department of Corrections to be securely held by them on Death Row until this sentence can be executed as provided for by law.

MAY GOD HAVE MERCY ON YOUR SOUL.

DONE AND ORDERED at Clearwater, Pinellas County, Florida, this 4th day of November 1994.

/s/

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Susan F. Schaeffer
Circuit Judge

Copies furnished to:

The Honorable Bernie McCabe, State Attorney
Fredric S. Zinober, Chief Counsel for Defendant
Mr. Oba Chandler, Defendant.

APPENDIX B

IN THE CIRCUIT COURT OF ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA
Plaintiff,
vs.

CRIMINAL DIVISION
CASE NO. 92-6089

LEONARDO FRANQUI,
Defendant.
_____/

SENTENCING ORDER

On September 23, 1993, the defendant, Leonardo Franqui, was convicted by a jury of the Crimes of First Degree Murder, Attempted First Degree Murder (2 counts), Attempted Armed Robbery, Grand Theft (2 counts) and Possession of Firearm During the Commission of a Felony.

On November 4, 1993, the same jury recommended, by a vote of nine (9) to three (3), that the court sentence the defendant to death.

Pursuant to Section 921.141 of the Florida Statutes this court is required to consider each and every aggravating and mitigating circumstance set forth by the statute. Having heard all of the evidence introduced during the course of the trial and penalty phase, as well as the presentations made by the State and the defendant Franqui on November 16, 1993, this court now addresses these issues.

The court is conscious of the fact that this defendant is entitled to an individual consideration of the aggravating and mitigating circumstances.

AGGRAVATING CIRCUMSTANCES

The defendant was previously convicted of another capital felony or of a felony involving a threat of violence to the person.

The state has proven beyond and to the exclusion of every reasonable doubt that the defendant Franqui has been previously convicted of the offenses of aggravated assault and attempted armed robbery in the case of State of Florida v. Leonardo Frangui, case number 92-1680 and of the offenses of armed robbery and armed kidnapping in the case of State of Florida v. Leonardo Franqui, case number 92-6346.[1070] Additionally the state has proven beyond a reasonable doubt that the defendant has been convicted of two counts of attempted first degree murder in the present case which the court can consider as a prior violent felony for purposes of this aggravator[1071].

The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit or in flight after committing or attempting to commit a robbery.

[1070] The defendants' argument that these convictions should not be considered for purposes of this aggravator because they are being appealed is not meritorious. Ruffin v. State 397 So.2d 277 (Fla.1981); Jackson v. State 502 So.2d 409 (Fla. 1966).

[1071] *See* LeCroy v. State 533 So.2d 750 (Fla. *1988).*

The State has proven beyond and to the exclusion of every reasonable doubt that the defendant was engaged in the attempted robbery of Danilo Cabanas, Jr. and Danilo Cabanas, Sr. at the time he murdered Raul Lopez.

The capital felony was committed for pecuniary gain.

The State has proven beyond and to the exclusion of every reasonable doubt that the defendant was aware that the Cabanas' regularly withdrew large sums of cash from the Republic National Bank. On the occasion of the attempted robbery herein the defendant stalked the Cabanas' as they went to the bank, followed them to a pre-arranged location and attacked them with an obvious intent to rob them of their money.

The court recognizes that this aggravator merges with the aggravator which addresses the fact that the capital felony was committed during the course of an attempted robbery. Accordingly these two aggravators will be considered as one.

The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The evidence established that the defendant was aware of the method in which the Cabanas went to the bank to make their cash withdrawals. The defendant Frangui himself, in his confession, explained that he was aware of the Cabanast schedule up to five to six months[1072] before the attempted robbery, murder and attempted murder in this case occurred The co-defendant Abreu testified that the robbery was carefully planned but that the issue of how to handle the "bodyguard" the Cabanas had hired was also discussed. The defendant and his co-defendants decided that in order to successfully execute the robbery of the Cabanas the "bodyguard" would have to be murdered. At some point in time the defendants decided that the defendant Franqui would be the one to distract and assassinate the "bodyguard's." It was planned that Franqui would drive his car in such a way as to force the "bodyguard's" car off the road and then he would kill him.

As we now know there was no bodyguard, per se, but rather a friend of the Cabanas, Raul Lopez, had offered to assist them in the transportation of the money in an effort to provide added security. Mr. Lopez was not a professional in the security business or anything of the kind.

According to plan Mr. Franqui and his co-defendants stalked the Cabanas as they went to the bank. After their intended victims left the bank the defendant and his co-defendants established their pre-arranged positions, i.e. the defendants Abreu and San Martin positioned their car in front of the Cabanas' vehicle and the defendant Franqui drove behind the truck being driven by Raul Lopez. When they reached west 20th Avenue and 41 Street the defendants Abreu and San Martin stopped their vehicle thus forcing the Cabanas to stop theirs. The defendant Franqui stopped his vehicle immediately next to the Cabanas' car thus foreclosing their only possible escape route which would have been to move into the next lane and drive around the car being driven by Abreu and San Martin.

The defendant Franqui's passenger window was open and the evidence shows that immediately upon stopping his vehicle Franqui opened fire on Raul Lopez. Consistent with their intentions Franqui killed Raul Lopez before the latter could in any away help his friends.

This court is satisfied beyond and to the exclusion of any reasonable doubt that Raul Lopez was marked for death long before December 6th; that the defendant Franqui and his co-defendants in a cold, calculated and premeditated manner planned his murder for no reason other than to facilitate the robbery of the thousands of dollars the Cabanas were carrying on the day in question; that the premeditation in this case is far greater than that necessary for a conviction for, the crime of first

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[1072] *See* confession of Leonardo Franqui taken on January 18, 1992, at 10:15 p.m. at page 7.

degree murder and is of the heightened nature required for the establishment of this aggravator.[1073]

STATUTORY MITIGATING CIRCUMSTANCES

In his sentencing memorandum the defendant Franqui argues that the evidence has established the existence of four statutory mitigating circumstances. This court clearly recalls the testimony of Dr. Jethro Toomer who testified that in his expert opinion the defendant was under the influence of an extreme mental or emotional disturbance. The court further acknowledges that although the court refused to instruct the jury on the statutory mitigating factor of the defendant's age the defendant objected to that ruling and has repeatedly argued that the defendant's chronological age, when viewed in the light of his suggested mental retardation, do establish this statutory mitigating factor. The court does not however remember any evidence suggesting that Mr. Franqui acted under extreme duress or under the substantial domination of another or that he lacked the capacity to appreciate the criminality of his conduct or that his ability to conform his conduct to the requirements of the law was substantially impaired. It appears that the State shares the court's recollection since their sentencing memorandum addresses the issue by stating simply that the defendant Franqui offered only one statutory mitigating circumstance, to-wit, that the defendant was under the influence of extreme mental or emotional disturbance. Regardless of this fact however the court will now address each and every statutory and non-statutory mitigating circumstance proposed by the defendant.

> The crime for which Leonardo Frangui is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

The defendant Franqui offered the testimony of Dr. Jethro Toomer to establish the existence of this statutory mitigating circumstance. Dr. Toomer testified that his evaluation of Mr. Franqui revealed that the defendant was abandoned by his mother at an early stage and that he was thereafter raised by the man he erroneously believed to be his natural father. This man, according to Dr. Toomer and the defendant's uncle Mr Mario Franqui, was an alcoholic and drug addict who was ill qualified to raise the defendant. Additionally the defendant suffered the loss of his younger brother, an experience which seriously impacted upon the defendant. Dr. Toomer concludes from these factors as well as the defendant's low IQ (below 60 and thus in the mentally retarded range) that the defendant suffered from a borderline personality disorder which ultimately gave rise to Mr. Franqui's participation in the events that lead to this case. All of these factors lead Dr. Toomer to the conclusion that on the day these crimes were committed the defendant did in fact act while under the influence of extreme mental or emotional disturbance.

It is undeniable that the defendant Franqui has experienced some difficulties in his life. The court will address these below when considering the non-statutory mitigating circumstances. This court however cannot understand how the leap can be made from Dr. Toomer's diagnosis of a borderline personality disorder to the conclusion that on December 6, 1991, the defendant acted under the influence of extreme mental or emotional disturbance. If the court were to accept the premise that the defendant does in fact suffer from the diagnosed disorder and that such a condition can manifest itself on any given day, as, according to Dr. Toomer, it did on December 6, 1991, then the inevitable conclusion would be that it also manifested itself on November 29, 1991, when the defendant assaulted Pedro Santos and attempted to rob him at the Republic National Bank and on January 14, 1992, when the defendant robbed and kidnapped Craig Van Nest. It would also follow that when the defendant's mind spawned these crimes it was also suffering from the same extreme mental or

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[1073] See Hardwick v. State 521 So.2d 1071 (Fla.) cert.denied 488 U.S. 871 (1988); Phillips v. state 476 So.2d 194 (1085); Troeddel v. State 462 So.2d 392 (Fla. 1984); Stano v. State 460 So.2d 890 (Fla.1984); Eutzy v. State 458 So.2d 755 (Fla. 1984); Corham v State 454 So.2d 556 (Fla. 1984); Mason v. State 438 So.2d 374 (Fla. 1983).

emotional disorder. In short, under Dr. Toomer's perspective, the defendant's background and his resulting borderline personality disorder serve as a perpetual mitigator for any instance of anti-social behavior this defendant is capable of exhibiting.

The court is persuaded by Dr. Charles Mutter's well reasoned opinion that the defendant simply made choices which were oriented to improve the defendant's financial situation and that the defendant was not acting under the influence of extreme mental or emotional disturbance. The facts support Dr. Mutter's conclusions.

There are individuals who come before this court accused of committing random acts of violence which result in harm to many people. Such conduct could conceivably be attributed to the type of disorder that Dr. Toomer describes but such was not this defendant's conduct. The single most significant aspect of this case and of the defendant's other violent crimes is planning. Although this defendant cannot be characterized as the most successful armed robber in the history of Dade County, it was not for a lack of planning.

In the November 29, 1991, attempted robbery and aggravated assault of Pedro Santos the evidence established that the defendant Franqui and his co-defendants met at the Dennys restaurant which adjoins the Republic National Bank in question. From there they observed the bank security guard carry a bag from the bank to the drive-in teller. Believing that the guard was carrying money the defendant and his friends planned the crime. The defendant and his co-defendants planned and engineered the theft of cars to facilitate the robbery.

Having planned the robbery for the following day they were frustrated by the Thanksgiving holiday and had to postpone their plans for the next day. On the Friday after Thanksgiving they executed their plans and attempted the robbery. Every action of the defendant was meaningful and goal oriented. The object of his efforts was money and, as future events would show, never on a small scale.

On January 14, 1992, the unfortunate object of the defendant's attention was Craig Van Nest. Once again the defendant acted in an organized and goal oriented manner. The record is unclear as to why Mr. Van Nest was targeted however it is consistent with this defendant's other crimes that Mr. Van Nest deals in very expensive and valuable merchandise. The defendant and his co-defendants approached Van Nest while the latter was driving his car. They tried to pull him over by identifying themselves as police officers, yet another example of the planning that went into the commission of these crimes. When Van Nest refused to stop his vehicle he was followed to his destination where he was pistol whipped by one of Mr. Franqui's co-defendants and then kidnapped by Franqui and San Martin.[1074]

This defendant's premeditating and calculating nature was most clearly set out in the present case. This was the most thoroughly planned of the defendant's crimes. The victims were stalked. Their routines were studied. Their relative functions were analyzed. Trucks were stolen so they could be used in the robbery the next day. A get-away vehicle was placed at a pre-arranged location so that the stolen trucks could be abandoned and escape could be more discreetly achieved. Masks were used so as to make identification impossible. Gloves were used so that no identifying fingerprints would be left behind. The ambush was arranged to occur in a somewhat isolated location. The victims' cars were efficiently blocked to prevent escape. Raul Lopez was assassinated to prevent resistance. Finally, it is obvious, whether pre-planned or not, that the defendant and his accomplices never intended to "ask" for the money in question. They all exited their vehicles firing their weapons at Raul Lopez and at the Cabanas. The defendants San Martin and Abreu showered the windshield of the Cabanas car with gunfire before any request for money was made. Thus violence was not something reserved for the uncooperative victim but was an integral part of the plan.

The facts in all of these cases belie Dr. Toomer's suggestion that the defendant acted while

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[1074] Although urged by the state to do so, this court does not, for the purpose of sentencing these defendants, speculate as to why Mr. Van Nest was kidnapped or what his destiny might have been but for police intervention.

under extreme mental or emotional disturbance on December 6, 1991. The testimony of Michael Barrechio bears out the opinion of Dr. Mutter that the defendant simply chose to engage in this type of activity. Mr. Barrechio testified that the defendant had been a good employee and would have been re-hired had he wanted his job back. Life is made up of a long series of choices all of us must make. People are ultimately judged by the choices they make. The defendant Franqui is no exception.

For the reasons stated above the court rejects the existence of this statutory mitigating circumstance.

The defendant acted under extreme duress or under the substantial domination of another person.

As indicated above the court recalls no expert testimony establishing the existence of this mitigating factor nor does the court feel that any evidence presented on the defendant's behalf establishes it. Accordingly the court rejects the existence of this statutory mitigating circumstance.

The capacity of Leonardo Frangui to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

The court recalls no expert testimony establishing the existence of this mitigating factor nor does the court feel that any evidence presented on the defendant's behalf establishes it. Accordingly the court rejects the existence of this statutory mitigating circumstance.

The age of the defendant at the time of the crime.

The court refused to instruct the jury on this statutory mitigating circumstance during the penalty phase of this trial. The court still feels that the defendant's age is not a mitigating factor and thus rejects the existence of this statutory mitigating circumstance.[1075]

The following statutory mitigating circumstances have not been argued by the defendant but the court nevertheless considers them since they are included in F.S. 921.141.

The defendant has no significant history of prior criminal activity.

Clearly this defendant has significant prior violent crimes in his history and the court rejects the existence of this statutory mitigating factor.

The victim was a participant in the defendant's conduct or consented to the act.

There is no evidence of the existence of this statutory mitigating factor and the court rejects it as a mitigator herein.

The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

There is no evidence of the existence of this statutory mitigating factor. Indeed, quite to the contrary, the evidence is clear that this defendant was in fact the actual killer of the victim herein. The

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[1075] *See* Scull v. State 533 So.2d 1137 (Fla. 1988); Kokal v**.** State 492 So.2d 1317 (Fla. 1986); Cooper v. State 492 So.2d 1059 (Fla.1986); Garcia v. State 492 So.2d 360 (Fla. 1986); Mills v. State 462 So.2d 1075 (Fla. 1985); Mason v. State 438 So.2d 374 (Fla. 1983); Fitzpatrick v. State 437 So. 2D 1072 (Fla. 1983); Simmons v. State 419 S. 2d 316 (Fla. 1982).

court therefore rejects the existence of this mitigator.

NON-STATUTORY MITIGATING CIRCUMSTANCES

The defendant argues the existence of seventeen non-statutory mitigating circumstances. The court feels that several of them are repetitive and they are more properly analyzed as eleven.

Leonardo Franqui is mentally retarded as evidenced by Dr. Toomer's conclusion that his IQ level is below 60.

The court consolidates paragraphs “e” and “f” of the defendant's sentencing memorandum at page twelve for purposes of this discussion.

The court has considered the results of Dr. Toomer's test as concerns the defendant's IQ. Since it is impossible for the court to verify the accuracy or validity of such a test, the court must consider it in the light of the facts known to the court. In making this analysis the court is conscious of the fact that although an individual's performance on such a test may be unable to exceed his true abilities it may easily reflect less than his best efforts.

The defense suggests that this court should accept, as a non-statutory mitigating factor the fact that, according to Dr. Toomer, Mr. Franqui is mentally retarded. Every piece of evidence presented in this trial, penalty phase and sentencing hearings, with the exception of Dr. Toomer's testimony, definitively establishes that Mr. Franqui is not mentally retarded. The crimes he has committed, as described above, reflect an unshakable pattern of premeditation, calculation and shrewd planning that are totally inconsistent with mental retardation. Mr. Franqui's "good employment background" (one of the asserted non-statutory mitigating circumstances) as established by witness Michael Barecchio shows that he was not only a good employee but that on many occasions he displayed initiative and a capacity to finish his assigned tasks and move on to others without direction or supervision. His ability to establish a meaningful relationship with a woman, to have and raise children with her and to support a family further suggest that he is not mentally retarded.

In order to find that this defendant is mentally retarded the court would have to accept Dr. Toomer's test result and ignore the clear and irrefutable logic of the facts in this case. The court is unwilling to do this and therefore rejects the existence of this non-statutory mitigating circumstance.

The defendant's borderline personality disorder.

In paragraph "g" of the defendant's sentencing memorandum at page 13 the defense asks the court to consider Dr. Toomer's diagnosis that Mr. Franqui suffers from a borderline personality disorder as a non-statutory mitigating circumstance. The court is not reasonably convinced that this condition actually exists. Dr. Toomer suggests that because of the hardships this defendant suffered during his youth, i.e. his abandonment by his mother, the poor parenting of his adoptive father and the death of his younger brother he suffers from a borderline personality disorder. It appears to this court that Dr. Toomer would diagnose anyone with similar hardships in their background as also suffering from this disorder. Yet it is clear that many honest, hard working, law abiding and decent people also come from less than ideal households. It seems that the only difference between those who have the disorder and those who do not is the commission of a capital felony. The court rejects this as a mitigator.

Leonardo Frangui's organic brain damage.

In paragraph "h" at page 13 of the defendant's sentencing memorandum the defense argues that the defendant suffers from organic brain damage and that the court should consider this as a non-statutory mitigating circumstance. Dr. Toomer testified that there were factors in his evaluation of the defendant that indicated the existence of organicity. However there is no direct proof of this and

the court is not reasonably convinced of the existence of this mitigator. It is therefore rejected.

The co-defendant Pablo Abreu was sentenced to life imprisonment.

In paragraph "i" at page 13 of the defendant's sentencing memorandum the defense argues that the fact that the defendant Pablo Abreu was sentenced to life imprisonment and did not receive the death penalty should be considered a non-statutory mitigating factor.

Throughout the trial of this case and then through the penalty phase and sentencing hearings defense counsel have repeatedly reminded the court that the defendant does not stand convicted of the murder of Officer Stephen Bauer. The attorneys for the defendant have stressed that their client is presumed innocent of the charges in that indictment and that the existence of those pending charges should not influence this court in any way. The state has also avoided even the mention of that case in its own effort to avoid possible damage to this record. This court is very conscious of the meritorious arguments of the defense that the pending indictment against this defendant must not affect this sentencing process. This court knows very little about that case beyond the fact that the defendant is presumed innocent of the accusations therein. However, in discussing the suggestion of disparate sentencing, it is impossible to ignore the fact that Abreu pled guilty not only to this indictment but also to the indictment charging the murder of Officer Bauer.

In analyzing the life sentence imposed on Abreu it is important to first acknowledge that Abreu did not have any previous convictions for crimes of violence. More significant however was his peripheral participation in the murder of Officer Bauer. According to the state, during the attempted robbery of the Kislak Bank, Mr. Abreu was a get-away driver stationed several blocks away. The defense has never challenged that factual assertion made by the State during the sentencing hearings. Abreu's relatively small participation in that case must be viewed against the alleged participation of this defendant who is the actual alleged killer of Officer Bauer.

This court has discussed the pending indictment only for the purpose of honestly addressing the issue of disparate sentencing. Absolutely no consideration is being given to that case in deciding the appropriate sentence herein.

Leonardo Frangui's poor family background including his abandonment by his mother, the death of his brother and his deprived childhood.

The court consolidates paragraphs "j", "n", and "s" at page 13 of the defense's sentencing memorandum for purposes of this discussion. The defendant argues that his poor family background and deprived childhood are non-statutory mitigating circumstances. The court is reasonably convinced that the defendant did suffer hardships during his youth. The abandonment by his mother, the fact that the man who decided to raise him was an alcoholic and drug addict and the death of his younger brother were undoubtedly factors which created hardships for the defendant and the court does find that this constitutes a single non-statutory mitigating factor.

Leonardo Frangui confessed to his crime.

In paragraph "o" at page 13 of the defendant's sentencing memorandum the defendant argues that the fact that he confessed to the police should constitute a non-statutory mitigating circumstance. The court rejects this as any type of mitigator.

Leonardo Franqui has expressed remorse.

In paragraph "k" at page 13 of the defendant's sentencing memorandum the defense suggests that the remorse expressed by the defendant should constitute a non-statutory mitigating circumstance.

At the sentencing hearing held on November 16, 1993, defense counsel handed the court several letters written on behalf of the defendant. One of those letters was from the defendant

himself. This letter is now a part of the record in this case. In the letter the defendant expresses his love for his wife and children and then addresses the court as follows:

> Your honor sir I do not wish to *try* the case in my letter but like to bring up a very important part and major factor which I feel should make your decision hopeful much *easier*. I took this case to trial for one main reason I thought the truth would come out. It didn't!! and now I am at your mercy.
> Your honor sir I am a firm believer in the notion that the truth will eventually come out and even though it hasn't yet I still believe the truth will prevail.

The rest of the letter is a plea for mercy. The statement presented above can hardly be interpreted as an expression of remorse, indeed this court interprets it as a statement of defiance. Defiance even in the face of overwhelming evidence of guilt. At the sentencing hearing the court gave Mr. Franqui the opportunity to explain this statement, to express his "unspoken" truth. The defendant chose not to elaborate. This court rejects any suggestion that this defendant is contrite or remorseful and consequently does not find the existence of this non-statutory mitigating circumstance.

Leonardo Frangui is a caring husband, father, brother and provider.

The court consolidates paragraphs “l”, “p”. “q”. and “t” at page 13 of the defendant's sentencing memorandum for purposes of this discussion. Here the defense argues that the defendant is a caring husband, father, brother and provider and that this fact should be considered as a non-statutory mitigating circumstance. There is very little objective proof of this assertion, however, since the standard for the establishment of the existence of this mitigator is relatively low the court is reasonably convinced that it has been established. The court will therefore consider this as a single non-statutory mitigating factor.

Leonardo Frangui suffers from mental problems and emotional disturbance which does not reach the level of statutory mitigating factors.

In paragraph “m” at page 13 of the defendant's sentencing memorandum the defense argues that although the court may not be convinced that the defendant's mental status amounts to a statutory mitigating circumstance the court should nevertheless find that it does constitute a non-statutory mitigating circumstance. For the reasons articulated above this court does not find that the defendant suffers from any type of mental or emotional disturbance that in any way mitigates this crime. This mitigator is therefor rejected.

Mercy upon Leonardo Frangui

The defendant argues that a jury's death recommendation need not be given the same level of consideration due a recommendation of life imprisonment. He then urges the court to sentence him to life imprisonment. The court does not read the law this way.

The law is clear that “…a jury's advisory opinion is entitled to great weight reflecting as it does, the conscience of the community and should not be overturned unless no reasonable basis exists for the opinion.”[1076] The only argument that can be made that this concept does not apply to a death recommendation is that a sentence of life imprisonment is not subject to appellate review and is therefore final. To ignore the clear intent of the law for the simple reason that the court cannot be reversed on appeal however is intellectually dishonest and morally reprehensible. It is inherent in our

[1076] *See* Richardson v. state 437 So.2d 1091, 1095 (Fla.1991).

concept of fundamental fairness that the court apply the law fairly to both the defense and the state. Although mercy and compassion are integral parts of the sentencing process the court rejects the notion that mercy, blindly applied for the purpose of achieving a desired result, can be a substitute for the meticulous weighing process which has been so clearly and repeatedly articulated by the Supreme Court.

Conclusion

The court finds that the state has established, beyond and to the exclusion of every reasonable doubt the existence of four aggravating circumstances, two of which merge thus leaving three aggravators.

The court finds that no statutory mitigating circumstances exist.

The court is reasonably convinced that two non-statutory mitigating circumstances have been established by the evidence.

In weighing the aggravating factors against the mitigating factors the court understands that the process is not simply an arithmetic one. It is not enough to weigh the number of aggravators against the number of mitigators but rather the process is more qualitative than quantitative. The court must and does look to the nature and quality of the aggravators and mitigators which it has found to exist.

This court finds that the aggravating circumstances in this case far outweigh the mitigating circumstances. The aggravating circumstances in this case are appalling, the defendant's previous convictions for violent crimes, the fact that the murder herein was committed during the commission of an attempted robbery and for pecuniary gain and the cold, calculated and premeditated manner in which the murder was committed, greatly outweigh the relatively insignificant non-statutory circumstances established by this record. Even in the absence of the cold, calculated and premeditated aggravator the court would still feel that the remaining two aggravators seriously outweighed the existing mitigators.

SENTENCE

As to Count I of the Indictment, the first degree murder of Raul Lopez, this court sentences you, Leonardo Franqui, to death.

As to Count II of the Indictment, the attempted first degree murder of Danilo Cabanas, Jr. this court sentences you to life imprisonment with a minimum mandatory sentence of three (3) years.[1077]

As to Count III of the Indictment, the attempted first degree murder of Danilo Cabanas, Sr., this court sentences you to life imprisonment with a minimum mandatory sentence of three (3) years.[1078]

As to Count IV of the Indictment. the attempted armed robbery of Danilo Cabanas, Jr. and Danilo Cabanas, Sr., this court sentences you to fifteen years in the state penitentiary with a minimum mandatory sentence of three (3) years.[1079]

As to Count V of the Indictment, Grand Theft, this court sentences you to five (5) years in the state penitentiary.

As to Count VI of the Indictment, Grand Theft, this court sentences you to five (5) years in

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[1077] The court *departs* from *the* recommended sentencing guidelines due to the unscorable nature of the capital felony. Hansbrough v. State 509 So.2d 1061 (Fla.1987).

[1078] See footnote 8 above for departure reasons.

[1079] See footnote 8 above for departure reasons.

the state penitentiary.

As to Count VII of the Indictment, Possession of a Firearm During the Commission of a Felony, this court sentences you to fifteen (15) years in the state penitentiary.

Each of these sentences will run consecutive to each other and consecutive to the sentence of death.

It is ordered that you, Leonardo Franqui, be taken by the proper authority to the Florida State Prison, and there be kept under close confinement until the date of your execution is set.

It is further ordered that on such scheduled date, you, Leonardo Franqui, be put to death.

You are hereby notified that this sentence is subject to automatic review by the Florida Supreme Court.

DONE AND ORDERED this 23rd day of November 1993.

/s/
RODOLFO SORONDO, JR.
Circuit Court Judge

APPENDIX C

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA, CRIMINAL DIVISION

Plaintiff CASE NO, 92-2141D

vs.

RICARDO GONZALEZ,

Defendant.
_____/

SENTENCING ORDER

The Florida Supreme Court remanded this case to this court with instructions that a new sentencing hearing be held as to the crime of first degree murder. On August 10, 1998 through August 13, 1998 a jury was empaneled and a sentencing hearing was then held. On August 20, 1998, the jury recommended, by a vote of 8 to 4, that the court impose the death penalty upon the Defendant.

On September 4, 1998 the court held a Spencer hearing and allowed each side to present additional evidence and arguments to the court.

This court is now required to consider and give individual consideration to each and every aggravating and mitigating circumstance set forth by Section 921.141 of the Florida Statutes, including any and all non-statutory mitigating circumstances. Having heard all of the evidence introduced during the course of the sentencing proceeding, as well as the presentations made by the State and the defendant on September 4, 1998 this court now addresses each of the aggravating and mitigating circumstances at issue in this proceeding:

AGGRAVATING CIRCUMSTANCES

1. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The state has proven beyond and to the exclusion of every reasonable doubt that the defendant was contemporaneously convicted of the armed robbery of the Kislak National Bank and/or Michelle Chin-Watson and of the aggravated assault of Lasonya Hadley. The court can and does consider these contemporaneous convictions as prior felonies involving the use or threat of violence to the person, *see LeCroy v. State*, 533 So.2d 750 (Fla. 1988). The court also finds that this aggravating circumstance is entitled to some weight.

2. The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit or in flight after committing or attempting to committee a robbery.

The State has proven beyond and to the exclusion of every reasonable doubt that the defendant was committing an Armed Robbery of the Kislak National Bank at the time he fired shots at Officer

Stephen Bauer and killed him. The court finds the existence of this aggravating circumstance and gives it great weight.

3. The capital felony was committed for pecuniary gain.

The State has proven beyond and to the exclusion of every reasonable doubt that the defendant went to the Kislak National Bank with the intent to steal money. Immediately after he shot and killed Officer Bauer, the defendant went to pick up the money tray from the ground. Later, he received $1,500.00 as his share of the proceeds from the robbery/murder.

The court recognizes, however, that this aggravating circumstance merges with the aggravating circumstance that the capital felony was committed during the course of an armed robbery. Accordingly these two aggravating circumstances will be considered as one.

4. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from justice.

The State has proven beyond and to the exclusion of every reasonable doubt that Officer Stephen Bauer was a law enforcement officer with the North Miami Police Department, that he was in full uniform on the day he was killed; and that his identity as a police officer was apparent. The uniform patches clearly identified him as a member of the "North Miami Police." He was wearing a gunbelt with a gun clearly visible in its holster. His police radio was also clearly visible. The defendant's accomplices had "cased out" the bank on two occasions -- including the day before -- and observed that a uniformed officer escorted the tellers to the drive-through windows in the morning. When approached by these armed men, Officer Bauer took action to protect the tellers and apprehend the defendants. The defendant and his accomplice, Leonardo Franqui, saw Officer Bauer reach for his service pistol. The defendant and Franqui did not give the officer a chance to do anything further. In order to avoid their own arrest, they immediately moved to outflank the officer and fired their weapons at him, killing him. The court finds that this defendant's primary purpose or motivation for killing Officer Bauer was to avoid his own arrest. The court finds the existence of this aggravating circumstance and gives it great weight.

5. The crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of governmental function or the enforcement of laws.

This aggravating circumstance has been established beyond a reasonable doubt. The killing of Officer Bauer was done to hinder the enforcement of laws, that is: the arrest of the defendant for the armed robbery of the bank. This circumstance merges with the previous circumstance that the crime was committed to avoid lawful arrest. They will be considered as one aggravating circumstance and no additional weight is added due to this additional aggravating circumstance.

6. The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

The State has established beyond and to the exclusion of every reasonable doubt that Stephen Bauer was a law enforcement officer and that at the time of his death he was engaged in the performance of his official duties, to-wit: the protection of Lasonya Hadley, Michelle Chin-Watson, and the Kislak National Bank and effectuating the arrest of the defendant and his accomplices. The court further finds beyond a reasonable doubt that the defendant knew Steven Bauer was a law enforcement officer. The court finds the existence of this aggravating circumstance and gives it great weight.

The State has argued that this aggravating circumstance does not merge with the two

previously discussed aggravating circumstances. The court finds, however, that this aggravating circumstance does merge with the aggravating circumstances that the capital felony was committed for the purpose of preventing a lawful arrest and that it was committed to hinder the enforcement of laws. Thus, these three aggravating circumstances will be considered as one.

STATUTORY MITIGATING CIRCUMSTANCES

The court will address each and every statutory mitigating circumstance provided by the Florida Statute 921.141 and every non-statutory mitigating circumstance argued by the defendant.

1. The defendant has no significant history of criminal activity.

The defendant established that he had no arrests or convictions for any crimes either as an adult or as a juvenile. The State did not dispute this. The court finds that this mitigating circumstance has been established and is entitled to some weight.

2. The crime for which the defendant is to be sentenced was committed while he was under the influence extreme mental or emotional disturbance.

Dr. Hyman Eisenstein, a board certified clinical neuro-psychologist testified on behalf of the defendant at the hearing. Dr. Eisenstein opined that the defendant acted under a state of extreme mental and/or emotional disturbance due to his marital demands, developmental history of shuffling back and forth between family members, educational and language deficiencies, emotional state, history of boxing and brain damage, inability to control impulses, and lack of judgment.

In order to property evaluate Dr. Eisenstein's ultimate opinion, a thorough discussion of his testimony, and a comparison of it to the other evidence in the case, is appropriate. As the Florida Supreme Court stated in *Walls v. State*, 641 So.2d 381 (Fla. 1994):

> [A] distinction exists between factual evidence Or testimony, and opinion testimony. As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable or contradictory.... Opinion testimony, on the other hand, is not subject to the same rule... Certain kinds of opinion testimony clearly are admissible -- and especially qualified expert opinion testimony -- but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking.
> *Id*. at 390-91.

Dr. Eisenstein had the defendant perform a number of tests. These tests allowed the doctor to evaluate the defendant's intelligence, motor skills, cognitive skills and language skills. The court will discuss the results of many of these tests.

The doctor first asked the defendant to perform a grip strength test. The results of the test showed that the right hand was in the normal range but the left hand was slightly impaired. Dr. Eisenstein opined that the damage to the right hemisphere of the defendant's brain could account for the lesser strength in his left hand. On cross-examination, however, the doctor admitted that the defendant's left index finger had been severed years earlier when a car battery exploded and this hand injury could account for the difference in grip strength between one hand and the other.

The next test was a finger tapping test. In this test, the defendant is asked to perform a number of taps with his index finger. With his right hand, he performed in the high normal range. With his left hand, the defendant used his middle finger since he has no index finger. Even using that finger, the defendant scored in the normal range.

On the pegboard test, the defendant was required to place a number of pegs into the board.

With his right hand, he scored in the normal range. With his left hand, he was slightly impaired.

In a complex figure sensory perception test, the defendant performed in the high normal range.

On a trailmaking test he scored in the normal range on one part of the test and mildly impaired on another part of the test.

Thus, on most of the performance tests the defendant scored in the normal or high normal range.

On one language test - a naming test - the defendant scored in the profoundly impaired range placing him in the bottom 1 to 2 per cent of the population. However, he scored in the normal range on fluency test and in the upper end of mild mentally retarded on the reading articulation test. While the defendant's language scores were not as high as his performance scores, Dr. Eisenstein admitted that the fact that Spanish was the defendant's primary language could account for lower scores in the language tests given in English.

In an IQ test given by Dr. Eisenstein, the defendant's full scale IQ was 80, or at the lower end of average. In a test given to the defendant four months later, he scored a 93.

On personality tests, the defendant demonstrated that he was suffering from severe anxiety, nervousness, impulsivity, that he was shy, inhibited, was socially withdrawn and had difficulty with socialization skills. The personality test depends on honest responses from the defendant. The defendant, however, lied to Dr. Eisenstein about his grades in school and lied about his proclaimed innocence of this murder so the court has concerns about the validity of these test results. Also, these tests were given to the defendant while he was in jail and after he had already been convicted of first degree murder of a police officer and was facing the death penalty or -- at best -- spending the rest of his life in prison. Common sense dictates that anyone in that situation would be under stress and suffer from anxiety and nervousness.

On the memory tests the defendant scored in the mild mentally retarded range.

His school records showed an IQ of 79 and a clear learning disability.

Dr. Eisenstein summarized his findings by opining that all these factors caused the defendant to act impulsively on January 3, 1992. However, there are no facts at hand which support this opinion. As the Supreme Court held in discussing the value of opinion testimony in Walls, "its weight diminishes to the degree such support is lacking." *Walls* at 385. The defendant's own confession established that he was aware of the planned robbery for 10 days before the crimes. The day before the crimes the defendant again met with his co-defendants and discussed the plan. The day of the crime the defendant and co-defendants drove the getaway car and the two stolen cars to the area of the bank early enough to make sure their cars were first in line. They then went to a bakery and waited for the bank to open. The defendant exited the vehicle with his gun drawn, pointed, and ready for action. These are not facts which support an act of impulsivity.

Further, in spite of his brain damage, learning disabilities and stresses, the defendant was able to conform his conduct to the law for every day of his life prior to January 3, 1992, and for all the days since.

Even the testimony of the defendant's other expert, Dr. Alan Wagshul, a board certified neurologist fails to lend support to Dr. Eisenstein's opinion. Dr. Wagshul testified in the original sentencing hearing in 1994 and his testimony was re-read to the jury during this hearing. Dr. Wagshul ordered that an MRI be performed by Dr. Thomas Naidich on the defendant's brain. That MRI revealed that the defendant has two cavities in the middle of his brain which are filled with spinal fluid. This condition is generally abnormal but is commonly found in boxers. Dr. Wagshul opined that the defendant's boxing injuries caused this organic brain damage which he classified as pugilistic encephalopathy. Dr. Wagshul opined that this injury can lead to impulsiveness. However, he stated that it would not cause someone to rob a bank and kill a police officer.

More significantly, Dr. Wagshul testified that the defendant's brain wave activity was normal and that he suffered no neurological difficulty as a result of this brain injury. His gait was normal and his neurological examination was completely normal. This diagnosis was confirmed by the detectives who spoke to the defendant in 1992 as well as another defense expert, Dr. Brad Fisher, who examined the defendant in 1998. Each of those witnesses noticed no abnormalities in the defendant's speech,

movement, or mannerisms.

Furthermore, the defendant was able to hold different jobs for long periods of times, even working as a technician in an optical laboratory. His responses to all the doctors and all the police he spoke to were logical. Even though the defendant lost some boxing matches, he was never knocked out. Although the defendant scored poorly on some tests, he scored extremely highly on other tests and overall his scores were about average.

The testimony and evidence did not reasonably establish the existence of this mitigating circumstance. At best, the evidence established that the defendant had a physical abnormality in his brain. But, this physical condition did not cause any diminished mental capacity or physical impairment.

3. <u>The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.</u>

The state has established beyond and to the exclusion of every reasonable doubt that the defendant was a major participant in the bank robbery and in the murder of Officer Bauer. The defendant was aware of the planned robbery for approximately 10 days. He unhesitatingly agreed to participate in the robbery and agreed to be one of two gunmen during the robbery. It was this defendant who actually fired the fatal shot that killed Officer Bauer. There is simply no evidence which reasonably establishes that this mitigating circumstance applies to this case.

4. <u>The defendant acted under extreme duress or under the substantial domination of another person.</u>

The defendant presented witnesses who testified that the defendant's wife, Marisol, put pressure on him by complaining that he was not making enough money, that she wanted a new car and jewelry, and that she wanted to party and have a good time. The court accepts this testimony as being credible.

Dr. Eisenstein, testified that this pressure from his wife was one of the stressors that contributed to the defendant's involvement in this offense.

While the court accepts the testimony of these witnesses, it has not been reasonably established that his marriage placed the defendant in a state of extreme duress or under the substantial domination of another person. Dr. Eisenstein admitted that this type of financial strain in a relationship is commonplace. There is nothing to suggest that this defendant's wife's complaints were any more extreme than those of any other young woman who wants a better financial status for her family and wants to have a good time.

More particularly, the defendant gave a detailed statement to the police. Not once did the defendant state that his wife's pressures in any way contributed to his involvement in this homicide. In fact, the defendant said he used the money from the robbery to fix his own car and still had some money left. He did not buy anything for his wife and did not give her any money. After his apartment was searched and $1,200.00 was found hidden in a gym bag in his closet, the defendant gave another statement. Again, the defendant did not say that he spent any money on his wife. To the contrary, he hid the money from her.

The court concludes that this mitigating circumstance has not been reasonably established.

5. <u>The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.</u>

Dr. Hyman Eisenstein opined that the defendant was under a state of extreme mental and emotional disturbance. He did not test, nor is there any credible evidence in the record to suggest, that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Dr. Eisenstein testified that the

defendant acted impulsively due to his brain injury. But, this crime was planned over a ten day period. The defendant readily agreed to participate in a bank robbery the first time it was suggested to him. The defendant's brain injury did not cause him to act impulsively and violate the law any time before or since this incident. There is simply no evidence which can be reasonably relied upon to establish this mitigating circumstance.

6. The age of the defendant at the time of the crime.

The defendant was born on January 19, 1970. Therefore, he was twenty-one years old on the day he shot and killed Officer Bauer and was, in fact, almost twenty-two years old. The court is not reasonably convinced that this mitigating circumstance exists in this case.[1080] The defendant was married at the time of this incident, had worked steadily for different periods of time, and was a mature adult.

NON-STATUTORY MITIGATING CIRCUMSTANCES

The defendant suggests that this court should consider the existence of several non- statutory mitigating circumstances. The court will address each one.

1. The defendant's deprived upbringing and family history.

The defendant argues that the evidence established that he suffered a deprived family background which should be considered in mitigation. The evidence established that the defendant was born out of wedlock and that his father was married and had a family and did not live with his mother or with the defendant. To that extent, the defendant's upbringing was not ordinary. The court hesitates to use the term normal since there really is no set, normal pattern for upbringing in today's world. While his upbringing was out of the ordinary, it was far from deprived.

The defendant grew up in two loving, caring households. He spent parts of his youth with his mother in Miami and other parts with his grandparents in Puerto Rico. Both families wanted the defendant to five permanently with them. The defendant had his own room in each house and was given everything he needed - including spending money. When he was in Puerto Rico, his father visited with him every day. Both families taught him to respect the law and to lead a good life. No family members were involved in any crimes. The defendant was never abused physically, verbally, or emotionally. If anything, the defendant's upbringing was exemplary. In no way was he ever deprived. Therefore, this mitigating circumstance has not been reasonably established.

2. The defendant's brain damage and psychological problems.

Although the testimony of the defense witnesses did not establish the statutory mitigating circumstances, the court finds that the defendant's brain damage, learning disability and below average intelligence have been reasonably established and constitute a non-statutory mitigating circumstance. In addition, witnesses testified that the defendant has suffered migraine headaches since boyhood. Regardless of these physical problems, the defendant was able to work, marry, comply with the law, and contribute to society in spite of these deficiencies. Accordingly, the court gives this mitigating circumstance little weight.

[1080] Skull v. State, 533 So.2d 1137 (Fla. 1988), Kokal v. State 492 So.2d 1317 (Fla. 1986); Cooper v. State, 492 So.2d 1059 (Fla. 1986); Garcia v. State 492 So.2d 360 (Fla. 1986); Mills v. State, 462 So.2d 1075 (Fla. 1985); Mason v. State, 438 So.2d 374 (Fla. 1983); Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983); Simmons v. State, 419 So.2d 316 (Fla. 1982)

3. Remorse.

During the Spencer hearing the defendant addressed the court and the Bauer family and apologized for what happened to Officer Bauer. The court believes he was sincere in his apology. The court is reasonably convinced that this mitigating circumstance has been established. However, the defendant did not accept personal responsibility for Officer Bauer's death and, years earlier, he was not completely candid to the police in his statements and he also falsely claimed his innocence to Dr. Eisenstein. The court gives little weight to this mitigating circumstance.

4. The defendant's cooperation with the authorities.

The defendant's statements to the police were instrumental in securing his own conviction. However, the defendant attempted to minimize his actual level of participation and falsely claimed that he did not know Officer Bauer was a police officer. The court is reasonably convinced of the existence of this mitigating circumstance but in the light of all the facts in this case gives it little weight.

5. The life sentences imposed on Pabo Abreu and Pablo San Martin.

The defendant's position is that the life sentences imposed on co-defendants Pablo Abreu and Pablo San Martin dictate that a life sentence is appropriate for him. The court finds that these sentences are a mitigating circumstance but that they are entitled to little weight. Pablo Abreu was a getaway driver parked blocks from the bank. Abreu cooperated with the State and agreed to testify against his co-defendants. Pablo San Martin went to the bank but he was unarmed. He did not personally commit an act of violence towards Officer Bauer or the tellers. The jury in Pablo San Martin's trial recommended a life sentence and the Florida Supreme Court ruled that the trial court improperly overrode that recommendation. This defendant fired the fatal shot while Officer Bauer was helpless to resist. The great variance in the degree of participation of these co-defendants justifies the variance in sentences.

6. The defendant's good conduct in custody and potential for rehabilitation.

The defendant established that he has had good conduct during, six years of incarceration. However, the defendant has been in extremely secure detention while at the Dade County Jail or on Death Row. His opportunities to create mischief have been minimal. Dr. Fisher also testified that the defendant is a good candidate for rehabilitation. The court finds that this mitigating circumstance has been established but is entitled to little weight.

PROPORTIONALITY REVIEW

This court recognizes that the Supreme Court of Florida will conduct a proportionality review of the sentence in this case. *See Dixon v. State*, 283 So.2d 1 (Fla. 1973). The most logical interpretation of the evidence in this case established that this defendant intentionally and ruthlessly fired upon a uniformed law enforcement officer who was trying to prevent a robbery in progress. The defendant kept shooting until, while the victim was helpless to resist, he delivered the fatal blow. Nothing about his age, physical condition, background or mental status, suggests that the ultimate sentence for such conduct is disproportionate. This court's review of other reported capital cases has led the court to conclude that the death penalty is not disproportionate.

CONCLUSION

The court finds that the state has established, beyond and to the exclusion of every reasonable doubt, the existence of six statutory aggravating circumstances. However, two of the aggravating circumstances (during robbery and financial gain) merge into one and three others (victim was a law enforcement officer, murder committed to hinder or disrupt enforcement of laws, murder committed to evade arrest) merge into one other. Thus, a total of three aggravating circumstances exist.

The court is reasonably convinced of the existence of one statutory mitigating circumstance.

The court is reasonably convinced of the existence of five non-statutory mitigating circumstances.

In weighing the aggravating factors against the mitigating factors the court understands that the process is not simply a quantitative analysis but a qualitative one. It is the court's duty to look to the nature and quality of the aggravating and mitigating circumstances which have been established.

Under such an analysis, the aggravating circumstances in this case far outweigh the mitigating circumstances.

SENTENCE

As to Count 1 of the Indictment, the first degree murder of Officer Stephen Bauer, I sentence you, Ricardo Gonzalez, to death.

This sentence shall run consecutive to all other sentences in this case. To the extent that the consecutive nature of this sentence represents a departure from the sentencing guidelines recommended range, the reason for departure is the unscorable nature of the capital offense.

It is ordered that you, Ricardo Gonzalez, be taken by the proper authority to the Florida State Prison, and there be kept in close confinement until the date of your execution is set.

It is further ordered that on such scheduled date, you, Ricardo Gonzalez, be put to death.

You are hereby notified that this sentence is subject to automatic review by the Florida Supreme Court.

DONE AND ORDERED this 18th day of September 1998.

/s/
ROBERT N. SCOLA, JR.
CIRCUIT COURT JUDGE

cc: Abraham Laeser, ASA
Gail Levine, ASA
Reemberto Diaz, Esq.
Bruce Fleischer, Esq

APPENDIX D

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT OF
FLORIDA, SEMINOLE COUNTY

STATE OF FLORIDA,
Plaintiff,

CASE NO. 99-881-CFA

v.

RICHARD LYNCH,
Defendant.
_____/

SENTENCING ORDER

The defendant entered a plea of guilty before this court on October 19, 2000, to the first degree murders of Roseanna Morgan and Leah Caday as well as to one count each of armed burglary of a dwelling and kidnapping. On that same date the defendant waived his right to a penalty phase jury and the court allowed the penalty phase to commence at a non-jury hearing on January 8, 2001. The parties presented matters in aggravation and mitigation during the penalty phase hearing. A Spencer hearing was scheduled for February 6, 2001, and additional evidence was taken. Victim impact statements were presented but the court has not considered them in arriving at the sentence to be imposed. The defendant was given an opportunity to be heard regarding the sentences to be imposed and he made a statement. The parties stipulated to submit written final arguments and sentencing memoranda and the court has read them and considered them. The court now finds as follows:

FACTS

The defendant and Roseanna Morgan had an affair that lasted several months. The defendant, who was unemployed and who was being supported by his wife, obtained three credit cards that he used to establish Roseanna Morgan in an apartment. He also bought her an automobile. He ran up over $6,000.00 in credit card debt as a result of this affair. Roseanna Morgan was also married. Her husband was employed in Saudi Arabia. He returned home and, on February 9, 1999, she decided to resume relations with him. This upset the defendant and on March 3, 1999, he wrote a letter to his wife in which he disclosed the affair in detail and announced his future plans. In the letter the defendant stated,

"I am sorry. I am very despondent and depressed beyond description. There has been recent events which drove me to this.

"I want you to send copies of letter & card and pictures to her family, mom and dad in Hawaii...I want them to have a sense of why it happened, some decent closure, a reason and understanding, they are good parents like yours. I want them to know what she did, the pain she caused, that it was not just a random act of violence.

"I had three credit cards I got by myself - Chase Visa, People's MasterCard, MBNA Visa. She had no good credit, and I helped her buy car, '85 Buick, get apt in Rosecliff and buy things for apt, pay bills, she was paying on cards and would have paid them little by little. She was responsible. Suddenly she decided to get back with husband on Feb 9. She is afraid of him, or custody of kids or

something. Suddenly just a week after she gave me that card, it was over.....She promised to pay credit cards, her bills and she made payment February 18 on one, but I cannot live with that worry. The Chase Visa is $6,000 - I feel she will not pay all. So between the worry about bills, you finding out and your anger and possibly getting thrown out on street, our sad life lately and the pain of losing her, and losing my dream which seemed so close, I feel there is no way out for me. I am sorry for all the pain, suffering, expense, embarrassment and hardship I will cause and give to you.....

"That is why she must pay the price. She built me up, made me love her, loved me, gave me that card on Feb 6 then on 9th she ended it. You cannot tell someone words like that, then expect them to turn off like a switch. Then there's the $ worry."

The evidence presented establishes that subsequent to February 6, 1999, the defendant made numerous attempts to regain Roseanna Morgan's favor and even had conversations with her husband on the subject. One of Roseanna Morgan's coworkers saw the defendant at their place of employment. By then, he was stalking her.

On the afternoon of March 5, 1999, the defendant carefully packed three firearms and ammunition into a black bag. Then he carried the black bag and firearms to Roseanna Morgan's apartment. He waited outside the apartment for her to come home. Leah Caday, Roseanna Morgan's teenage daughter, came home first. In describing the incident the defendant stated, "I was waiting for her. Her daughter come home and we went in the apartment." The defendant held Leah in the apartment with one of the firearms in view for thirty to forty minutes. The defendant admits that Leah was thoroughly terrified during this ordeal. He stated, "I put the gun down on the table and the daughter was just terrified. She says 'why are you doing this to me?'" When Roseanna Morgan returned to the apartment the defendant met her at the front door and shot her several times in the legs while she was standing in the hallway. Another shot entered her eye and exited her neck. Then the defendant dragged her into the apartment while she was screaming for help and administered a coup de grace by firing a bullet into her brain. Meanwhile, a neighbor called 911 and notified the police.

After shooting Roseanna Morgan, the defendant telephoned his wife and told her what he had done. The defendant's wife testified that during this conversation she heard Leah screaming in the background. Then he dispatched Leah with one shot in the back that killed her almost instantly. He notified his wife of the second murder and told her where to find the letter he had written to her. She obtained the letter and called 911. The defendant called the Sanford Police Department. During that call he made a statement about the incident to the dispatcher.

After the police were notified, two officers attempted to investigate but when they tried to enter the apartment a shot was fired and they retreated. The SWAT team arrived and, after negotiations, the defendant was arrested without further incident.

Based upon the testimony presented and the other evidence in the case, the court finds as follows:

AGGRAVATING FACTORS
(ROSEANNA MORGAN)

The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The facts that tend to establish this aggravating factor, are (1) the defendant's letter to his wife in which he asked her to notify Roseanna Morgan's parents about "the pain she caused," that the homicide was not "a random act of violence" and that she had to "pay the price;" (2) the defendant carefully packed three firearms in a black bag along with ammunition and took them with him to Roseanna Morgan's apartment; (3) the passage of time between the date of the letter and the killing; (4) the passage of time while the defendant held and terrorized Leah while awaiting Roseanna Morgan's return and (5) the coup de grace.

The defense presented a psychologist, Dr. Jacqueline Olander, who opined that the defendant's motive in going to the apartment was to commit suicide in front of Roseanna Morgan. Dr. William Riebsame, a psychologist presented by the state, disagreed. It was his opinion that the defendant's motive was a murder-suicide and that the defendant simply did not carry out the second part of the

plan. Dr. Riebsame's opinion is more supportive of the evidence in the case and it is accepted by the court. The contents of the defendant's letter set forth a murder suicide plan without saying as much in so many words. It would have been unnecessary for Roseanna Morgan's parents to be notified "about the pain she caused" or that the killing "was not just a random act of violence" or "(t)hat is why she must pay the price" unless the defendant fully intended to kill her. But for the actions of Joyce Fagan, the dispatcher for the Sanford Police Department, and Stephanie Ryan, the hostage negotiator, the defendant may have carried out the second part of his plan. These two individuals had extensive conversations with the defendant after the murders and dissuaded him from harming himself or anyone else.

The court finds this aggravating circumstance to have been established beyond a reasonable doubt. The mental mitigation presented by the defendant has been carefully considered by the court in light of the holding in Alameida v. State, 748 So.2d 922 (Fla. 1999). The court is convinced that the defendant was sufficiently in control of his faculties to plan and carry out the murder of Roseanna Morgan. Accordingly, this aggravating circumstance is given great weight.

The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The contemporaneous conviction for a violent crime cannot generally be used to support this circumstance. However, if more than one victim is involved, this circumstance can be used. King v. State, 390 So.2d 315 (Fla. 1980); Pardo v. State, 563 So.2d 77 (Fla. 1990); Stein v. State, 632 So.2d 1361 (Fla. 1994). Since there were two victims in this case, this aggravating factor has been established beyond a reasonable doubt. However, since Roseanna Morgan was the first victim to be killed, this aggravator is given little weight.

The capital felony was committed while the defendant was engaged in aggravated child abuse, burglary or kidnapping.

This aggravating circumstance invokes the ancient and much criticized "felony-murder rule." See, Aaron v. State, 299 N.W.2d 304, 13 A.L.R.4th 1180 (Mich. 1980). The evidence established that the defendant gained entry into the apartment with the intent to commit murder so the homicide was committed during an armed burglary. This aggravating circumstance has been proven beyond a reasonable doubt. The defendant formed the intent to kill Roseanna Morgan before he entered the apartment. Just how he gained entry, whether it was by force after he met Leah Caday or after he convinced her to allow him in, is immaterial. Entry gained by trick or fraud will support conviction for burglary, because consent to enter obtained by trick or fraud is actually no consent at all and, therefore, the entry is unauthorized. Gordon v. State, 745 So.2d 1016 (4th DCA 1999), rehearing denied, cause dismissed, 751 So.2d 50.

The evidence does not establish that Roseanna Morgan was killed during a kidnapping[1081] or as a result of child abuse.[1082]

Since the felony-murder rule merely provides an alternative theory to first degree murder by premeditation and since armed burglary was part of the defendant's premeditated plan, this aggravator is given little weight.

The capital felony was committed for the purpose of avoiding or preventing a lawful

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[1081]Berry v. State, 668 So.2d 967 (1996). (If, during commission of robbery, the defendant confines the victims by simply holding them at gunpoint, or if the defendant moves the victims to different room in apartment, closes the door, and orders them not to come out, a kidnapping conviction cannot stand.); Brown v. State, 719 So.2d 955 (Fla. 4th DCA 1998). (For a kidnapping conviction to stand, the resulting movement or confinement: (1) must not be slight, inconsequential, and merely incidental to the other offense; (2) must not be of the kind inherent in the nature of the other offense; and (3) must have some significance independent of the other offense in that it makes the other offense substantially easier to commit or substantially lessens the risk of detection.)

[1082]Roseanna Morgan was over the age of eighteen.

arrest.

This aggravating factor is refuted by all of the evidence as to the murder of Roseanna Morgan and the court determines that it has not been established beyond a reasonable doubt.

The capital felony was especially heinous, atrocious or cruel.

In order for a crime to be especially heinous, atrocious or cruel it must be both conscienceless or pitiless and unnecessarily torturous to the victim. Richardson v. State, 604 So.2d 1107 (Fla. 1992); Hartley v. State, 686 So.2d 1316 (Fla. 1996); Zakrzewski v. State, 717 So.2d 488 (Fla. 1988); Nelson v. State, 748 So.2d 237 (Fla. 1999). Generally, this circumstance does not apply to shooting deaths that are instantaneous or nearly so. Lewis v. State, 398 So. 2d 432 (Fla. 1981); Clark v. State, 613 So.2d 412 (Fla. 1992) Robertson v. State, 611 So.2d 1228 (Fla. 1993); Kearse v. State, 662 So.2d 677 (Fla. 1995). There are exceptions to the general rule. A review of several cases reveals some of the factors that can be considered that establish this aggravator.

In Rolling v. State, 695 So.2d 278 (Fla. 1997), the victim displayed defensive wounds and the evidence established she survived a knife attack for less than a minute. Roseanna Morgan received multiple nonlethal gunshot wounds to her legs, a defensive wound to her hand and a lethal but not instantly lethal wound to the head before she was dragged screaming into the apartment where the coup de grace was administered.

In Mahn v. State, 714 So.2d 391 (Fla. 1998), the victim was stabbed numerous times, some of which were defensive. In Cummings v. State, 684 So.2d 729 (Fla. 1996), the victim was stabbed several times, some of the wounds being defensive, and she remained conscious for several minutes. In Nelson v. State, 748 So.2d 237 (Fla. 1999), the victim was struck several times with a baseball bat. These three cases carry the common factor of multiple wounds and a less than instantaneous death. That is the sort of death suffered by Roseanna Morgan.

Finally, in Wournos v. State, 644 So.2d 1000 (Fla. 1994) and Geralds v. State, 674 So.2d 96 (Fla. 1996), this aggravator was found to be established when the victim's deaths were neither instantaneous nor painless.

In considering all of the circumstances of this case, the court finds this aggravating factor has been proven beyond a reasonable doubt and it is given great weight.

AGGRAVATING FACTORS
(LEAH CADAY)

The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

As stated above, the contemporaneous conviction for a violent crime cannot generally be used to support this circumstance. However, if more than one victim is involved, this circumstance can be used. King v. State, 390 So.2d 315 (Fla. 1980); Pardo v. State, 563 So.2d 77 (Fla. 1990); Stein v. State, 632 So.2d 1361 (Fla. 1994). Since there were two victims in this case, this aggravating factor has been established beyond a reasonable doubt. And, since Leah Caday was the second victim to be killed, this aggravator is given great weight.

The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The evidence does not establish beyond a reasonable doubt that the defendant premeditated the murder of Leah Caday.

The capital felony was committed while the defendant was engaged in aggravated child abuse, burglary or kidnapping

This aggravating circumstance also invokes the felony-murder

rule. Leah Caday was under the age of eighteen years. In fact she was thirteen. The legislature, through the operation of the felony-murder rule, has made the killing of any child her age first degree murder. The killing was also committed during the course of an armed burglary. An objective view of the facts surrounding the killing of Leah Caday results in a finding that her killing was an afterthought - an act imminently dangerous to another and evincing a depraved mind regardless of human life. But for the felony-murder rule such a killing would be second degree murder. Since the killing has already been elevated from second degree murder to first degree murder, the amount of weight given to this aggravating factor should be substantially less than great weight. However, due to the age of the victim, the court assigns significant weight to this aggravator.

The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

This aggravating circumstance is not permitted to be found absent "strong evidence." In cases where the victim is not a law enforcement officer it must be "the sole or dominant motive for the murder." Preston v. State, 607 So.2d 404 (Fla. 1992). However, this aggravator has been allowed in cases where the only motive for the killing appears to be the elimination of a witness. In Willacy v. State, 696 So.2d 693 (Fla. 1997), for instance, the victim surprised the defendant during a burglary and he killed her. The court reasoned there was little reason to do so other than to eliminate her as a witness. In contrast, in Zack v. State, 753 So.2d 9 (Fla. 2000), the murder was premeditated and elimination of the witness was only incidental to the premeditated plan.

The murder of Leah Caday was not premeditated. In order to find the existence of this aggravator there must have been no other logical reason for the defendant to kill Leah except to eliminate her as a witness. This, of course, requires a finding that sometime after Roseanna Morgan's murder the defendant changed his mind about committing suicide and decided to escape detection by killing Leah. The taped conversation with the dispatcher is evidence that he had no such intent. It was the defendant who called the police, confessed to the killings and made arrangements for his subsequent arrest without incident. It makes no sense for the defendant to kill Leah in order to eliminate her as a witness and then confess to the crime moments later. Accordingly, the court finds that the murder of Leah Caday was for a reason or reasons other than to avoid or prevent a lawful arrest.

The capital felony was especially heinous, atrocious or cruel.

Leah Caday was confined in the apartment with the defendant for between thirty and forty minutes before her mother came home. During that time she was terrified of the defendant and his gun. After her mother came home she watched in horror while her mother was brutally murdered. Virginia Lynch heard her screaming in the background during the first phone call the defendant made to her. She had time to contemplate her impending death. See, Hannon v. State, 638 So.2d 39 (Fla. 1994). Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even when the victim's death is almost instantaneous. Preston v. State, 607 So.2d 404 (Fla. 1992). The heinous, atrocious, or cruel aggravating circumstance may be proven in part by evidence of the infliction of "mental anguish" which the victim suffered prior to the fatal shot. Henyard v. State, 689 So.2d 239 (Fla. 1997). The actions of the defendant prior to shooting Leah qualify her murder as especially heinous, atrocious and cruel. This aggravating circumstance has been established beyond a reasonable doubt and is given great weight.

MITIGATING CIRCUMSTANCES

The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

The experts called by the defense and the state presented evidence on this mitigating circumstance. They did not agree with each other. Dr. Olander believed the defendant was under the influence of extreme mental or emotional disturbance. Dr. Riebsame believed the disturbance to be

less than extreme. Dr. Riebsame's testimony is the most credible. The defendant was emotionally disturbed. His girlfriend had decided to return to her husband and this meant loss of a sex partner for whom he had strong feelings. However, he was able to plan his course of action and carry out all but the suicide portion of the plan. The court gives the emotional disturbance suffered by the defendant moderate weight.

The defendant's capacity to conform his conduct to the requirements of law was substantially impaired.

The experts, Dr. Olander and Dr. Riebsame, agreed that the defendant's capacity to conform his conduct to the requirements of law was impaired. They disagree on the degree of impairment. Dr. Olander believes the defendant has a schizoaffective disorder. Dr. Riebsame did not believe the defendant has a schizoaffective disorder. He noted that the defendant did not suffer delusions or have difficulty recalling events about the murders. He testified that it is usual for a person with such a disorder to report a very bizarre description of events that makes sense to him or her but not to anyone else. Dr. Riebsame's testimony on this issue is the most credible and is accepted by the court. The fact that the defendant's capacity to conform his conduct to the requirements of law was impaired, but not substantially impaired, is given moderate weight.

The defendant has no significant history of prior criminal activity.

This mitigating factor has been established and is not controverted. However, the circumstances of this double murder, including the murder of the second victim, "militate against" this factor and it is given little weight. Ramirez v. State, 739 So.2d 568 (Fla. 1999).

Any other aspect of the defendant's character or background.
The defendant suffered from mental illnesses at the time of the offense.

The expert witnesses agreed that the defendant has a depressive disorder and that he had this condition at the time of the offense. The evidence also established that he has a personality disorder not otherwise specified with paranoid features, obsessive-compulsive features and passive aggressive features. As previously stated, while Dr. Olander believes the defendant to have a schizoaffective disorder, Dr. Riebsame disagrees and the court has accepted Dr. Riebsame's opinion. The defendant's personality disorders are given some weight.

The defendant was emotionally and physically abused as a child.

The evidence established that the defendant's father was a strict disciplinarian who insisted upon the defendant reporting to him every half hour if he was playing or "sign in" if the father was not present. The experts disagreed about whether this amounted to emotional and physical abuse but the court considers this mitigating factor to have been established. However, since there is no real connection between this mitigator and the murders, it is given little weight.

The defendant has a history of alcohol abuse.

The defendant reported a history of alcohol abuse to Dr. Olander and there is no evidence to the contrary. However, the defendant was neither under the influence of alcohol at any time during the events that led up to the murders nor at the time of the murders themselves so this mitigator is given little weight. Mahn v. State, 714 So.2d 391 (Fla. 1998).

The defendant has adjusted well to incarceration.

There is no direct evidence of this mitigating factor. However, the court has observed the defendant during these proceedings and has received no adverse information from the courthouse security detail. Accordingly, the court views this mitigator as having been established but assigns

little weight to it.

When possible, the defendant has sought gainful employment.

The defendant has been employed during much of his lifetime. He has been a truck driver, a transit authority policeman, a security guard and a bus driver. He was not employed at the time of the murders. He took care of the two young children while his wife worked as income provider. This mitigating circumstance has been established but it is given little weight.

The defendant cooperated with the police.

The evidence is clear that the defendant remained at the scene of the murders and made several statements implicating himself in the murders. While the evidence contradicts the defendant's version of the events as being accidental, the court agrees that the degree of cooperation given resulted in the guilty pleas entered in this case. The fact that this case did not have to be tried convinces the court to give this mitigator moderate weight.

Other mitigating factors:

During the Spencer hearing the defendant made a statement in which he expressed remorse for his actions and stated that he has been a good father to his children and intends to continue being as good a father as he can while in prison. The court accepts these factors as mitigating and assigns little weight to them.

To summarize, the court finds the following aggravating and mitigating factors and assigns the weight given to each:

Aggravating Factors
(Roseanna Morgan)

The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. - Great weight.

The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. - Little weight

The capital felony was committed while the defendant was engaged in aggravated child abuse, burglary or kidnapping. - Little weight

The capital felony was especially heinous, atrocious or cruel. - Great weight

Aggravating Factors
(Leah Caday)

The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. - Great weight

The capital felony was committed while the defendant was engaged in aggravated child abuse, burglary or kidnapping - Significant weight

The capital felony was especially heinous, atrocious or cruel.- Great weight

MITIGATING CIRCUMSTANCES

The crime for which the defendant is to be sentenced was committed while he was under the influence of a mental or emotional disturbance. - Moderate weight

The defendant's capacity to conform his conduct to the requirements of law was impaired. - Moderate weight

The defendant has no significant history of prior criminal activity. - Moderate weight

The defendant suffered from mental illnesses at the time of the offense. - Some weight

The defendant was emotionally and physically abused as a child. - Little weight

The defendant has a history of alcohol abuse. Little weight

The defendant has adjusted well to incarceration. - Little weight

The defendant cooperated with the police. - Moderate weight

Other mitigating factors including the defendant's expression of remorse, he has been a good father to his children and his intention to maintain his relationship with his children while in prison. - Little weight

Having reviewed all of the aggravating and mitigating circumstances the court finds that the aggravating circumstances outweigh the mitigating circumstances for the murders of Roseanna Morgan and Leah Caday. Accordingly,

IT IS THE JUDGMENT OF THIS COURT:

1. For the murder of Roseanna Morgan the defendant is sentenced to be put to death in the manner prescribed by law.
2. For the murder of Leah Caday the defendant is sentenced to be put to death in the manner prescribed by law.
3. For the crime of armed burglary of a dwelling the defendant is sentenced to serve a term of imprisonment in the Department of the Corrections of the State of Florida for his natural life.

4. For the crime of kidnapping the defendant is sentenced to serve a term of imprisonment in the Department of Corrections of the State of Florida for his natural life.
5. The sentences are to run concurrent with each other and the costs are waived.
6. The defendant is given 735 days credit for time served.

ORDERED at Sanford, Seminole County, Florida, this __ day of March 2001.

/S/

O. H. Eaton, Jr.
Circuit Judge

Copies furnished to:
Counsel of record
Defendant

APPENDIX E

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
OF FLORIDA, SEMINOLE COUNTY

STATE OF FLORIDA,
Plaintiff,

CASE NO. M04-2491-CFA

v.

CLEMENTE JAVIER AGUIRRE-JARQUIN,
Defendant
_____/

SENTENCING ORDER

PROCEDURAL HISTORY

The Defendant was indicted for two counts of first degree murder by the Seminole County Grand Jury on July 13, 2004, for the murders of Cheryl Williams and her mother, Carol Bareis.

On October 14, 2005, defense counsel filed a motion to require the State Attorney to disclose the aggravating circumstances the State would rely upon and the Court entered an order requiring the disclosure. *State v. Steele*, 931 So. 2d 538 (Fla. 2005). Defense counsel also filed a number of motions directed to the constitutional deficiencies in the Florida death penalty scheme but all of those motions were denied. Some of the issues raised in the motions merit discussion in this sentencing order and they will be discussed in turn.

On November 16, 2005, the State Attorney filed an information charging the Defendant with burglary of a dwelling (with an assault or battery) arising out of the same incident as the murder charges. Subsequently, the Court consolidated the information with the indictment for trial.

The case was set for jury trial on February 20, 2006, and on February 28, 2006, the jury returned a verdict of guilty on all counts. The Court suggested the jury should be given an

interrogatory verdict in order for counsel and the Court to know whether the jury considered the homicides to be premeditated, or felony murder, or both, but the State Attorney objected to the interrogatory verdict so the Court is not aware of how the jury viewed the evidence. Accordingly, the Court must independently make the specific findings that are required in determining the existence of aggravating factors relating to premeditation and felony murder.

The Defendant requested the Court to allow him to waive a jury for the penalty phase. He argued the same jury that had just convicted him of murder could not be expected to fairly evaluate the aggravating and mitigating circumstances. The Court denied the motion. *State v. Carr*, 336 So. 2d 358 (Fla. 1976); *Sireci v.State*, 587 So. 2d 450 (Fla. 1991).

The penalty phase began on March 9, 2006, and, after the jury deliberated, it returned a recommendation that the Defendant be put to death for the murder of Cheryl Williams, by a vote of seven to five, and for the murder of Carol Bareis, by a vote of nine to three.

On June 1, 2006, the Court conducted a *Spencer* hearing. *Spencer v. State*, 615 So. 2d 688 (Fla. 1993). At that time, both the State and defense counsel presented additional evidence. The Court ordered both counsel to provide sentencing memoranda and sentencing was set at the request of counsel for June 30, 2006.

FACTS

The Defendant, who is Hispanic and has limited ability to communicate in English, lived next door to the victims in this case. His dwelling was really a shed located behind a mobile home. The testimony at trial and the photographs in evidence suggest that he had no electricity, water, or bathroom facilities. He had kitchen and bathroom privileges in the mobile home. Two other Hispanic males lived in the mobile home. The connection among these people was employment at a restaurant, where the Defendant was hired as a dishwasher, and later was promoted to a position called a "prep cook."

The victims, Cheryl Williams and Carol Bareis, lived next door to the Defendant in a mobile home that had been modified with an addition that created more living space. Ms. Williams' daughter, Samantha, who was about the same age as the Defendant, lived there also. Ms Bareis was Cheryl Williams' mother. She was sixty-nine years old and confined to a wheel chair due to a stroke.

At the time of the murders, Samantha was away from the residence, spending the night with her boyfriend.

During the early morning of June 17, 2004, the Defendant came to the victim's residence and gained entry through the unlocked front door. He had a large knife with him that probably belonged to the restaurant where he worked. He attacked Cheryl Williams at the front door entrance and stabbed or cut her 129 times. The attack was very violent, with Ms. Williams struggling to save herself. The Defendant then ventured into the living room where Carol Bareis was sitting in her wheel chair and stabbed her once in the heart, killing her almost instantly. The crime scene was most gruesome and provided important forensic evidence.

The Defendant left the crime scene with the murder weapon and walked back to his residence. He abandoned the knife in the back yard and put his bloody clothing in a bag and threw it onto the roof of his shed. He then took a shower and changed clothing.

Samantha Williams' boyfriend discovered the crime scene the next morning. He went to Samantha's residence to retrieve some clothing and other articles for her. The police were immediately on the scene and the Defendant was arrested shortly after the knife and bloody clothes were located.

At trial, the Defendant denied responsibility for the murders. He testified that he came upon the scene and his clothes became bloody because he was trying to determine if the victims were still alive. He went all through the house because he was concerned that Samantha might also have been killed. He did not call the police because he is an illegal alien and feared deportation. The forensic evidence contradicts this version of events, and the jury rejected it.

The evidence does establish that the Defendant was cocaine and alcohol dependent and that he had consumed plenty of both during the hours before the murders.

CONSTITUTIONAL ARGUMENTS

Defense counsel raised several constitutional arguments in his pretrial motions and in his sentencing memorandum. The Court chooses to discuss some of them because they are issues that are of concern to the Court in deciding the sentence to be imposed in this case.

Florida's death penalty scheme places certain duties upon the trial judge in determining

whether to impose the death penalty or a sentence of life imprisonment without possibility of parole.

One of the duties placed upon the trial judge is to give the recommendation of the jury "great weight," unless circumstances not applicable here allow lesser weight. See *Muhammad v. State*, 782 So.2d 343 (Fla. 2001). However, a definition of this subjective term, "great weight," is not contained in the statute or the case law. The most that can be said about the guidance the Supreme Court of Florida has given to the trial courts in applying this term is that when a jury returns a life recommendation, "great weight" almost always precludes the imposition of a death sentence, *Smith v. State*, 866 So. 2d 650 (Fla. 2004), while "great weight" does not preclude the trial judge from disagreeing with a death recommendation and imposing a life sentence. *Tompkins v. State*, 872 So. 2d 230 (Fla. 2003). How "great" is the weight when the members of the jury cannot agree unanimously on the recommended sentence? Should a seven to five vote for death be given the same weight as a unanimous vote? These are issues the trial courts deal with in capital cases.

The role of the jury during the penalty phase under the Florida death penalty scheme has always been confusing. The jury makes no findings of fact as to the existence of aggravating or mitigating circumstances, nor what weight should be given to them, when making its sentencing recommendation. The jury is not required to unanimously find a particular aggravating circumstance exists beyond a reasonable doubt. It makes the recommendation by majority vote, and it is possible that none of the jurors agreed that a particular aggravating circumstance submitted to them was proven beyond a reasonable doubt. The jury recommendation does not contain any interrogatories setting forth which aggravating factors were found, and by what vote; which mitigating factors were found, and by what vote; how the jury weighed the various aggravating and mitigating circumstances; and, of course, no one will ever know if one, more than one, any, or all of the jurors agreed on any of the aggravating and mitigating circumstances. It is possible, in a case such as this one, where several aggravating circumstances are submitted, that none of them received a majority vote. This places the Court in the position of not knowing which aggravating and mitigating circumstances the jury considered to be proven and provides little, if any, guidance in determining a sentence. In fact, the trial judge is prohibited by law from requiring the jury to make findings through a verdict containing special interrogatories. *State v. Steele*, 921 So. 2d 538 (Fla. 2006). Accordingly, absent

a recommendation for life, the jury recommendation is essentially meaningless to the trial judge, especially if the parties present additional aggravating and mitigating circumstances at the *Spencer* hearing.

After the jury renders its recommendation, the trial judge is required by law to independently find the existence of aggravating and mitigating circumstances. The Statute provides, "Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is imposed." Sec. 921.141, Fla. Stat. (2005).

There is no question about the trial court's duty to make findings independent from those made by the jury. The Supreme Court of Florida has made that clear on a number of occasions. Recently, the Court stated, "However, we remind judges of their duty to independently weigh aggravating and mitigating circumstances. A sentencing order should reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors and the weight each should receive." *Blackwater v. State*, 851So. 2d 650, 653 (Fla. 2003).

Since the jury makes no findings whatsoever, and only delivers a sentence recommendation, the question arises as to what "great weight" truly means. The Court concludes that when a jury returns a recommendation for the death penalty, "great weight" simply means the trial judge is not precluded from considering that option. As has been observed by the United States Supreme Court, "A Florida trial court nor more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona*, 497 U. S. 639, 648 (1990).

Florida trial judges are bound to follow the precedent laid down by the Supreme Court of Florida. That Court has taken the position that the Florida capital punishment scheme is constitutionally valid unless and until the United States Supreme Court declares otherwise. *Marshal v. Crosby*, 911 So. 2d 1129 (Fla. 2005). Following that precedent, knowing the obvious due process problems with Florida's death penalty scheme, certainly tests the resolve of trial judges, who must decide who will live and who will die. See, *Ring v. Ariz*., 536 U.S. 584 (2002).

That being said, this Court will use the tools available under the present law in deciding the

penalty to be imposed in this case.

AGGRAVATING CIRCUMSTANCES

The State presented several aggravating circumstances to the jury. Some of the circumstances apply to both victims and some only apply to one. The circumstances for each victim will be discussed.

CHERYL WILLIAMS

1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

This aggravating circumstance was established by the verdict finding the Defendant guilty of the murder of Carol Bareis. *King v. State*, 390 So. 2d 315 (Fla. 1980); *Pardo v. State*, 563 So. 2d 77 (Fla. 1990); *Stein v. State*, 632 So. 2d 1361 (Fla. 1994); *Francis v. State*, 808 So. 2d 110 (Fla. 2002). The Court specifically finds this aggravating circumstance to have been proven beyond a reasonable doubt. However, because Cheryl Williams was the first victim murdered, the Court assigns only moderate weight to it and would not impose the death penalty on this aggravating circumstance alone.

2. The capital felony was committed while the Defendant was engaged in the commission of a burglary.

The jury found the Defendant guilty of burglary of a dwelling with an assault or battery arising out of the same incident as the murders. The Court independently finds that this aggravator was proven beyond a reasonable doubt. The question of what weight to assign this aggravating circumstance depends on a number of factors. In cases where premeditation is not shown and the killing is accidental, little, if any, weight should be given to this aggravator because but for the felony, the homicide would be less than first degree murder. In cases where premeditation is present, the weight should be greater. In this case, the jury did not disclose its findings as to whether the murders were premeditated. The Court independently finds from the evidence that premeditation was proven beyond a reasonable doubt. The Court bases this finding upon the fact that the Defendant armed himself with a knife before going to the victim's residence and the fact that there was ample time for reflection sometime between the first and the one hundred twenty ninth blow. Accordingly, the Court assigns more than moderate, but less than great weight, to this aggravating circumstance.

3. The capital felony was especially heinous, atrocious, or cruel.

The testimony of Dr. Thomas Beaver was particularly instructive in establishing this aggravating circumstance. He testified that Cheryl Williams suffered one hundred twenty nine stab or incised wounds. From the examination of her body it was determined that she was first standing face-to-face with her attacker. Then she was prone on her back using her legs and feet to defend herself. Finally, she was crawling away. The evidence establishes that she was conscious during most of the attack. The crime scene provided clear evidence of a violent, protracted struggle. Dr. Beaver testified that the pain she suffered approached the limits a human being can endure. Multiple stab wounds inflicted upon a conscious victim have been held to be heinous, atrocious, and cruel. *Cox v. State*, 819 So. 2d 705 (Fla. 2002); *Francis v. State*, 808 So. 2d 110 (Fla. 2001); *Davis v. State*, 648 So. 2d 107 (Fla. 1994); *Pittman v. State*, 646 So. 2d 646 So. 2d 167 (Fla. 1994); *Duest v. State*, 462 So. 2d 446 (Fla. 1985). The Court independently finds this aggravating circumstance was proven beyond a reasonable doubt and assigns great weight to it.

CAROL BAREIS

1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

This aggravating circumstance was established by the verdict finding the Defendant guilty of the murder of Cheryl Williams. *King v. State*, 390 So. 2d 315 (Fla. 1980); *Pardo v. State*, 563 So. 2d 77 (Fla. 1990); *Stein v. State*, 632 So. 2d 1361 (Fla. 1994); *Francis v. State*, 808 So. 2d 110 (Fla. 2002). The Court independently finds this aggravating circumstance to have been proven beyond a reasonable doubt. Because Carol Bareis was the second victim killed, the Court assigns great weight to this aggravator.

2. The capital felony was committed while the Defendant was engaged in the commission of a burglary.

The jury found the Defendant guilty of burglary of a dwelling with an assault or battery arising out of the same incident as the murders. The Court independently finds that this aggravator was proven beyond a reasonable doubt. The question of what weight to assign this aggravating circumstance depends on a number of factors. In cases where premeditation is not shown and the killing is accidental, little, if any, weight should be given to this aggravator because, but for the felony, the homicide would be less than first degree murder. In cases where premeditation is present,

the weight should be greater. In this case, the jury did not disclose its findings as to whether the murders were premeditated. The Court independently finds from the evidence that premeditation was proven beyond a reasonable doubt. The Court bases this finding upon the fact that the Defendant armed himself with a knife before going to the victim's residence and the fact that there was ample time for reflection sometime between the first blow delivered to Cheryl Williams and the fatal wound inflicted upon Carol Bareis. Accordingly, the Court assigns more than moderate, but less than great weight, to this aggravating circumstance.

3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

This aggravating circumstance was not presented to the jury because the Court was of the impression that there was insufficient evidence to justify having the jury consider it. The State urged the Court to reconsider the existence of this aggravating circumstance at the *Spencer* hearing. Such practice is constitutionally suspect under the decision of *Ring v. Arizona*, 536 U. S. 584 (2002). However, it is part of the Florida death penalty scheme established by the Supreme Court of Florida, and the Court will consider the evidence that may establish it.

The "avoid arrest" aggravator is difficult to prove. Where the victim is not a police officer, the evidence supporting this aggravator must prove that the sole or dominent motive for the killing was to eliminate the witness. *Zack v. State*, 753 So. 2d 9 (Fla. 2000); *Urbin v. State*, 714 So.2d 411 (Fla. 1998); *Consalvo v. State*, 697 So. 2d 805, 819 (Fla. 1996) (speculation not enough); *Preston*, 607 So. 2d 404 (Fla. 1992) (the fact that it may have been one of the motives is not enough.); *Davis v. State*, 604 So. 2d 794 (Fla. 1992); *Connor v. State*, 803 So. 2d 598 (Fla. 2001). Mere speculation on the part of the State that witness elimination was the dominant motive cannot support this aggravator. *Connor v. State*, 803 So. 2d 598 (Fla. 2001). However, this aggravator may be established through circumstantial evidence for which the motive for the murder can be inferred. The fact that the victim and the Defendant knew each other, without more, is generally insufficient. However, evidence that the Defendant used gloves, wore a mask, made incriminating statements about witness elimination, whether the victim resisted, and whether the victim was confined or was in a position to pose a threat to the Defendant are factors that may be considered. See *Renolds v. State*, __ So. 2d

__, 2006 WL 1381880 (Fla. May 18, 2006); *Buzia v. State*, 926 So. 2d 1203 (Fla. 2006).

In this case, direct evidence of motive is lacking. The circumstances of the killings lead the Court to independently find that whatever motive the Defendant had to stab Cheryl Williams to death in such a brutal manner did not transfer to Carol Bareis. That being the case, the only motive for her murder was to eliminate her as a witness. The Defendant had no other reason to kill her. She was partially paralyzed and in a wheel chair, thereby posing no threat to him.

The Court independently finds this aggravating circumstance has been proven beyond a reasonable doubt and assigns great weight to it.

4. The capital felony was especially heinous, atrocious, or cruel.

The Court independently finds that the evidence established the murder of Cheryl Williams occurred first. Carol Bareis was wheel chair bound in the room next to, and in close proximity with, the entrance way where Williams was murdered. She must have been aware of the violence and brutality directed towards her daughter. The incident must have terrified her. The Defendant then came at her with the same knife he used to murder Williams and plunged it into her heart. The fear, emotional strain and terror she suffered prior to the fatal blow are sufficient for the Court to find the murder of Carol Bareis was heinous, atrocious or cruel. *Lynch v. State*, 841 So. 2d 362 (Fla. 2003). The Court assigns great weight to this aggravating circumstance.

5. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense or moral or legal justification.

This aggravating circumstance was not proven beyond a reasonable doubt. The jury verdict did not indicate whether the murders were premeditated, felony murders, or both. The Court has independently found that the murders were premeditated. However, the heightened premeditation needed to establish this aggravator has not been proven beyond a reasonable doubt. *Fennie v. State*, 648 So. 2d 95 (Fla. 1994); *Jackson v. State*, 648 So. 2d 85 (Fla. 1994); *Walls v. State*, 641 So. 2d 381 (Fla. 1994).

6. The victim of the capital felony was particularly vulnerable due to advanced age or disability.

The Court independently finds this aggravating circumstance was proven beyond a reasonable doubt. As has been previously stated, the victim in this case was sixty nine years old and confined

to a wheel chair due to a stroke. She was disabled and helpless to defend herself. *Woodel v. State*, 804 So. 2d 316 (Fla. 2001). The Court assigns great weight to this aggravating circumstance.

MITIGATING CIRCUMSTANCES

1. The murders were committed while the Defendant was under the influence of extreme mental or emotional disturbance.

This mitigating circumstance involves the Defendant's dependency on alcohol and cocaine as well as his history of using other drugs, such as inhalants. See, *Holsworth v. State*, 522 So. 2d 348 (Fla. 1988). The evidence presented to establish this mitigating circumstance came from two respected psychologists. Both of them agreed this mitigating circumstance exists - they disagreed as to whether it was "extreme." The Court is reasonably convinced that the Defendant was under the influence of an extreme emotional disturbance at the time of the killings.

However, the Court assigns only moderate weight to this mitigating circumstance. The fact that the Defendant chose to abuse drugs is different from external causes of mental or emotional disturbances, such as receiving a blow to the head. See, *Crook v. State*, 813 So. 2d 68 (Fla. 2002). Additionally, the connection between drug abuse and the commission of these murders is less than clear. The Defendant does not claim the cocaine and alcohol made him do it and the Court does not so find.

2. At the time of the murders, the capacity of the Defendant to appreciate the criminality of his conduct was substantially impaired or the Defendant's capacity to conform his conduct to the requirements of the law was substantially impaired.

This mitigating circumstance was established on the same evidence as the "extreme emotional disturbance" mitigating circumstance. The Court is reasonably convinced that the mitigating circumstance was proven. However, for the reasons previously stated during the discussion of the "extreme emotional disturbance" mitigating circumstance, the Court assigns moderate weight to it.

3. The age of the Defendant at the time of the murders.

The Defendant had a chronological age of twenty four years at the time of the murders. In order for a person who has reached majority to claim age as a significant mitigating circumstance, age must be linked with some other characteristic of the Defendant or the crime, such as significant emotional immaturity or mental problems. Here, the Defendant had both. The evidence is reasonably

convincing that the Defendant's psychological makeup is that of an adolescent. Defense counsel urges the Court to assign great weight to this mitigating circumstance. However, other evidence in the case suggests that, in spite of the Defendant's emotional immaturity, he was able to function in day to day life. He made his was to Seminole County from Honduras and established himself here. He held a job at a restaurant and received a promotion. He also obtained part time work. The Court assigns little weight to this mitigating circumstance.

4. The Defendant suffered from a long term problem with substance abuse.

This mitigating circumstance was established by reasonably convincing evidence and has been discussed above. It is error for the Court not to give appropriate consideration to this mitigating circumstance, even if it is not specifically connected to the crime. *Mahn v. State*, 714 So. 2d 391 (Fla. 1998). Here, there is no doubt the Defendant had been using alcohol and cocaine during the hours just prior to the murders. He even asked his room mate for a beer around 6:00 a.m. The Court assigns moderate weight to this mitigating circumstance.

5. The circumstances of the Defendant's birth show that he suffered from oxygen depravation and possible brain damage.

Dr. Deborah Day testified the Defendant gave her a history of his birth as it had been told to him and that he was born after his due date and was blue or purple at the time of his birth. This history was confirmed by Dr. Day's interview with the Defendant's sister. Other evidence, including additional information from Dr. Day about the conversation with the Defendant's sister, indicates that the Defendant was "normal" as he began to develop. As defense counsel concedes, "That simply means that the Defendant suffered no obvious long term medical complications from his birth or that the Defendant did not receive sufficient medical care to identify long term problems." P. 18, Defendant's Sentencing Memorandum. The evidence does not convince the Court that the circumstances of the Defendant's birth caused him any long term physical or emotional problems. The Court does not find the evidence to be mitigating or mitigating in the case. *Knight v. State*, 746 So. 2d 423 (Fla. 1998). The question of whether the Defendant has suffered brain damage is considered later in this order.

6. The Defendant was raised in a dysfunctional family setting.
7. The Defendant suffered from physical abuse as a child.

These two mitigating circumstances are related and will be discussed together. The evidence establishes that the Defendant was raised in a home with no father figure and he was left alone as a small child while his mother worked and his sister was in school. His sister subjected him to severe punishment for violations of the rules of the household. The Court is reasonably convinced these two mitigating circumstances were proven and are mitigating in nature. They do little, if anything, to mitigate the murders in this case and are assigned little weight.

8. The Defendant completed the equivalent of a high school education, but performed poorly in later years of his schooling.

The different experts disagreed as to the cause of the Defendant's poor performance in school. Dr. Day believed the poor performance could be attributed to substance abuse. Dr. Reibsame came to the conclusion that the poor grades could be attributable to the Defendant's report that "he fell in love." Perhaps there was a combination of the two. In any event, poor performance in school has the effect of limiting one's possibilities in the work place, as is evidenced by the Defendant's employment as a dishwasher. The Court is reasonably convinced this mitigating circumstance was established, but assigns it little weight.

9. The Defendant suffered brain damage as a result of his abuse of polysubstances including inhalants.

Dr. Michael Gobel, a neurologist, could find no evidence of brain damage although he would expect brain damage in an individual who had a history of drug and alcohol abuse as severe as the Defendant's history. Dr. Day also believed the Defendant suffered brain damage. If the Defendant suffers from brain damage, it is from drug and alcohol abuse and not due to any childhood injury or problems. A letter from Marlis Licona Mehia, a teacher who has known the Defendant since he was a child, stated, " I have known the youth Clemente Javier Aguirre Jarquin since he was a child and he has exhibited normal behavior consistent with good established social standards." Several other letters basically state the same thing. There is no evidence that the brain damage contributed in any way to the Defendant's decision to murder the two victims in this case. Therefore, the Court is reasonably convinced that the Defendant suffers from brain damage, but the extent of the brain damage and the effect such damage may have upon the Defendant's quality of life has not been

proven. The Court assigns moderate weight to this mitigating circumstance.

SUMMARY OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

The Court finds the following aggravating and mitigating circumstances and assigns the weight to each as is indicated:

AGGRAVATING CIRCUMSTANCES

CHERYL WILLIAMS

1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person - Moderate weight.

2. The capital felony was committed while the Defendant was engaged in the commission of a burglary - Moderate, but less than great weight.

3. The capital felony was especially heinous, atrocious, or cruel - Great weight.

CAROL BAREIS

1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person - Great weight.

2. The capital felony was committed while the Defendant was engaged in the commission of a burglary - Moderate, but less than great weight.

3. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest - Great weight.

4. The capital felony was especially heinous, atrocious or cruel - Great weight.

5. The victim of the capital felony was particularly vulnerable due to advanced age or disability - Great weight.

MITIGATING CIRCUMSTANCES

1. The murders were committed while the Defendant was under the influence of extreme mental or emotional disturbance - Moderate weight.

2. At the time of the murders, the capacity of the Defendant to appreciate the criminality of his conduct was substantially impaired or the Defendant's capacity to conform his conduct to the requirements of law was substantially impaired - Moderate weight.

3. The age of the Defendant at the time of the murders - little weight.

4. The Defendant suffered from a long term problem with substance abuse - Moderate weight.

5. The Defendant was raised in a dysfunctional family setting and suffered from physical abuse as a child - Little weight.

6.The Defendant completed the equivalent of a high school education, but performed poorly in later years of his schooling - Little weight.

7. The Defendant suffered brain damage as a result of his abuse of polysubstances, including inhalants - Little weight.

CONCLUSION

The Court concludes that the aggravating factors applicable to each of these murders far outweigh the mitigating factors presented. Accordingly, Clemente Javier Aguirre-Jarquin,

1. For the murder of Cheryl Williams, the Court sentences you to be put to death in the manner prescribed by law.

2. For the murder of Carol Bareis, the Court sentences you to be put to death in the manner prescribed by law.

3. For the crime of Burglary of a Dwelling with an Assault or Battery, the Court sentences you to serve a term of imprisonment in the Department of Corrections of the State of Florida for the rest of your natural life, with credit for 742 days time served.

4. You are advised that you have the right to appeal this judgment and sentence to the Supreme Court of Florida within thirty days. The Public Defender is appointed for that purpose.

5. You are committed to the Department of Corrections for execution of this sentence.

ORDERED at Sanford, Seminole County, Florida, this 30th day of June, 2006.

_____
O. H. Eaton, Jr., Circuit Judge

Copies furnished in open court to:
State Attorney
Public Defender

_____
Deputy Clerk

APPENDIX F[1]

SC05-1890
APPENDIX 1
Amended March 27, 2007

7.11 PENALTY PROCEEDINGS — CAPITAL CASES
§ 921.141, Fla. Stat.

Give 1a at the beginning of penalty proceedings before a jury that did not try the issue of guilt. Give bracketed language if the case has been remanded by the supreme court for a new penalty proceeding. See Hitchcock v. State, 673 So. 2d 859 (Fla. 1996). In addition, give the jury other appropriate general instructions.

1. a. Ladies and gentlemen of the jury, the defendant has been found guilty of Murder in the First Degree. [An appellate court has reviewed and affirmed the defendant's conviction. However, the appellate court sent the case back to this court with instructions that the defendant is to have a new trial to decide what sentence should be imposed.] Consequently, you will not concern yourselves with the question of [his] [her] guilt.

Give 1b at beginning of penalty proceedings before the jury that found the defendant guilty.

b. Ladies and gentlemen of the jury, you have found the defendant guilty of Murder in the First Degree.

2. The punishment for this crime is either death or life imprisonment without the possibility of parole. <u>The</u> ~~F~~<u>f</u>inal decision as to ~~what~~ <u>which</u> punishment shall be imposed rests solely with the judge of this court; however, the law requires that you, the jury, render to the court an advisory sentence as to ~~what~~ <u>which</u> punishment should be imposed upon the defendant.

For murders committed prior to May 25, 1994, the penalties were different; therefore, for crimes committed before that date, this instruction should be modified to comply with the statute in effect at the time the crime was committed.

Give in all cases before taking evidence in penalty proceedings.

The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that

<u>Give only to the jury that found the defendant guilty.</u>

~~[~~this evidence when considered with the evidence you have already heard~~]~~

Give only to a new penalty phase jury.

~~[~~this evidence~~]~~

is presented in order that you might determine, first, whether sufficient aggravating circumstances exist ~~that~~ which would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

Give after the taking of evidence and argument.

~~Ladies and gentlemen of the jury,~~ It is now your duty to advise the court as to the ~~what~~ punishment that should be imposed upon the defendant for ~~[~~his~~]~~ ~~[~~her~~]~~ the crime of First Degree Murder ~~in the First Degree~~. You must follow the law that will now be given to you and render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist. The definition of aggravating and mitigating circumstances will be given to you in a few moments. As you have been told, the final decision as to ~~what~~ which punishment shall be imposed is ~~the~~ my responsibility~~.~~ ~~of the judge; h~~However, ~~it is your duty to follow~~ the law requires ~~that will now be given you by the court and~~ you to render ~~to the court~~ an advisory sentence ~~based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.~~ as to which punishment should be imposed – life imprisonment without the possibility of parole or the death penalty. Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given great weight and deference by the Court in determining which punishment to impose.

Give only to the jury that found the defendant guilty.

Your advisory sentence should be based upon the evidence of aggravating and mitigating circumstances ~~[~~that you have heard while trying the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings~~]~~. ~~[that has been presented to you in these proceedings].~~

Give only to a new penalty phase jury.

Your advisory sentence should be based upon the evidence of aggravating and mitigating circumstances that has been presented to you in

these proceedings.

Burden of proof. Reasonable doubt. Give to all penalty phase juries.

The State has the burden to prove each aggravating circumstance beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to disregard an aggravating circumstance if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating circumstance exists, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance has not been proved beyond every reasonable doubt and you must not consider it in rendering an advisory sentence to the court.

Give only to the jury that found the defendant guilty.

It is to the evidence introduced during the guilt phase of this trial and in this proceeding, and to it alone, that you are to look for that proof.

Give only to a new penalty phase jury.

It is to the evidence introduced during this proceeding, and to it alone, that you are to look for that proof.

A reasonable doubt as to the existence of an aggravating circumstance may arise from the evidence, conflicts in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you determine it should receive.

Weighing the evidence.

It is up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.

Credibility of witnesses.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?

2. Did the witness seem to have an accurate memory?

3. Was the witness honest and straightforward in answering the

attorneys' questions?

4. Did the witness have some interest in how the case should be decided?

5. Did the witness' testimony agree with the other testimony and other evidence in the case?

6. Had the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?

7. Had any pressure or threat been used against the witness that affected the truth of the witness' testimony?

8. Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court?

9. Was it proved that the witness had been convicted of a felony or a crime involving dishonesty?

10. Was it proved that the general reputation of the witness for telling the truth and being honest was bad?

You may rely upon your own conclusion about a witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

Expert witnesses.

Expert witnesses are like other witnesses with one exception - the law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given on a subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

Give only if the defendant did not testify.

A defendant in a criminal case has a constitutional right not to testify at any stage of the proceedings. You must not draw any inference from the fact that a defendant does not testify.

Give only if the defendant testified.

The defendant in this case has become a witness. You should apply the same rules to consideration of [his] [her] testimony that you apply to the testimony.

Rules for deliberation.

These are some general rules that apply to your discussion. You must

follow these rules in order to return a lawful recommendation:

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your recommendation will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

2. Your recommendation must be decided only upon the evidence that you have heard from the testimony of the witnesses, [have seen in the form of the exhibits in evidence] and these instructions.

3. Your recommendation must not be based upon the fact that you feel sorry for anyone, or are angry at anyone.

4. Remember, the lawyers are not on trial. Your feelings about them should not influence your recommendation.

5. It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his or her testimony.

6. Your recommendation should not be influenced by feelings of prejudice, bias or sympathy. Your recommendation must be based on the evidence, and on the law contained in these instructions.

Aggravating circumstances. § 921.141(5), Fla. Stat.

An aggravating circumstance is a standard to guide the jury in making the choice between the alternative recommendations of life imprisonment without the possibility of parole or death. It is a circumstance which increases the enormity of a crime or the injury to a victim.

In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven beyond a reasonable doubt.

~~*§ 921.141(5), Fla. Stat.*~~

The aggravating circumstances that you may consider are limited to any of the following that you find are established by the evidence:

Give only those aggravating circumstances for which evidence has been presented.

1. The ~~crime for which~~ (defendant) ~~is to be sentenced~~ capital felony was committed by a ~~while [he] [she] had been~~ person previously convicted of a felony and ~~[~~was [under sentence of imprisonment]

~~[or] [was~~ [placed on community control] ~~[or] [was~~ [on felony probation]~~;~~.

2. The defendant ~~has been~~ was previously convicted of [another capital ~~offense~~ felony] ~~or of~~ [a felony involving the [use] [threat] of violence to ~~some~~ the person~~;~~.

Because the character of a crime if involving violence or threat of violence is a matter of law, when the State offers evidence under aggravating circumstance "2" the court should instruct the jury of the following, as applicable:

Give 2a or 2b as applicable.

a. The crime of (previous crime) **is a capital felony~~;~~.**

b. The crime of (previous crime) **is a felony involving the [use] [threat] of violence to another person~~;~~.**

3. The defendant~~, in committing the crime for which [he] [she] is to be sentenced~~, knowingly created a great risk of death to many persons~~;~~.

4. The ~~crime~~ capital felony ~~for which the defendant is to be sentenced~~ was committed while ~~[~~he~~] [~~she~~]~~ the defendant was

[engaged]
[an accomplice]

in

[the commission of]
[an attempt to commit]
[flight after committing or attempting to commit]

~~the crime of~~ any

Check § 921.141(5)(d), Fla. Stat., for any change in list of offenses.

[robbery].
[sexual battery].
[aggravated child abuse].
[abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement].
[arson].
[burglary].
[kidnapping].
[aircraft piracy].

[~~the~~ unlawful throwing, placing or discharging of a destructive device or bomb].

5. The ~~crime~~ capital felony ~~for which the defendant is to be sentenced~~ was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

6. The ~~crime~~ capital felony ~~for which the defendant is to be sentenced~~ was committed for ~~financial~~ pecuniary gain.

7. The ~~crime~~ capital felony ~~for which the defendant is to be sentenced~~ was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

8. The ~~crime~~ capital felony ~~for which the defendant is to be sentenced~~ was especially heinous, atrocious or cruel.

"Heinous" means extremely wicked or shockingly evil.

"Atrocious" means outrageously wicked and vile.

"Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

9. The ~~crime~~ capital felony ~~for which the defendant is to be sentenced~~ was a homicide and was committed in a cold, ~~and~~ calculated, and premeditated manner, ~~and~~ without any pretense of moral or legal justification.

"Cold" means the murder was the product of calm and cool reflection.

"Calculated" means having a careful plan or prearranged design to commit murder.

~~[As I have previously defined for you],~~ ~~a~~ A killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow

reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder.

10. The victim of the ~~crime~~ capital felony ~~for which defendant is to be sentenced~~ was a law enforcement officer engaged in the performance of ~~the officer's~~ [his] [her]official duties.

11. The victim of the ~~crime~~ capital felony ~~for which the defendant is to be sentenced~~ was an elected or appointed public official engaged in the performance of [his] [her] official duties, ~~and~~ if the ~~crime~~ motive for the capital felony was related, in whole or in part, to the victim's official capacity.

12. The victim of the capital felony was a person less than 12 years of age.

13. The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

With the following aggravating factor, definitions as appropriate from § 874.03, Fla. Stat., must be given.

14. The capital felony was committed by a criminal street gang member.

§ 921.141, Fla. Stat.

15. The capital felony was committed by a person designated as a sexual predator or a person previously designated as a sexual predator who had the sexual predator designation removed.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole.

Merging aggravating factors.

Give the following paragraph if applicable. When it is given, you must also give the jury an example specifying each potentially duplicitous aggravating

circumstance. See Castro v. State, 596 So. 2d 259 (Fla. 1992).

The State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are proven beyond a reasonable doubt by a single aspect of the offense, you are to consider that as supporting only one aggravating circumstance.

~~**If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole.**~~

Mitigating circumstances. § 921.141(6), Fla. Stat.

Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the mitigating circumstances outweigh the ~~mitigating~~ aggravating circumstances that you find to exist. ~~that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are:~~

A mitigating circumstance is a standard that, in fairness or in the totality of a defendant's life or character, may be considered as extenuation or reducing the degree of criminal responsibility for the crime(s) committed.

A mitigating circumstance is not limited to the facts surrounding the crime. It can be anything in the life of a defendant which might indicate that the death penalty is not appropriate for the defendant.

A mitigating circumstance may include any aspect of the defendant's character or record and any other circumstance of the offense.

A mitigating circumstance need not be proven beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence that should be imposed.

Among the mitigating circumstances you may consider, if you are reasonably convinced they are established by the evidence, are:

Give only those mitigating circumstances for which evidence has been presented.

1. ~~(Defendant)~~ **The defendant has no significant history of prior criminal activity~~;~~.**

If the defendant offers evidence on this circumstance and the State, in rebuttal, offers evidence of other crimes, also give the following:

Conviction of (previous crime) **is not an aggravating circumstance to be considered in determining the penalty to be imposed on the defendant, but a conviction of that crime may be considered by the jury in determining whether the defendant has a significant history of prior criminal activity.**

2. The ~~crime~~ capital felony ~~for which the defendant is to be sentenced~~ was committed while ~~[he] [she]~~ the defendant was under the influence of extreme mental or emotional disturbance~~;~~.

3. The victim was a participant in the defendant's conduct or consented to the act~~;~~.

4. The defendant was an accomplice in the ~~offense for which [he] [she] is to be sentenced but the offense was~~ capital felony committed by another person and ~~the defendant's~~ [his[[her] participation was relatively minor~~;~~.

5. The defendant acted under extreme duress or under the substantial domination of another person~~;~~.

6. The capacity of the defendant to appreciate the criminality of [his] [her] conduct or to conform [his] [her] conduct to the requirements of law was substantially impaired~~;~~.

7. The age of the defendant at the time of the crime~~;~~.

~~Both 8a and 8b must be given unless the defendant requests otherwise~~

8. ~~Any of the following circumstances~~ The existence of any other factors in the defendant's character, or record, or the circumstance of the offense that would mitigate against the imposition of the death penalty~~:~~.

~~a. Any [other] aspect of the defendant's character, record, or background.~~

~~b. Any other circumstance of the offense.~~

~~Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.~~

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

~~*Give before a new penalty phase jury*~~

~~**[A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to disregard an aggravating circumstance if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating circumstance exists, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance has not been proved beyond a reasonable doubt and you should disregard it, because the doubt is reasonable.**~~

~~**It is to the evidence introduced in this proceeding, and to it alone, that you are to look for that proof.**~~

~~**A reasonable doubt as to the existence of an aggravating circumstance may arise from the evidence, conflicts in the evidence or the lack of evidence.**~~

~~**If you have a reasonable doubt as to the existence of an aggravating circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you feel determine it should receive.]**~~

~~**If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.**~~

~~**A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.**~~

Victim impact evidence. Give 1, or 2, or 3 or all as applicable.

You have heard evidence about the impact of this homicide on the

1. family,
2. friends,
3. colleagues

of (decedent)**. This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by** (decedent's) **death. However, you may not consider this evidence as an aggravating circumstance. Your recommendation to the court must be based on the aggravating circumstances and the mitigating circumstances upon which you have been instructed.**

Recommended sentence.

The sentence that you recommend to the court must be based upon the

facts as you find them from the evidence and the law. ~~You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.~~ If, after weighing the aggravating and mitigating circumstances, you determine that the mitigating circumstances found to exist do not sufficiently outweigh the aggravating circumstances; or, in the absence of mitigating factors, if you find that the aggravating factors alone are sufficient, you may exercise your option to recommend that a death sentence be imposed rather than a sentence of life in prison without the possibility of parole. However, regardless of your findings with respect to aggravating and mitigating circumstances you are never required to recommend a sentence of death.

The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law contemplates that different factors may be given different weight or values by different jurors. In your decision making process, you, and you alone, are to decide what weight is to be given to a particular factor.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the jury can ~~determination of whether you~~ recommend a sentence of ~~death or sentence of life imprisonment~~ life imprisonment or death in this case ~~can be reached by a~~ on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift, and consider the evidence, ~~and all of it,~~ realizing that human life is at stake, and bring ~~to bear~~ your best judgment to bear in reaching your advisory sentence.

If a majority of the jury, seven or more, determine that (defendant) **should be sentenced to death, your advisory sentence will be:**

> **A majority of the jury by a vote of _____, to _____ advise and recommend to the court that it impose the death penalty upon** (defendant)**.**

On the other hand, if by six or more votes the jury determines that (defendant) **should not be sentenced to death, your advisory sentence will be:**

> **The jury advises and recommends to the court that it impose a sentence of life imprisonment upon** (defendant) **without possibility of parole.**

When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson, dated with today's date and returned to the court.

There is no set time for a jury to reach a verdict. Sometimes it only takes a few minutes. Other times it takes hours or even days. It all depends upon the complexity of the case, the issues involved and the makeup of the individual jury. You should take sufficient time to fairly discuss the evidence and arrive at a well reasoned recommendation.

You will now retire to consider your recommendation as to the penalty to be imposed upon the defendant. ~~When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson and returned to the court.~~

Comment

This instruction was adopted in 1981 and amended in 1985 [477 So. 2d 985], 1989 [543 So. 2d 1205], 1991 [579 So. 2d 75], 1992 [603 So. 2d 1175], 1994 [639 So. 2d 602], 1995 [665 So.2d 212], 1996 [678 So. 2d 1224], 1997 [690 So. 2d 1263], ~~and~~ 1998 [723 So. 2d 123] and 2007.

1.These Jury Instructions do not follow the standard instructions. They were prepared by the Criminal Court Steering Committee and are presently under consideration by the Supreme Court of Florida.

APPENDIX G

FLORIDA COLLEGE OF ADVANCED JUDICIAL STUDIES

MODEL

PENALTY PHASE

JURY INSTRUCTIONS

MARCH 31, 2007

These instructions do not follow the current standard jury instructions. However, they are recommended by the Handling Capital Cases Faculty. Death penalty jurisprudence changes almost weekly and the standard instructions are deficient in several respects. These instructions may be incomplete or may contain instructions that are unnecessary to a particular case. Counsel and trial judges are responsible to research the current decisions involving jury instructions and instruct the jury correctly in each individual capital case.

PENALTY PHASE INSTRUCTIONS

INTRODUCTION

Ladies and gentlemen of the jury, it is now your duty to advise the court as to the punishment that should be imposed upon the defendant for the crime of First Degree Murder. You must follow the law that will now be given to you and render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient aggravating circumstances exist that outweigh any mitigating circumstances found to exist. As you have been told, the final decision as to what punishment shall be imposed is my responsibility. However, the law requires that you render an advisory sentence as to what punishment should be imposed upon the defendant. I must give your recommendation great weight in determining what sentence to impose. It is only under rare circumstances that I would impose a sentence other than the sentence you recommend.

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings.

AGGRAVATING CIRCUMSTANCES

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

The aggravating circumstances that you may consider are limited to any of the following that you find are established by the evidence beyond a reasonable doubt:

1.
2.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole.

Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the aggravating circumstances outweigh the mitigating circumstances that you find to exist.

MITIGATING CIRCUMSTANCES

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence that should be imposed.

Among the mitigating circumstances you may consider, if you are reasonably convinced they are established by the evidence, are:

1.
2. All other evidence presented during the trial or penalty phase proceeding which you find to be mitigating.

VICTIM IMPACT EVIDENCE

You have heard evidence about the impact of this homicide on the (family) (friends) (colleagues) of (decedent). This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by (decedent's) death. However, you may not consider this evidence as an aggravating circumstance. Your recommendation to the Court must be based on the aggravating circumstances and the mitigating circumstances upon which you have been instructed.

BURDEN OF PROOF - REASONABLE DOUBT

The State has the burden to prove each aggravating circumstance beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to disregard an aggravating circumstance if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing and weighing all the evidence, you do not have an abiding conviction that the aggravating circumstance exists, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance has not been proved beyond a reasonable doubt and you should disregard it, because the doubt is reasonable.

It is to the evidence introduced during the guilt phase of the trial and in this proceeding, and to it alone, that you are to look for that proof.

A reasonable doubt as to the existence of an aggravating circumstance may arise from the evidence, conflicts in the evidence or the lack of evidence.

If you have a reasonable doubt as to the existence of an aggravating circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you determine it should receive.

WEIGHING THE EVIDENCE - CREDIBILITY OF WITNESSES

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?

2. Did the witness seem to have an accurate memory?

3. Was the witness honest and straightforward in answering the attorneys' questions?

4. Did the witness have some interest in how the case should be decided?

5. Does the witness' testimony agree with the other testimony and other evidence in the case?

6. Has the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?

7. Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court?

8. Was it proved that the witness had been convicted of a felony or a crime involving
dishonesty?

You may rely upon your own conclusion about a witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

Expert witnesses are like other witnesses with one exception - the law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given on a subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

A defendant in a criminal case has a constitutional right not to testify at any stage of the proceedings. You must not draw any inference from the fact that a defendant does not testify.

These are some general rules that apply to your discussion. You must follow these rules in order to return a lawful recommendation:

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your recommendation will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

2. Your recommendation must be decided only upon the evidence that you have heard from the testimony of the witnesses and have seen in the form of the exhibits in evidence and these instructions.

3. Your recommendation must not be based on your feeling sorry for anyone, or being angry at anyone.

4. Remember, the lawyers are not on trial. Your feelings about them should not influence your recommendation.

5. It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his or her testimony.

6. Your recommendation should not be influenced by feelings of prejudice or bias. Your recommendation must be based on the evidence, and on the law contained in these instructions.

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. If, after weighing the aggravating and mitigating circumstances, you determine that the mitigating factors found to exist do not outweigh the aggravating factors; or, in the absence of mitigating factors, if you find that the aggravating factors alone are sufficient, you may exercise your option to recommend that a death sentence be imposed rather than a sentence of life in prison without the possibility of parole. However, regardless of your findings with respect to aggravating and mitigating circumstances you are never *required* to recommend a sentence of death.

The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law contemplates that different factors may be given different weight or values by different jurors. In your decision making process, you, and you alone, are to decide what weight is to be given to a particular factor.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single

ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

If a majority of the jury (seven or more) determine that (Defendant) should be sentenced to death, your advisory sentence will be:

> A majority of the jury, by a vote of ____ to _____, advise and recommend to the court that it impose the death penalty upon (Defendant)..

On the other hand, if by six or more votes the jury determines that (Defendant) should not be sentenced to death, your advisory sentence will be:

> The jury advises and recommends to the court that it impose a sentence of life imprisonment upon (Defendant) without possibility of parole.

When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson, dated with today's date and returned to the court.

There is no set time for a jury to reach a verdict. Sometimes it only takes a few minutes. Other times it takes hours or even days. It all depends upon the complexity of the case, the issues involved and the make up of the individual jury. You should take sufficient time to fairly discuss the evidence and arrive at a well reasoned verdict.

You will now retire to consider your recommendation as to the penalty to be imposed upon the defendant.

APPENDIX H

IN THE CIRCUIT COURT OF THE
_____ JUDICIAL CIRCUIT
OF FLORIDA, _____ COUNTY

STATE OF FLORIDA,
Plaintiff,
v.

JOHN DOE,
Defendant
_____/

Case No.

VERDICT AS TO COUNT I

We, the jury, find as follows as to Count I charging the defendant with first degree murder: (Check one choice only)

_____ A. We, the jury find the defendant, JOHN DOE guilty of first degree murder, F.S.782.04(1)(a).

_____ of our number find the killing was premeditated.

_____ of our number find the killing was committed in the course of (Name of felony).

_____ B. We, the jury, find the defendant, JOHN DOE, guilty of the lesser included offense of second degree murder, F.S. 782.04(2).

_____ C. We, the jury, find the defendant, JOHN DOE, guilty of the lesser included offense of manslaughter, F.S. 782.07(1).

_____ D. We, the jury, find the defendant, JOHN DOE, not guilty.

SO SAY WE ALL.

DATED _____, 2009.

_____
FOREPERSON

_____
(PRINT NAME)

APPENDIX I

DIALOG FOR WAIVER OF JURY IN PENALTY PHASE

The Court: This is the case of State of Florida v. _____. I understand this is a defense motion to waive a jury for the penalty phase of this case. (Defense Attorney), is that what the defendant wants to do?

Defense Attorney: Yes, your honor.

The Court: Mr. (Defendant), raise your right hand and be placed under oath by the clerk.

The Court: You are (Defendant's name)?

Defendant: Yes.

The Court: You have heard your lawyer say you would like to waive a jury for the penalty phase of this case, is that what you want to do?

Defendant: Yes.

The Court: I need to advise you that you have the right to have a jury of 12 persons hear matters of aggravation limited by statute and any matters of mitigation you wish to present. You have the right to be represented by an attorney during the penalty phase hearing. You are entitled to testify before the jury at the hearing or to remain silent and your silence cannot be held against you. You have the right to the subpoena power of the court to compel the attendance of witnesses to testify at the hearing on your behalf.

If the jury recommends by a vote of at least six to six that you be given a life sentence, I will not override that recommendation and will sentence you to life in prison without the possibility of parole.

Assuming you received a full adversarial hearing before the jury with the presentation of evidence of aggravating and mitigating circumstances and the jury recommends that you be sentenced to death I must give that recommendation "great weight" although the final decision on the penalty to be imposed is my responsibility alone. Do you understand that?

Defendant: Yes.

The Court: Has anyone, your lawyer, your pastor, your relatives or anyone else given you any assurances that your decision to waive a jury for the penalty phase will result in any leniency whatsoever?

Defendant: No.

The Court: Do you understand that if I allow you to waive a jury for the penalty phase you will not be allowed to change your mind at a later date?

Defendant: Yes.

The Court: Are you sure that you want to waive a jury for the penalty phase?

Defendant: Yes, I am sure.

I have carefully considered your response to my questions and find that your decision to waive a jury for the penalty phase of this case has been made freely and voluntarily and the case will proceed to the penalty phase without a jury.

APPENDIX J

INTRODUCTORY REMARKS

and

INITIAL VOIR DIRE

(CRIMINAL)

(JUDGE O. H. EATON, JR.)

Good morning ladies and gentlemen. Welcome to the criminal division of the Circuit Court. The Circuit Court considers criminal cases that are classified as felonies. Felonies are crimes which are punishable by death or imprisonment in the state prison. Misdemeanors are crimes which are punishable by imprisonment in the County Jail. Misdemeanors are tried in the County Court unless they are joined in the Circuit Court with a felony charge.

In a few minutes the jury selection process will begin for the case(s) set for trial this week. Before we begin, I want to give you some information about the nature of criminal trials so you will have a better understanding of what is expected of you.

First, I want you to relax and try to consider your jury service to be an educational experience as well as service to your community.

The Rules of Criminal Procedure and the Rules of Evidence

govern the conduct of a criminal trial. These rules have historical foundation and have undergone revision almost constantly in order to adapt to new and different situations. Some of the rules require jurors to adjust traditional notions of fairness, especially the natural tendency to want to hear both sides of a dispute. A criminal trial does not follow the familiar form of a high school debate. Evidentiary rules and constitutional considerations often preclude presentation of information which jurors may feel would be helpful in deciding issues on trial.

One example of such an evidentiary rule is so basic to our system that it is contained in the Constitution itself. The Fifth Amendment provides that a person accused of a crime has the absolute right to remain silent and to require the state to prove its case without any assistance from the accused. When a defendant invokes this right, a jury is not permitted to be influenced in any way about that decision.

The hearsay rule is another example of a rule of evidence which restricts information at trial. A statement made out of court by a person, and offered in evidence to prove the truth of the statement, is generally considered to be hearsay and is usually inadmissible because such a statement is inherently unreliable. There are many exceptions to the hearsay rule and some of them may apply to the evidence (in this trial)

(in the trials scheduled this week).

Presumptions have long been a part of criminal law. The presumption of innocence is an example. Our system of justice is accusatorial in nature. That means the State has the power to accuse and the burden to prove a charge against a defendant. As a result, a defendant is presumed innocent until proven guilty beyond a reasonable doubt.

The point of this explanation is to tell you that a jury in a criminal trial may only consider evidence which is admissible in court and not necessarily all of the evidence which may be available in the world. And while this procedure may not equate to traditional notions of fairness, it is the result of many years of study and it allows only the most reliable types of evidence to be considered by juries. The search for truth deserves no less.

Trial courts are the only courts in this country that use juries. Courts of appeal review trial court proceedings. No witnesses testify in the courts of appeal and no new evidence is received. The appeal process is for the purpose of correcting errors made by trial judges and not for the purpose of retrying a case. Accordingly, you should consider that your verdict in this case will be binding upon the parties for all time.

Courts of appeal are not permitted to reweigh evidence and go behind the facts of a case as they are found by a jury.

The party who brings a case to court is called the plaintiff. In criminal prosecutions the plaintiff is always the State of Florida. Any person accused of a criminal offense is called a defendant.

The (first) case that is set for trial this morning is the case of State of Florida v. _____. Is the State ready for trial?

Is the defense ready for trial?

Ladies and gentlemen, when your name is called, please step forward and have a seat in the jury box as the bailiff instructs you.

(CALL THE NAMES OF THE JURORS.)

As you learned from the orientation film this morning, juries in Florida consist of either six or twelve persons. This is the type of case that has a __ person jury. We will also select __alternate juror(s). An alternate juror is a member of the jury and is required to listen to the evidence just as closely as a regular member of the panel. If one of the other jurors become ill or has to be replaced for some other reason, an alternate juror will take the place of the juror who has to be excused. However, if all of the regular members of the jury are present at the end of the trial, the alternate juror(s) should not retire to deliberate but

should remain in the jury box and await further instructions. Florida law requires __ jurors to render a verdict in this type of case. If no alternate juror is available and a regular juror has to be excused, the trial would have to start all over again.

I am now going to ask you some questions about your qualifications to serve as jurors in this particular case. After I have completed my questions, the prosecutor and defense counsel will be allowed to ask questions. This part of the trial is known as the voir dire examination and is the jury selection process. [Usually, a jury can be selected in an hour or more so you will probably know if you are going to be on this jury (before noon) (shortly)] [I expect jury selection to take at least a day if not more, so please bear with us.] The purpose of this questioning is to determine if your decision in this case would be influenced by any opinion which you may now hold or by some personal experience or special knowledge which you may have about the subject matter to be tried. The object is to obtain a jury that will impartially try the issues of this case based upon the evidence presented in the courtroom without being influenced by any outside factors. Please understand that this questioning is not for the purpose of prying into your affairs for personal reasons (in fact I will not allow the lawyers to

do that) but is only for the purpose of obtaining an impartial jury. If you are not selected on this jury, you may be selected for another one. You should not be concerned if you are excused from this jury. There are a wide variety of reasons why lawyers may prefer one juror to another but such factors as gender and ethnic origin are not grounds to excuse a juror. If you are excused, please do not feel offended or feel that your honesty or integrity is being questioned because it is not.

As I have stated, this is the case of State of Florida v. _____I will now read the charge(s) against the defendant. The charge(s) is (are) set forth in a document called an information (indictment). You will receive a copy of it when the trial begins. Under the Constitution of the United States and the State of Florida, every person accused of a crime is entitled to know the exact nature of the charge. The filing of this document fulfills that constitutional requirement.

The information (indictment) is not evidence and you are not to consider it as such. The information (indictment) sets forth ____ count(s) and reads in pertinent part that ******** (Read charges).

This (these) charge(s) are commonly referred to as (burglary, robbery, arson, first degree murder etc.)

Please answer my questions "yes" or "no" using your voice so I can

hear you. If your answer is different from those around you, please raise your hand.

VOIR DIRE BY THE COURT

1. You have heard the charge(s) alleged in the information (indictment). Do any of you know anything about this case, either personally, by rumor or by reading or hearing anything about it in any of the news media?

[IF A JUROR HAS KNOWLEDGE ABOUT THE CASE - The question is whether the juror has formed an opinion or has developed any bias or prejudice. If so, the test is whether the juror "can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." If there is a reasonable doubt, excuse the juror for cause upon motion. *Turner v. State*, 645 So.2d 444 (Fla. 1994).]

2. At this time I would like to introduce some of the participants in this trial.

Counsel for the state is _____ . Please stand.

Counsel for the defense is _____ . Please stand.

The defendant is _____. Please stand.

Thank you. You may be seated.

Are any of you related by blood or marriage to counsel for the state, counsel for the defendant or the defendant or have any of you had any business or social relationship with any of these people?

I am now going to ask the prosecutor to read the names of potential witnesses who may testify in this case. Please listen carefully to the names and see if you recognize any of them. Also, please understand that often many more names are listed than are actually called at trial. (Prosecutor reads list.)

(Defense Counsel), do you have any names to add to the list? (Adds names.)

(To jurors) Did any of you recognize any of the names of the potential witnesses?

Do any of you have any physical defects that would require special accommodations or assistance or which would render you incapable of performing your duties as a juror?

Do any of you have any bias or prejudice for against the defendant or for or against the State of Florida?

Do each of you agree that trial by jury is the appropriate way to

dispose of a criminal case?

Do any of you have any conscientious beliefs that would preclude you from returning a guilty verdict or a not guilty verdict in an appropriate case?

As jurors, you will be the judges of the facts and I will be the judge of the law. Do each of you agree with that proposition?

Do you agree that if you are selected as a juror in this case you will put out of your mind any preconceived notion of what the law is or what you might think it ought to be and accept the law of this case as I instruct you?

Do you agree that if you are selected as a juror in this case that any verdict you render will be based upon the testimony coming from the witness stand, any additional evidence received by the court and the instructions on the law I give you - these things and these things only?

Do you agree with the principle of law that a person is presumed to be innocent until proven guilty beyond a reasonable doubt?

Will you give the defendant in this case that presumption?

Will you continue to give the defendant the presumption of innocence through each stage of the trial until the State of Florida, if it can, overcomes the presumption by proving the defendant guilty beyond

a reasonable doubt - will you believe the defendant to be not guilty that long?

In order to sustain a guilty verdict there must be proof. Since no proof has been submitted at this point in the trial and the defendant is presumed to be innocent, is the defendant guilty of anything?

(TO BE GIVEN IN HOMICIDE CASES)

Did any of you know (decedent) during his (her) lifetime?

DEATH PENALTY ISSUES

As you have heard, the defendant is charged with murder in the first degree. Murder in the first degree is punishable by life in prison (without parole) (without the possibility of parole for twenty-five years) or death.

Now, because the death penalty may become an issue in this case I want to tell you how it is tried.

First, let me tell you that the penalty for first degree murder in Florida is life in prison without possibility of parole. The death penalty only becomes a possible penalty under certain circumstances. Let me explain. If, and only if, the jury returns a verdict of guilty of murder in the first degree in this case, the jury will reconvene for the purpose of rendering an advisory recommendation as to which sentence, death or

life imprisonment, should be imposed.

At this hearing, evidence of aggravating and mitigating circumstances will be presented for you to consider. Then both the state and the defendant will have an opportunity to present argument for and against the death penalty. Following those arguments I will give you written instructions on the law that you are to apply in weighing those circumstances and making your recommendation.

The final determination of which sentence should be imposed is my responsibility. However, under the law I must give your recommendation "great weight."

Many people have strong feelings about the death penalty, both for it and against it. The fact that you may have such feelings does not disqualify you to serve as a juror as long as you are able to put those feelings aside and apply the law as I instruct you. In other words, you must be willing to be bound by your oath as a juror to obey the laws of this State in making your recommendation.

Now, with that explanation, I must ask you a few questions.

Are (any of) you unalterably opposed to the death penalty such that you could not consider it as a penalty under any circumstances?

Are (any of) you of the opinion that death is the only appropriate

penalty for murder in the first degree and that opinion is so strong that you could not consider life imprisonment as a penalty under any circumstances?

If the jury returns a verdict of murder in the first degree in this case, will you **weigh** the aggravating and mitigating circumstances presented, **listen** to the arguments of the attorneys, apply the law as I instruct you and **fairly consider both possible penalties** before making your penalty recommendation?

ALTERNATIVE INSTRUCTION #1 WHEN DEATH PENALTY IS NOT AN ISSUE

Murder in the first degree is a capital offense in Florida and that is why twelve persons are selected for the jury. However, not all first degree murder cases involve the death penalty. This is one of those cases. The death penalty is not an issue in this case.

ALTERNATIVE INSTRUCTION #2 WHEN DEATH PENALTY IS NOT AN ISSUE DUE TO WAIVER OF PENALTY PHASE JURY

Murder in the first degree is a capital offense in Florida and that is why twelve persons are selected for the jury. However, not all first degree murder cases require jury involvement in determining the penalty. This is one of those cases. The court alone will determine the penalty to be imposed if the defendant is found guilty.

This trial is estimated to take _____ days. I try to hold court during regular business hours. However, it may be necessary for us to start early or work late on one or more days. I will try to give you as much notice as possible if that is to occur. With that schedule in mind, do any of you have any other reason why you cannot this case your undivided attention?

I am now going to ask you to introduce yourselves to us. We know your names. We do not know much else. Please tell us:

1. Your occupation.

2. If you are married, that fact.

3. If your spouse is employed, your spouse's occupation.

4. Whether you have children, and if so, their ages, and if they are old enough to work, their occupations.

5. If there have been any prior court events in your life, such as service as a juror, being a party or a witness in a case, being accused of a crime, having a divorce or bankruptcy or any other opportunity to come to court.

6. Whether you have any friends or acquaintances in the judicial system including police officers, judges, lawyers, clerks or anyone else.

Thank you all for answering my questions so candidly. Counsel

will now have an opportunity to ask you some questions. They will not ask the same questions I have asked but they may want to follow up with questions about areas I have covered. Please think about the questions asked and answer counsel's questions as accurately and truthfully as you can.

Mr. (Ms.) (Prosecutor), you may inquire.

Mr. (Ms.) (Defense Counsel), you may inquire.

Comments on Voir Dire

This trial dialog was taken from various sources. The actual questions posed to the jury panel were adapted from the trial record of the Seminole County murder trial of *State v. Terry Melvin Sims*. The trial took place in 1986 and the trial judge was the Honorable Tom Waddell, Jr. (Sims was the first person executed by lethal injection in Florida.)

Judge Waddell retired in 1989 and passed away in 1994. He was a wise and revered no-nonsense judge who had the respect of the legal community.

Judge Waddell did not allow lawyers to "trick" jurors by asking questions that would require the opponent to "rehabilitate" the juror. Here are some examples:

1. The "law enforcement officer is more credible trick."

This trick usually comes up when defense counsel during voir dire says something like this: "I expect some witnesses the state will call in this case will be police officers. Do you believe the testimony of a police officer is more credible than other witnesses because the witness is a police officer?" This question is asked without any reference to the fact that all witnesses are supposed to be treated alike. Jurors have been taught that police officers are professionals and they are trained in their work so the juror will likely answer the question "yes." The voir dire by the court set forth in the materials above eliminates this trick. After the jurors are asked, if they know anyone involved in the judicial system, there will probably be at least one juror who knows a police officer. That point it is a good time for the court to state the correct rule as follows:

> (Mr.) (Ms.) _____, you have indicated that you know a member of law enforcement and this gives me an opportunity to tell you how the

court treats law enforcement officers and other witnesses who are involved in the criminal justice system. Every witness comes to court on equal footing with any other witness. In other words, the testimony of such a witness is not to be given greater weight simply because of the witness' occupation or profession. I will instruct you on how to weigh the credibility of witness when the trial begins. Can you assure me that you will follow my instructions and fairly consider the testimony of all of the witnesses?

In any event, this issue should be covered by the court before the lawyers begin voir dire.

2. The "where there is smoke there is fire" trick.

This trick deals with the presumption of innocence. The lawyer tricks the juror by asking if the juror "thinks the defendant must have done something wrong to have been brought to court." This question is asked without explanation about the presumption of innocence. Judge Waddell used to close this potential trap before he allowed the lawyers to voir dire by asking the panel as follows:

> In order to sustain a guilty verdict there must be proof. Since no proof has been submitted at this point in the trial and the defendant is presumed to be innocent, is the defendant guilty of anything?

This question is included in the trial dialog set forth above.

3. Law 101 Questions.

Questions that ask a juror about the law without explaining the law to the juror are almost always traps and should not be allowed. I call these "Law 101 questions." How much a juror knows about the presumption of innocence or the elements of an offense does not have anything to do with the juror's qualifications.

An example of the "Law 101 question" is the "elements of the offense trap" used by some lawyers to exclude a juror. The lawyer will say something like "every crime has a number of elements. If there are three elements to a crime and the state proves all but one of them beyond a reasonable doubt, what would you do?" This question invites a juror to make a "common sense" answer that turns into a disqualification. Interrupt the lawyer and explain to the juror that each of the elements must be proven beyond a reasonable doubt.

OTHER VOIR DIRE ISSUES

Occasionally, in Judge Wadell's court, a lawyer would make the almost fatal mistake of asking a juror the same question Judge Waddell asked. When that happened, the judge would interrupt the lawyer and sternly remark, "Counselor, the jurors have already assured me that they will (follow the law as I instruct them) (require the state to prove each element of the offense beyond a reasonable doubt) and **I** believe them. If you don't believe them you may inquire further." He put great emphasis on the word "I." That usually took care of that problem.

It is important to remember that voir dire is for the purposes of determining

the qualifications of juror to serve in a particular case. While questions that touch upon the issues in the case are usually appropriate, questions that solicit answers out of idle curiosity or are indirect should be discouraged.

It is idle curiosity to ask a juror what he or she thinks about the criminal justice system or the United States Supreme Court, especially after the extensive questioning by the court in the above dialog.

Likewise, in a case involving a firearm, the question "do you have any bumper stickers on your car?" is much less direct than "do you own a firearm?" or "are you a member of the NRA?" The bumper sticker question and the question about what magazines or books a juror reads are seldom designed to solicit useful information. If they are asked over and over to individual jurors they will waste time that could be more productively used.

Another confusing line of questioning has to do with the burden of proof in criminal cases. The state attorney usually starts the comparison discussion by talking about the difference between "reasonable doubt" and "a shadow of a doubt." The one has nothing to do with the other so the comparison is meaningless. That causes the defense attorney to talk about the difference between the "greater weight of the evidence" and "reasonable doubt." Usually this is accompanied by an almost comical display of tipping the scales. That difference is also misleading and meaningless. Counsel should be admonished before voir dire that these questions are improper and the court will instruct the jurors on burden of proof. In some cases, it may be appropriate to read the reasonable doubt instruction to the jurors prior to beginning voir dire.

APPENDIX K

LIFE SENTENCE
(MULTIPLE COUNTS)

(Defendant), the court has carefully considered the evidence presented and finds that the mitigating circumstances in this case outweigh the aggravating circumstances, and for the murder of (Victim) you should lose your liberty, but not your life.

Accordingly, the court sentences you on Count I to serve a term of imprisonment in the Department of Corrections of the State of Florida for the rest of your natural life.

On Counts II and III the court sentences you to serve a term of imprisonment in the Department of Corrections of the State of Florida for a term of 15 years with a minimum mandatory of 3 years.

The sentences are to run concurrent with each other and you are given credit for ___ days time served since (date of arrest).

The clerk is directed to assess the costs of the case as a judgment.

You have the right to appeal this sentence within 30 days from this date. (I will continue the appointment of the Public Defender for that purpose) (If you cannot afford an attorney, one will be appointed for you), but if you wish to take an appeal, you must do so in writing within 30 days.