

IN THE SUPREME COURT OF FLORIDA

ADAM DAVIS,)
)
)
)
Appellant,)
)
vs.) CASE NUMBER SC00-313
)
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The original record on appeal comprises fifteen consecutively numbered volumes. (I-XV). The pages of volumes I through IV are numbered consecutively (pages 1-654) and include various pleadings and orders filed in the case. The pages of volumes V through XV are numbered consecutively (pages 1-1570) and include the transcripts of the jury trial and pre- and post-trial hearings.

Counsel will refer to the original record on appeal using volume number with reference to the appropriate pages. The supplemental record on appeal comprises one volume containing consecutively numbered pages (1 - 5). Counsel will refer to the supplemental record using the symbol (SR) with reference to the appropriate volume and page number.

STATEMENT OF THE CASE

On July 8, 1998, a Hillsborough County, Florida grand jury indicted Adam Davis, Appellant, along with co-defendants Valessa Robinson and John Whispel, with the premeditated first degree murder of Vicki Lyn Robinson.¹ The grand jury also charged them with Robbery with a Deadly Weapon, and Grant Theft Motor Vehicle. (I 51-55). Privately retained counsel initially represented Appellant for the guilt phase, but the trial court permitted private counsel to withdraw, over Appellant's objection (I 89,90).

On October 22, 1999, the court conducted a hearing on numerous motions filed by trial counsel. The motions and orders relevant for purposes of appeal are as follows:

<u>Motion</u>	<u>Ruling</u>
1. Motion to Declare Section 921.141, F.S., unconstitutional for lack of adequate appellate review;	Denied (XV 1411)
2. Motion to Declare Section 921.141, F.S., unconstitutional because it precludes consideration of mitigation by imposing improper burdens of proof or persuasion	Denied (XV 1411)
3. Motion to Declare section 921.141, F.S., unconstitutional because only a bare majority of jurors is sufficient to recommend a death sentence;	Denied (XV 1412)
4. For failure to provide guidance in the finding of sentencing circumstances, and to preclude death sentence or to allow unrestricted consideration of mitigation evidence;	Denied (XV 1412)
5. And/or s921.141(5)(h), F.S., and/or Standard (5)(h) instruction 1413)	Denied (XV 1413)

¹The State sought the death penalty only in Appellant's case. Co-defendant Valessa Robinson was ineligible due to her age at the time of the offense. (XV 1565). On June 29, 1990, co-defendant Whispel plead pursuant to an amended indictment to second degree murder, grand theft third degree, and grand theft motor vehicle. (I 13-14).

unconstitutional facially and as applied (heinous, atrocious, and cruel)

- | | | |
|-----|--|---------------------|
| 6. | Motion to Declare unconstitutional Section 921.141 (5)(1), F.S., unconstitutional facially and as applied (cold, calculating, premeditated) | Denied
(XV 1412) |
| 7. | Motion for additional peremptory challenges due to numerical disparity regarding peremptory challenges and section 913.08, F.S. (1987) due to sensitive voir dire issues in this case; | Denied
(XV 1434) |
| 8. | Motion to exclude photographic Evidence; | Denied
(XV 1419) |
| 9. | Motion to declare death penalty Unconstitutional as imposed under 921.141 and 922.10, F.S. | Denied
(XV 1409) |
| 10. | Motion to preclude death penalty Due to proportionality | Denied
(XV 1410) |
| 11. | Motion to Declare Florida Rules of Criminal Procedure unconstitutional As applied to separate sentencing Procedure based on Florida Statutes | Denied
(XV 1436) |

On October 26, 1999, the trial court conducted a hearing on Appellant's motion to suppress statements he gave to law enforcement immediately after his arrest. (XV 1446). The trial court denied the motion. (XV 1540).

VOIR DIRE

The case proceeded to trial on November 1, 1999. During jury selection, the court conducted voir dire in two separate

fashions. The first consisted of individual voir dire on the issues of pre-trial publicity and the death penalty. (VI 104). After seven hours of this individualized examination, the court changed the method of voir dire and ordered that the attorneys question each potential juror in front of the panel as a whole. (VII 401) Trial counsel objected to the court's decision to change the manner of the jury selection midway through the process. (IX 626).

During the individual voir dire process, trial counsel attempted to ask whether mercy could play a role in the potential juror's sentencing recommendation. The trial court sustained the State's objection. (V 20). However, the trial court did eventually permit trial counsel to proceed with this method of inquiry.

During the individual voir dire process, trial counsel asked prospective juror Pritchett if he believes mercy played a part in his decision as a juror.(V 20). The same inquiry was made to prospective juror Mosier. Potential juror Vernon Mosier stated that he would not consider mercy towards Appellant a reason to impose a life sentence over death. (V 82-82). He reaffirmed that position during the group selection process conducted the next day. (IX 625). As a result, trial counsel moved to strike Mr. Mosier for cause. The court denied the strike for cause. (IX 630). Mr. Mosier eventually becomes the foreman of the jury. (IV 598).

Also during jury selection, prospective juror Whitman stated that the manner of the victim's death was going to probably cause her a problem. Trial counsel moved to strike prospective juror Whitman for cause and said motion was denied. (VI 160,163). Prospective juror Eustace informed trial counsel and the court during jury selection that he had previously formed an opinion that the Defendant was guilty. In response, trial counsel moved to strike prospective juror Eustace for cause, a request the court denied. (VI 191, 199).

Prospective juror Junda stated that he could not be fair and impartial. Regardless, the court refused to strike Mr. Junda for cause. (VI 210 - 11). Trial counsel also requested that prospective juror Hall be stricken due to her description as the incident being a tragic one. Trial counsel argued that the pre-trial publicity regarding the facts of the case would prevent the prospective juror Hall from being fair and impartial and moved to strike her for cause. The court denied the request. (VI 241 - 258).

During the voir dire process, the court attempted to give its own explanation of a death penalty case. During the explanation of the second phase of a death penalty case, the court stated:

"In phase two, you, as jurors, will receive information from the state attorney's office who will present evidence to you concerning aggravating factors. The state must prove these aggravating factors beyond a reasonable doubt to you, as jurors,

upon which you could base a verdict for the death penalty. The defense in this case will present to you mitigating factors on a *preponderance of the evidence to establish those mitigating factors.*" (emphasis added) (VIII 416).

The court then goes on to state:

"You will then be asked - - you will then be asked to weigh those aggravating factors against those mitigating factors and determine as a jury panel whether you feel the appropriate recommended sentence in this case would be a sentence of life in prison or a death penalty sentence. You make that recommendation to me as the judge."

Further along in the voir dire process, the State informs the jury that co-defendant Valessa Robinson had not yet gone to trial. (VIII 499). In addition, she was not eligible to receive the death penalty and that the second co-defendant, John Whispel, pled guilty to second-degree murder and received twenty-five years in the Florida State Prison as a sentence. (X 645-46).

Also during the voir dire process, the prosecution delved into Appellant's presumption of innocence. Specifically, the State commented that

"You can never be one hundred percent positive of anything, and so that is not the burden that the State should shoulder." (IX 612)

The prosecutor further commented that

"I want to clarify something.. when Mr. Davis came into court [a prospective juror] assumed that there was a reason for him to be here, and I think none of us want to think that the police are out just grabbing citizens off the street and dragging them into court for no reason, right." (IX 613).

After hearing these comments and explanations by the prosecution, prospective juror Pritchett remained equivocal, stating that "I think, I can, yeah" when asked if he could properly apply the law. (IX 613).

When questioned regarding Appellant's right to remain silent, prospective juror Whitman gave a response "I would just like anyone in that position to have something to say in their defense." (IX 614).

As a result of their equivocal answers, trial counsel again moved to strike Pritchett and Whitman for cause. The court denied both motions. (IX 627, 630, 631). As a result, the defense was forced to use preemptive strikes on these aforementioned perspective jurors. (IX 629, 631).

In questioning perspective juror Lopez, the State asked if he would be able to impose a life sentence over a death sentence on someone. (X 731). Lopez, in response, answers he "would think so". (X 731). The prosecutor then goes on to ask

"Okay. Then if the State has proven to you at least one aggravating circumstance and the defense presents to you mitigation, can you balance - - can you balance - - can you engage in the balancing test that we described to you and determine whether the aggravating factor outweighs the mitigation in which case death would be an appropriate sentence or whether the mitigating evidence outweighs the aggravating factors where life could be an appropriate sentence. Could you do that?"

Perspective juror Lopez once again equivocally answers "I believe I could, I think so." (X 731 - 32). As a result,

trial counsel moved to strike Lopez for cause. The court denied said motion. (X 733).

The defense was then forced to use its peremptories on all the aforementioned jurors, save Mr. Mosier. Having used all of its peremptories during the course of jury selection, renewed its motion for additional peremptory strikes, in order to strike Mr. Mosier.² (X 734). The court denied the request for these additional peremptories both in the pre-trial and trial phase. (X 735, XV 1434).

In sum, the court denied the following motions for cause strikes: prospective juror Pritchett, prospective juror Mosier, prospective juror Whitman, prospective juror Eustace, prospective juror Junda, prospective juror Lopez, prospective juror Carmen, prospective juror Hall, and prospective juror Brandon.

THE TRIAL

During the State's case-in-chief, The State presented testimony from the victim's boyfriend, cooperating co-defendant Whispel, law enforcement officers, numerous lay witnesses, and the medical examiner. Detective Iverson, a Hillsborough County homicide detective, testified that he obtained a confession from co-defendant Valessa.³ At cross-

²Trial counsel requested additional peremptories in a standard pre-trial motion. (II 273-77).

³ At the time of Appellant's trial, co-defendant Valessa Robinson had not yet proceeded to trial. (XV 1545-47). In

examination, trial counsel sought to question the detective about statements where Valessa Robinson admitting to murdering of her mother. (XII 1027, 1031). Trial counsel apparently did not proffer this confession because the Court indicated her familiarity with the nature of the statements without state objection. (X 1031). The court refused to allow any questioning regarding Valessa's confession based on the hearsay rule. (XII 1031).

The State also introduced the taped statement made by Appellant to Detective Iverson. (XII 991-1002). This taped statement had been the subject of the motion to suppress mentioned, *supra*. Trial counsel timely objected to its admission. (XI 954).

The State also sought to introduce post-mortem pictures of the decedent. Over objection, the court admitted pictures of a trashcan with the victim inside of it (XII 1099) and pictures of the corpse showing post-mortem maggot infestation. (XII 1186).

At the conclusion of the guilt phase of the trial, the jury found Appellant guilty on all counts. (IV 597-98).

PENALTY PHASE

During the penalty phase, the trial court denied Appellant's proposed jury penalty phase instruction related

addition, she had previously invoked her constitutional rights.(I 1).

to the participation of others and to the actions of Appellant after the death of the victim. The Court denied the instructions. (XIII 1276, 1278-79, XIV 1292).

The State presented numerous impact witnesses and Appellant's certified conviction. (XIV 1294-1308, 1343). As aggravation, the State argued that the murder was committed in a harsh, atrocious, and cruel manner, as well as being cold, calculated and premeditated. (XIV 1371, 1373). As mitigation, Appellant presented testimony from a psychologist and family members. The psychologist, Dr. Michael Gamache, testified that the death of Appellant's father and the discovery that Appellant's mother was not his biological mother resulted in traumatic life changes. (XIV 1326-28). Additionally, Dr. Gamache testified about the impact of Appellant's severe drug use. (XIV 1329). Finally, Dr. Gamache provided unrefuted testimony that Appellant could be a productive member of the prison community should he be sentenced to life. (XIV 1331). Various friends and relatives of Appellant provided background as to Appellant's difficult childhood. (XIV 1344-65). After closing arguments, the jury recommended that Appellant be put to death. The vote was seven (7) to five (5). (XIV 1387).

On December 17, the Court conducted a sentencing hearing. In aggravation, the court found that Appellant had committed the crime having previously been found guilty of a

felony and under the sentence of probation. (XV 1556). In addition, the court held that the Appellant committed the crime in an especially heinous, atrocious, or cruel manner. (XV 1556). The court also found the crime to have been committed in a cold, calculated, and premeditated manner. (XV 1561).

In mitigation, the court concluded that Appellant's age was a mitigating factor, but gave it little weight. (XV 1562). The court also determined that the influence of LSD on Appellant at the time of the offense was entitled to some weight as a mitigating circumstance. (XV 1562). The court gave some weight to Appellant's lack of previous "assaultive" [sic] behavior, to hardships suffered during his youth, to his skills as a writer and artist, and to his appropriate courtroom behavior. (XV 1563-64). Of note, as to the issue of proportionality between Appellant and co-defendant Valessa Robinson, the trial court stated "...death was never an option for the defendant Robinson because of her age at the time of the offense... [t]he court would note that as between these two defendants, however, *there was no significant difference in the level of culpability.*" (Emphasis added). (XV 1565). Nevertheless, the court sentenced Appellant to death. (XV 1567).

Appellant filed timely notice of appeal on January 6, 2000. This brief follows.

STATEMENT OF THE FACTS

During the summer of 1998, fourteen year old Valessa Robinson was giving her mother, Mrs. Vicki Robinson, a good deal of trouble. (XI 818). Valessa was a runaway 5-10 times over and a drug user. (XI 820, 895). She was also a rebellious and headstrong teenager and Mrs. Robinson found her difficult to control. (XI 818, 821).

Appellant was dating Valessa. (XI 810). Although Mrs. Robinson was troubled by the relationship, Appellant was always respectful and well mannered towards Mrs. Robinson. He was never heard to utter a disrespectful word to her or express any desire to kill her. (XI 820, 897).

On Friday, June 26, 1998, Mrs. Robinson's older daughter, Michelle, was not home because she was out-of-state with her father. (XI 810). During the course of that day, Mrs. Robinson ran errands with Valessa, Appellant, and Jon Whispel, a mutual friend of Valessa's and Appellant's. (XI 836). After finishing their errands, Mrs. Robinson dropped off Whispel at work. (XI 837). Later that same evening, Valessa, Appellant, and Whispel returned to the Robinson household. (XI 837). Mrs. Robinson, who was divorced, invited her boyfriend, Jim Englert over for supper. (XI 810). When Mr. Englert was preparing to leave the Robinson household, he inquired if Appellant and Whispel needed rides home. They turned down his offer because their bicycles were in the

garage and they did not want to leave them behind. (XI 813). Appellant and Whispel then left the Robinson house and rode their bicycles to Denny's restaurant at the intersection of Stall Road and Dale Mabry Highway, in Tampa, Florida. (XI 839).

Sometime during the evening hours, Valessa decided she was going to join Appellant and Whispel. She snuck out of the house and rode her bicycle to the Denny's restaurant. (XI 839). Meeting the Appellant and Whispel, the three youngsters left and went in search of narcotics to use during the evening. (XI 840).

Apparently successful in their drug hunt, the three returned to Denny's restaurant. There, over a meal of LSD and orange juice, Valessa Robinson decided to "kill [her] mom." (XI 840, 906). She announced her intention to Appellant and Whispel, who were both "shocked" by Valessa's murderous desires. (XI 840, 907). Regardless, Appellant and Whispel indulged Valessa's need to murder her mother and the three decided to inject Mrs. Robinson with a heroin overdose. (XI 841).

The youngsters then rode their bicycles back to Valessa's house in search of motorized transportation to secure the heroin necessary for the overdose. (XI 841). There, Appellant quietly rolled the van out of the garage as to not wake Mrs. Robinson. (XI 842). Valessa and Whispel joined Appellant and

together the three drove to a party at the home of Robert Anders. (XI 842-43). Upon arrival, Appellant entered the Anders house in search of heroin. He was not successful in finding the heroin Valessa needed to kill her mother. (XI 843). Jon Whispel, however, provided Appellant money to purchase the syringe necessary for the injection. (XI 844). The three return to the Robinson home and gather in Valessa's bedroom. (XI 845).

While in Valessa's room, Appellant, Valessa, and Whispel continue to "trip" on acid. (XI 845) They also turned on Valessa's "black light," Whispel took off his white shirt (that glowed due to the blacklight) and the three continued to "roll" on acid. (XI 845). At some point during this drug escapade, Valessa secured some bleach from the laundry room and Appellant filled Whispel's syringe with it. (XI 845-46). Valessa and Appellant then left Valessa's bedroom. (XI 847).

In the interim, Mrs. Robinson woke up. She accompanied Appellant and Valessa back to Valessa's bedroom. (XI 847). Mrs. Robinson then ordered Valessa to get her sleeping bag and demanded that Valessa sleep with her. (XI 848). Complying with Mrs. Robinson's request, Appellant handed Valessa her sleeping bag and followed her out of the room into the kitchen. (XI 848).

En route, Appellant placed Mrs. Robinson in a "sleeper" hold. (XI 849). Valessa joined him, held her mother down, as

Appellant injected Mrs. Robinson with the bleached-filled syringe. (XI 850-512). Despite these actions, Mrs. Robinson did not die. Whispel then suggested the use of a knife. (XI 852). As Whispel waited in the room with Appellant, Valessa pinned her mother down in the kitchen, and killed her by repeatedly stabbing her in the throat and back with a knife.⁴ (SR 1, 3, 5).

Appellant then lowered Mrs. Robinson's body into a container, covered her with a blanket, and placed the container in the van. (XI 855-56). The three youths cleaned the scene with bleach, bath towels, and brushes and drove off to dispose of the body. (XI 857). They went to a trail, thinking they could bury the container. (XI 859). Due to the rough terrain, however, they were unsuccessful in their attempt. (XI 859). After concealing the container with foliage, the three eventually returned to the Robinson household. (XI 861-62). There, Valessa suggested they take her mother's credit cards since she knew the personal

⁴This testimony conflicted with that provided initially by John Whispel. According to Whispel, Appellant stabbed Mrs. Robinson and that he returned to the bedroom with blood on his hands. (XI 852). However, Whispel later admitted that he did not see Appellant stab the victim and that he did not know who killed Mrs. Robinson. (XI 852, 884, 932). Furthermore, his ability to perceive events was altered by the "bad [acid] trip" and his lack of corrective eyewear. (XI 921, 924.)

identification numbers necessary to obtain cash. (XI 862-863).

The youths then traveled to the Ybor City district of Tampa and, over the course of the next two days, purchased tattoos for themselves. XI 863. They also decided to purchase cement in an effort to sink the receptacle containing Mrs. Robinson's body. XI 867.

During the time the youths were making the various purchases, Jim Englert, Ms. Robinson's boyfriend, became concerned after she failed to appear for a pre-planned beach trip. XI 814. He reported her as missing to the Hillsborough County Sheriff's Office. XI 815. As a result, the news media broadcast Appellant's picture as a suspect in the disappearance. XI 868. Appellant became aware of his and Valessa's notoriety and the three youth rejected their plan to sink the body . XI 868.

As a substitute plan, Valessa, accompanied by Appellant and Whispel, embarked on a cross-country drive along Interstate 10. XI 869. They continued to withdraw funds using Mrs. Robinson's credit cards, thereby allowing law enforcement to track their course of travel. XI 942. The road trip brought them to Pecos County, Texas, where it came to a crashing conclusion. As Appellant drove towards Pecos County, the local sheriff, having reviewing law enforcement bulletins, suspected the three youths were headed his way. XII 977. His suspicions were confirmed when he observed a van

fitting the description of Ms. Robinson's van traveling along Interstate 10. (XII 980). He gave chase with his deputy riding shotgun, who opened fire on the van. (XI 870, XII 979-80). The deputy fired numerous shots and blew out the van's tires. (XI 954, XII 982). The van crashed into a fence and Valessa, Appellant, and Whispel were all arrested and jailed. (XI 954, XII 983).

On or about Thursday, July 2, 1998, Detectives Iverson and Marsicano, the Hillsborough County investigators on the case, flew to Texas to interview the three youths. (XI 954). The investigators first obtained Valessa's confession to the murder. (XI 955, SR 1, 3, 5). She calmly answered their questions, showing no emotion as she described butchering her mother. (XI 955, XII 1034). She confessed to stabbing Mrs. Robinson in the throat and back numerous times, while the Appellant and Whispel were in her bedroom. (SR 1, 3, 5).

The detectives sought to interrogate Appellant in the early morning hours of July 3, 1998. (XV 1454). Having already obtained information about the death from the other two co-defendant's, the detectives awakened Appellant to meet with them. (XV 1460). Detective Iverson first met with Appellant "informally" for approximately eight to ten minutes prior to administering Miranda warnings or taping any statements. (XV 1457, 1459). Detective Iverson chose not to initially administer Miranda warnings despite his knowledge

that Appellant was allegedly involved in the death of Mrs. Robinson. (XV 1465).

During the "informal" questioning prior to Miranda warnings, Appellant outlined his involvement in the death of the victim. (XV 1466). Only after Appellant had allegedly implicated himself in the homicide did the detective administer the Miranda warnings, written waiver of rights form, and thereafter obtained the tape statement shouldering the responsibility for the killing of Mrs. Robinson. (XII 991-1002), (XV 1466, 1469). Moreover, when Appellant gave his statement to the detectives, he had already committed himself to taking the blame for Valessa with the view that he and Valessa were the "Romeo and Juliette of the 90's." (XI 937, XIII 1151).

SUMMARY OF THE ARGUMENTS

Appellant contends that he was deprived of his right to a fair trial and unconstitutionally and illegally sentenced to death. First, Appellant's purported confession was illegally obtained in violation of his Miranda rights. Since law enforcement interviewed him in a custodial setting without informing him of his rights, Appellant described in detail his involvement in the crime. It was only after he admitted his involvement that law enforcement saw fit to read him his Miranda warnings and obtain a written waiver. Said waiver does not come with sufficient reliability since Appellant had already confessed, was incarcerated, and was awakened in the early morning hours after detectives had already determined his alleged role from the other co-defendants.

During the course of Appellant's jury selection, the Court improperly refused to strike equivocal prospective jurors for cause. As a result, Appellant was forced to use his peremptories on these prospective jurors and he exhausted his initial ten. The court refused to grant additional peremptories, thereby violating Appellant's right to a fair trial.

The trial court improperly denied admission of a the co-defendant Valessa Robinson's confession. Said confession directly inculpated co-defendant Valessa and exculpated

Appellant by placing him in another room from where the killing took place. The court improperly relied on the hearsay rule to exclude this confession, despite the fact that co-defendant Valessa was unavailable and the court indicated it was fully aware of her statements without State objection.

The court also improperly admitted gruesome photographs, which depicted excessive decomposition of the victim's body, despite the fact that there were no issues regarding death in dispute and that said pictures inflamed the passions of the jury. Admission of said pictures denied the Appellant a fair trial.

The trial court further erred by refusing to instruct the jury that the sentencing exposure of the other participants could be considered mitigation. The court erred by finding the death was committed in a heinous atrocious and cruel manner, in addition to being cold, calculated, and premeditated. The death sentence was imposed with a bare majority and is thereby unconstitutional. Finally, the Florida death penalty is unconstitutional due to improper appellate review, improper preclusion of mitigation, and lack of proper guidelines to the jury for its recommendation of life or death.

ARGUMENTS

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

POINT I.

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS OBTAINED IN VIOLATION OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS.

On July 2, 1998, detectives from the Hillsborough County Sheriff's Office flew to Texas to interview all three of the co-defendants. Prior to reading the Defendant his Miranda warnings, the detectives attempted to establish a report with the Appellant. During that process, the Appellant gave a purported confession, admitting to the alleged killing of Vicky Robinson. Only after having obtained this confession did law enforcement officers then read the Appellant his Miranda warnings. After reading him these warnings, the Appellant once again gave a taped purported confession.

The circumstances in the instance case are comparable to those in Ramirez v. State, 739 So.2d 568 (Fla. 1999). In Ramirez, the defendant and co-defendant were accused of first-

degree murder. Defendant Ramirez was given the death penalty. Id. at 571. The law enforcement officers in Ramirez obtained an initial confession from Ramirez's co-defendant. Upon obtaining this confession, a sheriff's deputy responded to Ramirez's home and began to question him regarding the murder. As a result of this questioning, Ramirez admitted to the crime. Id. Subsequent to this admission, law enforcement officers then read Ramirez his Miranda warnings. Ramirez then again admitted to his involvement in the killings. Id.

In reversing Ramirez's conviction, the Supreme Court of Florida articulated a number of overriding principles. First, and foremost, the court stated that "both the United States and Florida constitutions provide that persons shall not be compelled to be witnesses against themselves in any criminal matter." Id. The court further held, "this constitutional guarantee is fully applicable during a period of custodial interrogation." Id.

The court then explains that the Miranda holding "requires that police inform suspects that they have the right to remain silent, and that anything they do say can be used against them." Id. at 573. In explaining the importance of the Miranda warning, the court held the requirement of warnings and waiver of rights is fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogations. The court further goes on

to explain the exclusionary rule "unless and until the Miranda warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against the defendant." Id. at 573.

In the instant case, as in Ramirez, it is clear that the Defendant was interrogated by law enforcement officers while in custody. Two sheriff's detectives from Hillsborough County appeared in the early morning hours to confront the Defendant with the death of Vicky Robinson. At that time, the detectives questioned the Appellant as to his role and that of the co-defendants, having already spoken to the other two co-defendants. Furthermore, the Defendant was in custody in a Texas jail at the time of the questioning.

In the instant case, it is clear and undisputed that the Appellant was held in custody since he was incarcerated at the time of the interrogation. Rather than read Appellant, a suspected murderer, his Miranda warnings immediately prior to questioning, the detectives used an "informal" and deceptive method of questioning in order to gain the Defendant's trust. It was only after the Defendant had admitted to his alleged role in the offense that the officers feel compelled to administer his Miranda warnings and to have the Defendant sign a waiver. As in the Ramirez case, the Miranda warnings were not given until the Appellant had given "significant admissions of guilt." Id. at 576. Furthermore, also as in Ramirez, the

Appellant "had already implicated himself in the crime and the detectives had independent corroboration of his involvement and ample probable cause to arrest him for murder... [i]t is simply inappropriate for the police to make a representation intended to lull a young defendant into a false sense of security and to delude him as to his true position at the very moment that the Miranda warnings are about to be administered. Id. at 577.

There is no doubt that in the instant case the Defendant had given a full-blown admission to the alleged death of Vicky Robinson. It was only after "the cat was out of the bag" that the detectives felt it appropriate to read the Defendant his Miranda warnings. But, by then, it was too late. The Defendant had already significantly implicated himself. In addition, the detectives also had independent corroboration of the Appellant's alleged involvement.

This Court has held that failure to inform the defendant of his Miranda warnings does not necessarily preclude the use of subsequent confessions given after Miranda has been read. In upholding the use of a subsequent confession, this Court has held that the trial court was required to consider the surrounding circumstances of the subsequent confession. Id. at 113. However, in Ramirez, unlike the instant case, the defendant executed two of three written waiver forms. Id. In the instant case, there is one significant circumstance distinguishing the facts from Ramirez. The Defendant was presented with a written

waiver immediately after having given the purported admission. There was no time for reflection before the Defendant was confronted with this form by two police detectives. The initial confession, obtained without proper reading of Miranda, was given immediately before the second confession. Such tactics can only be considered "coercive" and "over reaching." See, Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (Voluntariness depends upon the absence of coercive police activity or over reaching). It is clear in the instant case that law enforcement awakened Appellant in the early morning hours, questioned Appellant into providing an alleged untaped confession, and only then gave Appellant his Miranda warnings. Then, after it was too late and with no time for reflection, compelled Appellant to sign a waiver of rights form in the early morning hours while in the presence of two detectives in a Texas jail. Such a waiver does not sufficiently remove the taint of the initial improperly obtained confession. Therefore, the Defendant's alleged statements to law enforcement officers could not be considered voluntary, should have been suppressed, and the trial court committed reversible error in failing to do so.

POINT II

THE TRIAL COURT IMPROPERLY DENIED DEFENSE COUNSEL'S MOTIONS TO STRIKE PERSPECTIVE JURORS FOR CAUSE, RESULTING IN APPELLANT EXHAUSTING HIS PEREMPTORIES, WHEREBY THE COURT IMPROPERLY REFUSING TO FURTHER PEREMPTORY STRIKES.

The trial court improperly denied a cause to strike on a number of prospective jurors, thereby requiring Appellant to use his limited number of peremptories. During jury selection, perspective juror Pritchett was asked whether mercy could play a role in his decision on whether to impose the death penalty, a perfectly acceptable and permissible consideration. The trial court erroneously sustained an objection to said question. However, pursuant to Thomas v. State, 403 So.2d 371 (Fla. 1981) and Poole v. State, 194 So.2d 903 (Fla. 1967), said question was entirely proper. Perspective juror Pritchett, however, stated he could not consider mercy in his decision whether or not to impose the death penalty. As a result, perspective juror Pritchett should have been struck for cause. The trial court did not do so and Appellant was forced to use a peremptory.

Prospective juror Mosier was also asked if he could consider mercy and also indicated he could not. Pursuant to Thomas v. State and Poole v. State, *supra*, said questions were entirely proper. Since perspective juror Mosier conclusively could not consider mercy, thereby rendering a cause strike appropriate. Since Appellant had exhausted his peremptories on other

prospective jurors, Mr. Mosier remained on the jury and became its foreman.

Prospective juror Whitman said the fact that the victim suffered a terrible death. He equivocally stated that the manner of the victim's death was "probably" going to cause him problems. VI 160. Prospective juror Eustace had a preformed opinion as to Appellant's guilt, yet the court refused a cause strike. VI 191. Prospective juror Junda unequivocally stated he could not be fair and impartial. VI 148. The court refused to strike Mr. Junda for cause. VI 210. Appellant was forced to use a peremptory.

Prospective juror Lopez could not answer any question without equivocating. Specifically, he could not answer how he felt about the death penalty (VII 322), he felt he could "probably" sit as a juror (VII 323), and he "probably" could sentence someone to death (VII 324). Of particular note, he "did not know how to answer" the question as to whether life is a severe enough punishment in a murder case. (VII 327). Again, a denial of a cause strike (VII 327) and the forced use of a peremptory.

Florida Rule of Criminal Procedure 3.350(a) and §913.08(1)(a), Fla.Stat. (1987), provides for only ten peremptory challenges in a capital case. Because a twelve-person jury must be selected, the procedural rules actually provide less potency in making peremptory challenges in capital cases than it does in other less serious cases. For example, where the charge is

punishable by life imprisonment, ten peremptory challenges are allowed, although only a six-person jury is seated. One and two-thirds challenges per jury seat is afforded. In less serious cases, six peremptory challenges are allowed to aid in selecting a six-person jury, a one-to-one ratio. In capital cases, only ten challenges are allowed in a selection of a twelve-person jury, a ratio of less than one challenge to each seat. Authorizing less potency in peremptory challenges than is effectively allowed in other cases deprives the defendant of the right to equal protection under the laws afforded him by the Fourteenth Amendment to the United States Constitution and by Article I, Section 2 of the Constitution of the State of Florida and by the right against cruel and unusual punishment as is guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution.

Section 913.08(1)(a), Fla.Stat. (1987) makes it more difficult for a defendant charged with a capital crime to obtain an acceptable jury than for defendants charged with non-capital crimes. There is no compelling interest, nor is there any rational basis, for a limitation on the number of peremptory challenges in capital cases which makes it more difficult to obtain a fair and impartial jury in capital cases than in other criminal cases.

In the instant case, the ability of the trial counsel to fairly have access to peremptory challenges was further limited by the court's failure to properly strike jurors for cause. Therefore, defense counsel was forced to use peremptory challenges where a cause strike should have been granted.

The right to a fair and impartial jury is a fundamental right. In Thomas v. State, 403 So.2d 371 (Fla. 1983), the supreme court found error that the limitation of appellant to sixteen peremptory challenges actually prejudiced him because he was not able to strike a juror who later became foreman. Id. at 374. The instant case is directly comparable in that prospective juror Mosier actually became the foreman of the jury after trial counsel requested a cause strike and the trial court denied said request.

In Chapman v. State, 593 So.2d 605, 606 (Fla. 4th DCA 1992), the court held that the legal standard to determine whether to strike a juror for cause is "whether there is a reasonable doubt about the ability of the juror to decide the case fairly and impartially...however, the impartiality of the finder of fact is an absolute prerequisite to our system of justice. Closed cases should be resolved in favor of excusing the juror rather than leaving a doubt as to her impartiality." See, Franco v. State, 777 So.2d 1138, 1139 (Fla. 4th DCA 2001). In Hill v. State, 477 So.2d 553 (Fla. 1985), the supreme court ordered that trial courts use the following rule:

"If there is a basis for any reasonable doubt as to any jurors processing the state of mind which would enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on a motion of a party or by the court on its own motion...

Florida and most other jurisdictions adhere to the general rule that it is reasonable error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and denied."

The standard articulated in Hill is applicable to the instant case. All the aforementioned prospective jurors equivocated on their ability to be fair and impartial in the instant case, rather than error on the side of caution. The court summarily denied these requests for cause strikes. Such denial amounted to reversible error and denied the Appellant a fair trial due to the trial court's failure to grant additional peremptory challenges. See also Price v. State, 538 So.2d 486, 489(Fla. 3rd DCA 1989)(juror is not impartial when one side must overcome preconceived opinion in order to prevail; when any reasonable doubt exists as to whether juror possesses the state of mind necessary to render impartial recommendation as to punishment, juror must be excused for cause); Robinson v. State, 506 So.2d 1070, 1072(Fla. 5th DCA 1987) (Prospective jurors' promise that they would try to be impartial, even though they were unsure of ability to be impartial, did not guarantee defendant's fair

trial and would justify exclusion for cause).

POINT III

THE TRIAL COURT REVERSIBLY ERRED BY DISALLOWING
THE STATEMENTS OBTAINED FROM CO-DEFENDANT VALESSA
ROBINSON

It is unrefuted that Valessa Robinson admitted to the investigating detectives that she stabbed her mother. SR 1, 3, 5. Furthermore, she also told Detectives that she believed Appellant was in the bedroom at the time she committed the stabbing in the kitchen. SR 5. In lieu of a proffer, trial counsel informed the court that he wished to elicit these statements from Detective Iverson. The trial court indicated that it understood these statements and that they would not be admitted due to the hearsay rule. In denying the jury the opportunity to hear the statements of co-defendant Valessa Robinson, the court committed reversible error.⁵

⁵Although trial counsel did not seek a proffer of Valessa's statements from Detective Iverson, such a decision is not fatal to appellate review of the issue. See Sommerville v. State, 584 So.2d 200, 201 (Fla 1st DCA 1991) (failure to proffer evidence not fatal to review of alleged error where it was clear from the record that both the trial court and prosecutor realized what the excluded evidence would concern); Orlando/Orange County Expressway Authority v. Latham, 643 So.2d 10, 11 (Fla 5th DCA 1994) (error in excluding testimony was preserved without witness testifying when attorney proffered evidence, without objection, and trial court ruled to exclude it). Her confession also satisfies the "unavailability of

The instant case is squarely on point with the U.S. Supreme Court case Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297. In Chambers, the Defendant was charged with the capital murder of a policeman. Id at 286, 1041. A third party later confessed to the same murder with which the Chambers had been charged. Id at 287, 1042. Chambers sought to introduce the testimony of three witnesses who heard the third party confess to the murder of the policeman, thereby exonerating Chambers. Id. at 292-93, 1044-45. The trial court barred all three witnesses, citing the hearsay rule. Id.

The U.S. Supreme Court ruled that the "exclusion of this critical evidence... denied him [Chambers] a trial in accord with traditional and fundamental standards of due process." Id. at 302, 1049. (Ellipses added). The court reasoned that the declaration against interest exception to the hearsay rule applied to the testimony of witnesses who heard the third party confess to the murder. Specifically, the court said

Among the most prevalent of these exceptions [to the hearsay rule] is the one applicable to declarations against interest—an exception founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made.

Id. at 299, 1047. The court further ruled that these statements were made under circumstances that provided assurances of reliability. Id. at 300, 1048. In so holding, the court concluded

Few rights are more fundamental than that of an accused to present witnesses in his own behalf... the testimony rejected by the trial court here bore persuasive assurances of trustworthiness and this was well within the basic rationale of the exception for declarations against interest. The testimony was also critical to Chamber's defense. In these

declarant" requirement put forth by Section 90.804(2), F.S. At the time of Appellant's trial, Valessa was also under indictment for first degree murder and had not yet proceeded to trial. Therefore, she was not available to testify as a witness since she could not be compelled to testify under the Fifth Amendment.

circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule must not be applied mechanically to defeat the ends of justice.

Id. at 302, 1049.

Florida, in Section 9.804(2)(c), F.S., has adopted the declaration against interest hearsay exception. Specifically, a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is admissible if corroborating circumstances show the trustworthiness of the statement. In addition, the declarant must be unavailable.

In the instant case, it is clear that overwhelming safeguards of reliability surround Valessa's confession. First, she admitted killing her mother to multiple parties, i.e., two (2) different sworn law enforcement officers. Second, she made her confession in close proximity in time to the murder- July 3, 1998, four days after the incident. (XV 1451-53, 1474). Third, she admitted to killing her mother on tape. (SR 1, 3, 5). Fourth, she described the murder weapon as a knife. Fourth, she provided gruesome details as to where on her mother's body she plunged the knife. Fifth, she articulated in what room she butchered her mother- the kitchen. Sixth, she told the officers where her mother was standing in the when she cut her- by the sink. She even told them the color of her mother's nightgown was

peach. (SR 5). And, most importantly, told them that Appellant was in her bedroom with co-defendant Whispel.⁶ (SR 5).

Since Valessa's statements met the test of corroboration, they should have been admitted in both the guilt and penalty phases. The trial court committed reversible error by excluding the opportunity to introduce or cross examine the detectives about these statements, resulting in the denial of Appellant's due process rights. *See also Vorhees v. State*, 699 So.2d 602 613 (Fla. 1997) (statements in which defendant's companion admitted that he, not defendant, had cut victim's throat were admissible as declarations against interest, even if statements did not exonerate defendant of capital murder; statements were relevant, tended to exculpate defendant, and met test of corroboration).

POINT IV

⁶Her confession also satisfies the "unavailability of declarant" requirement put forth by Section 90.804(2), F.S.. At the time of Appellant's trial, Valessa was also under indictment for first degree murder and had not yet proceeded to trial. Therefore, she was not available to testify as a witness since she could not be compelled to testify under the Fifth Amendment.

THE TRIAL COURT ERRED BY ADMITTING INFLAMMATORY
PHOTOGRAPHS DEPICTING THE POST-MORTEM DECOMPOSITION OF
THE VICTIM'S BODY

Several times during the trial, Appellant objected to the introduction of several gruesome photographs that depicted the victim in an advanced stage of decomposition. XII 1184-85. The admission of an autopsy picture of the head and neck area denied Appellant due process of law guaranteed by Article I, Sections 2,9,12,16, and 17 of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The photographs had no relevance to any issue in the case. Any possible relevance of this evidence was outweighed by its prejudice. §90.403, Fla. Stat. (1998). The test for the admissibility of a photo of the murder victim is relevance, not necessity. Ruiz v. State, 743 So. 2d 1, 8 (Fla. 1999). The determination of the admissibility of such photos is within the sound discretion of the trial court and will not be disturbed on appeal in the absence of abuse. Id. In Ruiz, this Court found error in the penalty phase admission of a two by three feet blow-up of a photo showing the bloody and disfigured head and upper torso of the victim. Because the prosecutor provided no relevant basis for submitting the blow-up in the penalty phase, this Court concluded that it was offered simply to inflame the jury. Id.

This Court has outlined the standard for the admission of potentially prejudicial photos. To be relevant, a photo of the deceased victim must be probative of an issue that is in dispute. In the present case, the medical examiner testified that the photo was relevant to show the difficulty in finding puncture wounds in the neck or for testing of any substance that might have been injected into the neck. XII 1185. The fact that the victim had been stabbed in the neck was not in dispute. Admission of the inflammatory photo thus was gratuitous. See Almeida v. State, 748 So.2d 922, 929-30 (Fla. 1999). (Autopsy photograph of murder victim that depicted gutted body cavity was unduly inflammatory; medical examiner testified that photograph was relevant to show trajectory of bullet and nature of injuries, but neither of those points was in dispute).

In this case, it is clear that Appellant was denied a fair trial when the court allowed a photograph of the deceased's decomposing head and neck to go to the jury. The photograph could serve no purpose other than to inflame and prejudice the jury and was thereby unduly prejudicial requiring a reversal of his conviction and death sentence.

POINT V

THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY REGARDING MITIGATION IN LIGHT OF THE DISPROPORTIONATE SENTENCES RECEIVED BY EQUALLY CULPABLE CO-DEFENDANTS.

In the instant case, the Appellant and his two co-defendants were all allegedly involved in the death of Vicky Robinson. All three were charged in the same indictment with first-degree murder. However, only the Appellant was exposed to the death sentence due to the plea of co-defendant John Whispel and the age of co-defendant Valessa Robinson. Additionally, there was clear evidence that the co-defendant Valessa Robinson admitted to being the individual who stabbed the victim. Although this information was not properly admitted by the court, such action can clearly lead to the consideration of the death sentence as disproportionate. Trial counsel properly sought an instruction on this issue, which the trial court improperly denied. (IV 564, XIV 1239).

It is clear that the evidence of a co-defendant's sentence can be a non-statutory mitigator. See, Parker v. Dugger, 498 U.S. 308, 314 (1991). The instant case is also comparable to Foster v. State, 778 So.2d 906 (Fla. 2000). In Foster, four gang members were accused of murdering a teacher at their high school. Three of Foster's co-defendant entered into plea agreements and testified against Foster. As a result, only Foster faced exposure to the death penalty and, was in fact, sentenced to death. Id. at 910 - 911.

In his direct appeal, Foster argued that he was the only one sentenced to death out of the four participants in the crime, thereby arguing the disproportionality of his sentence.

Id. at 921. The court held:

"While a death sentence is not disproportionate *per se* because a co-defendant receives a lesser punishment for the same crime, especially when he is less culpable, *citing Hannan v. State*, 638 So.2d 39 (Fla. 1994), we agree the sentence of an accomplice may indeed affect the imposition of a death sentence upon a defendant."

It is clear that in the instant case neither of the Appellant's co-defendants was eligible to be sentenced to death. However, the trial court erroneously prevented refused to give trial counsel's requested instruction that the jury could consider disproportionate sentences as mitigation. during the sentencing phase to argue said information to the jury. By excluding this argument, defense counsel was deprived of his ideal opportunity to argue that disproportionality of sentence can, in fact, be a substantial mitigation. As a result, the Defendant was denied the opportunity to present what could be considered a mitigator sparing him the death sentencing. This is especially cause for concern because the Defendant was sentenced to death by only one vote. Therefore, the trial court erred by disallowing argument by defense counsel and disallowing the mitigator for disproportionate sentence. *See also, Jackson*

v. State, 599 So.2d 103 (Fla. 1992) (Despaired treatment given to an equally culpable co-defendant can be considered in created jury's recommendation of life.) Hitchcock v. Dugger, 41 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (In absence of showing that error in failing to consider non-statutory mitigating circumstances when imposing sentence was harmless exclusion of mitigating evidence and renders death sentence invalid.); Brookings v. State, 495 So.2d 135 (Fla. 1986) (Jury in capital murder prosecution could reasonably consider, in setting sentence, "deals" for leniency made by two State witnesses, who were also principals to murder, and thus, trial court erred in overriding jury recommendation of life sentence in favor of death penalty).

POINT VI

THE TRIAL COURT ERRED BY IMPOSING THE DEATH SENTENCE IN THE ABSENCE OF FACTS SUPPORTING THE HEINOUS, ATROCIOUS, AND CRUEL AGGRAVATOR.

The State was required to prove the HAC aggravator beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). The aggravating circumstances of especially heinous, atrocious, or cruel requires the State prove the following elements:

1. The defendant must have:
 - a. deliberately inflicted, or

b. chosen a method of death with the intent to cause extraordinary mental or physical pain to the victim;

2. The victim must have actually consciously suffered such pain for more than a brief period of time.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), the Florida Supreme Court defined those crimes which are heinous, atrocious, or cruel:

"It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accomplished by such additional acts as to set the crime apart from the norm of capital felonies - - the consciousness or pitiless crime which is unnecessarily torturous to the victim."

The Florida Supreme Court has further defined the definition of the HAC factor. In Richardson v. State, 602 So.2d 1107 (Fla. 1992), the court citing Sochor v. Florida, 112 S.Ct. 2114 (1992) reaffirmed that to qualify for HAC "the crime must be both consciousness or pitiless and unnecessarily torturous to the victim." These refinements, in recent case law, have emphasized that in order for a murder to be classified as HAC, there must be evidence, proved beyond a reasonable doubt, that the defendant deliberately intended to inflict a high degree of suffering or pain. Hamilton v. State, 678 So.2d 1228 (Fla. 1996); Santos v. State, 591 So.2d 160

(Fla. 1991); Schere v. State, 579 So.2d 86 (Fla. 1991). In the instant case, there is a complete absence of any evidence throughout the complete trial and penalty phase to suggest that there was any intent on the part of the Appellant to inflict any type of suffering or pain upon the victim. The evidence was, in fact, overwhelmingly in support of the theory that the motive was to cause the death of Mrs. Robinson in a quick and efficient manner. The evidence in this case strongly suggests that the method employed in the death of Mrs. Robinson evinced a complete lack of planning and sophistication. Rather, Mr. Davis along with the two co-defendants decided at a Denny's restaurant, while under the influence of narcotics, on the spur of the moment, to kill Mrs. Robinson. The decision was made to inject her with heroin and bring about a quick death. When the defendants were unable to obtain the amount of heroin needed to carry out their initial plan, they decided to cause the death of Vicky Robinson through the injection of bleach into her neck. It was only after this method proved unsuccessful that the defendants found another method in which Mrs. Robinson would die. The evident frustration over the fact that the victim remained alive during the course of the evening is clear evidence that none of the defendants, especially the Appellant, had any intention that the victim should die a slow, torturous death.

In Bonafay v. State, 626 So.2d 1310 (Fla. 1993), the supreme court held that a killing where the defendant shot the victim from outside a store, then broke inside and shot the victim again while the victim begged for his life was not heinous, atrocious and cruel because there was no intent to torture or inflict a high degree of pain. Where evidence does not show that the defendant intended to torture the victim, the evidence fails to show that the killing was heinous, atrocious, and cruel. McKinney v. State, 579 So.2d 80 (Fla. 1991). A killing will only qualify as heinous, atrocious and cruel if it exhibits a desire to inflict a high degree of pain or an uttering difference to or enjoyment of the suffering of another. Santos v. State, 591 So.2d 160 (Fla. 1991). Again, there is no evidence which this Court can rely upon in the instant case which will in any way support the requirement that the Appellant intended to inflict a high degree of pain or to torture Vicky Robinson.

No method of killing is *per se* heinous, atrocious, or cruel. Rather, there must be some evidence that the victim actually suffered prolonged physical or mental pain. Evidence of the victim's fear or agony over her impending death can satisfy the second element of the HAC aggravator. Generally, the longer a victim is aware of impending death, the greater the chance that the subsequent killing will be found to be heinous, atrocious, or cruel.

In the instant case, it is clear that the Defendant initially attempted to place Mrs. Robinson in a choke hold, which may or may not have rendered her immediately unconscious. In addition, the medical examiner could not conclude that the victim was immediately unconscious as a result of this choke hold. Therefore, the evidence is not clear, nor is it proved beyond a reasonable doubt, whether Mrs. Robinson was conscious, semi-conscious, or unconscious during the course of the murder. Thus, it could not be proved beyond a reasonable doubt that the death suffered by Mrs. Robinson was accompanied by prolonged physical and/or mental suffering. The case is comparable to Elam v. State, 636 So.2d 1312 (Fla. 1994) where the supreme court rejected the HAC factor where the victim was repeatedly bashed in the head with a brick because the victim was rendered unconscious in a short period of time. Similarly, in Rhodes v. State, 547 So.2d 1201 (Fla. 1989), the HAC circumstance was improperly found for the strangulation murder of a semi-conscious victim. See also, Herzog v. State, 439 So.2d 1372 (Fla. 1983).

Finally, the Appellant's mental defects are an important part in evaluating the gravity of the HAC aggravator and can serve to mitigate the impact of HAC. This aggravating factor looks at the totality of the situation rather than to a particular aspect of the murder or the appellant's character. The Florida Supreme Court has reversed some death sentences

because the heinousness of the defendant's crimes were caused by his mental or emotional impairment. The court has reversed death sentences where the heinousness of the murder resulted from the defendant's drug or alcohol intoxication. See, Holsworth v. State, 522 So.2d 348 (Fla. 1988); Ross v. State, 474 So.2d 1170 (Fla. 1985). In the instant case, it is undisputed that the Appellant, along with the co-defendants, had consumed LSD immediately prior to the death of Mrs. Robinson. Co-defendant Whispel offered extensive testimony as to the state of mind of the Appellant and his use of LSD. He further testified as to the amount of LSD consumed by the Appellant. It certainly was not proved by the State that the murder of Mrs. Robinson was not committed while the Defendant was under the extreme influence of LSD. Therefore, the trial court erred by finding that the murder was committed in a heinous, atrocious, and cruel manner. This aggravator does not apply to the facts in this case, thereby rendering the Defendant's death sentence invalid.⁷

POINT VII

THE TRIAL COURT ERRED BY IMPOSING THE DEATH SENTENCE IN
ABSENCE OF FACTS SUPPORTING THE COLD, CALCULATED, AND
PREMEDITATED AGGRAVATOR.

⁷Appellant further adopts and incorporates all arguments made in the Motion to Declare Death Penalty Unconstitutional as applied to the HAC factor found in Volume I, pp. 161-176 of the record on appeal.

The court found that the cold, calculated and premeditated (CCP) aggravator applied to the instant case. In Jackson v. State, 648 So.2d 85 (Fla. 1994), the supreme court outlined the four elements of this aggravator:

1. The killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage;
2. the murder must be a product of a careful, planned or prearranged design to commit the murder before the fatal incident;
3. there must be heightened premeditation, i.e. premeditation over and above what is required for an aggravated first-degree murder;
4. the murder must have no pretense of moral or legal justification.

In accessing these four elements, the state of mind of the Appellant is critical to the analysis. Clearly, a killing in a fit of rage is inconsistent with the CCP factor. See, Crump v. State, 622 So.2d 963 (Fla. 1993). In addition, impulsive or panic killings do not qualify for this aggravator. See, Rogers v. State, 511 So.2d 526 (Fla. 1992); Hamblen v. State, 527 So.2d 800 (Fla. 1988). Furthermore, killing in other contexts, such as in the heat of passion during the course of domestic situations, likewise do not qualify for the CCP factor. See, Maulden v. State, 617 So.2d 298 (Fla. 1993); Wilson v. State, 493 So.2d 1019 (Fla. 1986). Finally, and most importantly, a defendant under the influence of excessive drugs or alcohol use may be deemed incapable of forming the degree of premeditation

required for the CCP factor. White v. State, 616 So.2d 21 (Fla. 1993); Penn v. State, 574 So.2d 1079 (Fla. 1991).

To support the CCP aggravator, the evidence must be proved by the State beyond a reasonable doubt that the murder was calculated, committed pursuant to a careful plan, or prearranged designed to kill. This aggravating factor is reserved primarily for execution or contract murders or witness elimination killings. See, Hansborough v. State, 509 So.2d 1081 (Fla. 1987); Maharaj v. State, 597 So.2d 786 (Fla. 1992); Pardo v. State, 563 So.2d 77 (Fla. 1990). Simply proving a premeditated murder for purposes of guilt is not enough to support the CCP aggravating circumstance. This element requires the existence of the "calculated" and "coldness" elements as demonstrating the greater premeditation. Even as a matter of death, which requires a period of time to accomplish its end, does not necessarily provide the perpetrator with the need for calm reflection. Campbell v. State, 571 So.2d 415 (Fla. 1990). Smothering the victim with evidence that the process required several minutes did not come alone, qualify the crime for the CCP aggravator in Capehart v. State, 583 So.2d 1009 (Fla. 1991).

In the instant case, it is uncontroverted that the idea to kill Vicky Robinson was formulated by Valessa Robinson as the three co-defendants sat at a Denny's restaurant consuming LSD and orange juice. There was never any evidence presented that

a plot to kill Mrs. Robinson was hatched prior to the consumption of the narcotics. A murder is not cold, calculated, and premeditated where the evidence shows that the defendant did not plan or prearrange to commit the murder prior to the commencement of the conduct that led to the death of the victim. Thompson v. State, 619 So.2d 261 (Fla. 1992). From the moment the defendants consumed LSD and orange juice at the Denny's restaurant, there was an uninterrupted course of conduct over the next couple of hours that ultimately led to the death of Mrs. Robinson. Therefore, there was absolutely no evidence that the planning of the death occurred over a lengthy period of time apart from the consumption of any narcotics. Furthermore, the haphazard pattern of conduct by the defendants shows an unsophisticated and impaired ability on the part of the Appellate to form the level of heightened premeditation contemplated by the CCP factor.

Most importantly, when there is evidence that the defendant was under the influence of narcotics when the murder was committed and a long history of drug abuse, the court errs in finding that the killing was cold, calculated and premeditated. See, White v. State, 616 So.2d 21 (Fla. 1993). It is undisputed in the instant case that at no point in time did the Defendant engage in anything but drug use. Furthermore, during the penalty phase, it was uncontroverted that the Defendant engaged in a long pattern of drug abuse.

Therefore, the State failed to meet the four prongs required in a finding of cold, calculated and premeditated. Therefore, the court erred in finding that the manner of death was an aggravating circumstance and the Appellant's death sentence is invalid.⁸

POINT VIII

ADAM DAVIS'S DEATH SENTENCE IS GROUNDED ON A BARE MAJORITY OF THE JURY'S VOTE (7-5) AND IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Eighth and Fourteenth Amendments require a heightened degree of reliability when a death sentence is imposed. Lockett v. Ohio, 438 U.S. 586, 604 (1978). In addition, the recommendation by a jury of a life or death sentence is crucial in the sentencing process and its decision must be given great weight. Grossman v. State, 528 So.2d 833, 839 n.1, 845 (Fla. 1988).

Appellant recognizes that this Court has previously rejected arguments challenging the impositions of death sentences based on bare majority jury recommendations. See, Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990). However, in

⁸Appellant adopts and incorporates by reference all argument raised in Appellant's Motion to Declare Death Penalty Unconstitutional as applied to CCP found in Volume I, pp 146-60) of the record on appeal.

deciding death penalty cases, the U.S. Supreme Court has expressed great concern over death penalties imposed by a bare majority. In Johnson v. Louisiana, 406 U.S. 356, 366 (1972), Justice Blackman in his concurring opinion stated that a seven-to-five standard would cause him "great difficulty".

The danger of such a slim recommendation for death, in light of the numerous errors already presented throughout the course of trial, is heightened because each of the seven jurors could have found a different aggravated factor. After all, unless a capital jury finds that at least one aggravating circumstance has been proven beyond a reasonable doubt, a death sentence is not even legally permissible. Thompson v. State, 565 So.2d 1311, 1318. In the Appellant's case, there has been the imposition of a death sentence even where five of the twelve jurors found that no aggravating factors were proved beyond a reasonable doubt. This realization makes it clear that the death sentencing scheme under which the Defendant was ordered to die is constitutionally infirm and in violation of Amendments of Five, Six, Eight, and Fourteen of the United States Constitution and Article I, Sections 2, 9, 16, 17, 21, and 22 of the Florida Constitution.

POINT IX

FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 17, AND THE U.S. CONSTITUTION, AMENDMENTS VIII AND XIV.

A. Lack of Adequate Appellate Review

Florida's death penalty statute, Section 921.141, F.S., is unconstitutional because in operation it does not permit sufficient review. In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the United States Supreme Court upheld Florida's capital punishment scheme. Crucial to the plurality decision was the finding that Florida law required a heightened level of appellate review:

The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. See §921.141(4) (Supp. 1976-1977). The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is possible. The Supreme Court of Florida like its Georgia counterpart considers its function to be to "[guarantee] that the aggravating and mitigating reasons present in one case will reach a similar result to that reached under similar circumstances in another case. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." State v. Dixon, 283 So.2d 1, 10 (1973).

428 U.S. at 250-251.

The Florida capital sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk of the contrary exists, it is minimized by Florida's appellate review system,

under which the evidence of the aggravating and mitigating circumstances is reviewed and weighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So.2d 481, (Fla. 1979).

Id. 252-53.

Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases. Nonetheless the petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of

rationality and consistency.

Id. 258-59.

Appellant argues that the circumstances underlying the Proffitt decision are no longer true. The intractable ambiguities in the statute have prevented the evenhanded application of appellate review and the independent reweighing process envisioned in Proffitt.

1. LACK OF CONSISTENCY IN WRITTEN FINDINGS
REGARDING MITIGATING CIRCUMSTANCES.

Precise written findings by the trial court are necessary to the system of appellate review required by Proffitt since "the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible" Id. 250-251. However, the history of the administration of this requirement has been so haphazard as to violate the very intent of strict appellate review.

It was not until 1990 that the Supreme Court required specific findings of fact regarding mitigating evidence. Furthermore, the administration of the requirement of factual findings regarding aggravating circumstances has been arbitrary and inconsistent. In June, 1990, the Florida Supreme Court first required that the trial court make explicit findings regarding the mitigating circumstances. Campbell v. State, 571 So.2d 415

(Fla. 1990) (the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant). However, in Floyd v. State, 569 So.2d 1225 (Fla. 1990), the court upheld a sentencing order in which the trial judge said only the following about the mitigating evidence: "...this Court heard everything at the sentencing hearing that the Defendant chose to present. This Court now finds that sufficient mitigating circumstances which would require a lesser penalty do not exist." Hence, it appears that the Campbell requirement of specific written findings, which enables proper appellate review as mandated by Proffitt, has been overruled or can be ignored by the trial courts. Thus, today's application of the death penalty statute in Florida fails to meet high standards of consistency set forth by the U.S. Supreme Court in Proffitt, thereby resulting in the arbitrary and capricious application of the statute. Furthermore, the failure to require such findings in the hundreds of pre-Campbell cases renders proportionality review arbitrary and capricious. In its application, section 921.141 violates Proffitt and it is therefore unconstitutional.

The case law regarding rendition of the sentencing order is equally open to unacceptable levels of inconsistency. It was not until Van Royal v. State, 497 So.2d 625 (Fla. 1986) that this court imposed a requirement that the findings of the trial court be made concurrently with the imposition of sentence in the findings of the trial courts. As Justice Ehrlich noted in his concurring opinion, there can be no meaningful weighing

process unless rendition of the order is concurrent with imposition of the death sentence. Id. at 630. Van Royal, however, was thereafter strictly limited to its facts and the court continued to uphold death sentences even where the sentencing order was not rendered until months after sentencing.

It was not until Grossman v. State, 525 So.2d 833, 841 (Fla. 1988) that the court ordered that the sentencing order be rendered at the time of sentencing. And it was not until two years later, in Bouie v. State, 559 So.2d 1113 (Fla. 1990), that a death sentence was actually reversed for inadequacy of the trial court's findings. Due to the inconsistencies in the concurrency requirement, the manner in which the death penalty is imposed in Florida violates the prohibition against the arbitrary and capricious rendered in Proffitt.

Finally, Proffitt contemplated appellate review in which the trial court would make specific findings regarding the aggravating circumstances and the Supreme Court would review the record to determine whether such findings were supported by the record. Unfortunately, appellate review has not operated in this way. An illustration of how appellate review has actually been appellate review can be found in Mason v. State, 438 So.2d 374 (Fla. 1983), cert. den., 465 U.S. 1051 (1984). In Mason, the trial court made the specific finding of an aggravating circumstance because the killer "had to lift his arm up and come down deliberately and with great force." See J. Kennedy, *Florida's "'Cold, Calculated and Premeditated'" Aggravating*

Circumstance in Death Penalty Cases", XVII Stetson L. Rev. 47, 72 (1987), citing Mason v. State, 438 So.2d at 374. Instead of reviewing the propriety of aggravator as supported by the evidence presented to the trial court, this Court substituted its own finding: "The record shows that appellant broke into Mrs. Chapman's home, armed himself in her kitchen, and attacked her as she lay sleeping in bed. Nothing indicates that she provoked the attack in any way or that appellant had any reason for committing the murder. There was sufficient evidence for the trial court to find this circumstance applicable." Mason v. State, 438 So.2d at 379. This Court's substitution of its own aggravating circumstances, rather than the appropriate review of the trial court's findings, violates the consistency requirement of Proffitt and results in an unconstitutionally impermissible and capricious manner of review.

2. FLORIDA DEATH PENALTY STATUTE UNCONSTITUTIONALLY APPLIES A DEFERENCE STANDARD ON REVIEW OF QUESTIONS OF LAW AND MIXED QUESTIONS OF FACT AND LAW

The Florida appellate system has an unconstitutional presumption in favor of the State on questions of law. Properly, questions of law and mixed questions of law and fact should be subject to *de novo* appellate review. See Gibbs v. Air Canada, 810 F.2d 1529, 1532, (11th Cir. 1987) *reh. denied* 816 F.2d 688 (table) (proper to apply *de novo* standard of review on questions of law) and Smith v. Wainwright, 777 F. 2d 609, 615-616 (11th Cir. 1985) (mixed questions of law and fact require

de novo review).

Florida appellate review in capital cases has not complied with these requirements and therefore violates the Due Process and Cruel and Unusual Punishment Clauses of the State and Federal Constitutions. Although the Florida Supreme Court has sometimes engaged in *de novo* review of questions of law or of mixed questions of law and fact it has at other times used a highly deferential standard of review. See Potter v. State, 429 So.2d 293,296 (Fla. 1983), *cert. den.*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983) (deference to trial court's failure to find apparently un rebutted mitigation), Johnson v. State, 520 So.2d 565,566 (Fla. 1988), Sochor v. State, 580 So.2d 595 (Fla. 1991).

From the foregoing, either Florida has an illegal presumption of correctness with respect to questions of law or mixed questions of fact and law, or appellate review is conducted in an arbitrary and inconsistent manner contrary to the requirements of Proffitt and of the Constitution. Further, the presumption of correctness on such issues is contrary to the constitutional and statutory requirement of strict construction of penal laws.

3. FLORIDA'S FAILURE TO APPLY A "STRICT CONSTRUCTION"
STANDARD OF REVIEW OF AGGRAVATING CIRCUMSTANCES
RENDERS THE DEATH PENALTY UNCONSTITUTIONAL.

The failure to apply the due process requirement of strict construction is most apparent with regard to aggravating circumstances. A death penalty statute is unconstitutional if

it has "standards so vague that they would fail adequately to channel the sentencing decision patters of juries with the result that a pattern of arbitrary and capricious sentencing" could occur. Godfrey v. Georgia, 446 U.S., 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Potter v. State, 564 So.2d 1060, 1063-64 (Fla. 1990), Lowenfield v. Phelps, 108 S.Ct. 546, 554 (1988).

Section 775.021(1), Fla. Stat., sets out the rule for construing provisions of the Florida Criminal Code:

The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This principle of strict construction is not merely a maxim of statutory interpretation. It is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (rule "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "plainly and unmistakably" proscribed. [Cit. Omitted]). This principle of strict

construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). It applies to Florida capital proceedings. Trotter v. State, 576 So.2d 691, 694 (Fla. 1990) (sentence of imprisonment aggravating circumstance).

Cases construing our aggravating factors have not complied with this principle. For instance, attempts at construction have led to contrary results as to the "cold, calculated and premeditated" (CCP) and "heinous, atrocious, or cruel" (HAC) circumstances making them unconstitutional because they do not rationally narrow the class of death eligible persons, or channel discretion as required by, e.g., Lowenfeld v. Phelps, 108 S.Ct. 546, 554-55 (1988). The aggravating circumstances mean pretty much what one wants them to mean, so that the statute is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

As to CCP, compare Herring with Rogers v. State, 511 So.2d 526 (Fla. 1987) (overruling Herring), with Swafford v. State, 533 So.2d 270 (Fla. 1988) (resurrecting Herring), with Schafer v. State, 537 So.2d 988 (Fla. 1989) (reinterring Herring). Compare also Provenzano v. State, 497 So.2d 1177, 1183 (Fla. 1986) ("Heightened premeditation necessary for this circumstance does not have to be directed toward the specific victim." CCP applied to lulling of bailiff who came out of courtroom while defendant was trying to kill two

police officers), with Amoros v. State, 531 So.2d 1256 (Fla. 1988) (CCP improperly applied to killing of woman present when defendant sought to kill girlfriend).

As to HAC, compare Raulerson v. State, 358 So.2d 826 (Fla. 1978) (finding HAC), with Raulerson v. State, 420 So.2d 567 (Fla. 1982) (rejecting HAC on same facts). Compare also Mills v. State, 476 So.2d 172, 178 (Fla. 1985) (focus is on "intent and method" of defendant) with Pope v. State, 441 So.2d 1073, 1078 (Fla. 1984) ("nor is the defendant's mind-set ever at issue").⁹ Compare also Herzog v. State, 439 So.2d 1372 (Fla. 1983) (HAC rejected where decedent semi-conscious), with Jennings v. State, 453 So.2d 1109 1115 (Fla. 1984), vacated 470 U.S. 1002, *rev'd on other grounds*, 473 So.2d 204 (1985) (HAC applied where decedent unconscious). Compare Brown v. State, 526 So.2d 903 (Fla. 1988) (HAC rejected where police officer beaten and killed during struggle for gun and must have known she was fighting for her life), with Grossman v. State, 525 So.2d 833 (Fla. 1988) (HAC applied where police officer beaten and killed during struggle for gun and must have known she was fighting for her life).

Similarly, the "great risk of death to many persons" factor has been inconsistently applied and construed. Compare King v. State, 390 So.2d 315, 320 (Fla. 1980) (circumstance

⁹In Stano v. State, 460 So.2d 890 (Fla. 1985), the court refused to apply Pope retroactively. This result scarcely promotes the evenhanded application of the death penalty required by Proffitt.

found where defendant set house on fire; defendant could have "reasonably foreseen" that the fire would pose a great risk) with King v. State, 514 So.2d 354 (Fla. 1987) (rejecting circumstance on same facts) with White v. State, 403 So.2d 331,337 (Fla. 1981) (factor could not be applied "for what might have occurred," but must rest on "what in fact occurred").

The "prior violent felony" circumstance has been broadly construed in violation of the rule of lenity. A strict construction in favor of the accused would be that the circumstance should apply only where the prior felony conviction (or at least the prior felony) occurred before the killing. The cases have instead adopted a construction favorable to the state, ruling that the factor applies even to contemporaneous violent felonies. See Lucas v. State, 376 So.2d 1149 (Fla. 1979).

The "under sentence of imprisonment" factor has similarly been construed in violation of the rule of lenity. It has been applied to persons who had been released from prison on parole. See Aldridge v. State, 351 So.2d 942 (Fla. 1977). It has been indicated that it applies to persons in jail as a condition of probation (and therefore not "prisoners" in the strict sense of the term). See Peek v. State, 395 So.2d 492, 499 (Fla. 1981).

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

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

From the foregoing, Florida's appellate review does not fulfill the requirements of Proffitt of strict appellate review so that the death penalty is reserved only for the worst homicides.

4. REWEIGHING.

As already noted, Proffitt calls for appellate reweighing of the aggravating and sentencing evidence and factors. 428 U.S. at 252-253 ("the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida"). However, a decision by this Court appears to leave such matters to the trial court. See Smith v. State, 407 So.2d 894, 901 (Fla. 1981) ("the decision of whether a particular mitigating circumstance in sentencing is proven and the weight to be given it rest with the judge and jury") and Atkins v. State, 497 So.2d 1200 (Fla. 1986).

5. LACK OF SPECIAL VERDICTS.

Florida law does not require special verdicts as to the theory of guilt or as to sentencing circumstances. Hence, the appellate court is in no position to know what aggravating and mitigating circumstances the jury found. Worse yet, it does not

know whether the jury acquitted the defendant of felony murder or murder by premeditated design so that a finding of the felony murder or premeditation factor would violate double jeopardy under Delap v. Dugger, 890 F. 2d 285,306-319 (11th Cir. 1989). This necessarily leads to double jeopardy and collateral estoppel problems where the jury has rejected an aggravating factor but the trial court nevertheless finds it. It also ensures uncertainty in the fact finding process in violation of the eighth amendment.

Our law in effect makes the aggravating circumstances elements of the crime so as to make the defendant death eligible. Hence, the lack of a unanimous jury verdict as to any aggravating circumstance violates Article I, Sections 9, 16, and 17 of the State Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution.

6. TECHNICALITIES AS BARS TO APPELLATE REVIEW:
THE CONTEMPORANEOUS OBJECTION RULE.

Proffitt contains the notion of consistency in resolution of the merits of issues on appeal. In keeping with the principle of full appellate review in capital cases, the general rule around the country is in favor of limiting the use of technical obstacles to appellate review in capital cases. Florida, however, has fostered the application of the contemporaneous objection rules and other procedural obstacles to appellate review, although this policy has not

been without inconsistency, as shown by recent decisions.¹⁰

In Floyd v. State, 569 So.2d 1225 (Fla. 1990), the court held that the trial court erred by refusing to grant the defense's cause challenge to a juror named Hendry, but then wrote:

However, our inquiry does not end there. Although the trial court erred in failing to excuse Hendry for cause, reversal is warranted under our case law only if Floyd exhausted his peremptory challenges, requested additional peremptories, and had that request denied by the trial court. See Hamilton v. State, 547 So.2d 630 (Fla. 198)]; Moore v. State, 525 So.2d 870 (Fla. 1988)]; Hill v. State, 477 So.2d 553 Fla. 1985)]. Although Floyd used a peremptory to remove juror Hendry, and he exhausted his peremptory challenges, he failed to request any additional peremptories to replace the one used to excuse juror Hendry. Nor did he show that a juror unacceptable to him served on the jury. Thus, Floyd failed to preserve his position for appeal. Reilly v. State, 557 So.2d 1365, 1367 (Fla. 1990); Hill, 477 So.2d at 556; Young v. State, 234 So.2d 341,348-49 (Fla. 1970), *receded from on other grounds*, State v. Retherford, 270 So.2d 363 (Fla. 1972), *cert. den.*, 412 U.S. 953 (1973); Rollins v. State, 148 So.2d 274, 276 (Fla. 1963).

569 So.2d at 1230. The obvious teaching of Floyd and prior

¹⁰ Florida actually has several codified contemporaneous objection rules. The ones that usually apply to criminal cases are section 90.104, Florida Statutes (pertaining to evidentiary objections), and rule 3.390 (d) and (e), Florida Rules of Criminal procedure (pertaining to jury instructions). Various other rules and statutes (such as Fla.R.Crim. P. 3.600, (pertaining to motions for new trial), and Fla. R.Jud.Adm. 2.070, (pertaining to recording of court proceedings), and Section 90.107, Florida Statutes (pertaining to limiting instructions) also bear on preservation issues, as does a confused and sometimes contradictory body of ever-evolving case law.

cases is that, to preserve such an issue for appeal, one must exhaust one's peremptories, request additional peremptories, and have that request denied by the trial court.

But when Melvin Trotter's attorney did exactly that in his capital trial the supreme court held that the issue was not preserved for review:

Trotter raises eight points on appeal. He first contends that the trial court erred in refusing to excuse four prospective jurors for cause, thus forcing the defense to expend peremptory challenges in removing them. He argues that because he eventually exhausted his peremptory challenges and was denied an additional one, reversal is required under state and federal law. We disagree. Under federal law, the defendant must show that a biased juror was seated. Ross v. Oklahoma, 108 S.Ct. 2273 (1988). Trotter has made no such claim. Under Florida law, "[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." Pentecost v. State, 545 So.2d 861,863 n. 1 (Fla. 1989). By this we mean the following: Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory

challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted. The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial. In the present case, after exhausting his peremptory challenges, Trotter failed to object to any venire person who ultimately was seated.

Trotter v. State, 576 So.2d 691,692-693 (Fla. 1990).

The purpose of the contemporaneous objection rule is to prevent the defense from raising for the first time on appeal matters that were not presented to the trial court. Castor v. State, 365 So.2d 701 (Fla. 1978).¹¹ It would seem that this

¹¹ In Castor, defense counsel did not object to an incomplete re-instruction to the jury on manslaughter. The court wrote at page 703:

As a general matter, a reviewing court will not consider points raised for the first time on appeal. Dormin v. State, 314 So. 2d 134 (Fla. 1975). Where the alleged error is giving or

purpose would be satisfied where the trial court directly rules on the merits of the issue advanced on appeal. But in Nixon v. State, 572 So.2d 1336 (Fla. 1990), the court held unpreserved an issue directly ruled on by the trial court. At the end of the prosecutor's argument to the jury in the guilt phase of his trial, the defendant's attorney moved for a mistrial arguing that the prosecutor had made an improper "Golden Rule" argument, noting that "at this time to instruct the jury to disregard it would be to no avail."¹² Although defense counsel

failing to give a particular jury instruction, we have invariably required the assertion of a timely objection. Febre v. State, 158 Fla. 853, 30 So.2d 367 (1947); see Williams v. State, 285 So.2d 13 (Fla. 1973). The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal. See Rivers v. State, 307 So.2d 826 (Fla. 1st DCA), *cert. den.*, 316 So.2d 382 (Fla. 1975); York v. Rivers v. State, 307 So.2d 826 (Fla. 1st DCA), *cert. den.*, 316 So.2d 382 (Fla. 1975); York v. State, 232 So.2d 767 (Fla. 4th DCA 1969).

¹²

A "Golden Rule" argument is one that invites jurors to imagine themselves in the place of one of the parties (or, in a criminal case, in the place of the victim). Joan W. v. City of Chicago, 771 F.2d 1020, 1022 (7th Cir. 1985) (such

had made no objection at the time of the challenged remark, the trial court treated the motion as an objection and ruled that the prosecutor's argument was not improper. On appeal, Mr. Nixon argued that counsel's motion for mistrial preserved the issue for appeal under State v. Cumbie, 380 So.2d 1031 (Fla. 1980).¹³ Rejecting this argument, the court wrote:

argument "has been universally condemned by the courts"). In Nixon, the prosecutor, in a somewhat confused discussion of his role in the litigation and of the emotions generated by the facts of the case, told the jury that he had "an obligation to make you feel just a little bit, just a little bit, of what [the decedent] felt because, otherwise, sometimes I think it's easy to forget that." 572 So.2d at 1340.

¹³In State v. Cumbie the court ruled that a motion for mistrial made after the jury retired to deliberate did not preserve for appeal an issue of improper prosecutorial argument, writing at pages 1033-1034:

Clark requires that a motion for mistrial be made "at the time the improper comment is made." In the present case, to have met this requirement, we hold that it would have been sufficient if Cumbie had moved for mistrial at some point during closing argument or, at the latest, at the conclusion of the prosecutor's closing argument. To avoid interruption in the continuity of the closing argument and more particularly to afford defendant [sic] an opportunity to evaluate the prejudicial nature of the objectionable comments in the context of the total closing argument, we do not impose a strict rule requiring that a motion for mistrial be made in the next breath following the objection to the remark. Here, Cumbie objected to the prosecutor's comment, and the trial court sustained the objection and instructed the jury to disregard this remark. If Cumbie felt that the judge's admonition was inadequate, he should have informed the judge of this fact at the time of his objection or, at the latest, at the end of the prosecutor's closing

We do not construe Cumbe to obviate the need for a contemporaneous objection. The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system. A contemporaneous objection puts the judge on notice that an error may have been committed and provides the opportunity to correct the error at an early stage of the proceedings. Castor v. State, 365 So.2d 701,703 (Fla. 1978). While the motion for mistrial may be made as late as the end of the closing argument, a timely objection must be made in order to allow curative instructions or admonishment to counsel. As noted by defense counsel in this case, in many instances a curative instruction at the end of closing argument would be of no avail. Accordingly, defense counsel's motion for mistrial at the end of closing argument, absent a contemporaneous objection, was insufficient to preserve this claim under our decision in Cumbe. Even if the issue were properly preserved, we agree with the trial court that taken in context the comments complained of did not amount to a Golden Rule argument.

The court's reliance on Castor requires further analysis, since Castor merely stands for the proposition that one cannot raise on appeal arguments that one did not make in the trial court. It would seem that one would be in compliance with Castor where the trial court rules on the merits of one's objection. In Nixon, the trial judge did rule on the merits and found the prosecutor's argument unobjectionable. Given this ruling, there is no likelihood that the trial court would have

argument. The judge then may have been able to give additional curative instructions which may have remedied Cumbe's objection. The motion for mistrial in the present case, made after jury instructions and retirement of the jury for deliberation, however, came too late to preserve Cumbe's objection for appeal.

corrected the matter by giving a curative instruction, so that a request for such an instruction would have been useless under Simpson v. State, 418 So.2d 984 (Fla. 1982). Thus the underlying premise of Nixon (that the trial court was not afforded the opportunity to remedy the situation) is invalid since the trial court would not have remedied the situation.

In Nixon the court made no mention of the fact that a month earlier, in Occhicone v. State, 570 So.2d 902 (Fla. 1990), it had not found a procedural bar where the trial court had refused to rule on the merits of an issue on the ground of procedural default. At Occhicone's trial, the state introduced evidence that he had been uncooperative when a deputy had tried to swab his hands for an atomic absorption test. The trial court denied counsel's objection to this testimony as untimely because counsel had not objected at a previous bench conference concerning the deputy's testimony. Defense counsel subsequently objected when the prosecutor referred to the testimony in final argument. Without addressing the apparent procedural bar, the court directly reached the merits and held the prosecutor's argument proper.

From the foregoing, Florida has not given the full appellate review in capital cases required by Proffitt and by {}921.141, Fla. Stat.

7. INADEQUACY OF APPELLATE COUNSEL.

Florida law has no minimum requirements for the adequacy of appellate counsel in appellate cases. The result is that the Supreme Court itself has decried the lack of competent attorneys handling capital appeals. See Cave v. State, 476 So.2d 180, 183, n. 1 (Fla. 1985). See also Rose v. Dugger, 508 So.2d 321,325 (Fla. 1987) (appellate counsel "has either not clearly read the record or has not accurately presented its contents to this Court") and Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984) (counsel acted under actual conflict of interest in 1977 appeal, to appellant's detriment). Obviously, the systemic lack of adequate counsel renders appellate review meaningless.

8. PROPORTIONALITY REVIEW.

In Proffitt, the Supreme Court emphasized the importance of proportionality review as a means of limiting arbitrary application of the death penalty in Florida. The Florida Supreme Court has not adopted a precise procedure for the conduct of proportionality review, and its cases are sometimes difficult to reconcile with one another, as shown by the cases of Fitzpatrick and Hitchcock.

In Fitzpatrick v. State, 527 So.2d 809, 812 (Fla. 1988), the court reversed Mr. Fitzpatrick's death sentence where the trial judge had followed a jury recommendation of death. The court specifically wrote that it was reweighing aggravating and mitigating circumstances, and that it was reversing solely

because:

We believe that in comparison to other cases involving the imposition of the death penalty, this punishment is unwarranted in this case. See Ferr v. State, 507 So.2d 1373 (Fla. 1987)

Ferr and involved a life verdict. Hence, one would safely assume from Fitzpatrick that one could rely on life verdict cases in making a proportionality argument. But in Hitchcock v. State, 578 So.2d 685,693 (Fla. 1990), the Supreme Court disapproved of reliance on life verdict cases in making a proportionality argument:

We also disagree with Hitchcock's claim that his death sentence is disproportionate. The court conscientiously weighed the aggravating circumstances against the mitigating evidence and concluded that death was warranted. The cases Hitchcock relies on are distinguishable, being primarily jury override cases, e.g., Holsworth v. State, 522 So.2d 348 (Fla. 1988), e.g., Garron v. State, 528 So.2d 353 (Fla. 1988); Wilson v. State, 493 So.2d 1019 (Fla. 1986), and cases with few valid aggravating circumstances and considerable mitigating evidence, e.g., Songer v. State, 544 So.2d 1010 (Fla. 1989). On the circumstances of this case, and in comparison with other cases, we find Hitchcock's sentence of death proportionate to his crime.

B. SECTION 921.121, FLORIDA STATUTES IS UNCONSTITUTIONAL BECAUSE IT PRECLUDES CONSIDERATION OF MITIGATION BY IMPOSING IMPROPER BURDENS OF PROOF.

Section 921.121, Florida Statutes is unconstitutional because it precludes consideration of mitigation by imposing improper burdens of proof. The standard jury instructions written by the court require Appellant to present proof to reasonably convince the jury of a mitigating factor. This court imposed burden is not part of the

Section 921.141, Florida Statutes, and is unconstitutional.¹⁴

A strict construction of this statute would impose no burden on the defense respecting mitigation. By requiring the standard of presentation in Campbell, the Court has transcended the separation of powers, in violation of Article II, Section 3 of the Florida Constitution. The Campbell requirement also contradicts the U.S. Supreme Court ruling in Skipper v. North Carolina, 106 S.Ct. 1669, 1671 (1989), requiring that the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. If the defendant can not meet the burden of proof, then this burden impermissibly excludes evidence that can be considered in mitigation.

The "reasonably convincing" standard is also impermissibly preclusive, since much mitigating evidence does not lend itself to quantification under this standard. See Mills v. Maryland, 108 S.Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393. (1987). Thus, by imposing a standard on Appellate to prove his mitigation beyond a "reasonably convincing standard", Florida's death penalty is in violation of the Fifth, Sixth, Eighth, and Fourteen Amendment, U.S. Constitution, and Article I, Sections 9, 16, 17, 21, and 22 of the Florida Constitution.

C. SECTION 921.141, FLORIDA STATUTES, IS UNCONSTITUTIONAL

¹⁴In a footnote in Campbell v. State, 571 So.2d 415, 419 (Fla. 1990) (footnote citation omitted), this court held that the defendant must reasonably establish each mitigator by the evidence presented.

BECAUSE IT DOES NOT GIVE PROPER GUIDANCE IN THE FINDING OF SENTENCING
CIRCUMSTANCES.

Appellant adopts the motion and argument on this issue and its
entirety found in Volume I, pp. 131-44 of the record on appeal.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests that the Court reverse Appellant's conviction and sentence and remand for a new trial; in the alternative, Appellant requests that his sentence be reduced to life imprisonment without parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail: Office of the Attorney General, Suite 700, 2002 N. Lois Avenue, Tampa, FL 33607 on this ____ day of _____, 2002.

Guillermo E. Gomez, Jr.

**CERTIFICATE OF FONT REQUIREMENTS OF
FLORIDA APPELLATE RULE 9.210**

I hereby certify that the size and style of type used in this computer-generated brief is Courier New 12 point font.

Guillermo E. Gomez, Jr.