

IN THE SUPREME COURT OF FLORIDA

CASE NO. 02-39

CHARLES GLOBE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR COLUMBIA COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of Mr. Globe's conviction for first-degree murder and sentence of death. The record on appeal will be referred to as "R[volume number]. [page

REQUEST FOR ORAL ARGUMENT

Mr. Globe has been sentenced to death. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Globe, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

PRELIMINARY STATEMENT .....	...
... i	
REQUEST FOR ORAL ARGUMENT .....	..
.. ii	
TABLE OF CONTENTS	iii-iv
iii-iv	
TABLE OF AUTHORITIES	v-x
v-x	
NATURE OF THE CASE .....	...
...1	
STATEMENT OF THE CASE .....	. 2-3
. 2-3	
STATEMENT OF THE FACTS .....	.4-15
.4-15	
SUMMARY OF THE ARGUMENT	16-19
16-19	
STANDARD OF REVIEW .....	. 20
. 20	
ARGUMENTS	
I. MR. GLOBE WAS CONVICTED OF PREMEDITATED FIRST-DEGREE MURDER AND SENTENCED TO DEATH ON THE BASIS OF ILLEGALLY AND UNCONSTITUTIONALLY OBTAINED STATEMENTS	21- 54

II.	THE ADMISSION OF CODEFENDANT BUSBY’S STATEMENTS VIOLATED MR. GLOBE’S CONFRONTATION RIGHTS AND THE FIFTH, SIXTH AND EIGHTH AMENDMENTS . . . . .	.55-58
III.	MR. GLOBE’S JURY WAS MISLED BY COMMENTS AND PENALTY PHASE INSTRUCTIONS WHICH VIOLATED CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985), AND RING V. ARIZONA, 122 S.CT. 2428 (2002)	59-62
IV.	FLORIDA’S CAPITAL SENTENCING PROCEDURE DEPRIVED MR. GLOBE OF HIS SIXTH AMENDMENT RIGHTS TO NOTICE AND TO A JURY TRIAL AND OF HIS RIGHT TO DUE PROCESS . . . . .	.63-77
V.	THE TRIAL COURT’S SENTENCING ORDER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS . . . . .	.78-82
VI.	THE TRIAL COURT ERRED IN GIVING THE PRINCIPAL INSTRUCTION . . . . .	.83-85
VII.	THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE . . . . .	.86-89
VIII.	THE TRIAL COURT ERRED BOTH LEGALLY AND FACTUALLY IN ITS EVALUATION OF MITIGATING FACTORS BY APPLYING IMPROPER LEGAL STANDARDS AND BY FAILING TO EXPLAIN ITS WEIGHING PROCESS . . . . .	.90-

94

CONCLUSION
...95

CERTIFICATE OF COMPLIANCE
. 95

CERTIFICATE OF SERVICE
..95

TABLE OF AUTHORITIES

	<u>Page</u>
Agan v. State, 445 So. 2d 326, 328 (Fla. 1983)	88
Allen v. United States, 2002 U.S. LEXIS 4893 (June 28, 2002)	71, 72
Almendarez-Torres v. United States, 523 U.S. 224 (1998)	76, 77
Anderson v. State, 420 So. 2d 574, 576 (Fla. 1982)	38
Apprendi v. New Jersey, 530 U.S. 466 (2000)	60, 61, 63, 64, 71
Arizona v. Fulminante, 499 U.S. 279, 296 (1991)	40
Art. I, § 17. Fla. Const.	87
Bertolotti v. State, 476 So.2d 130 (Fla. 1985)	79
Bottoson v. Moore, ___ So.2d ___, 2002 WL 31386790 (Fla. 2002) .61, 62, 74-77	
Brown v. Illinois, 422 U.S. 590, 603-04 (1975)	32, 33
Brumbley v. State, 453 So.2d 381, 385 (Fla. 1984)	84
Bruton v. United States, 391 U.S. 123 (1968) (R25. 509)	55, 56, 57
Buford v. State, 570 So. 2d 923, 925 (Fla. 1990)	94
Caldwell v. Mississippi, 472 U.S. 320 (1985)	17, 59, 60, 61, 62, 69, 76
Campbell v. State, 571 So. 2d 415 (Fla. 1990)	90, 91, 94
Cannady v. State, 427 So. 2d 723 (Fla. 1983)	81, 92
Carter v. State, 560 So. 2d 1166 (Fla. 1990)	81, 92, 94

Chapman v. California, 386 U.S. 18 (1967)	49
Chavez v. State, 2002 WL 1065901 at 15 (Fla. 2002)	37, 38
Cheshire v. State, 568 So. 2d 908 (Fla. 1990)(citing Lockett)	81, 92
Cochran v. State, 547 So.2d 928 (Fla. 1989)	79
Colorado v. Connelly, 479 U.S. 157, 167-68 (1986)	35, 36
Combs v. State, 525 So. 2d 853, 859 (Fla. 1988)(Shaw, J., concurring)	66
Coney v. State, 653 So. 2d 1009, 1011 (Fla. 1995)	88
Cruz v. New York, 481 U.S. 220 (1987)	56, 57, 58
Deangelo v. State, 616 So. 2d 440, 443 (Fla. 1993)	86
DeJonge v. Oregon, 299 U.S. 353 (1937)	73
Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982)	90
Edwards v. Arizona, 451 U.S. 477, 482 (1981)	27
Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977)	78
Fare v. Michael C., 442 U.S. 707, 725 (1979)	35
Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995)	91, 94
Fla.Stat. § 775.082	65, 72
Fla.Stat. § 921.141(7)(b), F.S.A.	72, 81
Flanning v. State, 597 So. 2d 864, 867 (Fla. 3d DCA 1992), Jones v. State, 92 So.2d 261 (Fla. 1956)	67

Gore v. State, 599 So. 2d 978, 981 n.5 (Fla. 1992)	28
Grossman v. State, 525 So. 2d 833, 840 (Fla. 1988)	66
Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987)	94
Hitchcock v. Dugger, 481 U.S. 393, 394 (1987)	90
Hudson v. State, 708 So. 2d 256, 259-60 (Fla. 1998)	91, 93, 94
In re Winship, 397 U.S. 358 (1970)	70
Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990)	67
Jones v. United States, 526 U.S. 227 (1999)	70
Keen v. State, 504 So. 2d 396, 400 (Fla. 1987)	37, 38, 39
King v. Moore, ___ So.2d ___, 2002 WL 313386234 (Fla. 2002)	73, 74, 77
Kipp v. State, 668 So. 2d 214, 216 (Fla. 2d DCA 1996)	28, 32
Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993)	88
Lee v. Illinois, 476 U.S. 530, 543 (1986)	56, 57
Lockett v. Ohio, 438 U.S. 586 (1978)	80, 92
Lusk v. State, 446 So. 2d 1038, 1042 (Fla. 1984)	88
Mansfield v. State, 758 So.2d 636, 647 (Fla. 2000)	86
Marshall v. State, 604 So. 2d 799, 802 (Fla. 1992)	88
Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988)	79

McCampbell v. State, 421 So. 2d 1072 (Fla. 1982)	79
Merck v. State, 763 So. 2d 295, 298 (Fla. 2000)	91, 92, 93, 94
Michigan v. Mosley, 423 U.S. 96, 104 (1975)	28, 29, 32
Miller v. State, 373 So. 2d 882 (Fla. 1979)	79
Miranda v. Arizona, 384 U.S. 436 (1966)	27, 28, 29, 31, 32, 33, 34
Moran v. Burbine, 475 U.S. 412, 421 (1986), quoting Miranda, 384 U.S. at 444	34, 35
Morton v. State, 789 So. 2d 324, 333 (Fla. 2001)	66
Mullaney v. Wilbur, 421 U.S. 684, 698 (1975)	70
Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990)	91
Nye and Nissen v. United States, 336 U.S. 613 (1949)	84
Ohio v. Roberts, 448 U.S. 56, 66 (1980)	56
Oregon v. Elstad, 470 U.S. 298 (1985)	31, 32, 34
Parker v. Dugger, 498 U.S. 308 (1991)	90
Penry v. Lynaugh, 492 U.S. 302 (1989)	81, 82, 93
Peoples v. State, 612 So. 2d 555, 556 (Fla. 1992), quoting Traylor v. State, 596 So. 2d 957, 970 (Fla. 1992)	39
Pope v. State, 441 So.2d 1073 (Fla. 1983)	79
Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)	87
Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) ..	79

Quince v. State, 414 So.2d 185 (Fla. 1982)	79
Ramirez v. State, 739 So. 2d 568, 575 (Fla. 1999)	32, 34, 36, 38
Ray v. State, 755 So. 2d 604, 611 (Fla. 2000)	86
Rhode Island v. Innis, 446 U.S. 291 (1980)	29
Ring v. Arizona, 122 S. Ct. 2428 (2002)	17, 18, 59, 60, 62-65, 68, 71, 74-77
Robinson v. State, 520 So.2d 1, 6 (Fla. 1988)	79
Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987)	90
Rule 3.130, Fla. R. Crim, P.	36, 37
Rule 9.030(a)(1)(A)(i), Fl. R. App. P.	1
Section 921.141, Fla. Stat.	65, 67, 68, 81
Skipper v. South Carolina, 476 U.S. 1, 2 (1986)	90
Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997) (citing Terry, 668 So. 2d at 965)	88
State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986)	40, 49
State v. Dixon, 283 So. 2d 1 (Fla. 1973)	81
State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973)	92
State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973)	86, 92
State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973)	66
State v. Dye, 346 So. 2d 538, 541 (Fla. 1977)	72

State v. Gray, 435 So. 2d 816, 818 (Fla. 1983)	72
State v. Overfelt, 457 So. 2d 1385, 1387 (Fla. 1984)	67
State v. Perkins, 760 So. 2d 85, 88 (Fla. 2000), quoting Wong Sun v. United States, 371 U.S. at 487-88	30, 32
Sullivan v. Louisiana, 508 U.S. 275 (1993)	18, 62, 68, 70
Terry v. State, 668 So. 2d. 954, 965 (Fla.1996)	87, 88
Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994)	67
Thornhill v. Alabama, 310 U.S. 88 (1940)	73
Tillman v. State, 591 So. 2d 167 (Fla. 1991)	87
Trawick v. State, 473 So. 2d 1235 (Fla. 1985), cert. denied, 476 U.S. 1143 (1986)	79
United States v. Allen, 247 F.3d 741 (8th Cir. 2001)	71
Walker v. State, 707 So. 2d 300, 319 (Fla. 1997)	91, 93, 94
Walton v. Arizona, 497 U.S. 639 (1990)	63
Williamson v. State, 511 So. 2d 289, 291 (Fla. 1987)	88
Wong Sun v. United States, 371 U.S. 471 (1963)	30
Woodson v. North Carolina, 428 U.S. 280 (1976)	79
Yates v. Evatt, 111 S. Ct. 1884 (1991)	49, 50

(1) Nature of the case.

This is a direct appeal from a circuit court imposition of the death sentence after Mr. Globe was convicted of the first degree murder of Elton Ard. This Court has jurisdiction. Rule 9.030(a)(1)(A)(i), Fl. R. App. P.

STATEMENT OF THE CASE

(2) Course of proceedings and deposition in the lower tribunal.

Mr. Globe was charged by indictment with first-degree murder in the Third Judicial Circuit, Columbia County, Florida (R1. 1). Mr. Globe pled not guilty and requested a jury trial.

Trial began on September 10, 2001. On September 11, 2001, the jury found Mr. Globe guilty of premeditated first-degree murder (R11. 2084). On September 14, 2001, after a penalty phase, the jury recommended a death sentence by a vote of 9 to 3 (R11. 2159).

The defense and prosecution submitted sentencing memoranda (R12. 2375-2394; R12. 2395-R13. 2416). The court held a sentencing hearing on September 24, 2001 (R30). On October 11, 2001, the court entered an order sentencing Mr. Globe to death (R13. 2424-2436). The court found four aggravating circumstances: (1) prior conviction of a felony and under sentence of imprisonment; (2) prior conviction of a felony involving the use or threat of violence; (3) heinous, atrocious or cruel; and (4) cold, calculated and premeditated (R13. 2424-2428). The court found no statutory mitigating circumstances and eleven nonstatutory mitigating circumstances, giving those circumstances “little” or “slight” weight (R13. 2429-33).

Mr. Globe timely filed a notice of appeal (R13. 2440). This appeal follows.

(3) STATEMENT OF THE FACTS

At about 9:00 a.m. on July 3, 2000, Charles Globe and Andrew Busby were discovered in cell 212 of Quad Four of F-dorm in Columbia Correctional Institution

with Elton Ard, who appeared to be dead (R26. 574-76). Although the cell was supposed to be unlocked at that time of day, the cell door was locked (R26. 574-75). Only Busby and Ard were supposed to be in the cell (R26. 575).

Mr. Globe and Busby were sitting in the cell smoking cigarettes (R26. 575). Ard had a cigarette in his mouth (R26. 576). Mr. Globe and Busby were removed from the cell (R26. 576). Mr. Ard had no vital signs (R26. 587).

The medical examiner determined that Mr. Ard had nine areas of injury on his body, including abrasions and lacerations on his forehead, a swollen and discolored right eye, abrasions on his chin and jaw, and a long prominent abrasion on the front and sides of his neck (R26. 552-53). The bruises and abrasions occurred before Mr. Ard's death (R26. 567). A cord or piece of rope was tied around his left wrist (R26. 554). The cause of Mr. Ard's death was strangulation (R26. 555). The medical examiner characterized the long abrasion on Mr. Ard's neck as a "ligature impression" (R26. 557). There was one linear injury on Mr. Ard's neck which "is explained by one ligature being placed" (R26. 564-65).

Smaller abrasions in that area could have been caused by the perpetrator's fingernails or by Mr. Ard trying to remove the ligature (R26. 559). Mr. Ard's injuries were consistent with a scuffle or fight, and that fight occurred before Mr. Ard was strangled (R26. 569-70).

A crime laboratory analyst from the Florida Department of Law Enforcement (FDLE) collected evidence from cell 212 (R26. 591-93). A note taped to the cell's window said "Call F.D.L.E." (R26. 595). A note on the wall inside the cell said "Don't forget to look on the door" and had a smiley face drawn on it (R26. 597). Written on the inside of the cell door was "Remember Andy and K.D., 7-3-2000" (R26. 598).¹ To the left of "Andy" and to the right of "K.D.," were red stains which appeared to be fingerprint impressions in blood (R26. 598). "Andrew" was written on the left inside door jamb, and "K.D." was written on the right inside door jamb (R26. 599).² Around the door jamb and on the back of the toilet were other stains (R26. 599-600). Mr. Ard had a cigarette lighter in his left hand, a piece of torn sheet around his wrist and a cigarette in his mouth (R26. 602). An eyeglass wing was found behind the toilet (R26. 611). Busby had no apparent injuries to his

¹"K.D." is Mr. Globe.

²A forensic document examiner testified that Mr. Globe wrote "call F.D.L.E" and "remember Andy and K.D., 7-3-2000" (R27. 744, 746).

face or hands (R26. 612). Mr. Globe had abrasions below his sideburn, on his lip and on his right thumb (R26. 614-15).

On July 3, 2000, FDLE agent Gootee met with Mr. Globe, advised him of his rights and asked Mr. Globe if he wanted to talk (R25. 474). Mr. Globe replied, “[n]ot at this time” and said nothing else (Id.). Agent Gootee terminated the interview and passed this information on to FDLE agent Ugliano, who was the case agent (R25. 474-75).

Agent Ugliano testified that agent Gootee had attempted to interview Mr. Globe on July 3, 2000, and had told agent Ugliano what had occurred during that interview (R25. 476). About six hours later, agent Ugliano approached Mr. Globe about making a statement (R25. 476-77; R26. 698). Ugliano and Mr. Globe were standing outside the prison inspector’s office while Andrew Busby was inside the office (R25. 477). Ugliano asked Mr. Globe, “You are willing to make a statement?” and Mr. Globe said, “Yeah, if I can be with Andy [Busby]” (Id.). Both Mr. Globe and Busby then participated in an inculpatory taped statement (R25. 478). The tape was played for the jury (R26. 629-55).

Agent Ugliano went to talk to Mr. Globe again on July 7, 2000, because Ugliano had “some questions” (R25. 478). Ugliano advised Mr. Globe of his rights

and recorded an interview (Id.).³ The tape was played for the jury (R26. 659-68).

Mr. Globe was shackled and confined at about 9:00 a.m. on July 3 at Columbia Correctional Institution (R25. 491). After his statement that evening, Mr. Globe was moved to Florida State Prison, where confinement is more restrictive than confinement at Columbia (R25. 495). This move was a result of the incidents which occurred on July 3 (R25. 496). Between July 3 and July 7, there was no attempt to bring Mr. Globe before a judge (R25. 496). Counsel for Mr. Globe was appointed on September 7, 2000, and entered an appearance on September 8 (R1. 4, 6).

Agent Ugliano testified that on September 7, 2000, the date of Mr. Globe's arraignment, he and Mr. Globe were sitting outside the judge's office (R26. 694). Mr. Globe said: "It's stupid to have to go through all this bullshit. I know I am going to get the needle for killing him. I just don't give a shit. That's just the way it is. I just don't give a shit. You know what I am saying?" (R26. 694-95). Ugliano testified he said he could not talk to Mr. Globe because he had an attorney, and Mr. Globe replied, "Shit. We have already confessed to killing the dude. What's it matter?" (R26. 695).

³A more detailed account of how Mr. Globe's statements were obtained and the content of the statements is contained in Argument I.

Mr. Globe sent letters to three FDLE agents. Agent Schenck received a letter dated September 28, 2000 (R26. 670); agent Ugliano received a letter postmarked September 27, 2000 (R26. 690); agent Flournoy received a letter postmarked September 28, 2000 (R26. 692). A latent print examiner testified that Mr. Globe's fingerprints were on the three letters (R27. 722). A forensic document examiner testified that Mr. Globe wrote the letters (R27. 746). All three letters were read to the jury (R27. 748-61).⁴

At the penalty phase, the State presented evidence that Mr. Globe was in prison for two counts of sexual battery, kidnapping and robbery for which he had received three life sentences and one 30-year sentence (R29. 851, 853). The State also presented evidence that Mr. Globe was convicted of robbery in Illinois in 1983 (R29. 852).

In the defense case, Perkins testified by deposition that he was in prison with Mr. Globe, who was homosexual and "mostly a quiet guy" (R29. 855). Mr. Globe was the dominant person in the relationship with Busby and Mr. Globe was "real possessive" of Busby (R29. 856). Mr. Globe would get upset if other inmates talked to Busby (R29. 856-57). Mr. Globe was a decent friend, sharing his coffee and cigarettes with Perkins (R29. 859). Perkins never saw Mr. Globe treat other

⁴The contents of the letters are detailed in Argument I.

inmates badly (R29, 859).

William Wright, a volunteer prison minister who testified by videotape, met Mr. Globe in October 2000 and had seen him about 24 times (R29. 864). Mr. Globe had changed in that time period (R29. 865). When they first met, Mr. Globe told Wright that he should feel remorse about killing Ard, but was bothered because he did not feel anything (R29. 865). However, that changed in May, when Mr. Globe said “he did feel remorse. He felt sorry for [Mr. Ard’s] family because they wouldn’t be able to see him any more” (R29. 865). Mr. Globe had “[j]ust completely turned around from his stance last year at this time” (R29. 865). Last fall, Mr. Globe started drawing a Christian cartoon named Charlie’s World which included scripture verses and giving them to people to encourage them (R29. 865-66). Recently, Mr. Globe had done a cartoon strip for a friend of Wright’s who had breast cancer, and it definitely lifted her spirits (R29. 866). Mr. Globe looked to Wright for help (R29. 866).

Ruth Globe, Mr. Globe’s mother, testified that she moved from Florida to Delaware twelve years earlier (R29. 868). Mr. Globe’s father died in 1989 (R29. 870). At that time, Ruth Globe’s other children abandoned her, but Mr. Globe stayed in contact with her (R29. 870-71). Ruth Globe had not seen Mr. Globe for about 15 years (R29. 871). She did not tell Mr. Globe when she moved to

Delaware (R29. 871). Before that, she and Mr. Globe were corresponding (R29. 871).

Mr. Globe was no problem as a child (R29. 872). The family's financial circumstances were not very good (R29. 872). Mr. Globe got a job when he was high school age (R29. 873). He left home when he was 15 or 16 after he and his father and mother had an argument (R29. 873). His father did not try to stop him from leaving, but told him to go if he wanted to (R29. 873). Eventually, Mr. Globe came home, but his father told Ruth Globe to call the police (R29. 874). When Mr. Globe was 10, 12 or 14, his father often told him he was "dumb and stupid. He would never amount to anything" (R29. 874-75).

Mr. Globe got along well with his siblings (R29. 874). When his sister Diane ran away from home, Mr. Globe left with her to protect her (R29. 874). He viewed himself as a protector of his brothers and sisters (R29. 874).

Ruth Globe loves her son (R29. 875). When defense counsel attempted to ask if she was asking the jury not to put him to death, the State's objection was sustained (R29. 875).

At the sentencing hearing before the court, the defense presented another witness, Elizabeth McMahon, a clinical psychologist (R30. 920). Dr. McMahon had met with Mr. Globe three times and had reviewed his prison records, a PSI,

some letters and Mr. Globe's statement (R30. 922-23). She also spoke to his mother and administered some psychological tests to Mr. Globe (R30. 923-25). Dr. McMahon testified that Mr. Globe has a mixed personality disorder (R30. 926). Nothing in his records suggested he had a major mental disorder or major affective disturbance (R30. 926). The "underlying dynamics" of his personality disorder are "schizoid" and "paranoid," although he also meets the criteria for antisocial personality disorder (R30. 926). However, saying someone has antisocial personality disorder "tells you nothing about the underlying dynamics and those same behaviors can be a product of many underlying dynamics" (R30. 927). With Mr. Globe, "the underlying dynamics are those of a person whose [sic] very paranoid and is very schizoid" (R30. 927). Mr. Globe is "hostile and withdrawn" and "as a result when he interacts with the world, wherever he interacted with the world, he interacted with the world in an antisocial fashion" (R30. 927).

In his daily life, Mr. Globe "is a highly anxious, paranoid, hostile individual" who "sees the world as a very punitive, threatening, rejecting kind of place" (R30. 927). People with these characteristics "have begun very early in life to see the world as punitive, to see the world or experience the world as very threatening and dangerous" and see the people upon whom they are dependent as "rejecting and . . . hostile toward them and certainly don't meet their needs" (R30. 927-28). Mr.

Globe's world is "not a comfortable place to be" because

[W]hat they have learned is that they can respond to the world in like manner because they don't learn many good ways, many healthy ways of responding to the world so they can respond in a hostile way and that oftentimes they will strike out in a hostile way in an attempt to ward off what is anticipated as being something that is going to hurt them because from their experience they have been hurt a lot both psychologically and often physically, but primarily psychologically and the way to deal with an anticipated hurt is to strike out. But it's kind of like strike out before they get to you sort of an attitude and that is the way he reacts.

(R30. 928). Mr. Globe "doesn't know any other way to be" (R30. 928).

Mr. Globe was not born this way (R30. 929).. People "learn that view of the world from . . . whether or not somebody responds to their needs or meets particularly their psychological needs for dependency, love and affection and security and . . . basically loves them" (R30. 929). This "gives them their view of the wor[l]d and, in turn, their way of responding to the world" (R30. 929).

Mr. Globe told Dr. McMahon that his best memory of his mother was of her saying to him, "I ought to kill you now before someone else has to do it" (R30. 929). His mother "told him point-blank he wasn't wanted" and that "he was taking things away from his older sister" (R30. 929-30). Mr. Globe's mother had moved to Delaware without telling Mr. Globe, and she told Dr. McMahon that she knew where Mr. Globe was but had not written to him in twelve years because she lost

his address (R30. 930). Mrs. Globe also complained to Dr. McMahon that her children had turned against her (R30. 931).

Dr. McMahon also described physical abuse Mr. Globe experienced as a child:

He said his father had beat him with a belt one time. His mother had struck his head into the wall at least twice which required hospitalization. And that her other ways of disciplining him when he was bad basically amounted to sexual abuse, in that she would stand him up on the seat of the toilet and on the one hand being squeezing his scrotum saying, "You know you have been a bad boy, don't you" And then take an enema bag and insert water into his rectum and then would spank or whip him, beat him, whatever, telling him that if he released any of that water, he would then get all the more beating, and then would eventually give him permission to empty his bowel. Also that's the way she taught him his alphabet, his numbers, was to sit him naked on the kitchen stool and slap him whenever he didn't -- he missed a number or alphabet or letter.

(R30. 932).

Dr. McMahon acknowledged that she obtained this information only from Mr. Globe, but whether or not the information was accurate, "[f]or somebody to be as hostile, as paranoid, as withdrawn, as suspicious, as rejecting, as frightened of the world as he is, he has to have gotten that world view somehow" (R30. 933). Thus, "somewhere or other he had to have basic needs not met and there had to have been something in the people whom he trusted that he saw as a gross betrayal" (R30. 933-34).

Dr. McMahon testified that Mr. Globe also had a history of substance abuse (R30. 934). He started drinking at 10 or 11 and drank regularly by the age of 13 (R30. 934). By the time he was older, he drank about a third of vodka and twenty to thirty beers a day (R30. 934). Mr. Globe was also using drugs regularly by the time he was in late adolescence (R30. 934). He “start[ed] out with lacquer thinner, but [was] taking -- smoking pot, doing uppers, downers, hallucinogens, which were his drugs of choice, and some coke and even continued this while he was in DOC, that is, alcohol and drug ingestion” (R30. 934). Mr. Globe’s DOC records indicated that he was involved in substance abuse before he went to prison (R30. 934).

On cross-examination, Dr. McMahon testified that Mr. Globe has no brain damage or psychosis (R30. 935). He does have sadistic features and says that he takes sexual pleasure in inflicting pain on others (R30. 935). Mr. Globe knows the difference between right and wrong and understands the nature and consequences of his acts (R30. 935-36). None of the statutory mental health mitigating factors applied to Mr. Globe (R30. 936-37).

On redirect, Dr. McMahon testified that the linking of sexual pleasure with aggression and pain “is a perverted sort of thing” which is not typically how people raise their children and is a “conditioned” link (R30. 937-38). For Mr. Globe to

have this characteristic, “somehow early on he had to have been conditioned to have linked sexual arousal with pain and with the sense of control” (R30. 938). By “early on,” Dr. McMahon meant that Mr. Globe learned this behavior in childhood (R30. 938).

SUMMARY OF ARGUMENT

1. Mr. Globe's conviction and death sentence rest upon statements obtained in violation of his right to remain silent, his right to counsel and his right to a prompt first appearance. When Mr. Globe was first questioned by law enforcement, he invoked his right to silence and the interrogation ceased. Six hours later, a second officer had Mr. Globe brought to him and asked Mr. Globe if he wished to make a statement, although the second officer knew that Mr. Globe had invoked his right to silence. Mr. Globe gave a statement in response to the officer's questioning. Three days later, that officer questioned Mr. Globe again and again elicited statements from Mr. Globe. Mr. Globe was not taken before a judge until two months after the offense.

The first statement was obtained in violation of Mr. Globe's right to silence. The second statement was the "fruit" of the first unconstitutionally obtained statement. The second statement also was taken in violation of Mr. Globe's right to a prompt first appearance and was not made voluntarily, intelligently and knowingly.

The State cannot establish beyond a reasonable doubt that admission of

these statements at trial was harmless error. The State relied upon the statements to establish premeditation and aggravating factors. The question is whether the statements had “no effect” or “did not contribute to” Mr. Globe’s conviction and death sentence. The State cannot make this showing, and this Court should order a new trial and a new penalty phase.

2. The joint statement of Mr. Globe and codefendant Busby was admitted at Mr. Globe’s trial. Busby did not testify, and thus Mr. Globe was deprived of his confrontation rights. There is a weighty presumption against admitting such uncross-examined evidence, and the circumstances surrounding Busby’s statements are far from constitutionally sufficient to rebut the presumption of unreliability attaching to his statements. The State cannot establish beyond a reasonable doubt that admission of Busby’s statements was harmless. This Court should order a new trial and a new penalty phase.

3. At the penalty phase, defense counsel objected to the jury being told that it was providing only an “advisory sentence” and requested that the jury be instructed that its sentencing decision would be given “great weight.” However, in instructions at the penalty phase, the jury was told that its decision was only “advisory” or a “recommendation” and was not told that its decision would be given “great weight.” The instructions violated Caldwell v. Mississippi, 472 U.S.

320 (1985), and Ring v. Arizona, 122 S. Ct. 2428 (2002). This error means that the jury did not return a “verdict” under the Sixth Amendment and therefore cannot be harmless. Sullivan v. Louisiana, 508 U.S. 275 (1993). This Court should order a new penalty phase.

4. The Florida capital sentencing statute and Mr. Globe’s death sentence violate the Sixth and Fourteenth Amendments under Ring v. Arizona, 122 S. Ct. 2428 (2002). This Court should order a new penalty phase.

5. The trial court’s sentencing findings violate Florida law and the Eighth and Fourteenth Amendments of the United States Constitution. Regarding aggravating factors, the court relied upon nonstatutory aggravation and upon a mandatory death sentence. Regarding mitigating factors, the court failed to give “full effect” to nonstatutory mitigation because Mr. Globe was sane and had not established statutory mitigating factors. This Court should order resentencing.

6. The principal instruction was improperly given to the jury as a way of determining Mr. Globe’s criminal responsibility for premeditation. The jury was allowed to assess Mr. Globe’s participation in the murder through the words and conduct of his co-defendant, Andrew Busby.

7. This killing happened in a prison setting, guaranteeing the existence of two aggravating factors. The other two aggravating factors found in this case are

dependent in whole or in large part measure based on the statements of Mr. Globe or the joint statement with Mr. Busby. When this evidence is removed from the decision to impose death, it is clear that death is a disproportionate sentence for Mr. Globe.

8. The death penalty decision is dependent on a thoughtful and meaningful evaluation of all mitigation evidence presented and articulating how that evidence applies to the ultimate sentencing decision. The trial judge did not do this; there is no way for this Court to review findings that are qualitatively described as having “little” or “slight” weight.

STANDARD OF REVIEW

Arguments I, II, III, IV, V and VIII of Mr. Globe's Initial Brief present constitutional issues. Such issues present mixed questions of law and fact and are reviewed on appeal *de novo*, giving deference only to the trial court's factfindings. Argument VI is reviewed pursuant to an abuse of discretion standard. Argument VII is the automatic review this Court gives any death sentence to determine if it is proportionally imposed in relation to other similar factual circumstances.

ARGUMENT

ARGUMENT I

MR. GLOBE WAS CONVICTED OF PREMEDITATED FIRST-DEGREE MURDER AND SENTENCED TO DEATH ON THE BASIS OF ILLEGALLY AND UNCONSTITUTIONALLY OBTAINED STATEMENTS.

At trial, the State introduced tape recordings of statements made by Mr. Globe on July 3, 2000, and July 7, 2000 (R26. 627, 657). The state also introduced a statement Mr. Globe made to an FDLE agent on September 7, 2000, while Mr. Globe and the agent were awaiting Mr. Globe's arraignment (R26. 694). Before trial, the defense moved to suppress the July 3 statement because it was taken in violation of Mr. Globe's Fifth and Sixth Amendment rights and to suppress the July 7 statement because it was the fruit of the July 3 statement and because it was taken in violation of Mr. Globe's Sixth Amendment rights (R10. 1821-22, 1825-27). When the statements were introduced at trial, defense counsel renewed the motions to suppress (R26. 628, 629, 658). The defense renewed the motions again at the close of the State's case (R27. 770).

The court held a hearing on the motions to suppress. At the hearing, the State presented the testimony of William Gootee, special agent with the Florida Department of Law Enforcement (FDLE) (R25. 473). On July 3, 2000, agent Gootee went to Columbia Correctional Institution to investigate the death of Elton Ard (Id.). Agent Gootee met with Mr. Globe, advised him of his rights and asked Mr. Globe if he wanted to talk (R25. 474). Mr. Globe replied, “[n]ot at this time” and said nothing else (Id.). Agent Gootee passed this information on to FDLE agent Don Ugliano, who was the case agent (R25. 474-75).

Agent Ugliano testified that agent Gootee had attempted to interview Mr. Globe on July 3, 2000, and had told agent Ugliano what had occurred during that interview (R25. 476).⁵ Agent Ugliano then approached Mr. Globe about making a statement (R25. 476-77). Ugliano and Mr. Globe were standing outside the prison inspector’s office while Andrew Busby was inside the office (R25. 477). When a correctional officer walked by, Mr. Globe said something like “[t]hat guy, that asshole, doesn’t need to be here” (R25. 477). Ugliano asked Mr. Globe why, and Mr. Globe said, “The whole place is just screwed up. It is all messed up” (Id.). Ugliano then said, “You are willing to make a statement?” and Mr. Globe said,

⁵At trial, agent Ugliano testified that agent Gootee’s attempt to interview Mr. Globe occurred about six hours before Ugliano interviewed Mr. Globe (R26. 698).

“Yeah, if I can be with Andy” (Id.). Agent Ugliano described what happened next:

At that time Andrew Busby came out of the room. He was crying. Charles [Globe] asked to go speak to him. He was allowed to at which time Charles said: Andy, I am going to tell them what happened. You can -- you want to be in there with me? Andrew said yes. We took a tape recorded statement from him.

(R25. 477). Both Mr. Globe and Mr. Busby participated in the taped statement

(R25. 478).

Agent Ugliano went to talk to Mr. Globe again on July 7, 2000, because Ugliano had “some questions” (R25. 478). Ugliano advised Mr. Globe of his rights and recorded an interview (Id.).

Agent Ugliano testified that on September 7, 2000, the date of Mr. Globe’s arraignment, he and Mr. Globe were sitting outside the judge’s office (R25. 479).⁶ Mr. Globe said, “I can’t believe we are going through all this stuff. This is crazy” (Id.). Ugliano responded, “I really can’t talk to you any more. You have an attorney” (Id.).⁷ Mr. Globe replied, “I know I am going to get the needle. What is

⁶At trial, agent Ugliano testified that one reason he went to Mr. Globe’s arraignment was to see if Mr. Globe would make a statement (R26. 697).

⁷Counsel for Mr. Globe was appointed on September 7, 2000, and entered an appearance on September 8 (R1. 4, 6).

the big deal about it? I have already confessed to you for the killing” (Id.).⁸

Ugliano testified that this statement was not made in response to any questioning (R25. 479-80).

On cross-examination at the suppression hearing, Ugliano testified that on July 3, 2000, he had Mr. Globe brought to the inspector’s office in the prison’s administration building to photograph him and to place him in a room with Mr. Busby (R25. 481).⁹ Law enforcement’s intention at that time was to try to elicit statements from Mr. Globe (Id.). Ugliano testified, “The ultimate plan was to have [Mr. Globe] and Andrew [Busby] sit in an office together and probably were going to try to record it” (Id.). It was about 6:20 p.m. when Mr. Globe was brought to the inspector’s office (R25. 482). Ugliano was aware that earlier in the day Mr. Globe had told agent Gootee he did not want to talk (Id.). After Mr. Globe was brought to the office and he and agent Ugliano bantered a bit back and forth,

⁸At trial, agent Ugliano testified that on September 7, 2000, Mr. Globe said: “It’s stupid to have to go through all this bullshit. I know I am going to get the needle for killing him. I just don’t give a shit. That’s just the way it is. I just don’t give a shit. You know what I am saying?” (R26. 694-95). Ugliano testified he said he could not talk to Mr. Globe because he had an attorney, and Mr. Globe replied, “Shit. We have already confessed to killing the dude. What’s it matter?” (R26. 695).

⁹The inspector’s office where agent Ugliano and Mr. Globe met on July 3, 2000, was in the prison’s administration building (R25. 480-81). That building does not contain any cells (R25. 481).

Ugliano asked Mr. Globe if he was ready to talk (Id.). Ugliano “probably” told Mr. Globe “[y]ou really need to take the load off Andy” (R25. 482-83).

Correctional officer Jack Schenck testified that he was present for the July 3 and July 7 interviews and that he advised Mr. Globe of his rights at both of these interviews (R25. 485, 488). The State introduced tape recordings and transcripts of these interviews (R25. 486-89).

On cross-examination, officer Schenck testified that Mr. Globe was shackled and confined at about 9:00 a.m. on July 3 (R25. 491). After his statement that evening, Mr. Globe was moved to Florida State Prison, where confinement is more restrictive than confinement at Columbia Correctional Institution (R25. 495). This move was a result of the incidents which occurred on July 3 (R25. 496). Between July 3 and July 7, there was no attempt to bring Mr. Globe before a judge (R25. 496).

On redirect, officer Schenck testified that Mr. Globe was not placed under arrest on July 3 or July 7 (R25. 499). Mr. Globe was moved to Florida State Prison for the safety of the staff and inmates at Columbia Correctional (Id.).

Defense counsel argued that the July 3 and July 7 statements were obtained in violation of Mr. Globe’s Fifth Amendment right to silence (R25. 501). Counsel argued, “Once a suspect demonstrates his or her desire to terminate questioning,

law enforcement officials are not to take statements from suspects but scrupulously honor suspect's right to remain silent. Essentially that's what Mr. Globe did. He remained silent" (R25. 501). Counsel argued that agent Ugliano had Mr. Globe brought to the administration building "to try to get him to talk" and that once Mr. Globe was there, Ugliano brought up the subject of Mr. Globe making a statement (R25. 501-02). Counsel argued that the July 3 statement was clearly taken in violation of Mr. Globe's right to silence and that the July 7 statement was also taken in violation of this right because the second statement was taken to clarify matters which came up in the July 3 statement (R25. 502). Therefore, counsel argued, the July 7 statement arose from the July 3 statement (Id.).

Defense counsel also argued that once Mr. Globe was removed from the open population at Columbia Correctional and confined there and later at Florida State Prison, Mr. Globe was de facto arrested (R25. 503). Counsel argued that Mr. Globe's confinement was no different than placing a person in jail (R25. 503). Counsel argued that under the Florida Constitution, a criminally accused person's right to counsel arises when the person is placed in custodial restraint and that Florida law requires that such a person be brought before a judge "as soon as feasible after custodial restraint or upon first appearance" (R25. 503-04).

The prosecutor argued that Mr. Globe "made statements which were both

free and voluntary after full and complete advising of and waiver of his rights” (R25. 501). As to Mr. Globe’s invocation of his right to silence, the prosecutor contended, “[T]he man said he didn’t want to talk. They didn’t talk to him. They asked him: Are you ready to talk now? And he set the conditions under which he would -- he was willing to talk” (R25. 504). According to the prosecutor, law enforcement “scrupulously honored” Mr. Globe’s right to remain silent because they “[d]idn’t do anything other than ask him: Would you like to make a statement?” (R25. 505).

As to the failure to bring Mr. Globe before a judge until September 7, 2000, the prosecutor argued that Mr. Globe “was not under arrest on July 3rd. He wasn’t under arrest on July 7th” (R25. 505). Since Mr. Globe was not under arrest, the prosecutor argued, there was “no need to bring him before a magistrate and no problem with the statement that was given on the 7th” (R25. 506).

The court denied the motion to suppress (R11. 2100). The entirety of the court’s ruling reads: “DENIED. Upon a finding that the statements were made freely, voluntarily, and knowingly after full and complete advisal and waiver of Miranda rights” (R11. 2100).

A. THE SEPTEMBER 3, 2000, STATEMENT WAS OBTAINED IN VIOLATION OF MR. GLOBE’S RIGHT TO REMAIN SILENT.

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court declared, "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-74. Once a suspect invokes his right to silence, no further police interrogation may occur unless the suspect initiates further communication with the police. Edwards v. Arizona, 451 U.S. 477, 482 (1981).

The test for determining the voluntariness of statements made after the exercise of the right to remain silent is whether that right has been "scrupulously honored." Michigan v. Mosley, 423 U.S. 96, 104 (1975). A suspect's exercise of his right to remain silent does not "create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject." Id. at 102-03. If a suspect's invocation of the right to remain silent has been "scrupulously honored," subsequent statements may pass the first threshold of the voluntariness test. Gore v. State, 599 So. 2d 978, 981 n.5 (Fla. 1992); Kipp v. State, 668 So. 2d 214, 216 (Fla. 2d DCA 1996).

In Mr. Globe's case, the FDLE agents did not honor Mr. Globe's invocation of his right to remain silent at all. Agent Gootee informed Mr. Globe of his Miranda rights, and Mr. Globe chose to remain silent. Agent Gootee clearly

understood that Mr. Globe had invoked his right to silence and ceased the interrogation. At the suppression hearing, the prosecutor agreed that Mr. Globe had invoked his right to silence, saying, “[T]he man said he didn’t want to talk. They didn’t talk to him.”

About six hours later, although agent Gootee told agent Ugliano that Mr. Globe had elected to remain silent, agent Ugliano had Mr. Globe brought to the administration building for the express purpose of eliciting statements from Mr. Globe. Agent Ugliano initiated an interrogation of Mr. Globe by asking him, “You are willing to make a statement?” At the suppression hearing, the prosecutor argued that the statements should not be suppressed because law enforcement “[d]idn’t do anything other than ask him: Would you like to make a statement?”

Mr. Globe’s resulting statement was taken in violation of his right to remain silent and was made as a result of police interrogation. There can be no doubt that agent Ugliano’s question--“You are willing to make a statement?”--was interrogation. Rhode Island v. Innis, 446 U.S. 291 (1980). Under Miranda, custodial interrogation is “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Innis, 446 U.S. at 298, quoting Miranda, 384 U.S. at 444. Mr. Globe was clearly in custody, having been removed from the prison

population, placed in a solitary cell and shackled. Interrogation occurs when an individual in custody is subject to “express questioning” or its “functional equivalent.” Innis, 446 U.S. at 300-01. When agent Ugliano asked Mr. Globe if he was willing to make a statement, this was clearly “express questioning.”

Mr. Globe’s July 3, 2000, statement was taken in violation of his right to remain silent and was therefore involuntary. Michigan v. Mosley. The lower court erred in failing to suppress that statement.

B. THE SEPTEMBER 7, 2000, STATEMENT WAS THE FRUIT OF THE ILLEGALLY OBTAINED SEPTEMBER 3, 2000, STATEMENT.

Law enforcement violated Mr. Globe’s constitutional right to remain silent in obtaining the July 3 statement. This constitutional violation tainted the July 7 statement, which was the fruit of the July 3 constitutional violation and which also should have been suppressed. Wong Sun v. United States, 371 U.S. 471 (1963). Under the Wong Sun doctrine, the test for determining whether evidence is the “fruit of the poisonous tree” is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” State v. Perkins, 760 So. 2d 85, 88 (Fla. 2000), quoting Wong Sun v. United States, 371 U.S. at 487-88.

The violation of Mr. Globe’s right to remain silent which occurred on July 3 establishes that the July 3 statement was the product of coercion, as the Supreme Court has explained:

Once warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; *any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.* Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

Miranda, 384 U.S. at 473-74 (footnote omitted) (emphasis added).

In analyzing whether or not the July 7 statement should have been suppressed, it is of fundamental significance that the initial July 3 statement was the product of a constitutional violation. In Oregon v. Elstad, 470 U.S. 298 (1985), the Supreme Court distinguished between situations where the initial statement is the product of coercion (i.e., results from a Fifth Amendment violation) and where the initial statement was voluntary but unwarned: “There is a vast difference between the direct consequences flowing from coercion of a confession . . . and the uncertain consequences of [a] disclosure . . . freely given in response to an unwarned but noncoercive question.” Elstad, 470 U.S. at 312. In contrast to

Elstad, in Mr. Globe’s case law enforcement committed a constitutional violation on July 3, rather than a technical violation of Miranda.

Coercion of an initial confession requires a break in the chain of events in addition to the provision of Miranda warnings to remove the taint from a subsequent confession. Determining whether such a break occurred requires consideration of additional factors: “When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession.” Elstad, 470 U.S. at 310. Similarly, determining whether a Miranda waiver is valid depends upon the “totality of the circumstances.” Ramirez v. State, 739 So. 2d 568, 575 (Fla. 1999). See also Brown v. Illinois, 422 U.S. 590, 603-04 (1975) (after a constitutional violation, the provision of Miranda warnings alone may not be sufficient to remove the taint of the prior illegality).

Under the tests set forth in State v. Perkins, Michigan v. Mosley and Oregon v. Elstad, Mr. Globe’s July 7 statement was the illegal fruit of the unconstitutionally obtained July 3 statement. Mr. Globe’s right to remain silent was not “scrupulously honored” on July 3, Mosley, and the July 7 statement was obtained “by exploitation of that illegality.” Perkins. During the July 3 statement, the officers never mentioned the fact that Mr. Globe had previously invoked his right to

silence and therefore never indicated to him that they would honor any invocation of rights. In such circumstances, the initial illegality undermines the suspect's will to invoke his rights when law enforcement initiates further questioning. Kipp v. State, 668 So. 2d at 216.

Further, during the July 3 interview, the officers told Mr. Globe they would come to speak to him again, purportedly concerning complaints Mr. Globe had made about conditions at Columbia Correctional (R26. 651). However, agent Ugliano testified at the suppression hearing that he went to speak to Mr. Globe on July 7 in order to clarify matters that came up during the July 3 interview. On July 7, agent Ugliano began the interview by asking Mr. Globe to clarify the description of the device used to strangle the victim and then continued questioning Mr. Globe about the murder (R26. 659-67). Only at the end of the interview did agent Ugliano mention that he had told Mr. Globe on July 3 that he would return to talk to Mr. Globe "about those other issues he raised" (R26. 667). Agent Ugliano clearly used the unconstitutionally obtained July 3 statement in order to obtain the July 7 statement.

The provision of Miranda warnings at the July 7 statement was not sufficient to remove the taint of the July 3 illegality. Brown. Agent Ugliano simply rattled off the standard Miranda warning and did not stop after reading each right to ask if Mr.

Globe understood that right (R26. 659). Then, Ugliano simply asked, “Do you understand your rights,” to which Mr. Globe replied, “Sure” (R26. 659). When Ugliano asked, “With your rights in mind, would you like to answer questions and make a statement at this time,” Mr. Globe’s response was “[i]naudible” (R26. 659). Ugliano did not ask Mr. Globe if he wished to waive his rights and did not have Mr. Globe execute a written waiver of rights. Ugliano’s provision of Miranda warnings was not “thorough and careful” and did not ensure that Mr. Globe understood his rights. Ramirez, 739 So. 2d at 576.

Other factors also indicate that the July 3 illegality continued to taint the July 7 interview. Elstad; Ramirez. At the suppression hearing, the State did not identify any intervening circumstances which could have removed the taint. In fact, no such intervening circumstances occurred. Mr. Globe was moved to a solitary cell at Florida State Prison, and the State did not take him before a judge to be advised of his rights. From the perspective of someone in Mr. Globe’s situation, nothing had changed since the officers ignored his invocation of his rights on July 3 and told him they would return to talk to him again. The same officer who had interviewed Mr. Globe on July 3 conducted the July 7 interview. Further, that officer--Ugliano--had told Mr. Globe he would listen to Mr. Globe’s complaints about Columbia Correctional, but actually returned for a second interview in order to clarify matters

which came up in the first interview. Under these circumstances, the July 7 interview was tainted by the illegal July 3 interview.

C. THE JULY 7, 2000, STATEMENT WAS NOT MADE VOLUNTARILY, INTELLIGENTLY OR KNOWINGLY.

A criminal suspect may waive his Miranda rights if the waiver “is made voluntarily, knowingly and intelligently.” Moran v. Burbine, 475 U.S. 412, 421 (1986), quoting Miranda, 384 U.S. at 444. A valid waiver has two components:

First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the “totality of the circumstances surrounding the interrogation” reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Moran, 475 U.S. at 421, quoting Fare v. Michael C., 442 U.S. 707, 725 (1979).

The State has the burden of proving that a Miranda waiver was knowing, intelligent and voluntary. Ramirez, 739 So. 2d at 575. When law enforcement obtains a confession after the provision of Miranda warnings, the State has a “heavy burden” to establish by the “preponderance of the evidence” that the suspect knowingly and intelligently waived his Fifth Amendment rights. Ramirez, 739 So. 2d at 575, quoting Colorado v. Connelly, 479 U.S. 157, 167-68 (1986).

In Mr. Globe's case, the State did not meet its burden of proving that the July 7 statement was made voluntarily, intelligently and knowingly. First, Mr. Globe never explicitly waived his rights. Agent Ugliano simply rattled off the standard Miranda warning and did not stop after reading each right to ask if Mr. Globe understood that right (R26. 659). Then, Ugliano simply asked, "Do you understand your rights," to which Mr. Globe replied, "Sure" (R26. 659). When Ugliano asked, "With your rights in mind, would you like to answer questions and make a statement at this time," Mr. Globe's response was "[i]naudible" (R26. 659). Ugliano did not ask Mr. Globe if he wished to waive his rights and did not have Mr. Globe execute a written waiver of rights. Ugliano's provision of Miranda warnings was not "thorough and careful" and did not ensure that Mr. Globe understood his rights. Ramirez, 739 So. 2d at 576.

Other factors also indicate that Mr. Globe did not make a voluntary waiver. "The voluntariness of a waiver 'depend[s] on the absence of police overreaching.'" Ramirez, 739 So. 2d at 576, quoting Connelly, 479 U.S. at 170. Between July 3 and July 7, Mr. Globe was not taken before a judge to be advised of his rights. See Section D, infra. When Mr. Globe was finally taken before a judge two months later, on September 7, agent Ugliano told Mr. Globe he could not speak to him because Mr. Globe had an attorney. This exchange illustrates that agent Ugliano

believed that taking Mr. Globe before a judge would interfere with the agent's ability to talk to Mr. Globe. Further, on July 3, the FDLE agents told Mr. Globe that they would return to talk to him about his complaints about Columbia Correctional. However, agent Ugliano initiated the July 7 interview in order to question Mr. Globe about the murder, only mentioning at the end of the interview that he had told Mr. Globe he would come back to talk to him about "other issues." The "police overreaching" here rendered any "waiver" involuntary.

D. THE JULY 7, 2000, STATEMENT WAS TAKEN IN VIOLATION OF RULE 3.130, FLA. R. CRIM. P., AND IN VIOLATION OF MR. GLOBE'S RIGHT TO COUNSEL.

At the suppression hearing, Mr. Globe's counsel argued that the July 7 statement should be suppressed because under the Florida Constitution, a criminally accused person's right to counsel arises when the person is placed in custodial restraint and because Florida law requires that such a person be brought before a judge "as soon as feasible after custodial restraint or upon first appearance" (R25. 503-04). The State argued that Mr. Globe "was not under arrest on July 3rd. He wasn't under arrest on July 7th"; therefore, there was "no need to bring him before a magistrate and no problem with the statement that was given on the 7th" (R25. 505-06).

Mr. Globe's July 7 statement was coerced through a deprivation of his right

to a first appearance. Coercion of this type can be grounds for suppressing a confession. See Chavez v. State, 2002 WL 1065901 at 15 (Fla. 2002); Keen v. State, 504 So. 2d 396, 400 (Fla. 1987).

Rule 3.130, Fla. R. Crim. P., requires that an arrested person be taken before a judge within twenty-four hours of arrest. In Mr. Globe's case, the State circumvented this rule by not formally arresting Mr. Globe. However, practically speaking, Mr. Globe's restraint had all the features of an arrest, and Rule 3.130 should have been followed. As defense counsel argued at the suppression hearing, once Mr. Globe was removed from the open population at Columbia Correctional and confined there and later taken to Florida State Prison, Mr. Globe was de facto arrested, because such confinement was no different than placing a person in jail (R25. 503). Cf. Ramirez v. State, 739 So. 2d at 573-74 (defining "in custody").

This Court has explained that even when a violation of Rule 3.130 has been shown, a statement will not necessarily be suppressed: "where, as here, a defendant has been sufficiently advised of his rights, a confession that would otherwise be admissible is not subject to suppression merely because the defendant was deprived of a prompt first appearance." Chavez, 2002 WL 1065901 at 15. Chavez "was repeatedly advised of his Miranda rights, and knowingly, intelligently, and voluntarily waived them prior to confessing." Id. at 16. See also Keen, 504 So. 2d

at 400 (suppression of confession not required by violation of Rule 3.130 because defendant “was advised on his rights to remain silent and his right to counsel on four separate occasions and gave the statement at issue only after voluntarily signing a waiver of rights”). In contrast, Mr. Globe was not sufficiently advised of his rights, he did not waive his rights, and his response to agent Ugliano’s questioning on July 7 was not voluntary. See Section C, supra. Mr. Globe’s case is more like Anderson v. State, 420 So. 2d 574, 576 (Fla. 1982), in which this Court “found ‘significant’ the fact that the statement at issue came ‘far after’ Anderson should have been brought before a judicial officer ‘with the attendant advice of rights and appointment of counsel’” and “also found that the record failed to show a valid waiver.” Keen, 504 So. 2d at 400, quoting Anderson, 420 So. 2d at 576.

Additionally, under Article I, Section 9 of the Florida Constitution, the right to counsel attaches at the earliest of three points: when a criminal defendant “is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance.” Peoples v. State, 612 So. 2d 555, 556 (Fla. 1992), quoting Traylor v. State, 596 So. 2d 957, 970 (Fla. 1992). Law enforcement circumvented Mr. Globe’s right to counsel in taking the July 7 statement despite the fact that Mr. Globe had been in “custodial restraint”

since July 3.

E. ADMISSION OF MR. GLOBE'S STATEMENTS WAS NOT HARMLESS.

Although they were unconstitutionally obtained, Mr. Globe's July 3 and July 7 statements were introduced at trial. The statements contained details of the murder which were essential to the State's case for premeditated first-degree murder and for a death sentence. Under these circumstances, the State cannot show beyond a reasonable doubt that introduction of the unconstitutionally obtained statements was harmless error.

In order to establish harmless error, the State must be able to show beyond a reasonable doubt that the statements "did not contribute to [Mr. Globe's] conviction." Arizona v. Fulminante, 499 U.S. 279, 296 (1991). "The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). In Mr. Globe's case, the statements more than "contributed" to his conviction of premeditated first-degree murder and to his death sentence.

Mr. Globe's statements contained details of the murder which the State's

other evidence could not provide. In the July 3 statement, Mr. Globe and co-defendant Busby¹⁰ explained that the murder occurred because other inmates and corrections officers were calling Busby a punk (R26. 631). Since the inmates and corrections officers would not stop doing this, “One of them were going to die” (Id.). The victim, Elton Ard, was one of the inmates who was doing this (R26. 631-34). Ard was Busby’s cellmate (R26. 632). Mr. Globe and Busby had been “talking about [killing Ard] for days” and “last night we got everything--we got everything planned out” (R26. 635). The night before the murder, Busby signaled to Mr. Globe that he and Ard were going to breakfast in the morning (R26. 636).¹¹ Mr. Globe and Busby followed Ard back to the cell after breakfast (R26. 636). They closed the cell door and started choking Ard (R26. 637). Ard “struggled for a good 10, 15 minutes before he died” (R26. 637). He pleaded with them to stop and offered them forty-five dollars (R26. 638). Both Mr. Globe and Busby choked Ard:

¹⁰The court reporter’s transcription of the tape as it was played for the jury does not indicate which defendant is talking (See R26. 629-55). While the tape was played, the jurors were provided a transcript designating which defendant was speaking, but the jurors were not permitted to have the transcript during deliberations (R26. 626, 628-29).

¹¹In the transcript, one of the defendants says he “told K.D.” about Ard going to breakfast (R26. 636). “K.D.” is Mr. Globe.

All his air got cut off. While we were doing it, I think we crushed his neck. I heard something crack. I heard it. He was laying down. I was sitting up. My foot on the locker so he wouldn't fling us forward. His arm his [sic] around neck. I got my arm around his neck so he couldn't get loose. I was holding one of his legs with my leg. I was holding this arm with my arm. Also part of his leg -- (laughing)

(R26. 638). One defendant hit Ard in his nose, which began bleeding (R26. 639).

Ard "wasn't all the way dead," so the defendants tied a ligature tightly around his neck (R26. 639). After Ard was dead, they removed the ligature and put a cigarette in Ard's mouth (R26. 640). Mr. Globe ("K.D.") wrote on the cell door, "Remember Andy and K.D.," and the two used Ard's blood to put their fingerprints on the door (R26. 641). Busby wanted to do more to Ard, like poke his eyes out and put holes in his ears (R26. 641). One of the defendants wrote "Call FDLE" on a sign for the officers to see when they walked by (R26. 641). They committed the murder "to send a message" that what was happening to Busby in prison was "going to happen to another young white boy" (R26. 643). Mr. Globe and Busby had told prison officials what was happening to Busby, but "[n]othing was ever done about it. Before we went to this measure, we tried our damndest [sic] to get people off of us. Leave us alone. Because me and K.D. don't talk to nobody. I hate people. I don't talk to nobody" (R26. 644). Mr. Globe and Busby had also identified other inmates and prison staff as targets (R26.

644-47, 648).

In the July 7 statement, Mr. Globe described making two ligatures used to kill Ard (R26. 660-62). He made the ligature about two weeks before the murder and originally intended to use it on his next door neighbor, Eddie, who had started some of Busby's problems (R26. 661). When Mr. Globe and Busby were strangling Ard, the first ligature broke (R26. 662). Both Mr. Globe and Busby choked Ard at the same time (R26. 662). Before tying the second ligature around Ard's neck, they thought he was still alive, "So put the rope around his neck and pulled it tight. Tied a second knot and watched to see if he would struggle or move or anything" (R26. 663). After Ard jerked his head and made gasping noises "[a]bout six times," a "milky looking substance with just a little bit of eggs came out. Combined with the blood on the bed" (R26. 664). The murder happened at about 6:45 or 7:00 a.m., and the corrections officer found them about 8:40 a.m. (R26. 664). During that period, Mr. Globe and Busby "[s]tayed around and smoked cigarettes and chilled" (R26. 664). Mr. Globe and Busby picked the morning to commit the murder because it was easier for Mr. Globe to get into Busby's quad at that time of day (R26. 664-65).

The State also presented some letters which Mr. Globe had written to the FDLE agents. In State Exhibit 81, Mr. Globe wrote that he and Busby were going

to see Ard after breakfast to “talk to him a little and touch him a few times. Then maybe he will understand to keep his mouth to himself” (R27. 749). In the cell, Mr. Globe started hitting Ard, flipped him to the floor and grabbed him around the throat with his left arm (R27. 751). Busby “seen that I was going to kill the dude and said K.D., K.D., no, no, Man” (R27. 751). Busby got involved in the fight, and all three of them fell on the bottom bunk (R27. 751). Mr. Globe felt two of his ribs give way and “knew by the way we were positioned that I didn’t finish this soon that I probably would pass out for I was getting no air for a few seconds” (R27. 751).

In State Exhibit 80, Mr. Globe wrote, “Whispers I got 45. I will give all of it” (R27. 752). Mr. Globe then said, “I don’t want your money punk I want your fucking life” (R27. 752). Mr. Globe and Busby got up, and Mr. Globe tied the second ligature around Ard’s throat (R27. 752). Busby “was in a state of light shock,” and Mr. Globe said, “Look, you said you wanted to go to death row. Well, here is your opportunity” (R27. 752). Mr. Globe then told Busby, “If you want me to, I will take the weight for what I just did and say I made you go along under the fact that you thought -- we are going to beat him up like I told you last night and this morning” and “You think they will give us death now? Damn right. Then I will say I helped you” (R27. 753). Mr. Globe wrote about him and Busby

sticking the left wing of Mr. Globe's glasses in Ard's ear, taking the ligature from Ard's neck and putting it on his wrist, and putting a cigarette in Ard's mouth (R27. 754). Then Mr. Globe talked to Busby about "why it would be just as if he helped in killing Ard. That I would guarantee us the death sentence" (R27. 754-55). Mr. Globe wrote that in order to "guarantee us the death sentence," he decided to write things on the door and put their bloody fingerprints on the door (R27. 755).

In State Exhibit 79, Mr. Globe wrote, "How much of the statement about what went on in that room July 3rd. How much is or has been fabricated to spread the blame" (R27. 757). In State Exhibit 81, Mr. Globe wrote, "What happens if all of the verbal evidence that was given to your people turned out to be either completely false or drastically altered. Here is a new one for you. Make it seem like someone took part in a murder though they really didn't" (R27. 760).

In closing argument at the guilt-innocence phase, the defense urged the jury to consider the case in the context of the prison, which is "a totally different society which has its own rules" and where prisoners "have very little or no control over their life" (R28. 783). Defense counsel pointed out that Mr. Globe and Busby "obviously have had [a] very close relationship" and "shared very strong feelings for each other" (R28. 784-85). The defense argued that the taped statements showed that Mr. Globe and Busby were harassed by other inmates, who called

Busby a “punk,” and that corrections officials were indifferent to their complaints, telling Mr. Globe to take care of the problem himself (R28. 785-90).

Defense counsel argued that Mr. Globe and Busby concocted the story they told the authorities during the two hours they spent in the cell after Ard died (R28. 790). They concocted the story, counsel argued, because it would enhance their reputations in the prison, get them out of Columbia Correctional and would give them a forum to air their grievances about the prison (R28. 791). Counsel further argued that the statements themselves showed “evidence of, of being made up, concocted” because they contained inconsistencies and gaps indicating “[t]hey were making that part up as they went” (R28. 791-93). Counsel argued that Mr. Globe and Busby “prepared [their statements] in the two hours they were sitting in there to try and make sure they could tell something so incredulous they would have this forum to air their grievances” (R28. 793).

Defense counsel argued that “a more likely scenario” was contained in the letters Mr. Globe wrote (R28. 794). Counsel argued that the letters said Mr. Globe and Busby planned only “to take Mr. Ard up to the cell. Rough him up. Teach him a lesson where he wouldn’t run his mouth anymore. That’s what the plan was at the most” (R28. 794). Counsel argued that this is what corrections officials had told Mr. Globe to do when they told him to take care of the problem himself (R28.

795). Counsel argued that the bruising on Mr. Ard was consistent with a fight, as was the blood found on the lower part of the door frame and on the back of the toilet (R28. 795).

Defense counsel argued that the physical evidence and Mr. Globe's letters "tell us what happened or what started in cell 212 on the morning of July 3rd is not a planned, calculated murder as the state suggest[s]. There was a fight. It was a violent fight. No question about it. But not a premeditated murder" (R28. 796). Counsel again emphasized that Mr. Globe and Busby had two hours to decide "[t]his is how we are going to tell everybody. This is going to get everybody's attention" (R28. 796). Based on these factors, defense counsel asked the jury to find Mr. Globe not guilty of premeditated first-degree murder (R28. 797).

In the State's closing argument, the prosecutor relied upon the July 3 and July 7 statements to argue that Mr. Globe premeditated the murder: "The premeditated intent that he had was formed long before--by his testimony in the taped statement, as much as two months he started thinking about killing him" (R28. 801). The proof that Mr. Globe "killed after consciously deciding to do so" was that Mr. Globe "said he wanted to kill many people, several inmates and guards" (R28. 801). Premeditation was also established because Mr. Globe "made a garrotte. Not a defensive weapon but an offensive weapon. A weapon designed

for one purpose and that weapon was designed for murder, to kill” (R28. 801).

The prosecutor continued:

He made a second garrote, a backup. He wanted to kill Ard on Friday. Things didn't develop. Wanted to kill Ard on Saturday. Things didn't develop. Sunday, couldn't quite get it done then. He killed him on Monday. He killed after consciously deciding to do so. He went to his cell and he took both garrotes with him to Ard's cell.

Premeditated intent was formed before the killing.

He decided to kill. He made a murder weapon. He made a second murder weapon. Not a defensive weapon, a murder weapon. And he carried both these murder weapons to the cell. And he used both. The decision was present at the time of the killing. I don't want your money, Punk. I want your life.

He checked Ard's pulse. When he thought that there was a possibility he might still be alive, then he tied the second garrote down real tight.

He sat back and waited to watch him die.

He saw him gasping for breath, six gasps, as he jerked his head to try to get air into his lungs to continue living. And what did Globe do? He sat there and smoked a cigarette. He had the conscious intent present at the time of the killing to kill Elton Ard.

He had time to reflect on his decision. He had a list of potential victims. He made the garrote two weeks before the killing. He checked his pulse. He decided to use the second garrote. He consciously reflected on what he was about to do.

(R28. 801-03). The prosecutor argued that the construction of two garrotes

“shows not just premeditation but -- this murder wasn't just premeditated, it was

really, really premeditated. Premeditation to the nth degree to a distance beyond the -- what we would normally think about when one thinks about premeditation” (R28. 805). The prosecutor urged the jury not to believe the statements in Mr. Globe’s letters that his July 3 and July 7 statements were not true (R28. 808).

In rebuttal, the defense again relied upon Mr. Globe’s letters to argue that the murder was not premeditated (R28. 811). Counsel argued that the existence of the garrotte did not establish premeditation because the garrotte could have been intended, consistent with Mr. Globe’s letter saying the plan was to “rough up” Mr. Ard, to “get Elton Ard’s attention” (R28. 811). Counsel argued that Mr. Globe’s and Busby’s actions after Mr. Ard’s death, such as putting the cigarette in his mouth, was not evidence of premeditation but an attempt “to make it look more bizarre where they would get that forum. A more bizarre situation set up more people willing to listen” (R28. 813-14). Counsel argued that the murder was a “[b]eating that went very sour unfortunately,” but was either manslaughter or second-degree murder (R28. 814-15).

Mr. Globe’s statements were the State’s key evidence, and the prosecutor heavily relied upon them in urging the jury to convict Mr. Globe of premeditated first-degree murder. The defense relied upon Mr. Globe’s letters, which described the murder as occurring in the heat of the moment. In this context, it cannot be

said beyond a reasonable doubt that introduction of Mr. Globe's statements had "no effect" on the verdict.

In DiGuilio, this Court explained how a harmless error analysis is conducted:

The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

491 So. 2d at 1139. In Yates v. Evatt, 111 S. Ct. 1884 (1991), the Supreme Court explained that the test under Chapman v. California, 386 U.S. 18 (1967), "is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Yates, 111 S. Ct. at 1892 (quoting Chapman, 386 U.S. at 24). The Supreme Court elaborated, "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question." Yates, 111 S. Ct. at 1893.

In Mr. Globe's case, the statements were not "unimportant," but were the State's most important evidence of premeditation. The State relied upon the

statements to support premeditation. It is not possible to say here that the jury did not consider the statements or that the statements did not contribute to the verdict of premeditated first-degree murder.

The statements were also significant at the penalty phase. Two of the aggravating circumstances upon which the jury was instructed were “heinous, atrocious or cruel” and “cold, calculated and premeditated” (R29. 902-03). In urging the application of “heinous, atrocious or cruel,” the prosecutor argued:

Mr. Ard pleaded with Globe to stop. Mr. Ard offered all his money if Globe would stop. Globe taunted Ard. Called him a punk. Ard did not die immediately. He suffered. Globe enjoyed killing Ard.

It was fun. He took pleasure in it.

(R29. 883). In urging the jury to find “cold, calculated and premeditated,” the prosecutor argued:

It began with planning to kill weeks before Ard’s death. He made a list of people that he wanted to kill. I think he said there were seven people on the list. When efforts to kill another person prove futile because that person evaded Mr. Globe’s grasp, he settled upon an easier victim, Mr. Ard.

He made two garrotes. And a garrote in itself, a strangling string just by itself alone establishes cold, calculated and premeditated. That’s all that a garrote is good for is commission of premeditated, cold, calculated first degree murder.

He stopped during the process when he thought Ard was dead and checked for vital signs to make sure he was dead.

Then he applied the second garrote when he thought he may not be dead and tightened it down real tight. And sure enough Ard was not dead at that point.

And he sat down and he smoked a cigarette watching him die.

(R29. 884-85).

In opposing application of “heinous, atrocious or cruel,” defense counsel argued that the murder “unfolded basically in an uninterrupted sequence of events lasting just a very few moments” (R29. 890). Counsel continued:

Elton Ard was not tortured. There was a fight. No question about that. But there was no torturing of him. He wasn’t burned, he wasn’t mutilated, or anything of that nature before his death. That is the key factor, before his death. I would suggest to you the heinousness of this case does not rise to the level of especially. That’s what it has got to find, aggravating circumstances exist.

I would suggest the absence of this torturous nature of the events or the absence of any fact suggesting that it was unnecessarily painful. Also finding the absence of this aggravating factor. There is simply nothing before you to support a lingering torturous death of Elton Ard.

(R29. 890-91). As to “cold, calculated and premeditated,” defense counsel pointed out that this aggravator required “heightened premeditation” and argued:

Was this case, cold, calculated and premeditated as the state suggests, I say not. Under the scenarios we talked about during the final arguments of this case, it is -- suggest just as probably that this started out as a fight. Sometime during that fight, as you found, there was premeditation developed, developed during a set period of time and Elton Ard ended up dead.

Again, I would suggest that heightened level. That level that separates this from other homicides is not present here.

(R29. 892-93).

As in the guilt-innocence phase, the arguments for these aggravating factors turned on whether to rely upon Mr. Globe's statements--as the prosecutor did--or whether to rely upon his letters--as the defense did. Under the appropriate harmless error analysis explained above, it cannot be said beyond a reasonable doubt that the facts in Mr. Globe's statements were "unimportant" or "did not contribute to" the jury's consideration of the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors or to the jury's death recommendation.

The trial court's sentencing order relied upon Mr. Globe's statements to make several findings supporting "heinous, atrocious or cruel" and "cold, calculated and premeditated." As to "heinous, atrocious or cruel," the trial court's findings included: Mr. Globe "enjoyed killing the victim," "the victim struggled in an attempt to save himself," Mr. Globe "sought to allay the victim's fears by lulling him into a false sense of security before attacking him," and Mr. Globe's "taped statements indicated that [Mr. Globe] enjoyed the victim's suffering in that you laughed while describing the attack" (R13. 2425-26). The trial court found "cold, calculated and premeditated" based upon Mr. Globe's "written and taped

statements” (R13. 2427). The court found that Mr. Globe “had been contemplating the murder by ligature strangulation of an inmate or correctional officer for at least two weeks,” that Mr. Globe “decided to kill inmate Elton Ard more than 24 hours prior to the actual killing,” that Mr. Globe “carefully prefabricated two garrotes with which [he] intended to strangle inmate Elton Ard,” that Mr. Globe “then attempted the strangulation of Inmate Elton Ard on at least three occasions before being able to carry it out as [Mr. Globe] had pre-planned,” that Mr. Globe “strangled the victim for an extended period of time,” that “after a period of strangulation [Mr. Globe] released the victim and checked his vital signs to make sure the victim was dead,” and that “after believing that [he] possibly detected vital signs, [Mr. Globe] then applied the second garrote to the victim and sat back to smoke a cigarette and watch Inmate Alton [sic] Ard die” (R13. 2427). These findings on these two aggravators could only be based upon Mr. Globe’s taped statements, not upon his letters. The taped statements clearly contributed to the court’s sentencing findings.

F. CONCLUSION

Mr. Globe’s July 3 and July 7 statements were unconstitutionally obtained and improperly admitted at his trial. This Court should order a new trial and a new sentencing phase.

ARGUMENT II

THE ADMISSION OF CODEFENDANT BUSBY'S STATEMENTS VIOLATED MR. GLOBE'S CONFRONTATION RIGHTS AND THE FIFTH, SIXTH AND EIGHTH AMENDMENTS.

Before trial, the defense moved *in limine* to exclude the statements made by

Busby during the July 3, 2000, joint interrogation of Mr. Globe and Busby (R10. 1823). The motion argued, “The statements of Co-defendant Busby would not be admissible against Defendant Globe as the same would constitute hearsay and violate Defendant Globe’s right to confrontation under the Florida and Federal Constitutions” (Id.).

At a pretrial hearing, the defense argued that during the joint interview of Busby and Mr. Globe, Busby “was basically telling the cops what Mr. Globe did, how Mr. Globe did this, that, and the other” (R25. 507). Counsel gave the court examples of Busby’s statements incriminating Mr. Globe (R25. 507-08). Counsel argued that the statement of a non-testifying codefendant “[i]s general[ly] inadmissible against the defendant that is on trial” under Bruton v. United States, 391 U.S. 123 (1968) (R25. 509). Counsel requested that Busby’s statements be excluded from trial (R25. 511).

The State argued that Mr. Globe adopted Busby’s statements and therefore admitting Busby’s statements would not violate the Confrontation Clause (R25. 511-16). The defense argued that in order for the State’s adoption argument to be accepted, Mr. Globe would have had to adopt every individual statement made by Busby (R25. 517). The court denied the motion, ruling: “DENIED. Upon a finding that the recorded statements made by Andrew Busby were adopted by the

Defendant as his own” (R11. 2100). The joint statement was introduced at trial (R26. 627). Defense counsel renewed the motion *in limine* when the statement was introduced and again at the close of the State’s case (R26. 628, 629; R27. 770).

The admission of Busby’s statements violated Bruton v. United States, 391 U.S. 123 (1968). In Cruz v. New York, 481 U.S. 220 (1987), the Supreme Court reiterated the rule of Bruton--that introduction of a nontestifying codefendant's confession violates the defendant's confrontation rights. Cruz held that introduction of a nontestifying codefendant's interlocking confession violates the Confrontation Clause, but that the "interlocking" nature of the confessions may be considered in determining whether the violation is harmless. Cruz, 481 U.S. at 190-91.

Bruton forbids the introduction of a nontestifying codefendant's confession which is not directly admissible against the defendant. Cruz, 481 U.S. at 193. Because a codefendant's confession is presumptively unreliable, Ohio v. Roberts, 448 U.S. 56, 66 (1980), it is directly admissible against the defendant only if the confession bears sufficient "indicia of reliability." Lee v. Illinois, 476 U.S. 530, 543 (1986). There is a "weighty presumption against the admission of such uncross-examined evidence." Lee, 476 U.S. at 546. In assessing the reliability of a codefendant's confession, a court should examine factors such as the

circumstances surrounding the confession, the discrepancies between the codefendant's and defendant's statements, and whether those discrepancies involve significant issues in dispute at trial. Lee, 476 U.S. at 546.

As in Lee, 476 U.S. at 544-45, the circumstances surrounding Busby's statements are far from constitutionally sufficient to rebut the presumption of unreliability. The FDLE agents set up the interrogation, bringing Mr. Globe to the administration building in order to put him and Busby together (R25. 481). Busby had just spoken to his father on the telephone and was emotionally upset after that conversation (R25. 477). The FDLE agents' administration of Miranda rights was *pro forma* and was addressed to the codefendants jointly (R26. 630). Busby clearly had an interest in exculpating himself. Under Lee, Busby's statements clearly did not bear sufficient "indicia of reliability" to be independently admissible against Mr. Globe. Their admission thus violated Bruton and Cruz.

A Bruton violation can be harmless. Cruz, 481 U.S. at 194. The analysis of harmlessness is distinguished from the analysis of whether a codefendant's confession is sufficiently reliable to be independently admissible against the defendant. Even when the defendant's confession is admitted and interlocks in some respects with the codefendant's confession, the introduction of the codefendant's confession is not necessarily harmless. Cruz, 481 U.S. at 192-93.

If the confessions "interlock" to some degree, the likelihood of harm is much greater than if the confessions are "positively incompatible." *Id.* Here, it is clear that the confessions described the same series of events. The harm was magnified by the fact that the jurors were not permitted to take the transcripts indicating which defendant was speaking into the jury room, making it more likely that the jurors would attribute Busby's statements to Mr. Globe.

The trial court's admission of Busby's statements deprived Mr. Globe of his rights to confrontation, to due process, and to a reliable and individualized capital sentencing determination. This Court should order a new trial and sentencing.

ARGUMENT III

MR. GLOBE'S JURY WAS MISLED BY

**COMMENTS AND PENALTY PHASE
INSTRUCTIONS WHICH VIOLATED
CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985),
AND RING V. ARIZONA, 122 S.CT. 2428 (2002).**

Before the jury was instructed at the penalty phase, defense counsel objected that “[t]he jury instructions continually tell the jury to give an advisory sentence” and requested that the judge instruct the jury that he would give “greater extraordinary weight to their advisory sentence” (R29. 876). Defense counsel clarified that he was asking that the judge not use the words “advisory sentence” and that the judge instruct the jury he would give their decision “great weight” (R29. 876-77). The state opposed the requests, arguing that the judge should not deviate from the standard instructions (R29. 877). The judge denied both motions, although noting, “As a matter of law, the court must give great weight to the recommendation of the jury” (R29. 877-78).

When the penalty phase began, the court instructed the jurors, “The final decision as to what punishment should be imposed rest[s] solely with the judge of this court. However, the law requires that you, the jury, render to the court an advisory sentence as to what punishment should be imposed upon the defendant” (R29. 850). At the beginning of the jury instructions, the court told the jury:

Members of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for his

crime of murder in the first degree.

As you have been told, the final decision [a]s to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law that will now be given to you by the court and to render an advisory sentence. . . .

(R29. 901). The court repeated the term “advisory sentence” numerous times

(R29. 901, 904, 907 (4 times), 908 (2 times), 909). The court also told the jury it would “recommend” a sentence (R29. 906, 908, 909).

The court’s instructions at the penalty phase repeated what the jurors had heard during voir dire. Each prospective juror was questioned individually about the death penalty (R22. 48). During this questioning, each juror individually was told that he or she would be making a “recommendation” at the penalty phase.¹²

The Supreme Court has held, “[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985). In Ring v. Arizona, 122 S. Ct. 2428 (2002), the Court held that Apprendi v. New Jersey, 530 U.S. 466 (2000), applies to capital sentencing proceedings. Under Ring, Florida’s

¹²R22. 59, 71, 78, 83, 92, 104, 110, 116, 122, 128, 137, 144, 149, 153, 160, 170; R23. 181, 191, 202, 207, 212, 218, 223, 227, 234, 239, 242, 251, 257, 263; R24. 353, 356, 359, 361, 368, 374, 380, 384, 390, 395, 401, 406, 414, 417, 423).

capital sentencing scheme violates the jury trial guarantees of the Sixth and Fourteenth Amendments because it does not allow the jury to reach a verdict with respect to an “aggravating fact [which] is an element of the aggravated crime” punishable by death. Ring, 120 S. Ct. at 2441 (quoting Apprendi, 530 U.S. at 501 (Thomas, J., concurring)). Under Ring, the question is not whether death is an authorized punishment in a first-degree murder case, but whether the “facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone,” 122 S. Ct. at 2441, are found by the judge or jury. “If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt.” Ring, 122 S. Ct. at 2439.

Together, Caldwell and Ring establish that Mr. Globe’s death sentence violates the Sixth and Eighth Amendments. In Bottoson v. Moore, ___ So.2d ___, 2002 WL 31386790 (Fla. 2002), Justice Lewis explained his view that “the validity of jury instructions given in [Bottoson’s] case should be addressed in light of [Bottoson’s] facial attack upon Florida’s death penalty scheme on the basis of the holding in Ring v. Arizona.” Bottoson v. Moore, 2002 WL 31386790 at 29 (Lewis, J., concurring in result). According to Justice Lewis:

[I]n light of the dictates of Ring v. Arizona, it necessarily follows that

Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis under the United States Supreme Court's Caldwell v. Mississippi, 472 U.S. 320 (1985), holding.

Bottoson v. Moore, 2002 WL 31386790 at 28 (Lewis, J., concurring in result)..

Justice Pariente agreed with Justice Lewis on this issue: "I agree with Justice Lewis that there are deficiencies in our current death penalty sentencing instructions."

Bottoson v. Moore, 2002 WL 31386790 at 22 (Pariente, J., concurring in result).

Mr. Globe's death sentence rests upon a recommendation made by a jury told that its decision was only "advisory" or a "recommendation" and not told that its findings and verdict were the final decision. The death sentence therefore violates not only the Eighth Amendment rule of Caldwell, but also the Sixth Amendment. A "recommendation" made by persons who believe they are only making a "recommendation" is not a "verdict" under the Sixth Amendment. Such an error can never be harmless. Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). When the jury has been told it is only providing "advice," "there has been no jury verdict within the meaning of the Sixth Amendment," and therefore, "[t]here is no object, so to speak, upon which harmless-error scrutiny can operate." Id. at 280. This Court should order a new penalty phase.

ARGUMENT IV

FLORIDA'S CAPITAL SENTENCING PROCEDURE DEPRIVED MR. GLOBE OF HIS SIXTH AMENDMENT RIGHTS TO NOTICE AND TO A JURY TRIAL AND OF HIS RIGHT TO DUE PROCESS.

In Ring v. Arizona, 122 S. Ct. 2428 (2002), the United States Supreme Court held that Apprendi v. New Jersey, 530 U.S. 466 (2000), applies to capital sentencing proceedings. Ring overruled Walton v. Arizona, 497 U.S. 639 (1990), “to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.” Ring, 122 S. Ct. at 2443. Under Ring, “[b]ecause Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ Apprendi, 530 U.S., at 494, n. 19, the Sixth Amendment requires that they be found by a jury.” 122 S. Ct. at 2443. Since Arizona’s capital sentencing scheme is unconstitutional, so is Florida’s. “A Florida trial court no more has the assistance of a jury’s finding of fact with regard to sentencing issues that does a trial judge in Arizona.” Walton, 497 U.S. at 647-48.

A. MR. GLOBE’S DEATH SENTENCE IS INVALID BECAUSE A FLORIDA JURY’S ROLE IN CAPITAL SENTENCING DOES NOT SATISFY THE SIXTH AMENDMENT.

Florida’s capital sentencing scheme violates the jury trial guarantees of the

Sixth and Fourteenth Amendments because it does not allow the jury to reach a verdict with respect to an “aggravating fact [which] is an element of the aggravated crime” punishable by death. Ring, 120 S. Ct. at 2441 (quoting Apprendi, 530 U.S. at 501 (Thomas, J., concurring)). Under Ring, the question is not whether death is an authorized punishment in a first-degree murder case, but whether the “facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone,” 122 S. Ct. at 2441, are found by the judge or jury. “If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt.” Ring, 122 S. Ct. at 2439. A State may not avoid the Sixth Amendment by “specif[ying] ‘death or life imprisonment’ as the only sentencing options” because “the relevant inquiry is one not of form, but of effect.” Id. at 2440 (quoting Apprendi, 530 U.S. at 494). If the effect of finding an aggravating circumstance “expose[s] the defendant to a greater punishment than that authorized by the jury’s guilty verdict,” Apprendi, 530 U.S. at 494, the circumstance is an element which must be found by a jury beyond a reasonable doubt. Ring, 122 S. Ct. at 2440-41.

Florida’s capital sentencing statute makes imposition of the death penalty contingent upon factual findings made after a verdict finding the defendant guilty of

first-degree murder. Section 775.082 of the Florida Statutes provides that a person convicted of first-degree murder “shall” be sentenced to life imprisonment “unless the proceedings held to determine sentence according to the procedure set forth in [sec.] 921.141 result in findings by the court that such person shall be punished by death” (emphasis added).

Section 921.141, Fla. Stat., requires the trial judge to make three factual determinations before a death sentence may be imposed. The trial judge (1) must find the existence of at least one aggravating circumstance, (2) must find that “sufficient aggravating circumstances exist” to justify imposition of death, and (3) must find that “there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” Section 921.141(3), Fla. Stat. (emphasis added). If the judge does not make these findings, “the court shall impose sentence of life imprisonment in accordance with [sec.]775.082.” Id. (emphasis added). Because Florida’s death penalty statute makes imposition of a death sentence contingent upon these findings and gives sole responsibility for making these findings to the judge, it violates the Sixth Amendment.

Florida law does provide for the jury to hear evidence and “render an advisory sentence.” Sec. 921.141(2), Fla. Stat. However, the jury’s role does not satisfy the Sixth Amendment under Ring. Section 921.141(2) does not require a

jury verdict, but an “advisory sentence.” A Florida penalty phase jury does not make factfindings. A Florida penalty phase jury is not required to reach a verdict on any one of the three factual determinations required before a death sentence may be imposed.

Neither the sentencing statute, this Court’s cases, nor the jury instructions in Mr. Globe’s case required the jurors to find that the State had proven any one aggravating circumstance, or had established “sufficient” aggravating circumstances, or had shown that “there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” “[U]nder section 921.141, the jury’s advisory recommendation is not supported by findings of fact.” Combs v. State, 525 So. 2d 853, 859 (Fla. 1988)(Shaw, J., concurring).

Florida law requires that the trial judge’s findings be made independently of the jury’s recommendation. Grossman v. State, 525 So. 2d 833, 840 (Fla. 1988). This Court’s review of a death sentence is based and dependent upon only the judge’s written findings. Morton v. State, 789 So. 2d 324, 333 (Fla. 2001); Grossman, 525 So. 2d at 839; State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

Under Ring, aggravating factors are elements of capital murder. Under the Florida capital sentencing statute, the elements of capital murder are the three factual determinations the statute requires before a death sentence may be imposed.

However, the Florida statute does not require the jury's vote to be unanimous regarding the existence of an aggravating circumstance, regarding whether "sufficient" aggravating circumstances exist, or regarding whether mitigating circumstances exist which outweigh the aggravating circumstances. The statute requires only a majority vote of the jury in support of its advisory sentence. Sec. 921.141(2), Fla. Stat.

As to elements of an offense, this Court has recognized that a judge may not make factfindings "on matters associated with the criminal episode" because that "would be an invasion of the jury's historical function." State v. Overfelt, 457 So. 2d 1385, 1387 (Fla. 1984). Under Fla. R. Crim. P. 3.440, a jury verdict on the elements of a criminal charge must be unanimous. Since jury unanimity has long been the practice in Florida, "It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denies the defendant a fair trial." Flanning v. State, 597 So. 2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So. 2d 261 (Fla. 1956). However, this Court has approved allowing the jury to recommend a death sentence based upon a simple majority vote. See, e.g., Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994). The Court has also not required jury unanimity as to the existence of specific aggravating factors. Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990). Taken

together, Ring and Florida law, establish that the penalty phase jury's vote on the three factual determinations set forth in the statute is required to be unanimous.

Two of the elements required to be established in order for Mr. Globe to be sentenced to death were that "sufficient aggravating circumstances exist" to allow consideration of a death sentence and that mitigating circumstances sufficient to outweigh the aggravating circumstances did not exist. Sec. 921.141(3), Fla. Stat. Mr. Globe's jury was not instructed that these elements must be proved beyond a reasonable doubt. Such an error can never be harmless: "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). When the jury has not been instructed on the reasonable doubt standard, "there has been no jury verdict within the meaning of the Sixth Amendment," and therefore, "[t]here is no object, so to speak, upon which harmless-error scrutiny can operate." Id. at 280.

The language of Florida's capital sentencing statute, this Court's case law, and the Florida Rules of Criminal Procedure establish that the limited role of a Florida penalty phase jury does not satisfy the Sixth Amendment. The jury does not make fact findings, the jury does not return a verdict on the three factual determinations required by the statute before a death sentence may be considered, the jury vote is not required to be unanimous, and the jury is not instructed on the

reasonable doubt standard as to two of the three factual determinations required by the statute. Mr. Globe's death sentence violates the Sixth Amendment.

B. MR. GLOBE'S DEATH SENTENCE IS INVALID BECAUSE THE PROCEEDINGS BEFORE HIS JURY DID NOT SATISFY THE SIXTH AMENDMENT.

Even if this Court were to redefine the jury's role under the Florida capital sentencing statute, Mr. Globe's death sentence would violate the Sixth Amendment. Numerous errors involving comments to the jury and in the penalty phase jury instructions occurred in Mr. Globe's case. Thus, in addition to the structural infirmity of the statute discussed above, these errors vitiate any possible Sixth Amendment validity to the jury's advisory sentence in Mr. Globe's case.

Mr. Globe's jury was told that the "ultimate decision" was the judge's and that the jury only provides a "recommendation" or "advisory sentence." The Supreme Court has held, "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985). Mr. Globe's death sentence rests upon findings by a jury told that its decision was only a recommendation and thus violates not only the Eighth Amendment rule of Caldwell, but also the Sixth Amendment.

Mr. Globe's jury was told that one of the elements it had to find before considering whether to recommend death was "whether mitigating circumstances exist that outweigh the aggravating circumstances" (R29. 901, 904). This instruction violated due process and the right to a jury trial because it relieves the State of its burden to prove beyond a reasonable doubt the element of capital first-degree murder that "sufficient aggravating circumstances" exist which outweigh mitigating circumstances. In re Winship, 397 U.S. 358 (1970). Instead, the instruction shifts the burden of proof to the defendant to prove that the mitigating circumstances outweigh sufficient aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). Because Mr. Globe's jury was never required to find the element of sufficient aggravating circumstances beyond a reasonable doubt, the error cannot be subjected to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 279-80 (1993).

C. MR. GLOBE'S DEATH SENTENCE IS INVALID BECAUSE THE ELEMENTS OF THE OFFENSE NECESSARY TO ESTABLISH CAPITAL MURDER WERE NOT CHARGED IN THE INDICTMENT.

Jones v. United States, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the

maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” 526 U.S. at 243 n.6. Apprendi held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Apprendi, 530 U.S. at 475-76.¹³ Ring held that a death penalty statute’s “aggravating factors operate as ‘the functional equivalent of an element of a greater offense.’” Ring, 122 S. Ct. at 2443 (quoting Apprendi, 530 U.S. at 494 n.19).

In Jones, the Supreme Court noted that “[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration,” in particular because “elements must be charged in the indictment.” Jones, 526 U.S. at 232. After the decision in Ring, the Supreme Court overturned the death sentence imposed in United States v. Allen, 247 F.3d 741 (8th Cir. 2001), granted certiorari, vacated the judgment and remanded the case for reconsideration in light of Ring’s holding that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. Allen v. United States, 2002 U.S. LEXIS 4893 (June 28, 2002).

The question presented in Allen was whether aggravating factors under the

¹³The grand jury clause of the Fifth Amendment has not been held to apply to the States. Apprendi, 530 U.S. at 477 n.3.

federal death penalty statute “are elements of a capital crime and thus must be alleged in the indictment.” The Eighth Circuit rejected Allen’s argument because it believed aggravating factors are not elements of federal capital murder but are “sentencing protections that shield a defendant from automatically receiving the statutorily authorized death sentence.” Allen, 247 F.3d at 763.

Like the Fifth Amendment to the United States Constitution, Article I, section 15 of the Florida Constitution provides, “No person shall be tried for a capital crime without presentment or indictment by a grand jury.” Like 18 U.S.C. sections 3591 and 3592(c), Florida’s death penalty statute makes imposition of the death penalty contingent upon the government proving the existence of aggravating circumstances, establishing “sufficient aggravating circumstances” to call for a death sentence, and establishing that the mitigating circumstances are insufficient to outweigh the aggravating circumstances. Sections 775.082 and 921.141, Fla. Stat.

Florida law requires every “element of the offense” to be alleged in the information or indictment. State v. Gray, 435 So. 2d 816, 818 (Fla. 1983); State v. Dye, 346 So. 2d 538, 541 (Fla. 1977). An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage. Gray, 435 So. 2d at 818.

The Sixth Amendment requires that “[i]n all criminal prosecutions, the

accused shall . . . be informed of the nature and cause of the accusation. . . .” A conviction on a charge not made by the indictment is a denial of due process. State v. Gray, 435 So. 2d at 818, citing Thornhill v. Alabama, 310 U.S. 88 (1940), and DeJonge v. Oregon, 299 U.S. 353 (1937).

Because the State did not submit to the grand jury and the indictment did not state the essential elements of capital first-degree murder, Mr. Globe’s rights under Article I, section 15 of the Florida Constitution and the Sixth Amendment to the federal Constitution were violated. By wholly omitting any reference to the aggravating circumstances that the State would rely upon to seek a death sentence, the indictment prejudicially hindered Mr. Globe “in the preparation of a defense” to a sentence of death. Fla. R. Crim. P. 3.140(o).

D. BOTTOSON V. MOORE AND KING V. MOORE SUPPORT MR. GLOBE’S REQUEST FOR RELIEF.

On October 24, 2002, this Court issued its decisions in Bottoson v. Moore, ___ So.2d ___, 2002 WL 31386790 (Fla. 2002), and King v. Moore, ___ So.2d ___, 2002 WL 313386234 (Fla. 2002). In both cases, each justice wrote a separate opinion explaining his or her reasoning for denying relief. While a *per curiam* opinion announced the result in both cases, in neither case did a majority join the *per curiam* opinion or its reasoning. In both cases, four justices wrote separate

opinions explaining that they did not join the per curiam opinion, but “concur[red] in result only.” Bottoson v. Moore, 2002 WL 31386790 at 2; King v. Moore, 2002 WL 31386234 at 1-2.¹⁴ The four opinions concurring in result only raised substantial concerns about the constitutionality of Florida’s capital sentencing statute in light of Ring v. Arizona, 122 S. Ct. 2428 (2002). Under the logic of those four opinions, Mr. Globe is entitled to sentencing relief under Ring.

Justice Shaw expressed his view that the Florida death penalty statute violated the principle enunciated in Ring:

Nowhere in Florida law is there a requirement that the finding of an aggravating circumstance must be unanimous. Ring, however, by treating a “death qualifying” aggravator as an element of the offense, imposes upon the aggravator the same rigors of proof as other elements, including Florida’s requirement of a unanimous jury finding. Ring, therefore, has a direct impact on Florida’s capital sentencing statute.

Bottoson v. Moore, 2002 WL 31386790 at 18. At another point in his opinion, Justice Shaw concluded that Florida’s statute was “flawed because it lacks a unanimity requirement for the “death qualifying” aggravator. Bottoson v. Moore, 2002 WL 31386790 at 19.

¹⁴In many ways, the Bottoson v. Moore decision contains the primary opinions of the seven justices. The Florida Supreme Court had seven participating justices in that decision, while in King v. Moore, Justice Quince was recused. Generally, the separate opinions in King rely upon the separate opinions in Bottoson as more fully reflecting the reasoning of their authors.

In her opinion in Bottoson, Justice Pariente said, “I believe that we must confront the fact that the implications of Ring are inescapable.” Bottoson v. Moore, 2002 WL 31386790 at 22. She elaborated:

The crucial question after Ring is “one not of form, but of effect.” 122 S.Ct. at 2439. *In effect*, the maximum penalty of death can be imposed only with the additional factual finding that aggravating factors outweigh mitigating factors. *In effect*, Florida juries in capital cases *do not do* what Ring mandates – that is, make specific findings of fact regarding the aggravators necessary for the imposition of the death penalty. *In effect*, Florida juries *advise* the judge on the sentence and the judge *finds* the specific aggravators that support the sentence imposed. Indeed, under both the Florida and Arizona schemes, it is the judge who *independently* finds the aggravators necessary to impose the death sentence.

Bottoson v. Moore, 2002 WL 31386790 at 24 (italics in original).

Chief Justice Anstead explained his view of Ring and its application to the Florida death penalty statute:

Thus, Ring requires that the aggravating circumstances necessary to enhance a particular defendant’s sentence to death must be found by a jury beyond a reasonable doubt in the same manner that a jury must find that the government has proven all the elements of the crime of murder in the guilt phase. It appears that the provision for judicial findings of fact and the purely advisory role of the jury in capital sentencing in Florida falls short of the mandates announced in Ring and Apprendi for jury fact-finding.

Bottoson v. Moore, 2002 WL 3138670 at 10.

Justice Lewis explained in his view that “the validity of jury instructions given

in [Bottoson's] case should be addressed in light of [Bottoson's] facial attack upon Florida's death penalty scheme on the basis of the holding in Ring v.

Arizona." Bottoson v. Moore, 2002 WL 31386790 at 29.¹⁵ According to Justice Lewis:

[I]n light of the dictates of Ring v. Arizona, it necessarily follows that Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis under the United States Supreme Court's Caldwell v. Mississippi, 472 U.S. 320 (1985), holding.

Bottoson v. Moore, 2002 WL 31386790 at 28. Justice Pariente agreed with Justice Lewis on this issue: "I agree with Justice Lewis that there are deficiencies in our current death penalty sentencing instructions." Bottoson v. Moore, 2002 WL 31386790 at 22.

Some members of the Court in Bottoson and King relied upon the existence of the prior violent felony aggravator to deny relief. See, e.g., Bottoson, 2002 WL at 19 (Shaw, J., concurring in result only); Bottoson, 2002 WL 31386790 at 22 (Pariente, J., concurring in result only). This view relies upon Almendarez-Torres v. United States, 523 U.S. 224 (1998). Mr. Globe respectfully submits that

¹⁵Justice Lewis acknowledged that Ring has application to Florida's death penalty statute when he wrote that after Ring, a jury's "life recommendation must be respected." Bottoson v. Moore, 2002 WL 31386790 at 26. He concluded that as to jury overrides in favor of death, Florida law and Ring are in "irreconcilable conflict." Id.

Almendarez-Torres does not survive Apprendi and Ring. See Apprendi, 530 U.S. at 489 & n.15; Id., 530 U.S. at 520-21 (Thomas, J., concurring). Further, Apprendi specifically restricted Almendarez-Torres to its “unique facts.”

The opinions in Bottoson and King do not dispose of the issues in Mr. Globe’s case. The opinions of four Justices recognize that Florida’s capital sentencing statute cannot be reconciled with Ring. This Court should order a new penalty phase.

ARGUMENT V

THE TRIAL COURT’S SENTENCING ORDER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

In discussing the “previously convicted of a felony and under sentence of imprisonment aggravator,” the trial court’s sentencing order stated:

- a. Corrections serve the twin objectives of deterrence and punishment.
- b. You are currently serving three life sentences. You have no release date. Your only hope of release from prison is escape.
- c. Without the death penalty, there is no deterrence. Without the death penalty, there is no punishment.

(R13. 2434). The court’s reliance upon “no deterrence” and “no punishment” without the death sentence constituted nonstatutory aggravation and a mandatory death sentence, both of which violate the Eighth and Fourteenth Amendments to the United States Constitution.

Florida's death penalty statute limits the aggravating circumstances on which a sentence of death may be based. See Fla. Stat. § 921.141(5). In Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977), this Court stated:

We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition. Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

See also Robinson v. State, 520 So. 2d 1 (Fla. 1988). The Eighth Amendment requires that the sentencer only consider specifically defined aggravating circumstances. See Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). Thus, this Court has held that consideration of nonstatutory aggravating circumstances is impermissible. See Quince v. State, 414 So.2d 185 (Fla. 1982); Pope v. State, 441 So.2d 1073 (Fla. 1983); Trawick v. State, 473 So. 2d 1235 (Fla. 1985), cert. denied, 476 U.S. 1143 (1986); Bertolotti v. State, 476 So.2d 130 (Fla. 1985); Robinson v. State, 520 So.2d 1, 6 (Fla. 1988); Cochran v. State, 547 So.2d 928 (Fla. 1989); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Miller v. State, 373 So. 2d 882 (Fla. 1979). "No deterrence" and "no punishment" are not aggravating factors under Florida's statute, and the trial court's consideration of them thus violated Florida and federal law.

The trial court's consideration of "no deterrence" and "no punishment" also

amounted to the mandatory imposition of a death sentence for a defendant serving a life sentence. Mandatory death sentences are unconstitutional. Woodson v. North Carolina, 428 U.S. 280 (1976).

In discussing the mitigating circumstances of Mr. Globe's childhood abuse by his mother and of his personality disorder, the trial court stated that the persuasiveness of each of these factors "is substantially lessened by the following circumstances":

- i. The testimony of the Defense psychologist that you knew the difference between right and wrong.
- ii. The testimony of the Defense psychologist that you understood the nature and consequences of your acts.
- iii. The testimony of the Defense psychologist that you understood the criminality of your conduct.
- iv. The testimony of the Defense psychologist that you had the capacity to conform your conduct to the requirements of law.

(R13. 2430, 2431). The court thus relied upon Mr. Globe's sanity and upon the nonexistence of statutory mitigation to reduce the weight of mitigating factors, contrary to the Eighth and Fourteenth Amendments to the United States Constitution.

The Eighth Amendment requires that a capital sentencer consider any aspect of the defendant's history or character proffered as a reason for a sentence less

than death. Lockett v. Ohio, 438 U.S. 586 (1978). When evidence does not rise to the level required to establish a statutory mitigating factor, that evidence must still "be considered and weighed by the sentencer, no matter what the statutes say." Cheshire v. State, 568 So. 2d 908 (Fla. 1990)(citing Lockett); see Carter v. State, 560 So. 2d 1166 (Fla. 1990); Cannady v. State, 427 So. 2d 723 (Fla. 1983). The trial court's failure to give "full effect" to the nonstatutory mitigation by relying upon the nonexistence of statutory mitigation violated the Eighth Amendment. Penry v. Lynaugh, 492 U.S. 302 (1989).

Mitigating factors also may not be analyzed according to whether the defendant is sane. In State v. Dixon, 283 So. 2d 1 (Fla. 1973), this Court explained that statutory mental health mitigating circumstances are not refuted by evidence that the defendant is sane and competent:

Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to Fla.Stat. § 921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.

* * *

Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla.Stat. § 921.141(7)(f), F.S.A. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

283 So. 2d at 10. The trial court's reliance upon Mr. Globe's sanity to reduce the weight of nonstatutory mitigating factors thus violated Florida law. The trial court also violated the Eighth Amendment by failing to give "full effect" to a nonstatutory mitigating factor based upon improper considerations. Penry v. Lynaugh.

The trial court's sentencing order relies upon unconstitutional factors in finding aggravation and rejecting mitigation. This Court should order a resentencing.

ARGUMENT VI

THE TRIAL COURT ERRED IN GIVING THE PRINCIPAL INSTRUCTION.

In its initial preparation of the jury instructions, the state had requested the standard instruction on principals. (R26-707) The defense objected to the instruction and the State agreed to withdraw it. (R26-707) At the jury instruction conference at the conclusion of all the evidence, the trial judge noted that the parties had agreed not to include this but then indicated that “the principal instruction should be given.” (R27-773) The defense continued to object to giving the instruction and the State then changed its position. (R27-773) The court ruled that the instruction should be given. “I think the court is obligated to give the principal instruction. And it is a standard jury instruction. This is a clear principal case. Issues are clear there may be such an issue.” (R27-774) In its final instruction to the jury, the court gave the principal instruction. (R28-828)

The principal instruction is designed to punish a person who helps another person commit a crime. In this case, its application was that Charles Globe aided Andrew Busby in the premeditated killing Elton Ard. The instruction requires a two

part factual predicate before it can be given. First, Mr. Globe must have “had a conscious intent that the criminal act be done.” Second, Mr. Globe “did some act or said some word which was intended to and which did incite, cause encourage, assist or advise [Mr. Busby] to actually commit the crime.” Florida Standard Jury Instructions in Criminal Cases, 4th Edition (2002) Pg. 32.

The person who was killed was the cellmate of Mr. Busby at Columbia Correctional Institution. Elton Ard was apparently one of a number of prisoners in the prison who was verbally harassing Busby. Ard turned out to be the most convenient target. The evidence relating to the actual killing came mostly from the mouths or writings of Mr. Globe and Mr. Busby. This included a joint statement by Globe and Busby. This evidence was insufficient to allow the giving of the principal instruction.

The theory of principal responsibility focuses on the relationship between the defendant’s conduct and the crime. Nye and Nissen v. United States, 336 U.S. 613 (1949). This theory of criminal responsibility requires that a defendant’s participation in the crime be willful and knowing, so that simply associating with the other person is not sufficient to establish guilt. Mr. Globe was found guilty in this case of only premeditated murder; there was no concurrent finding of felony first degree murder. There can be no finding that Mr. Globe shared with Mr. Busby a

premeditated design to effect the death of Elton Ard.

In Brumbley v. State, 453 So.2d 381, 385 (Fla. 1984), Fred Brumbley and Russell Smith were charged with killing Robert Rogers.¹⁶ To support the premeditation element, the State relied on Smith's eyewitness account. At trial, Smith testified that it was Smith who killed Rogers and that Brumbley was not present when this happened. Smith also testified that Brumbley was ignorant about the murder. Smith did agree that Brumbley participated in kidnapping and robbing Smith and they had a discussion about what to do with Smith, including killing him. According to Smith, Brumbley shrugged his shoulders when Smith suggested killing Rogers. This Court held that this information was not enough to support the element of premeditation based on a shared criminal liability premise.

¹⁶In this case, the State proceeded on both premeditated and felony-murder theories to support a first degree murder conviction.

ARGUMENT VII

THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE.

This Court reviews each death sentence for both internal and external proportionality. First, this Court looks to the facts and circumstances of the case to determine if the death sentence should stand. Ray v. State, 755 So. 2d 604, 611 (Fla. 2000). If so, this Court considers the “totality of the circumstances in a case and compares it with other capital cases to ensure uniformity in application.” Mansfield v. State, 758 So.2d 636, 647 (Fla. 2000). In each instance, this Court has stressed “that the death penalty is reserved for ‘the most-aggravated and unmitigated of most serious crimes’.” State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973); Deangelo v. State, 616 So. 2d 440, 443 (Fla. 1993).

The trial court found four aggravating circumstances: (1) under sentence of imprisonment; (2) prior conviction of felony involving violence; (3) heinous, atrocious or cruel; and (4) cold, calculated and premeditated. The cold, calculated and premeditated factor must be struck because it is based solely upon Mr. Globe’s unconstitutionally obtained statements. See Argument I. Additionally, the

weight of the heinous, atrocious or cruel factor is greatly reduced when those statements are excluded.

Viewed appropriately, this case involves at most three aggravating factors, only one of which is based upon the manner in which the murder was committed. Further, this case is definitely not among the least mitigated. The trial court's order recognizes the extent and quality of mitigation offered on behalf of Mr. Globe. This has been previously detailed in the Statement of the Facts and other Arguments.

Although this Court's proportionality review is often viewed through the prism of counting the number of aggravators versus the number of mitigators, this is not the way it is designed to work. Proportionality review "requires a discrete analysis of the facts," Terry v. State, 668 So. 2d. 954, 965 (Fla.1996), and involves a qualitative review of the basis for each aggravator and mitigator rather than a quantitative analysis. The Court emphasized this requirement in Tillman v. State, 591 So. 2d 167 (Fla. 1991):

Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990).

The requirement that death be administered proportionately has

a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. Art. I, § 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. *Id.* Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, § 9, Fla. Const.; Porter.

...Thus proportionality review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law.

Id. at 169 (alterations in original) (citations and footnote omitted). Proportionality review involves consideration of "the totality of the circumstances in a case" in comparison with other death penalty cases. *Slincy v. State*, 699 So. 2d 662, 672 (Fla. 1997) (citing *Terry*, 668 So. 2d at 965).

When assessing proportionality, the Court compares the case to other cases involving similar facts. *Kramer v. State*, 619 So. 2d 274, 277 (Fla. 1993). In Mr. Globe's case, the murder occurred in a prison, and thus should be compared to other prison murders. When this comparison is made, it is clear that Mr. Globe's case is not the most aggravated and least mitigated. See *Coney v. State*, 653 So. 2d 1009, 1011 (Fla. 1995) (five aggravators and no mitigators); *Marshall v. State*, 604 So. 2d 799, 802 (Fla. 1992) (four aggravators, including nine prior convictions for violent felonies; two nonstatutory mitigators); *Williamson v. State*, 511 So. 2d

289, 291 (Fla. 1987) (three aggravators and no mitigators); Lusk v. State, 446 So. 2d 1038, 1042 (Fla. 1984) (four aggravators, including prior first-degree murder conviction; no mitigators); Agan v. State, 445 So. 2d 326, 328 (Fla. 1983) (two aggravators, including prior murder conviction; no aggravators).

These cases involved nothing or very little in mitigation. In contrast, in Mr. Globe's case, the trial court found eleven nonstatutory mitigating factors. Mr. Globe's death sentence is disproportionate and should be reduced to life imprisonment.

ARGUMENT VIII

THE TRIAL COURT ERRED BOTH LEGALLY AND FACTUALLY IN ITS EVALUATION OF MITIGATING FACTORS BY APPLYING IMPROPER LEGAL STANDARDS AND BY FAILING TO EXPLAIN ITS WEIGHING PROCESS.

In a capital case, “the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence.” Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); Skipper v. South Carolina, 476 U.S. 1, 2 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982). Both the trial court and this Court are constitutionally required to consider any mitigating evidence found anywhere in the record. Parker v. Dugger, 498 U.S. 308 (1991).

In implementing these constitutional requirements, this Court has defined the trial court’s duty to find and consider mitigation. Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987). In Campbell v. State, 571 So. 2d 415 (Fla. 1990), the Court reiterated the duties outlined in Rogers and further delineated the trial court’s

obligations in evaluating mitigating factors:

When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. . . . The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. . . . The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance.

Campbell, 571 So. 2d at 419 (citations and footnotes omitted). The written evaluation requirement of Campbell “cannot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of” and is not satisfied unless “it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the death penalty.” Walker v. State, 707 So. 2d 300, 319 (Fla. 1997). Thus, in addition to addressing whether mitigating factors are factually established, the sentencing order must also explain the reasoning for the trial court’s weighing of the mitigators. Merck v. State, 763 So. 2d 295, 298 (Fla. 2000); Hudson v. State, 708 So. 2d 256, 259-60 (Fla. 1998).

A mitigating factor need only be proved by a preponderance of the evidence. Campbell, 571 So. 2d at 419 (quoting Fla. Std. Jury Inst. (Crim.)). Accordingly, a trial court must find that a mitigating factor has been proved if it is supported by a

reasonable quantum of competent, uncontroverted evidence. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). Further, while it is within the trial court's discretion to determine the relative weights given to established mitigators, "some weight must be given to all established mitigators." Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995). In Mr. Globe's case, the trial court's sentencing order failed to satisfy Campbell and its progeny because the court failed to provide a thoughtful and comprehensive analysis of the weighing process.

In Mr. Globe's case, the court's sentencing order discussed statutory and nonstatutory mitigating factors, rejecting some factors and finding others (R13. 2429-33). The court assigned those mitigating factors it found "little" or "slight" weight (R13. 2430-33).

The trial court gave "little" and "slight" weight to nonstatutory mitigating factors relating to Mr. Globe's abuse as a child and to his personality disorder because Mr. Globe was sane and had not established statutory mental health mitigating factors (R13. 2430-31). A trial court is not permitted to reject nonstatutory mitigating factors based on the defendant's failure to prove statutory mitigating factors. Merck, 763 So. 2d at 298. When evidence does not rise to the level required to establish a statutory mitigating factor, that evidence must still "be considered and weighed by the sentencer, no matter what the statutes say."

Cheshire v. State, 568 So. 2d 908 (Fla. 1990)(citing Lockett v. Ohio, 438 U.S. 586 (1978)); see Carter v. State, 560 So. 2d 1166 (Fla. 1990); Cannady v. State, 427 So. 2d 723 (Fla. 1983). Mitigating factors also may not be analyzed according to whether the defendant is sane. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).

These proposed mitigating factors were supported by a reasonable quantum of competent, uncontroverted evidence. The trial court's failure to give "effect" to the nonstatutory mitigation by relying upon the nonexistence of statutory mitigation and upon Mr. Globe's sanity violated the Eighth Amendment. Penry v. Lynaugh, 492 U.S. 302 (1989). This error precludes meaningful review of the sentencing order and requires that the death sentence be vacated. Merck; Hudson; Walker; Ferrell; Campbell.

Further, the trial court's order is very unclear as to the weight attached to the mitigating factors the court found to exist and does not "explain the reasoning for the trial court's weighing of nonstatutory mitigation." Merck, 763 So. 2d at 298.. The court said the factors were given "slight weight" or "little weight." Is "slight" more or less than "little"? Is "little" more or less than "slight"?

One example of the difficulty presented by use of these vague, undefined terms is the court's treatment of the mitigator involving Mr. Globe's history of substance abuse and the mitigator involving Mr. Globe sharing sugar and cigarettes

with another prison inmate (R13. 2431-32).. The court assigned both of these mitigators “slight” weight. However, the evidence underlying the substance abuse mitigator was far more extensive, involved a much longer period of Mr. Globe’s life and addressed one of the formative forces in Mr. Globe’s life. This Court has recognized that a history of substance can be an important mitigating factor. Buford v. State, 570 So. 2d 923, 925 (Fla. 1990); Carter v. State, 560 So. 2d 1166, 1168 (Fla. 1990); Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987). While the trial court gave both mitigators “slight” weight, there is no way to determine from the sentencing order what “slight” means, or whether the “slight” weight given to the substance abuse mitigator is the same “slight” weight given to the mitigator involving sharing with another prison inmate.

The difficulty with understanding the meaning of “slight” and “little” permeates the sentencing order. Although the trial court found some nonstatutory mitigating factors, the court did not explain its reasoning for the weights assigned to these factors.

Further, the trial court did not explain how these mitigating factors were weighed against the aggravating factors. The court said only that each aggravating factor outweighed all of the mitigating factors combined (R13. 2434-35).

The court’s failure to provide a detailed, thoughtful and comprehensive

analysis of its weighing process precludes meaningful review of the sentencing order. Merck; Hudson; Walker; Ferrell. The errors in the sentencing order's consideration of mitigating factors violate the Eighth Amendment. Mr. Globe's death sentence should be vacated.

CONCLUSION

Based upon the record and the arguments presented in his Initial Brief, Mr. Globe respectfully urges the Court to order a new trial and a new penalty phase.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was typed using Times New Roman, 14 point.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail this ____ day of January, 2003, to **Mr. Charles Crist**, Attorney General, The Capitol, Tallahassee, Florida 32399.

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