

IN THE SUPREME COURT OF FLORIDA

MICHAEL GRIFFIN, :
Appellant, :
vs. : Case No. 93,906
STATE OF FLORIDA, :
Appellee. :
_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

KEVIN BRIGGS
Assistant Public Defender
FLORIDA BAR NUMBER 0520357

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831

(941) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

	<u>PAGE NO.</u>
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	4
SUMMARY OF THE ARGUMENT	30
ARGUMENT	32
ISSUE ONE	
DID THE TRIAL COURT ERR IN FINDING THAT APPELLANT HAD VOLUNTARILY AND INTELLIGENTLY WAIVED HIS RIGHT TO A JURY DURING THE PENALTY PHASE?	32
ISSUE TWO	
DID THE TRIAL COURT ERR IN FAILING TO CONSIDER A MITIGATING CIRCUM- STANCE PRESENTED BY THE DEFENSE?	38
ISSUE THREE	
DID THE TRIAL COURT ERRONEOUSLY CONSIDER TWO AGGRAVATING CIRCUM- STANCES THAT REFER TO THE SAME AS- PECT OF THE OFFENSE?	44
CONCLUSION	49
APPENDIX	
CERTIFICATE OF SERVICE	

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE NO.</u>
<u>Arthur v. State,</u> 374 S.E.2d 291 (S. Car. 1988)	36
<u>Banks v. State,</u> 700 So.2d 363 (Fla.1997)	44
<u>Bello v. State,</u> 547 So.2d 914 (Fla.1989)	44
<u>Bonifay v. State,</u> 626 So.2d 1310 (Fla.1993)	48
<u>Boykin v. Alabama,</u> 395 U.S. 238 (1969)	33
<u>Campbell v. State,</u> 571 So.2d 415 (Fla.1990)	30, 39, 40
<u>Chapman v. California,</u> 386 U.S. 18 (1967)	42
<u>Cherry v. State,</u> 544 So.2d 184 (Fla.1989)	45, 47
<u>Consalvo v. State,</u> 697 So.2d 805 (Fla.1996)	39
<u>Cooper v. Dugger,</u> 526 So.2d 900 (Fla.1988)	39, 41, 42
<u>Eddings v. Oklahoma,</u> 455 U.S. 104 (1982)	38, 39
<u>Espinosa v. Florida,</u> 505 U.S. 1079 (1992)	47
<u>Farr v. State,</u> 621 So.2d 1368 (Fla.1993)	39, 40
<u>Ferrell v. State,</u> 653 So.2d 367 (Fla.1995)	40
<u>Foster v. State,</u> 679 So.2d 747 (Fla.1996)	45, 46

TABLE OF CITATIONS (continued)

<u>Goodwin v. State,</u> 721 So.2d 728 (Fla. 4th DCA 1998)	42
<u>Green v. State,</u> 641 So.2d 391 (Fla.1994)	45-47
<u>Hudson v. State,</u> 708 So.2d 256 (Fla.1998)	39
<u>Jackson v. State,</u> 704 So.2d 500 (Fla.1998)	40
<u>Johnson v. Zerbst,</u> 304 U.S. 458 (1938)	34
<u>King v. State,</u> 514 So.2d 354 (Fla.1987)	35
<u>Lamadline v. State,</u> 303 So.2d 17 (Fla.1974)	33, 36
<u>Lockett v. Ohio,</u> 438 U.S. 586 (1978)	37, 42
<u>Maggard v. State,</u> 399 So.2d 973 (Fla.1981)	45
<u>Mahn v. State,</u> 714 So.2d 391 (Fla.1998)	40
<u>Mason v. State,</u> 719 So.2d 304 (Fla. 4th DCA 1998)	42
<u>Mills v. State,</u> 476 So.2d 172 (Fla.1985)	45
<u>Nibert v. State,</u> 574 So.2d 1059 (Fla.1990)	40
<u>Omelus v. State,</u> 584 So.2d 563 (Fla.1991)	48
<u>Pangburn v. State,</u> 661 So.2d 1182 (Fla.1995)	36

TABLE OF CITATIONS (continued)

<u>Porter v. State,</u> 723 So.2d 191 (Fla.1998)	39
<u>Provence v. State,</u> 337 So.2d 783 (Fla.1976)	44
<u>Richardson v. State,</u> 437 So.2d 1091 (Fla.1983)	36
<u>Skipper v. South Carolina,</u> 476 U.S. 1 (1986)	42
<u>Spencer v. State,</u> 615 So.2d 688 (Fla.1993)	2
<u>State v. Carr,</u> 336 So.2d 358 (Fla.1976)	33
<u>State v. DiGuilio,</u> 491 So.2d 1129 (Fla.1986)	42
<u>State v. Hernandez,</u> 645 So.2d 432 (Fla.1994)	33
<u>Stevens v. State,</u> 552 So.2d 1082 (Fla.1989)	39, 41
<u>Stringer v. Black,</u> 503 U.S. 222 (1991)	47, 48
<u>Valle v. State,</u> 502 So.2d 1225 (Fla.1987)	42, 43
 <u>OTHER AUTHORITIES</u>	
§ 924.051, Fla. Stat. (1997)	42

STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

PRELIMINARY STATEMENT

In this brief, pages in the record on appeal will be referred to by either an [S], referring to the supplemental volumes on appeal, or by a [V], referring to the remaining volumes. These symbols will be followed by the appropriate volume number and page number, [S2:33] for example.

STATEMENT OF THE CASE

In the Circuit Court for Pinellas County, a grand jury returned an indictment charging Appellant, Michael Griffin, with two counts of first-degree murder. [V1:1-2] Filed on November 29, 1995, the indictment charged Juan Antonio Lopez as a co-defendant. [V1:1] The offenses, according to the indictment, occurred on either October 7th or 8th, 1995. [V1:1] The state filed a notice of intent to seek the death penalty. [V1:5] On June 13, 1997, Appellant entered pleas of guilty to the two capital offenses. [V9:1595,1598-1607;V13:2114-15] The Honorable Brandt Downey presided at the plea hearing. [V9:1595] The trial court entered a written judgment adjudicating Appellant guilty of the two offenses. [V9:1593-94]

On December 8, 1997, Appellant appeared for the penalty phase trial. [S1:1] He waived the jury for this proceeding. [S1:8-13] At the conclusion of the evidentiary portion of the trial, defense counsel waived closing arguments and a separate hearing under Spencer v. State, 615 So.2d 688 (Fla.1993). [S3:346;S4:510-11;V14:2222-24] Both counsel for the state and for the defense filed written sentencing memoranda. [V11:2045-50,2051-61] After reviewing these memoranda, the trial court conducted a sentencing hearing on July 10, 1998. [V14:2220] Defense counsel waived the presentence investigation report. [V14:2225-26] The trial court imposed the death penalty. [V14:2250-51;V11:2082] The court

prepared a written sentencing order (Append. 1), which was filed on July 10, 1998. [V11:2062-75] Defense counsel filed a timely notice of appeal on July 29, 1998. [V11:2087] An amended notice of appeal was filed on August 11, 1998. [V11:2090-91] The trial court appointed the Public Defender for the 10th Judicial Circuit to represent Appellant on appeal. [V11:2095]

STATEMENT OF THE FACTS

I. Appellant's Life Prior to His Drug Addiction

Several witnesses testified concerning Appellant's character prior to his using cocaine. Appellant started using cocaine in 1995. [S1:85] William Schnitzler became friends with Appellant in 1985 or 1986 while they were in school. [S3:368-69] Appellant had a high grade point average while in high school. [S2:303;-S4:430,432] After they graduated, Schnitzler continued to see Appellant every week. [S3:369] Schnitzler testified Appellant was "a great person" who was never violent or abusive. [S3:370] Chuck Hash met Appellant in 1991. [S3:363-64] Hash saw Appellant almost every day; he and Appellant were good friends. [S3:364] Hash testified Appellant was "very outgoing, very personable person, do anything for a friend." [S3:365] Hash could not recall any time when Appellant was violent or abusive. [S3:367] Sandy Griffin, Appellant's mother, testified Appellant last lived with her in 1991; however, she had daily contact with him since that time. [S4:427-28] She testified that Appellant was very loving and compassionate as a child. [S4:429]

Tammy Young began dating Appellant in 1986. [S3:373] They dated for several years. [S3:373] Young and Appellant had a son. [S3:374-376] Appellant maintained contact with the child, who was ten at the time of the proceedings below. [S3:376-77] Photographs

of Appellant being with his son were introduced into evidence. [S3:379-80] Young confirmed that Appellant supported his son financially, never missing a child support payment until 1995. [S3:381] Young testified concerning Appellant's character during this time: "He's a very loving, compassionate man. I mean, he is so sweet, you know, and--I mean, he would not do anything to harm me or Kenny or anybody." [S3:385]

II. Appellant's Involvement with Drugs

James Griffin, Appellant's father, operated a refrigeration business called Moore's Refrigeration. [S3:350-51] Appellant worked for the business, beginning in 1989 when he graduated from high school. [S3:351-52] Mr. Griffin said Appellant was a very reliable worker. [S3:354] In 1995 Mr. Griffin learned that Appellant had been using cocaine, including crack cocaine. [S3:356-57] Mr. Griffin testified Appellant became "distant" and "lethargic." [S3:357] Appellant stopped working. [S3:358,391] Mr. Griffin said he did not know Appellant anymore. [S3:357]

Matthew Griffin, Appellant's younger brother, always had a good relationship with Appellant. [S3:387,390] Matthew testified Appellant was a "great worker." [S3:389] In 1995 Matthew noticed changes in Appellant. [S3:390-91] During this time, Matthew attempted unsuccessfully to locate Appellant. [S3:391-92] In 1995 Hash also noticed a change in Appellant. [S3:365] Hash said this change was caused by drug usage. [S3:365] About four or five

months before the offenses, Hash's relationship with Appellant ended. [S3:366] Hash said Appellant became indifferent to everybody. [S3:366] In 1995, Schnitzler asked Appellant to come to work for his company. [S3:371] Appellant was not interested and would not talk about what he was doing. [S3:371] Schnitzler testified Appellant's behavior was not what it had been previously. [S3:371-72]

Mrs. Griffin, Appellant's mother, testified she noticed changes in Appellant's behavior when he began neglecting his children and not contacting her. [S4:434] Appellant had, unexplainably, stopped visiting his son. [S3:381,382] Mrs. Griffin said she did not know Appellant's whereabouts for a time. [S4:434] Appellant had never previously smoked or used alcohol. [S4:435-36] But Mrs. Griffin learned in 1995 that Appellant might be using drugs. [S4:436] She tried to get Appellant into a drug rehabilitation center. [S4:436]

Tracy Griffin married Appellant about two weeks prior to the proceedings below. [S3:397,409] Tracy had known Appellant for three years. [S3:398] In late 1995 Tracy found cocaine inside one of Appellant's pockets. [S3:402] Tracy, because of the cocaine, told Appellant to leave her residence. [S3:402] He moved in with Nicolas Kocolis. [S3:403] Subsequently, Appellant tried to quit his addiction, but he resumed using cocaine. [S3:403] Tracy testified Appellant's personality changed. [S3:404] She said

Appellant was no longer responsive to her or his children after he began taking drugs. [S3:419-20]

According to Tracy, Appellant had never harmed or threatened her. [S3:404-05] She denied that Appellant had pushed her during a domestic dispute. [S3:410-12] Tracy acknowledged writing a letter in which she criticized Appellant for leaving her alone. [S3:415-17]

III. The Crime Scene

In October of 1995, James Cleasas worked as a manager for Service America Corporation, a vending machine company. [S1:28,32] The company's headquarters was in Oldsmar. [S1:28] Drivers working for the company would collect money from vending machines and put the money into cloth bags that were sealed and numbered. [S1:32] These bags were placed inside lockers. [S1:32,33]

Cleasas knew Appellant because Appellant used to work for Moore's Refrigeration, a company that did service work for Service America. [S1:30,51] Moore's Refrigeration was sometimes called at night in cases of emergency. [S1:45] Appellant worked several times on the refrigeration in both the trucks and the freezers. [S1:30] Cleasas testified Appellant was present when the drivers brought in money. [S1:34] Two days prior to the murders, Service America requested that Moore's Refrigeration repair a freezer. [S1:46]

On the morning of October 8, 1995, a Sunday, Cleasas received a telephone call from Terry Goldych. [S1:36] Goldych, who had arrived at Service America at 10:30 a.m, informed Cleasas that the doors to the business were open and that he could not locate Tom McCallops. [S1:36,59] Mr. McCallops worked for Cleasas, operating the company's warehouse as well as performing other duties. [S1:29] Goldych then discovered the bodies of Mr. McCallops and his wife Patricia McCallops. [S1:37] Hearing Goldych's report, Cleasas went to Service America where law enforcement had already arrived. [S1:37]

Officer John Mauro of the forensic science division of the sheriff's office, investigated the crime scene. [S2:215,216] A videotape of the crime scene was filmed and played during the proceeding below. [S2:216-17,225] Photographs of the business were also introduced into evidence. [S1:66-67;V12:2105] Officer Mauro prepared a diagram of the interior of the building, indicating the locations of the loading area, storage area, lockers, and freezers. [S2:222-23;V12:2106] The diagram showed where Goldych had found the victims, inside refrigeration unit number four. [S223,229;-V12:2106] To get to this unit, a person would have to walk past the lockers where about \$11,300 in change and bills had been removed. [S1:38;S2:223-24] Some of these lockers had been cut open. [S1:38] Photographs of the lockers were introduced into evidence. [S2:220;V12:2107] On the outside and inside of one of these lockers, law enforcement found blood. [S1:74;S2:220-21,228]

DNA testing on the blood indicated it was consistent with being Appellant's blood. [S1:62]

Officer Mauro testified that a hand truck belonging to Service America was located near some dumpsters at the end of a loading ramp, which was some distance away from the loading dock. [S2:219,226,238,240] Law enforcement found two milk crates near the loading area. [S2:227] The contents of these crates appeared to have been dumped out. [S1:41;S2:227] Similar crates were found inside the freezer where the victims were located. [S2:227]

Mrs. McCallops was on the floor of the left side of the freezer, and Mr. McCallops was in the back. [S1:161;S2:201] Mr. McCallops was lying on his right side. [S1:162] Nearby boxes did not have any blood splatter on them. [S1:162] The police found a 9 mm. bullet casing near the doorway of the freezer. [S2:230,232] Six other 9 mm. casings were found inside the freezer. [S2:230,-233,237] Shotgun wadding and bullet fragments were also located. [S2:230-31,231-32,233,235] The shotgun wadding was located inside the freezer. [S2:235-36] From where the wadding was found, Officer Mauro could not determine the location of the person firing the shotgun. [S2:235-36] Boxes inside the freezer and very near to Mr. McCallops appeared to have been disrupted. [S2:232] An indentation in the back wall of the freezer appeared to have been made by a bullet. [S2:233-34] Law enforcement found a pair of glasses inside the freezer. [S2:233,238-39]

Dr. Marie Hansen, a forensic pathologist, conducted an autopsy on the bodies on October 9th. [S1:160-61,163-64] Photographs of the bodies were admitted into evidence. [S1:161-63,181-82;V12:2109] Dr. Hansen testified Mr. McCallops suffered five gunshot wounds, four from a handgun and one from a shotgun. [S1:164;S2:196] The shotgun wound was to the upper right chest and neck area. [S1:165] According to Dr. Hansen, the shotgun wound and a gunshot wound to the right hip resulted from the first shots fired. [S1:165] The shotgun was fired from a distance of between one to three feet. [S1:166] In Dr. Hansen's opinion, the shot was fired while Mr. McCallops was standing. [S1:166-67;S2:196] Dr. Hansen testified that this wound was life-threatening and that victim would have died within several minutes. [S1:168;S2:199]

The gunshot wound to the hip went from Mr. McCallops' right buttock through the right thigh and exited through the hip. [S1:168] Dr. Hansen testified this wound was consistent with it being fired while Mr. McCallops was lying on his left side. [S1:169] She opined that the wound may have been fired before or after the shotgun blast but prior to the remaining three gunshot wounds. [S1:169] One of these shots was to the abdomen. Dr. Hansen said this wound was consistent with being fired while Mr. McCallops was in the position in which he was found, "on the floor on his right side with his left side up." [S1:171]

The third shot was located on the deceased's left thigh. [S1:171] This shot and the shot to the abdomen were fired from a

distance of more than two to three feet. [S1:171-72] The wound to the thigh was not life-threatening. [S172] According to Dr. Hansen, this wound was consistent with Mr. McCallops lying on his right side when he received the wound. [S1:172]

A fourth shot entered the deceased a couple of inches below the left ear canal. [S1:173] Dr. Hansen testified that this wound could have occurred while Mr. McCallops was in the position that he was ultimately found in. [S1:173] Dr. Hansen believed that the shot to the jaw was consistent with someone approaching Mr. McCallops and firing at a distance closer than the other shots. [S1:174-75;S2:200-01,202] This wound could have been fatal but not immediately. [S1:175;S2:199,202] Dr. Hansen testified the wounds had some tissue hemorrhage, indicating that Mr. McCallops was alive at the time of the shots; however, the doctor could not tell if Mr. McCallops was conscious. [S1:175;S2:200,201-02] Mr. McCallops moved from the time he suffered the shotgun wound to the time of the wound to his head. [S2:200]

Mrs. McCallops was lying just inside the freezer area. [S2:195] She suffered two gunshot wounds. [S1:175-76] One of the wounds entered her left breast and then went in and out of her left arm. [S1:176] This wound was consistent with her arm being held close to her left breast. [S1:177] The shot, which was fired from a distance of at least several feet, could have occurred while Mrs. McCallops was standing or lying down. [S1:177] Dr. Hansen believed

that this gunshot was the first shot fired. [S2:194] The wound was not life threatening. [S1:178,192]

A second gunshot wound was located on her right temple. [S1:178] The bullet, which was recovered, entered her brain. [S1:178-79] Dr. Hansen testified that a very fine blood splatter on her right hand was consistent with Mrs. McCallops having her hand up near her head at the time of the shot. [S1:180-81;S2:193] Dr. Hansen said the position of her hand would be consistent with a defensive motion. [S1:181] The wound, which was caused by a handgun, would have quickly caused death. [S1:181;S2:192] Dr. Hansen testified the shot was fired by a person in close proximity to Mrs. McCallops. [S2:194]

IV. The Investigation

Detective Robert Snipes was the lead investigator of the shootings. [S1:48] On October 28, 1995, Detective Snipes received a tip from Stephen Rodgers. [S1:49] Rodgers provided the name of Lewis McKee, a friend of Rodgers. [S1:50] McKee gave law enforcement the names of Appellant and Anthony Lopez. [S1:50] While at a bottle club, McKee had a conversation with Appellant and Lopez regarding a possible robbery. [S1:54] Detective Snipes later determined that Appellant and Lopez went to Shorty's Bar at 7:30 p.m. on October 5th. [S1:51-52] This bar was across the street from Service America. [S1:52] Detective Snipes testified Appellant and

Lopez went to the bar several times in order to conduct surveillance of Service America. [S1:54]

On October 29th, Detective Snipes questioned Appellant after advising him of his Miranda rights. [S1:63-64] When Detective Snipes first mentioned Mr. McCallops, Appellant did not become emotional. [S1:83] As the interview progressed and Detective Snipes showed Appellant a photo of Mr. McCallops, Appellant became emotional. [S1:84] When Detective Snipes questioned Appellant regarding his failure to pay child support and care for his children, Appellant began to cry. [S1:85] Appellant indicated he knew Mr. McCallops. [S1:65] Appellant knew Mr. McCallops filled in for other drivers and worked primarily in the warehouse. [S1:65]

Detective Snipes knew Appellant sold drugs for Kocolis, a local drug dealer. [S1:79] Detective Snipes testified Appellant had a dependant relationship with Kocolis, doing anything Kocolis requested. [S1:79] Kocolis assisted in the planning of the robbery and received money from the robbery. [S1:81,90] Kocolis provided the shotgun and the handgun that were used in the robbery. [S1:81, 99-100] Kocolis was paid for this shotgun as well as for the handgun. [S1:99] During Detective Snipes's questioning of Appellant, Appellant expressed a fear of implicating Kocolis in the offenses. [S1:85-86] Appellant indicated he and Kocolis had been friends who sometimes socialized together. [S1:91-92] Nonetheless, Appellant was willing to assist law enforcement in prosecuting Kocolis. [S1:100]

Detective Snipes questioned Kimberly Ally on November 10, 1995. [S2:325] Ally knew Appellant, Lopez, and Kocolis. [S2:325] She described Kocolis as her roommate at one time. [S2:326] Ally had a conversation with Lopez in early November, 1995. [S2:326-28] While they were sitting in an automobile, Lopez told Ally that Appellant climbed a fence in order to gain access to Service America. [S2:330] Appellant cut himself on the fence. [S2:330] According to Ally, Lopez told her that Appellant opened the door to the freezer and shot Mr. McCallops with a shotgun, spraying Mrs. McCallops with blood. [S2:331] To the contrary, Detective Snipes found no blood spray on Mrs. McCallops. [S2:332] Lopez told Ally that he shot Mr. and Mrs. McCallops in the head. [S2:332-33]

Law enforcement also interviewed Cynthia Lambert. [S1:86-87] Lambert related what Lopez had told her concerning the robbery. [S1:87] Lopez indicated he watched the victims while Appellant obtained the money. [S1:87-88] After Appellant returned and shot the victims, he told Lopez to make sure "it was done." [S1:88] Mrs. McCallops died of a gunshot wound to the head caused by a nine millimeter gun. [S1:88] Lopez admitted that he possessed this gun during the robbery. [S1:88] Lopez told Lambert that, in his opinion, Appellant intended to kill the victims from the outset because Appellant did not disguise himself. [S1:92]

A day or two prior to the shooting, Appellant had obtained the handgun. [S1:93] However, Lopez had agreed to purchase this firearm from Kocolis. [S1:94] Law enforcement never recovered the

handgun or the shotgun. [S1:94] Detective Snipes testified that no evidence suggested that Appellant possessed the handgun on the day of the homicides. [S2:333]

V Events Preceding Shootings

Melissa Clark was Kocolis' former girlfriend. [S1:114,135] She, seventeen at the time, lived with Kocolis during October of 1995. [S1:114,135] Appellant and Lopez also lived in the residence. [S1:114-15] Clark testified Kocolis always had money although he did not have a job. [S1:138] Many people came and went from the residence. [S1:139] According to Clark, Lopez was Kocolis' "do person." [S1:143,155] Lopez would do whatever Kocolis asked. [S1:143-44] She testified that Appellant was a friend of Kocolis. [S1:144]

Mary Hall also testified that Appellant socialized with Kocolis and his family. [S2:246] Hall started dating Appellant during the first week of October, 1995. [S2:243,258] Hall testified Appellant did not have a job during this time. [S1:68-69;S2:244] According to Hall, Appellant was in debt, owing child support and money on a truck. [S1:68-69;S2:244] Hall claimed Appellant told her that he wished he could "knock somebody over the head to pay his bills." [S2:247]

Clark testified Appellant, Kocolis, and Lopez discussed plans to commit a robbery in Oldsmar on October 7th. [S1:116,137] According to Clark, Appellant knew the place that was to be robbed.

[S1:116] Clark claimed Appellant was the first to mention the robbery. [S1:117] She observed Appellant taking off a gold chain and handing it to Kocolis in exchange for a nine-millimeter gun. [S1:118,140] This exchange occurred on October 6th at Heather's trailer. [S1:121,139] Cocaine was present in the trailer. [S1:139] Appellant put the gun inside his van. [S1:119] Appellant also kept a shotgun underneath the driver's seat of his van. [S1:95,119-20;S2:255] Appellant and most of his family used shotguns in hunting. [S1:99]

On October 6th, Appellant and Lopez went to Shorty's Bar, intending to commit the robbery. [S1:71,73,117-18] However, they decided not to commit the crime that night. [S1:72,121] Clark stated Appellant and Lopez left again the following day to commit the robbery. [S1:121] They planned to contact Kocolis on the following day. [S1:121]

VI. Events Subsequent to the Shootings

Suzette Copley knew Lopez because he was a friend of Melvin Green, her former boyfriend. [S1:105] On October 7, 1995, Copley and Green were celebrating their anniversary at the Tropicana Inn. [S1:106] At about 8:00 p.m., Lopez arrived with a car that Green wanted to borrow. [S1:55,107] Lopez used the phone while at the hotel, calling Appellant. [S1:107] At about 8:15 p.m., Copley, Green, and Lopez then drove to a gas station where they met Appellant. [S1:55,108] Appellant was driving a white van. [S1:55,108] Appellant and Lopez left together in Appellant's van. [S1:56,109] Prior to leaving, Lopez showed Copley a handgun. [S1:111]

At about 9:30 p.m., Lopez and Appellant returned to the Tropicana, so Lopez could regain possession of his vehicle. [S1:57,109] Copley testified she saw a considerable amount of blood on Appellant's shirt and his pants. [S1:109-10] The Tropicana was 19.3 miles from Service America and this distance would have taken about 34 minutes of driving time. [S1:57]

Appellant and the others left the Tropicana and went to the Kimberly Plaza Hotel. [S1:57-58] Appellant checked into this hotel at 9:53 p.m. [S1:58] Clark testified she saw Appellant at the Kimberly hotel at about midnight. [S1:122] The hotel room was very nice. [S1:123;S2:245] Appellant paid for the room as well as for an expensive bottle of Dom Perignon. [S1:59,123] Clark and Hall

testified Appellant was happy and having a good time. [S1:124,142;-S2:248] According to Clark, Lopez, on the other hand, was upset. [S1:142] Others in the room included Kocolis, Hall, Kocolis' sister, and Lambert. [S1:124;S2:244-45,259] The group used drugs and drank while inside the room. [S2:259] Appellant checked out of the hotel at 2:18 p.m. on the following day. [S1:60,128-29;S2:249]

Clark and Hall noticed Appellant had scratches on his arms. [S1:73-74;S2:248] According to Clark, Appellant had cash and a large duffle bag full of coins. [S1:95-96,100,125] Smaller bags were inside the larger bag. [S1:126] Inside each of the bags was a piece of paper indicating the amount inside. [S1:127] Appellant and Lopez brought the large bag into the room. [S1:126] Other bags were inside Appellant's truck. [S1:128] According to Hall, Appellant had a big roll of bills in his hand at the time he paid for the champaign. [S2:248]

Later that day, Clark returned to Kocolis' house. [S1:129] Appellant, Lopez, and Kocolis put change on a coffee table and asked those present to help roll it. [S1:129-30] Clark testified that a lot of change was present. [S1:95-96,100,130] These coins--as much as \$300--were taken to Seminole Bingo where they were exchanged for bills. [S1:130] Much of the money taken during the robbery was taken to Kocolis' residence. [S1:100-01]

On October 9th, Hall, Lambert, and Steve Montalvo went with Lopez to a trailer in the Suwannee River area. [S1:101-02;S2:249,259] They took a great number of coins with them.

[S2:259] Hall testified she and the others rolled coins at the trailer. [S2:249] While at the trailer, the group used crack cocaine. [S2:260] After using all of the cocaine, they went to Hillsborough County for more drugs and then returned. [S2:260] Appellant did not leave Hillsborough County; he stayed with Kocolis after the robbery. [S1:102-03]

At the trailer, law enforcement recovered a milk crate. [S1:101] Burnt bag fragments were also recovered from a hole that was behind the trailer. [S1:101] These fragments were consistent with bags taken from Service America. [S1:102] Clark testified Appellant burned some of the money bags at different locations. [S1:75-76,133] Appellant also burned some clothing that had blood on it. [S1:133] Samples of fragments collected from ashes at various locations were consistent with money bags belonging to Service America. [S1:77]

Hall testified she observed a milk crate in the back of Appellant's van sometime after the offenses. [S2:257] Inside the crate was a blanket covering what sounded like coins. [S2:257-58] Law enforcement later found a ski mask inside Appellant's van on the passenger side of the vehicle. [S2:340]

Hall learned of the robbery after returning to Hillsborough County from the Suwannee area. [S2:250] Hall denied that she learned of the events from Lopez. [S2:260-61] When Hall confronted Appellant, Appellant told her about the robbery and the two murders. [S2:252,262] Hall testified, "He [Appellant] said that he

had watched the people for two days to make sure that those two people were there because they knew him from a past work experience, I guess him working on their refrigeration system, and that they would let him in." [S2:252] Hall said Appellant told her that he had watched Service America from across the street inside a bar. [S2:252]

Appellant told Hall that the victims let him into the business. [S2:253] According to Hall, Appellant said he and Lopez put the victims in the freezer, loaded the van, and returned to the freezer where they shot the victims. [S2:253] Appellant related to Hall that he shot the victims because they had seen him. [S2:253] He said he did not wear a mask because his identity enabled them to gain access to the business. [S2:254] Appellant said he threw off a bridge the guns used during the offenses. [S2:254]

Hall claimed Appellant threatened to harm herself and her daughter if she were to say anything to anyone. [S2:255] She ended her relationship with Appellant after he admitted what he had done. [S2:264] Hall admitted that she did not wish to testify and that she did not cooperate with law enforcement. [S2:263,265] Hall testified she did not cooperate with police because she feared Appellant. [S2:266]

Clark also testified concerning alleged admissions made by Appellant. Clark asked Appellant what had happened while she was waiting with him inside his van. [S1:131,146] They were waiting for Kocolis, who was checking in with his probation officer.

[S1:131,146] Clark testified, "[H]e said that the people had let him in to [sic] the place because they knew him and that they had forced the people into the freezer and that they took the money. And he said he went back in there and finished them off and he stood them together and shot them." [S1:131] When asked who shot the victims, Clark replied that Appellant told her he shot the victims and that the money was already in the van when they were shot. [S1:131] Appellant told Lopez "to finish the job up." [S1:134] Clark testified that Appellant was not upset when he talked about the robbery. [S1:135] Appellant told Clark that he had a shotgun during the robbery. [S1:131] Clark testified Appellant threatened to kill anyone who told about his admissions. [S1:132]

Clark said she was later at a bar with Hall and Rene when Appellant threatened Hall because she had spoken to the police. [S1:132,148-50] Hall also testified that Appellant made threatening gestures at the bar. [S2:255-56] When Hall confronted Appellant outside the bar, Appellant told her the threat was a promise. [S2:256] To the contrary, Tracy Griffin testified that Hall was yelling at Appellant outside the bar. [S3:406] Tracy said Hall was upset about Appellant renewing his relationship with her. [S3:406]

Clark testified Kocolis and his sister, after the offenses, began telephoning her parent's house and harassing them. [S1:153] Clark's mother was a police officer. [S1:153] Clark spoke with

Kocolis to try to get him to stop the harassment. [S1:152-53]
Clark said Kocolis had received \$900 from the money that was taken
during the robbery. [S1:143]

VII. Testimony Regarding Appellant's Drug Usage and Mental Health.

Dr. Michael Maher, a psychiatrist and an expert on forensic psychology, interviewed Appellant on June 3, 1997 and on July 3, 1997. [S2:268,278] Dr. Maher testified Appellant appeared to be both open and honest during the interviews. [S2:270] Appellant volunteered to Dr. Maher information that was harmful to his defense. [S2:270,284] Appellant was remorseful: he cried on the occasions that Dr. Maher spoke to him and expressed regret for the harm he had caused. [S2:271] Although Dr. Maher said he could have done further testing and investigation, he did not believe this effort would change his opinions regarding Appellant. [S2:281]

Appellant indicated to Dr. Maher that he had used drugs since his late adolescence and had used crack cocaine for the six to twelve months prior to the offenses. [S2:271] Dr. Maher testified that such usage of crack cocaine would result in a change in personality. [S2:272] The change in personality would include "a relentless pattern of indifference to the things that once were important in the person's life and a relentless pattern of focusing more and more on those factors which are associated with getting and using the drug, the crack cocaine." [S2:272] Dr. Maher illustrated this pattern by noting that an addicted mother might totally and indifferently neglect her small child. [S2:273] After recovery from the addiction, the mother would work hard to become a good mother. [S2:273] According to Dr. Maher, the addiction would

manifest itself by "a change in their moral values and their behavior and a decline in their capacity to appreciate the feelings and well-being of other people." [S2:273]

Dr. Maher testified Appellant underwent brain surgery when he was ten years old after he was shot with a pellet gun. [S2:274-75] Appellant had a severe speech impairment for months afterwards. [S2:275] Dr. Maher testified about the effects of this injury [S2:276]:

"What he had then was a subtle injury that affected the global overall functioning of his brain and most importantly made him vulnerable to other things that would interfere with brain functioning, not so much that it caused damage and impairment that he didn't recover from, but rather that it left him vulnerable to other impairments that might come along down the road later."

The impairments that came later were severe depression and a suicide attempt when Appellant was sixteen. [S2:277] Dr. Maher said the depression and suicide attempt indicate Appellant had abnormal brain functioning. [S2:277]

Mr. Griffin, Appellant's father, testified that the injury crushed Appellant emotionally. [S3:352] Mr. Griffin said Appellant received brain surgery and had to undergo formal rehabilitation at the hospital. [S3:353] He could not speak for sometime after the surgery. [S3:353;S4:430-31] Ms. Griffin added that Appellant was also blind for a couple of days after the brain surgery. [S4:431] Dr. Melman, Appellant's neurosurgeon, told Ms. Griffin that Appellant could never play contact sports as a result of the injury. [S4:431-32]

On cross-examination, Dr. Maher said he did not review medical records of the treatment or police or jail reports. [S2:280,-281,283] Dr. Maher was not aware that Appellant had indicated to jail personnel, on the date of his arrest, that he had no drug problem or psychiatric problem. [S2:283] Although Dr. Maher testified he found no statutory mitigators, he said Appellant was under the influence of a mental or emotional defect. [S2:285,295]

Appellant told Dr. Maher that he had no direct involvement in the death of either of the victims, but he acknowledged being present during the offenses and having knowledge of what occurred. [S2:286] Appellant did not relate to Dr. Maher anything about his financial concerns, but he did relate that he was using cocaine all of the time and that his life was falling apart. [S2:287] Dr. Maher admitted he was not aware of all of the inculpatory evidence against Appellant. [S2:289-90] Dr. Maher said that this inculpatory evidence, if true, would alter his opinion that Appellant was at the high end of being open and truthful. [S2:292]

Mr. Griffin testified Appellant had a great need to be wanted and was susceptible to peer pressure. [S3:353] After Appellant fathered his first child when he was sixteen, Appellant contemplated suicide in a letter to his parents. [S3:355-56] Appellant believed he had let his parents down by having the child. [S3:355] Ms. Griffin testified Appellant took some pills and passed out. [S4:438] Appellant's parents took him to a suicide treatment center. [S4:438] Ms. Griffin testified Appellant was again

emotionally devastated in 1990 when a good friend died in an automobile accident. [S4:439]

Dr. Sidney Merin, a clinical psychologist hired by the state, interviewed Appellant on December 4, 1997. [S2:300] Dr. Merin also reviewed the depositions of a number of witnesses. [S2:300] Regarding the potential brain damage, Dr. Merin opined that the injury would not have had a detrimental effect on the brain. [S2:301-02,305] The wound was to an area of the brain that controlled visual or spatial relationships. [S2:304-05] According to Dr. Merin, Appellant's academic success in high school called into question whether he had a brain defect. [S2:302-03]

Dr. Merin testified Appellant denied using crack cocaine but admitted using powdered cocaine. [S2:306] Appellant told Dr. Merin this usage began when he was twenty-five years old. [S2:306,312] Appellant was born in 1970. [S2:312] He quickly became addicted to the drug. [S2:306] Dr. Merin did not believe that Appellant's use of cocaine had any effect on his judgment at the time of the offenses. [S2:307] However, he agreed with Dr. Maher that a person's life could deteriorate because of a cocaine addiction, and he said Appellant's deteriorating life could have been as a result of his addiction. [S2:313-14,317-18]

Dr. Merin did not review any of Appellant's previous medical or mental health history nor did he conduct any tests. [S2:308,310] Dr. Merin was unaware that Appellant could not speak after the brain injury. [S2:311] In Dr. Merin's opinion, Appellant might

suffer from a borderline personality disorder. [S2:318,319] Although he admitted that whether Appellant suffered from this disorder might be of value to the court, Dr. Merin did not conduct any tests to determine the existence of the disorder. [S2:320-21]

VIII. Appellant's Arrest and Conduct While Incarcerated

Mr. Griffin learned of the shootings after his son's arrest. [S3:358,359] Prior to the arrest, Appellant came to his father and said that he had done "something terrible." [S3:358,361-62] While in jail, Appellant talked to his father and showed great remorse over what had occurred. [S3:359-60] Mrs. Griffin also testified that Appellant was very remorseful, crying frequently because of what had happened. [S4:441] When Hash spoke to Appellant while he was incarcerated, Hash testified that he was more of his former self. [S3:367]

In August 1995, Tracy Griffin was pregnant with Appellant's child. [S3:405] Their daughter visited Appellant every week while he was in jail. [S3:405] Griffin and Appellant were again living together in late 1995. [S3:406] Griffin believed Appellant should receive life imprisonment, so he could be a father to his daughter. [S3:409] Griffin believed that Appellant could benefit his children even if he were incarcerated. [S3:360]

Appellant and Young's child continued to see Appellant when he was incarcerated. [S3:377] Young testified her son valued his relationship with Appellant. [S3:377] Young said her son would

continue to visit Appellant if he were incarcerated for life. [S3:384] Her son missed Appellant very badly. [S3:384] Matthew, Appellant's brother, also believed his brother deserved life imprisonment, so his children could visit him. [S3:395]

David Russo, a detention deputy, made contact with Appellant while Appellant was incarcerated in jail. [S2:205] Appellant's incarceration began on November 13, 1995. [S2:205] Since that time, Appellant had received three minor disciplinary reports against him. [S2:205,207,209] These reports consisted of tampering with a phone, disrupting a visitation, and possessing tobacco or contraband substances. [S2:205-06] At the time of the court proceeding below, Appellant had been incarcerated for over a year with no major disciplinary reports. [S2:206,212] Appellant had not engaged in any physical confrontations with other inmates or correctional officers. [S2:206]

IX. Appellant's Testimony

Appellant was 27 years-old at the time of his testimony. [S4:442] He testified he entered a guilty plea because he felt responsible for what had occurred. [S4:442,456-57] Appellant began using cocaine in early 1995. [S4:443] He testified the drug became "everything in my life." [S4:443] Appellant met Kocolis when he bought drugs from him. [S4:443] After Tracy Griffin kicked him out of her residence, Appellant lived with Kocolis. [S4:443,498]

Appellant considered Kocolis a friend. [S4:496] Appellant admitted he supported his habit by selling drugs. [S4:444]

Appellant told Kocolis and Lopez about the money at Service America. [S4:444-45] Appellant admitted he had the idea to rob Service America. [S4:457,460,502] Appellant also admitted he committed the robbery because he was having financial difficulties. [S4:460-62] Appellant was making money selling drugs, but he wanted more money. [S4:462-63] After Kocolis asked Appellant if the company could be robbed, Kocolis, Lopez, and Appellant began planning the robbery. [S4:445] The planning occurred over a two week period. [S4:469] Kocolis was going to drive a vehicle to facilitate the robbery, but he later decided against that plan. [S4:445,468]

Appellant testified that they could not get into Service America unless someone was present because the business had an alarm system and the gate was locked. [S4:446,471-72,465-66] Appellant did not know that Mrs. McCallops was going to be at Service America. [S4:447] He did not know who was at the company prior to going there. [S4:447] Appellant said they intended to commit the robbery and leave the workers alive inside the freezer. [S4:447]

Appellant wore a ski mask, and Lopez wore a hooded jacket and a ball cap. [S4:448] When they were about to get out of Appellant's van, Lopez, who possessed the handgun, picked up the shotgun and said it would be more intimidating. [S4:448-49,506]

Lopez had the handgun in a holster attached to his belt. [S4:506] Inside the business, Appellant and Lopez put Mr. and Mrs. McCallops into a freezer. [S4:449,473] According to Appellant, they escaped from this freezer after Mr. McCallops kicked the door open. [S4:473-74] During the robbery, Mr. McCallops also yelled out. [S4:474,477] After yelling, Mr. McCallops was put into another freezer. [S4:478]

As Appellant opened the lockers, he heard Lopez screaming at McCallops to shut up if they did not want to die. [S4:449,478,505] Appellant was opening the last locker when he heard the shotgun go off. [S4:449,478-79,505] Appellant ran back to where Lopez was standing. [S4:450,479] The shotgun was on the floor, and Lopez was firing shots with the handgun. [S4:450,479] Mr. McCallops tried to get up, but Lopez fired at him several times. [S4:480] Appellant did not see Lopez lean over and shoot Mr. McCallops. [S4:480-81] Appellant grabbed the shotgun and Lopez. [S4:450,480] They loaded the money into the van and left. [S4:450] Appellant and Lopez loaded the van with about \$12,000, mostly in change. [S4:476-77] They used milk crates to load the money. [S4:477] While loading the money, Appellant cut himself on one of the lockers. [S4:486-87]

Appellant denied that the victims were put into the freezer, the money taken, and then he and Lopez went back and killed the victims. [S4:450] Appellant denied making any statements about the robbery to Hall or Kocolis' girlfriend. [S4:450-51] He said he did not tell anyone who knew of the money not to talk to anyone.

[S4:493,494] Appellant said Kocolis was warning people not to say anything about the money. [S4:494-95] According to Appellant, Hall hated him because he went back to Tracy Griffin. [S4:451]

Appellant said he went to the Kimberly Plaza hotel after the offenses. [S4:483] He testified he felt horrible about what had occurred. [S4:483] He admitted a party was thrown at the hotel. [S4:484,487] Drugs were used at the party, and Appellant ordered champaign. [S4:487,488] Later Appellant burned the money bags. [S4:497-98] The guns were thrown off a bridge. [S4:500-01]

Appellant said he was using powder cocaine and free-basing cocaine around the time of the offenses. [S4:452] He denied using crack cocaine. [S4:452] Appellant apologized for what he had done. [S4:452] Appellant believed he could still provide some support for his family if he received a life sentence. [S4:453] Appellant asked the court for a life sentence, so he could be with his children in some way. [S4:456]

SUMMARY OF THE ARGUMENT

Three reversible errors occurred in the court below. First, the record does not demonstrate Appellant's intelligent and knowing waiver of the jury for the penalty phase proceeding. Appellant's only assertions regarding the waiver were affirmations of the trial court's very misleading statements regarding the jury's role during the proceeding. The court erroneously advised Appellant that the purpose of the proceeding was for the jury to hear evidence in support of the death penalty. The court made no mention that mitigating evidence could be presented or that the aggravating factors proposed by the state must be proven beyond a reasonable doubt. In addition, the court neglected to indicate that the court could override the jury recommendation.

The second and third errors concern the court's consideration of aggravating and mitigating circumstances. Although proposed as a mitigating factor by the defense, the court ignored Appellant's potential for future rehabilitation and productivity while in prison. This oversight violates this court's decision in Campbell v. State, 571 So.2d 415 (Fla.1990). The error is particularly egregious in this case where the evidence supporting the mitigating factor is great. The court committed a second error when it improperly found two aggravating circumstances that were based on the same aspect of the case. These aggravating circumstances were that the capital felonies were committed for pecuniary gain and

that they were committed while in the commission of a kidnapping. Under the circumstances of this case, the kidnapping was a part of the robbery because the former offense facilitated the latter. Not being separate and distinct, the finding of both aggravators constitutes improper doubling.

ARGUMENT

ISSUE ONE

DID THE TRIAL COURT ERR IN FINDING
THAT APPELLANT HAD VOLUNTARILY AND
INTELLIGENTLY WAIVED HIS RIGHT TO A
JURY DURING THE PENALTY PHASE?

Appellant waived his right to have a jury recommend a sentence after hearing evidence of mitigation and aggravation. The record, however, does not demonstrate that this waiver was knowingly or intelligently entered. To the contrary, the record reveals only Appellant's affirmation in a trial court's version of the penalty phase that was incomplete and incorrect. The total inadequacy of the trial court's attempt to determine the legitimacy of Appellant's waiver undermines the court's finding of a knowing and intelligent waiver and establishes nothing on which the waiver can be sustained.

Just prior to the presentation of penalty phase evidence, the lower court conducted an inquiry into Appellant's anticipated waiver of the jury advisory sentence. The trial judge informed Appellant of the following before accepting a waiver of the jury [S1:9-10]:

THE COURT: You understand, sir, that a presentation of evidence and testimony to the jury would be for the purposes of the State Attorney to prove the aggravating circumstances that they feel are present in this case, for the jury to hear that testimony and then to make a recommendation to me as to what they feel the proper sentence would be. Do you understand that that's the purpose of the penalty phase?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And you understand that their recommendations of either imposing the death sentence or imposing a life sentence need not be unanimous, that it just takes a majority vote of seven to five for the jury to recommend the imposition of the death sentence? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And do you understand by giving up your right to having this evidence presented to the jury that in essence this evidence would be presented to me and that I would make a final recommendation and decision as to what the sentence would be in this case? Do you understand that?

THE DEFENDANT: Yes, sir.

The court subsequently made a finding that Appellant had "knowingly and freely and voluntarily waived his right to have a jury impaneled. . ." [S1:13]

The trial court applied the correct standard in finding a waiver of the advisory sentence. A defendant may waive his right to a jury during the penalty phase if this waiver is both voluntary and intelligent. State v. Hernandez, 645 So.2d 432 (Fla.1994); State v. Carr, 336 So.2d 358 (Fla.1976). The voluntariness and intelligence of the waiver, however, will not be presumed. The record must affirmatively show a voluntary and intelligent waiver. Lamadline v. State, 303 So.2d 17 (Fla.1974). In Lamadline this court cited to Boykin v. Alabama, 395 U.S. 238 (1969), in support of the holding that a valid waiver will not be presumed. Lamadline v. State 303 So.2d at 20. The Supreme Court in Boykin held that a waiver of a jury trial is valid only if the record affirmatively

shows that the waiver is "an intentional relinquishment or abandonment of a known right or privilege." Id. at 243 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)) (emphasis added).

The plea colloquy referenced above does show Appellant's relinquishment of the jury advisory sentence. On the other hand, the record does not establish that this waiver was done knowingly or intelligently. During the trial court's inquiry, Appellant made no statements, general or specific, indicating his knowledge of the consequences of the waiver. Appellant only responded affirmatively when the court asked whether he understood what the court stated were the consequences of the waiver. Consequently, a determination of whether Appellant acted knowingly and intelligently turns on what the court said. The record provides no other clues. If the court clearly explained Appellant's right to a jury advisory sentence, Appellant's affirmative responses may be regarded as an indication of his knowledge. If, on the other hand, the court's statements were ambiguous or misleading, the record shows only that Appellant understood only what was unclear and misleading.

The trial court's inquiry into Appellant's knowledge of the consequences of the waiver was limited and misleading. The court began by making a patently erroneous statement of the purpose of the penalty phase proceeding. The court stated that evidence would be presented during the penalty phase "for the purposes of the State Attorney to prove the aggravating circumstances that they feel are present in this case. . ." [S1:9] According to the court,

the jury would hear "that testimony" and then make a recommendation concerning the penalty. [S1:9] The court concluded with the question: "Do you understand that that's the purpose of the penalty phase?" [S1:9] Glaringly absent from the court's attempted delineation of the proceeding is any hint that the defense could present mitigating evidence and argument to the jury during the penalty phase. The court also makes no mention that the state must prove each aggravating circumstances beyond a reasonable doubt. E.g., King v. State, 514 So.2d 354 (Fla.1987), cert. denied, 487 U.S. 1241 (1988). Under the trial court's description of the penalty phase, the jury serves to recommend a sentence once it hears only aggravating evidence--irrespective of the degree of proof--for imposing the death penalty. Appellant assented to the trial court's grossly inadequate description by agreeing in this purpose. [S1:9-10]

The trial court next compounded its misleading statement of the purpose of the penalty phase by failing to inform Appellant that the court could override a death recommendation. The court stressed that the jury recommendation did not have to be unanimous: "[I]t just takes a majority vote of seven to five for the jury to recommend the imposition of the death sentence? Do you understand that?". [S1:10] Already faced with the possibility of a jury deaf to mitigation, Appellant now confronted the possibility of a death sentence based solely on a non-unanimous verdict. The trial court's only explanation of the penalty phase left Appellant with

the understanding that the jury that might order his death could do so non-unanimously and one-sidedly. Not surprisingly then, Appellant was willing to waive this jury.

In Arthur v. State, 374 S.E.2d 291 (S. Car. 1988), the court held that a defendant's waiver of a jury for a resentencing proceeding in a capital case was not knowingly and voluntarily given. In Arthur defense counsel informed the trial judge that the defense had agreed to waive the jury during the penalty phase "with the Defendant's full knowledge." Id. at 293. The judge inquired whether the defendant was in agreement and whether he had any questions. Id. The defendant indicated his agreement and said he had no questions. Id.

On appeal the court held that the trial court's inquiry was "patently insufficient." Id. The court stated, "We hold that acceptance of a jury trial waiver must be based upon a written record clearly demonstrating that it was made knowingly and voluntarily. This can be accomplished only through a searching interrogation of the accused by the trial court itself." Id. As in Arthur, the record in the present case does not demonstrate that Appellant's waiver was entered knowingly and intelligently. The record shows only that Appellant understood a version of penalty phase procedures that was patently misleading. Therefore, the record does not establish an intelligent waiver of the jury.

This court has characterized the jury function during the penalty phase as "important," "substantial," and "essential."

Richardson v. State, 437 So.2d 1091, 1095 (Fla.1983); Pangburn v. State, 661 So.2d 1182, 1189 (Fla.1995); Lamadline v. State, 303 So.2d at 20. Procedural due process under the Florida and United States Constitutions demands that the right to a jury during the penalty phase not be denied without a showing of an intelligent and voluntary waiver. The jury's important role in the resulting imposition of either death or life imprisonment merits more than a cursory and erroneous inquiry of whether a defendant is intelligently relinquishing this right. The difference between the death penalty and other sentences requires a "greater degree of reliability" when death is imposed. Lockett v. Ohio, 438 U.S. 586, 604 (1978). Unfortunately, the degree of reliability afforded to Appellant was minimal. This court should restore reliability to the present case by reversing the sentences imposed by the lower court and remanding this case for a new penalty phase proceeding before a jury unless Appellant--after being accurately apprised of the jury's role--makes a knowing and intelligent waiver.

ISSUE TWO

DID THE TRIAL COURT ERR IN FAILING
TO CONSIDER A MITIGATING CIRCUM-
STANCE PRESENTED BY THE DEFENSE?

In a sentencing memorandum, defense counsel listed Appellant's potential for rehabilitation and productivity as a non-statutory mitigating circumstance. [V11:2048] Defense counsel stated that Appellant's employment history and support of his children show "the potential for rehabilitation and productivity within the prison system." [V11:2048] Despite the argument for this circumstance, the trial court's sentencing memorandum gave no consideration to the mitigating factor. The only possible reference to the factor in the sentencing order is the following statement: "Several other matters were raise [sic] by the defense in its sentencing memorandum which were called mitigating factors. However all those matters not already discussed above are not recognized under the law as valid mitigating circumstances and were not considered by the Court." [V11:2073] The failure of the trial court to consider the mitigating circumstance of Appellant's potential for rehabilitation and future productivity within the prison system is error. This court has repeatedly recognized this circumstance as proper mitigation. In this case where the circumstance is compelling and fully supported by the record, the trial court's lack of consideration of the mitigating circumstance is not harmless.

When determining the appropriateness of the death penalty, a trial court must give weight to all mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982); Cooper v. Dugger, 526 So.2d 900 (Fla.1988). This review is required under the eighth and fourteenth amendments to the United States Constitution. Eddings v. Oklahoma, 455 U.S. 104. The consideration and, ultimately, weighing of all established mitigating factors is a vital aspect of the constitutionality of the death penalty statute in Florida. Porter v. State, 723 So.2d 191 (Fla.1998); Hudson v. State, 708 So.2d 256 (Fla.1998). This court has underscored the necessity for the review of all mitigating evidence by holding the review must be conducted even though the defendant seeks the death penalty. Farr v. State, 621 So.2d 1368 (Fla.1993).

In Consalvo v. State, 697 So.2d 805, 818 (Fla.1996), cert. denied, --- U.S. ----, 118 S.Ct. 1681, 140 L.Ed.2d 819 (1998), this court said that "nonstatutory mitigation may consist of any factor that could reasonably bear on the sentence." In light of this principle, defense counsel presented to the trial court the mitigating circumstance of Appellant's potential for rehabilitation and productivity while imprisoned. This court has repeatedly recognized this circumstance as valid mitigation. Campbell v. State, 571 So.2d 415 (Fla.1990); Cooper v. Dugger, 526 So.2d 900; Stevens v. State, 552 So.2d 1082 (Fla.1989).

Despite knowledge of the mitigating circumstance, the trial court failed to consider the circumstance in its sentencing order.

This failure violates the procedures that this court set out in Campbell v. State, 571 So.2d 415. In Campbell this court established a requirement that the trial court expressly consider in the sentencing order each mitigating circumstance proposed by the defense. Id. at 419. This consideration must also extend to mitigating evidence "contained anywhere on the record." Farr v. State, 621 So.2d 1368 (Fla.1993). The weighing of the mitigating factor must be more than a cursory reflection because Campbell mandates "a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty." Ferrell v. State, 653 So.2d 367, 371 (Fla.1995); See also, Jackson v. State, 704 So.2d 500 (Fla.1998) (This court reverses death sentence because of trial court's summary treatment of mitigating circumstances.).

The trial court must consider the mitigating circumstance if it is "reasonably established" by the evidence. Ferrell v. State, 653 So.2d 367. This court has stated, "Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proven." Nibert v. State, 574 So.2d 1059, 1062 (Fla.1990); accord, Mahn v. State, 714 So.2d 391 (Fla.1998). During the proceeding below, defense counsel presented ample evidence supporting the assertion that Appellant had potential for rehabilitation and productivity within the prison system if he were to receive a life sentence. This evidence

included Appellant's reliable work and school history, his good behavior while incarcerated, and other character evidence suggesting his amenability to rehabilitation. This court has said that a defendant's employment history is relevant to show a potential for rehabilitation and productivity. Cooper v. Dugger, 526 So.2d at 902; Stevens v. State, 552 So.2d 1082. Appellant's father testified Appellant was a very reliable worker while he was working for Moore's Refrigeration. [S3:354] Appellant's brother, who worked with Appellant, testified that Appellant was a "great worker." [S3:389] Consistent with his good work ethic, Appellant was also a good student. [S2:303;S4:430,432]

In addition, Appellant's favorable conduct during his prior incarceration in county jail suggests a substantial likelihood for his future rehabilitation and productivity while incarcerated serving a life sentence. At the time of the court proceeding below, Appellant had been incarcerated for over a year with no disciplinary reports. [S2:206,212] Appellant had not engaged in any physical confrontations with either other inmates or correctional officers. [S2:206]

Appellant's history as a student, worker, and an inmate is consistent with other testimony revealing that Appellant, absent the drug usage and consequent drug subculture that precipitated the murders, was a law abiding citizen who supported his children financially and emotionally. Appellant had no prior arrests or convictions. [V11:2069,2076-77] Presumably, the illegal narcotics

that wrecked Appellant's life would not be available in state prison; therefore, Appellant could resume a life characterized by hard work and commitment to his children, albeit only emotionally. Unfortunately, the trial court failed to consider this important consideration of Appellant's future conduct.

In Cooper this court declared a potential for rehabilitation as a "significant factor in mitigation." Cooper v. Dugger, 526 So.2d at 902. A potential for rehabilitation is an indication of more than a defendant's future conduct in prison--the mitigating circumstance also reveals positive aspects of the defendant's character. Skipper v. South Carolina, 476 U.S. 1 (1986). The assessment of a defendant's character is an important aspect in determining the appropriateness of the death penalty. See generally, Lockett v. Ohio, 438 U.S. 586 (1978) (Capital cases demand a treatment of the defendant with "the respect due the uniqueness of the individual."). In cases like the instant case where the evidence of the defendant's amenability to rehabilitation is particularly persuasive, the suggestion of favorable aspects of the defendant's character is also correspondingly strong. Consequently, the trial court overlooked an important aspect of the sentencing decision when imposing the death penalty.

The state cannot show beyond a reasonable doubt that the trial court's overlooking of this important mitigating evidence did not

contribute to the sentence.¹ Thus the trial court's failure to consider the mitigating evidence cannot be considered harmless. In Valle v. State, 502 So.2d 1225 (Fla.1987), this court held that the trial court's refusal to permit evidence regarding the defendant's future prison adjustment was error that required a new jury recommendation on the sentencing in the capital case. This court should follow suit in the present case where the evidence of Appellant's potential for productivity and rehabilitation is both substantial and compelling.

¹The harmless error test to be applied in this case is whether the state can show beyond a reasonable doubt that the trial court error did not affect the sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Valle v. State, 502 So.2d 1225 (Fla. 1987). The provisions of section 924.051, Florida Statutes (1997) (The Appellate Reform Act), that place the burden on the defendant to establish prejudicial error do not apply in this case where the failure to consider mitigating evidence constitutes constitutional error. Mason v. State, 719 So.2d 304 (Fla. 4th DCA 1998); See also, Goodwin v. State, 721 So.2d 728 (Fla. 4th DCA 1998) (Court holds that Chapman requires the application of the beyond-a-reasonable-doubt standard where constitutional error is alleged.).

ISSUE THREE

DID THE TRIAL COURT ERRONEOUSLY
CONSIDER TWO AGGRAVATING CIRCUM-
STANCES THAT REFER TO THE SAME AS-
PECT OF THE OFFENSE?

In the sentencing order, the trial court listed four aggravating factors. [V11:2062-69] Two of these aggravators are that the capital felonies were committed for pecuniary gain and that the capital felonies were committed while in the commission of a kidnapping. [V11:2063,2066] The separate consideration of these two aggravators is reversible error because both of the aggravators refer to the same aspect of the offense. Under the facts of this case, the kidnapping was committed in order to facilitate the subsequent robbery. Being thus intertwined, the two aggravators are not separate and distinct aggravating circumstances.

The consideration of two aggravating circumstances that refer essentially to the same aspect of the offense is improper. Bello v. State, 547 So.2d 914 (Fla.1989); Banks v. State, 700 So.2d 363 (Fla.1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1314, 140 L.Ed.2d 477 (1998). In Banks this court stated multiple aggravators are appropriate only when they are "separate and distinct." Id. at 367. Accordingly, this court has held invalid this "doubling" of aggravators in numerous circumstances. See also, Provence v. State, 337 So.2d 783 (Fla.1976) (Consideration of pecuniary gain and the commission of a robbery was improper doubling.); Bello v. State, 547 So.2d 914 (Consideration of avoidance of lawful arrest

and disruption or hinderance of law enforcement was impermissible.); Maggard v. State, 399 So.2d 973 (Fla.1981) (Consideration of pecuniary gain motivation and commission of a burglary was improper.).

In Cherry v. State, 544 So.2d 184 (Fla.1989), cert. denied, 494 U.S. 1090, the appellant argued the lower court had inappropriately doubled two aggravators, that the murder occurred during the course of a burglary and that the murder was committed for pecuniary gain. The appellant had broken into a home with the intention to steal and had shot the occupant inside. Id. This court held that the two aggravators were based on the same aspect of the case and should have been considered as a single aggravating circumstance. Id. See also, Mills v. State, 476 So.2d 172 (Fla.1985) (Court finds improper doubling in case involving murder occurring during the course of a burglary.).

This court has also considered whether inappropriate doubling occurs when the aggravators are the murder occurring during the commission of a kidnapping and the perpetrator's committing the murder for pecuniary gain. Foster v. State, 679 So.2d 747 (Fla.1996); Green v. State, 641 So.2d 391 (Fla.1994), cert. denied, 513 U.S. 1159 (1995). The appellant in Green argued that improper doubling occurred because the indictment charged that the underlying intent of the kidnapping was to commit a robbery. Id. at 395. Even though the indictment charged in the alternative that the kidnapping was accomplished with the intent to terrorize, the

appellant argued the lack of a jury finding as to the motivation for the kidnapping precluded the doubling of the aggravators. Id.

This court did not agree. Finding that the purpose of the kidnapping was not to commit the robbery, this court held that the aggravating circumstances referred to different aspects of the case. Id. This court was careful to note, "If the sole purpose of the kidnapping had been to rob Flynn and Hallock, we would resolve this issue differently." Id. Significantly, this court pointed out that the robbery occurred before the kidnapping, precluding an argument that the kidnapping facilitated the robbery. Id. See also, Foster v. State, 679 So.2d 747 (Court also notes that the robbery occurred prior to the kidnapping, resulting in two separate aggravators.).

The present case concerns the circumstances foretold in Green. Appellant and his co-defendant kidnapped the victims by confining them inside the freezer before they committed the robbery. Appellant's admissions to Mary Hall and Melissa Clark indicate the following order of events: first, Mr. McCallops let Appellant and Lopez into the business; second, Appellant and Lopez confined the victims inside a freezer; third, they loaded the van with the monies; and lastly, they returned to the freezer and shot the victims. [S1:131;S2:253] The above sequence occurred because the sole purpose of the kidnapping was to facilitate the robbery. While they were completing the arduous task of loading into a vehicle over \$10,000 in mostly coins, Appellant and Lopez could not

afford to have the victims freed. They needed to control the victims, so they could load the monies unimpeded. By first confining the victims, Appellant and Lopez enabled the subsequent robbery.

Consequently, the kidnapping and pecuniary gain aggravators are not separate and distinct under the reasoning in Green. The doubling of these aggravators is similar to the doubling that this court found unlawful in Cherry v. State, 544 So.2d 184. In Cherry the defendant committed the burglary in order to commit a theft. Appellant, in the present case, committed the kidnapping in order to commit a robbery. The aggravators in both cases may entail different facts, the act of breaking into a home versus actually taking property for example. But the gravamen of the aggravators is the same: they both consider the same underlying circumstance that arguably supports the imposition of the death penalty. Thus the doubling of the two aggravators is error under the above cited cases.

Because of the doubling of the aggravators, the trial court erroneously considered an additional aggravating factor. The consideration of an invalid aggravator violates the eighth amendment requirement of individualized sentencing determinations. Stringer v. Black, 503 U.S. 222 (1991). In Espinosa v. Florida, 505 U.S. 1079, 1082 (1992), the Supreme Court held that "if a weighing State [such as Florida] decides to place capital-sentencing authority in two actors rather than one, neither actor must be

permitted to weigh invalid aggravating circumstances." 120 L. Ed. 2d at 859. The disruption of the weighing process by the consideration of an improper aggravating factor requires either application of the constitutional harmless error analysis or the reweighing of the aggravating and mitigating circumstances. Stringer v. Black, 503 U.S. at 232 ("[A] reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.").

In the present case, the court's error in weighing the additional aggravator is not harmless. In cases such as Omelus v. State, 584 So.2d 563 (Fla.1991) and Bonifay v. State, 626 So.2d 1310 (Fla.1993), this court has ordered new sentencing proceedings where the juries had been permitted to consider inapplicable aggravating circumstances. Four aggravators being found by the court below, the consideration of an invalid aggravator means the court improperly added a fourth of the aggravating circumstances to the side resulting in the death penalty. Because the weighing process vital to capital sentencing was unfairly tipped in favor of a death sentence in a case in which significant mitigation was presented, one cannot say beyond a reasonable doubt that this error did not contribute to the sentence. This court must reverse for a new penalty phase proceeding.

CONCLUSION

Based on the above arguments and authorities, Appellant respectfully requests that this court reverse the sentences of the lower court and remand this case for a new penalty phase proceeding.

APPENDIX TO BRIEF

1. Written Sentencing Order

p. 1

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of February, 2000.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

KEVIN BRIGGS
Assistant Public Defender
Florida Bar Number 0520357
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/kb