

IN THE SUPREME COURT OF FLORIDA

JAMES D. FORD, :
Appellant, :
vs. : Case No. 95,972
STATE OF FLORIDA, :
Appellee. :
_____ :

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

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

PRELIMINARY STATEMENT

The record on appeal herein consists of fifty-one (51) numbered volumes and one (1) supplemental volume. References to the record will be by volume number and page number.

Appellant, James Dennis Ford, was the defendant below, and the State of Florida was the plaintiff. In this brief, Ford will be referred to by name, or as Appellant. The other party will be referred to as the State or as Appellee.

STATEMENT OF THE CASE

On April 30, 1997, a Charlotte County grand jury returned a nine-count indictment against Appellant, James Dennis Ford. (Vol. 1, pp. 13-15) Count I charged Ford with the premeditated murder of Gregory Philip Malnory "by cutting and/or bludgeoning." (Vol. 1, p. 14) Count II charged Ford with felony murder of Malnory, with robbery as the underlying felony. (Vol. 1, p. 14) Count III charged that Ford robbed Malnory of his wallet and its contents, during which Ford carried a firearm. (Vol. 1, p. 14) Count IV charged Ford with the premeditated murder of Kimberly Ann Malnory "by cutting, bludgeoning, or shooting." (Vol. 1, p. 14) Count V charged Ford with felony murder of Kimberly Malnory, with sexual battery as the underlying felony. (Vol. 1, p. 14) Count VI charged Ford with felony murder of Kimberly Malnory, with robbery as the underlying felony. (Vol. 1, p. 14) Count VII charged Ford with the sexual battery of Kimberly Malnory, during which he used or threatened to use a firearm. (Vol. 1, p. 14) Count VIII alleged that Ford robbed Kimberly Malnory of clothing and/or U.S. currency, during which he carried a firearm. (Vol. 1, p. 15) And Count IX charged Ford with child abuse of Maranda Malnory¹ in that he unlawfully and willingly deprived her, or allowed her "to be

¹ The first name of the child is spelled two different ways in the record: M-i-r-a-n-d-a and M-a-r-a-n-d-a. In this brief, Appellant will employ the latter spelling, which is the spelling used in the indictment.

deprived of, necessary food, clothing, shelter, or medical treatment, or did knowingly inflict or permit the infliction of physical or mental injury to said child." (Vol. 1, p. 15) All offenses allegedly occurred on or about April 6, 1997. (Vol. 1, p. 13)

On January 4, 1999, the State filed a "Notice of Nolle Prosequi" as to Counts II, III, VI, and VIII of the indictment. (Vol. 7, p. 1219)

This cause proceeded to a jury trial beginning on February 22, 1999, with the Honorable Cynthia A. Ellis presiding. (Vol. 26, p. 1010-Vol. 43, p. 3728) On March 8, 1999, Appellant's jury found him guilty of the first degree murders of both Malnorys, guilty of sexual battery of Kimberly Malnory, and guilty of child abuse of Maranda Malnory. (Vol. 11, pp. 2100-2103; Vol. 43, pp. 3721-3722) Penalty phase was conducted on April 20-April 23, 1999. (Vol. 45, p. 3877-Vol. 50, p. 4697) After receiving additional evidence from the defense, and rebuttal evidence from the State, the jury returned recommendations by votes of 11-1 that James Dennis Ford be sentenced to death for each of the instant homicides. (Vol. 13, pp. 2357-2358; Vol. 50, pp. 4691-4692)

A Spencer² hearing was held before Judge Ellis on May 3, 1999, at which the court received victim impact evidence and heard arguments of counsel. (Vol. 51, pp. 4699-4731)

² Spencer v. State, 615 So. 2d 688 (Fla. 1993).

Sentencing was held before Judge Ellis on June 3, 1999. (Vol. 51, pp. 4733-4770) The court sentenced James Ford to 19.79 years in prison for sexual battery with a firearm, with a three-year minimum mandatory, and to a concurrent sentence of five years in prison for felony child abuse. (Vol. 15, pp. 2770-2771; Vol. 51, pp. 4741-4742) The court sentenced Ford to death for each of the two murders of which he was convicted. (Vol. 15, pp. 2715-2732; Vol. 51, pp. 4744-4769) The court found the following aggravating circumstances, all of which she afforded "great weight" (Vol. 15, pp. 2716-2721): (1) the capital felonies were especially heinous, atrocious, or cruel; (2) the capital felonies were homicides which were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; (3) the capital felony was committed while Ford was engaged in commission of a sexual battery; and (4) Ford was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person [based upon his contemporaneous convictions for the two homicides].

The court discussed five statutory mitigating circumstances in her sentencing order (Vol. 15, pp. 2722-2727): (1) Ford has no significant history of prior criminal activity ("some weight"); (2) the capital felony was committed while Ford was under the influence of extreme mental or emotional disturbance ("no weight whatsoever"); (3) Ford acted under extreme duress or under the substantial domination of another person ("no weight whatsoever"); (4) Ford's

capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired ("no weight whatsoever"); and (5) Ford's age at the time of the offenses ("very little weight"). The court also discussed a number of nonstatutory mitigating factors (Vol. 15, pp. 2727-2730): (1) Ford was a devoted son ("very little weight"); (2) Ford was a loyal friend ("very little weight"); (3) Ford is learning disabled ("no weight whatsoever"); (4) Ford suffers from mild organic brain impairment ("no weight whatsoever"); (5) Ford's developmental age is 14 ("no weight whatsoever"); (6) Ford's family history of alcoholism ("no weight whatsoever"); (7) Ford's own chronic alcoholism ("very little weight"); (8) Ford's diabetes (proven to exist, but did "not serve as valid mitigation"); (9) Ford's excellent jail record and jail conduct ("some weight"); (10) Ford's self-improvement while in jail ("some weight"); (11) lack of intervention by the school system for Ford's developmental impairments when he was a child ("very little weight"); (12) emotional impairment at the time of the crime ("no weight whatsoever"); (13) mentally impaired at the time of the crime ("no weight whatsoever"); (14) Ford's ability to conform his conduct at the time of the crime was impaired ("no weight whatsoever"); (15) Ford was not a sociopath or psychopath ("no weight whatsoever"); (16) Ford is not antisocial ("no weight whatsoever"); and (17) the alternative sentence of life in prison without release ("no weight whatsoever").

Appellant timely filed his notice of appeal to this Court on July 1, 1999. (Vol. 15, p. 2779)

STATEMENT OF THE FACTS

Guilt Phase--State's Case

Appellant, James Dennis Ford, who was called "Jimbo," worked at the South Florida Sod Farm as a trackhoe and heavy equipment operator. (Vol. 36, pp. 2504, 2539-2540, 2551, 2565, 2574) Greg Malnory also worked at the farm; he was the "fuel man," whose job was to deliver all the fuel to the tractors and other equipment used on the farm. (Vol. 36, p. 2503, 2539, 2541, 2552, 2566) He also helped with mechanic work at the shop. (Vol. 36, p. 2539, 2541, 2552) Malnory was a dependable worker who usually showed up for work on time. (Vol. 36, pp. 2503, 2514-2516, 2552, 2568)

Ford liked being out in the woods, and he had a campsite on the sod farm property that he occasionally used. (Vol. 36, p. 2524)

Once the workday or workweek was over, employees of the 7,000-acre sod farm were not allowed back on the property without consent of management. (Vol. 36, p. 2567) However, they could hunt and fish there on weekends if they obtained prior approval to do so. (Vol. 36, pp. 2497, 2564, 2566-2567) On Saturday afternoon, April 5, 1997, Greg Malnory asked Raymond Caruthers, the general manager, if he and his wife and child could come onto the farm to fish the next day, and Caruthers granted his permission. (Vol. 36, pp. 2563, 2566-2567) Malnory made no mention of Jimbo Ford, nor did Ford ask for permission to come to the property on Sunday to fish. (Vol. 36, pp. 2566-2567)

Barbara Caruthers lived on the South Florida Sod Farm and knew Jimbo Ford as an employee there. (Vol. 36, p. 2573) Around 1:30 on the afternoon of Sunday, April 6, 1997, Caruthers had a brief conversation with Ford as he was driving into the farm in his red pickup truck. (Vol. 36, pp. 2576-2577) Ford asked if she had seen Greg and Kim, as he was to meet them there to go fishing, and she said no. (Vol. 36, pp. 2577, 2589) Ford told Caruthers he was going to the shop to put water into his truck. (Vol. 36, p. 2577) As Caruthers was leaving the farm to go to Wal-Mart, she met the Malnorys' blue pickup truck coming into the farm, with Greg driving. (Vol. 36, pp. 2575, 2578)

Keith Worley, a mechanic at the farm, was working that Sunday afternoon around 3:00 or 3:30 when Ford pulled up in his truck and worked briefly with a dragline. (Vol. 36, p. 2505-2506, 2527-2528) Greg and Kim Malnory arrived a couple of minutes after Ford with their baby, Maranda, and said they were going fishing. (Vol. 36, pp. 2507-2508) Ford asked if they had some fishing hooks for catfish. (Vol. 36, pp. 2508-2509) He seemed a little bit quiet to Worley, but Worley did not notice any evidence that Ford was intoxicated. (Vol. 36, pp. 2509, 2510) The four people drove off in the two trucks to go fishing. (Vol. 36, pp. 2510, 2512)

Sergio Silva was also working at the farm that afternoon, and saw the two trucks driving on the dike road, with Ford's truck in the lead. (Vol. 36, pp. 2480-2485) He put the time as between 1:00

and 2:00. (Vol. 36, p. 2481-2482) He saw the blue truck go down into an area and "stop like they were fishing from there." (Vol. 36, pp. 2485-2486) The red truck also turned down that way, but Silva did not see where it went. (Vol. 36, pp. 2485-2486) The blue truck was still parked in the same place when Silva left the sod farm at 5:00 to go home. (Vol 36, p. 2488)

Between 5:30 and 6:00, Barbara Caruthers saw Ford leaving in his pickup truck, driving faster than he usually did. (Vol. 36, pp. 2579-2580) Caruthers waved, and Ford looked at her, but made no response. (Vol. 36, p. 2580)

That afternoon, sometime between 4:00 and 6:00, Jimbo Ford came to the home of Juan Gutierrez, who had known Ford for about two years. (Vol. 36, pp. 2594-2595, 2597)³ Ford "needed gas in order to keep going." (Vol. 36, p. 2595) He had blood on his clothes, which he explained came from a hog he had killed. (Vol. 36, p. 2596) Gutierrez could not locate any gas for Ford, but his brother, Fransisco, was able to help him. (Vol. 36, p. 2596, 2599) Juan Gutierrez did not want his brother to go with Ford, because Ford "looked strange and he looked like he was drunk." (Vol. 36, p. 2596) Juan Gutierrez had "knowledge about people" which he gained from an 11-month course he took at the police academy in Mexico.

³ At Ford's trial, Gutierrez testified through an interpreter. (Vol. 36, pp. 2590-2600)

(Vol. 36, p. 2596) Juan Gutierrez gave Ford a beer, which he took with him when he left with Fransisco. (Vol. 36, p. 2597)

Fransisco Gutierrez had known Jimbo Ford since 1986. (Vol. 36, p. 2601) He was able to obtain a quart of gas, but it was not enough to start Ford's truck, which was parked about a quarter of a mile from the Gutierrez residence beside a drainage ditch or canal. (Vol. 36, pp. 2602-2612) Using a small chain, Gutierrez towed Ford's truck, with Ford driving it, to a Circle K in Nocatee, where Ford pumped some gas into it, and the men started the truck using jumper cables. (Vol. 36, pp. 2612-2613, 2624) Ford was drunk that day, but "[h]e was still able to do things." (Vol. 36, p. 2614, 2624) When Gutierrez asked Ford if he had been working that day, he said that he had, and said that they had been fishing and hunting and everything else, but did not tell Gutierrez who he was with. (Vol. 36, pp. 2614-2617) Ford's clothes were dirty, which was not unusual, due to the kind of work he did, operating heavy machinery. (Vol. 36, pp. 2615, 2617) Gutierrez observed blood on Ford's forehead and the palms of his hands, but did not see any on his shirt. (Vol. 36, pp. 2615, 2620) Ford explained that sometimes he bled very easily because he had "sugar", or diabetes, and was trying to pinch his arm to demonstrate this, but no blood came out. (Vol. 36, pp. 2615-2619, 2626) Ford also mentioned that his dog, which Gutierrez saw in the back of Ford's truck that afternoon, had caught a hog, but it was too small, and Ford took it away from the dog. (Vol. 36, pp. 2605, 2620, 2623) Gutierrez understood that the

blood that was on Ford came from the hog. (Vol. 36, p. 2620) It seemed to Fransisco Gutierrez that Ford was in a hurry, anxious to get where he wanted to go. (Vol. 36, p. 2625)

The following morning, Monday, April 7, 1997, was foggy. (Vol. 36) Greg Malnory did not show up for work. (Vol. 36, pp. 2514, 2541-2542, 2552-2553, 2568) Attempts to contact him at home were unsuccessful. (Vol. 36, pp. 2515, 2541, 2553) When the fog cleared, Sergio Silva saw Malnory's blue pickup truck in the same place he had seen it on Sunday afternoon. (Vol. 36, pp. 2489-2492, 2542) Early that afternoon, he went with Terry Kimmel, another sod farm employee, to check on Malnory. (Vol. 36, pp. 2492, 2541-2543, 2554) Bobby Fussell, the farm manager, was right behind them. (Vol. 36, pp. 2543, 2554-2555) They found Kim Malnory lying next to the truck, face down,⁴ and Greg Malnory in a field some distance from the truck; both people appeared to be dead. (Vol. 36, pp. 2492-2496, 2543-2545, 2555-2557) The baby was alive in the truck, and there was a dog underneath the vehicle. (Vol. 36, pp. 2494, 2544, 2557) The doors to the pickup were open, and the girl had mosquito bites all over her. (Vol. 36, p. 2557)

Raymond Caruthers was the fourth person to arrive at the scene. (Vol. 36, pp. 2569) He observed Greg Malnory lying on his stomach, and Kimberly Malnory lying next to the pickup. (Vol. 36,

⁴ Detective Gerald Tollini of the Charlotte County Sheriff's Office testified that the female victim was lying on her back when he arrived. (Vol. 33, p. 2164)

pp. 2569-2570) He called 911 and requested that the sheriff's department send deputies there. (Vol. 36, p. 2569)

When Keith Worley saw James Ford that morning, he was quiet, not the normal Jimbo. (Vol. 36, p. 2514) After the Malnorys were found, Bobby Fussell called Worley on the radio, and he and Ford drove to the scene. (Vol. 36, pp. 2516-2517) Worley did not remember giving Ford directions as to where to go, but it "was just kind of a nervous time because [Worley] did not know what was going on." (Vol. 36, p. 2517) As they were traveling to the scene, Ford mentioned that he had loaned the Malnorys his rifle the day before to go hog hunting. (Vol. 36, pp. 2517, 2534)

Bobby Fussell noticed several scratches on Jimbo Ford that Monday; the biggest was on one of his arms. (Vol. 36, p. 2558) Ford was wearing short sleeves. (Vol. 36, pp. 2533, 2559-2560) Keith Worley also noticed a scratch on Ford's right forearm that had iodine on it (Vol. 36, pp. 2521-2522, 2532-2533)

When Ford arrived at the reservoir, he did not approach the scene, but remained at the top of the levy road. (Vol. 36, pp. 2570-2571) Caruthers asked him if he had any idea what happened, and he responded that he did not, that it was just a terrible thing. (Vol. 36, p. 2571) Caruthers directed Ford to go down to an intersection to direct the police when they arrived. (Vol. 36, pp. 2571-2572)

After the deputies arrived, the dog was gotten from underneath the truck,⁵ and Maranda Malnory was removed from her car seat. (Vol. 33, p. 2138) She had what appeared to be blood on her clothing, but no injuries other than insect bites, and she was not in acute distress. (Vol. 33, pp. 2140-2142) Maranda was taken to St. Joseph's Hospital, and was later turned over to relatives. (Vol. 33, p. 2156)

Captain Anthony Penland of the Charlotte County Sheriff's Office observed that there was a fishing pole in the back of the blue pickup truck, and fishing line underneath Greg Malnory. (Vol. 35, pp. 2406-2409)

Crime scene technician Frank Toolan noticed that there were beer bottles in the back of the truck and on the ground. (Vol. 33, p. 2234)

Dr. Rosa Robison, a surgical pathologist, who was working as an assistant medical examiner in Charlotte County on April 7, 1997, went to the sod farm late that afternoon. (Vol. 34, pp. 2319, 2324, 2355) She obtained specimens from the female victim, who was wearing a bathing suit that was cut or ripped at the crotch. (Vol. 34, pp. 2326-2328, 2335) Robison observed some oval-shaped discolorations on the inner sides of the female's thighs that were

⁵ There was a discrepancy in the testimony regarding how the dog was persuaded to come out from under the truck. Jeffrey Philbin, a paramedic who responded to the scene, said that the dog had to be pepper sprayed (Vol. 33, pp. 2138, 2141), while Detective Gerald Tollini testified that he merely called the dog, and it came to him. (Vol. 33, pp. 2148-2149, 2159-2160)

consistent with thumbprints, and were made when she was alive. (Vol. 34, pp. 2334-2335, 2348-2352)

Dr. Manfred Clark Borges, the medical examiner, performed autopsies on both victims on April 8. (Vol. 35, p. 2417) He did not find any thumb-size bruises or other bruises on the inside of Kimberly Malnory's thighs, no any visible trauma to her sexual organs. (Vol. 35, p. 2460) He found that she had suffered nine chopping-type sharp force injuries to the head, as well as a contact gunshot wound to the roof of her mouth. (Vol. 35, pp. 2419-2420, 2426, 2430) There was bruising to the back portions of her extremities indicative of "defense injuries." (Vol. 35, pp. 2420-2421, 2424-2425) Her death, which was not instantaneous, resulted from a combination of the sharp force injuries and the gunshot. (Vol. 35, pp. 2431-2432, 2438) Greg Malnory had incurred seven sharp force injuries, including one that cut his jugular vein. (Vol. 35, pp. 2436-2437, 2440) He also had a gunshot to the head that had been fired from some distance and from somewhat behind and to his right. (Vol. 35, pp. 2436-2437, 2439) His death also was caused by sharp force injuries and the gunshot wound. (Vol. 35, pp. 2437-2438, 2443) There was no alcohol or drugs detected in the system of either victim. (Vol. 35, p. 2470)

On April 12, 1997, deputies from the Charlotte County Sheriff's Office conducted a search of Jimbo Ford's house in

Arcadia and seized an Old Timer's knife that was on a nightstand in a bedroom. (Vol. 38, pp. 2764-2765, 2770-2771)⁶

On April 17, 1997, Sergeant James Kenville of the Charlotte County Sheriff's Department discovered and retrieved the stock of a rifle from a drainage canal in the area where Jimbo's Ford's truck had run out of gas on April 6. (Vol. 37, pp. 2641-2646) This stock was from a .22 bolt action, single-shot Remington rifle that Richard Bennett had traded to Jimbo Ford about three years before the trial. (Vol. 37, pp. 2650-2653) Bennett had carved the words "Old Betsy" into the stock when he was a kid. (Vol. 37, p. 2651) In trade for this rifle, Bennett received a .22 semiautomatic rifle with a scope on it from Ford. (Vol 37, p. 2652)

The State also presented evidence regarding DNA testing that was performed at the Florida Department of Law Enforcement Laboratory in Tampa and at a private lab in Nashville, Tennessee called Microdiagnostics. (Vol. 38, p. 2802-Vol. 42, p. 3410) The FDLE lab performed PCR (polymerase chain reaction) and RFLP (restriction fragment length polymorphisms) testing, while Microdiagnostics used a newer and more sensitive form of testing called STR (short tandem repeats). (Vol. 38, p. 2836; Vol. 39, pp. 2893, 2896, 2920; Vol. 40, pp. 3113-3114, 3143, 3256) Robyn Ragsdale of FDLE testified as to the following results, which were

⁶ Keith Worley testified that Jimbo Ford routinely carried a pocketknife that looked just like the one that was seized from Ford's residence. (Vol. 36, pp. 2524-2526)

obtained using the PCR technique: Fingernail clippings and scrapings from Kimberly Malnory's hands were consistent with he DNA type; Greg Malnory and Jimbo Ford were excluded as being contributors. (Vol. 39, pp. 2960-2961) Stains on a camera taken from the Malnory's truck were consistent with Greg's DNA type; Kim Malnory and Ford could be excluded. (Vol. 39, pp. 2961-2962) A blood stain on the steering wheel from the Malnory's truck was consistent with Kim's DNA; Greg Malnory and Jimbo Ford were ruled out as contributors. (Vol. 39, pp. 2963-2965) One stain on the shoulder area of the t-shirt Kim Malnory was wearing when she was found was consistent with her DNA. (Vol. 39, pp. 2966-2967, 2979) There was a semen stain on the lower left back of the shirt, inside the hem; Ragsdale did not perform a PCR analysis on this. (Vol. 39, pp. 2967, 2975-2979; Vol. 40, pp. 3107-3108) A swabbing from the car seat from the Malnory's truck was consistent with Kim's DNA. (Vol. 39, pp. 2980-2986) A cutting from the strap of the car seat contained a mixture, with Kim being included as a possible contributor, and Ford being excluded as having contributed to that stain. (Vol. 39, pp. 2986-2988) A substance from the vaginal area of Kimberly Malnory gave positive chemical indications for the presence of semen, and sperm were observed under the microscope by Robyn Ragsdale of FDLE. (Vol. 39, pp. 2988-2989) There appeared to be DNA from at least two individuals. (Vol. 39, p. 2989) Assuming only one semen donor, Gregory Malnory was excluded, but Ford could not "be excluded as the contributor to the mixture." (Vol. 39, p.

2994) DNA from the blade of the knife found in Ford's house was consistent with Ford's type. (Vol. 39, pp. 2999-3002) DNA from debris that was inside the knife was consistent with that of Greg Malnory; Kim Malnory and Jimbo Ford were excluded as a contributor. (Vol. 39, pp. 3002-3003) In order to obtain results on the knife, Ragsdale had to run both tests twice. (Vol. 39, pp. 3003-3004) A swabbing from the left shoe taken from Ford's truck revealed a DNA profile consistent with that of Ford. (Vol. 39, pp. 3005-3006) The Malnorys were excluded as being contributors. (Vol. 39, pp. 3005-3006) DNA from a stain on the right shoe from the truck was consistent with that of Kim Malnory; Greg Malnory and Jimbo Ford could be excluded as contributing to that stain. (Vol. 39, p. 3006) A cutting from the seat cover from Ford's truck revealed DNA consistent with that of Kim Malnory; Greg Malnory and Jimbo Ford were excluded as possible contributors to that stain. (Vol. 39, pp. 3008-3009) Blood found on several items of clothing worn by Maranda Malnory on the day the homicides occurred was consistent with the DNA profile of Kim Malnory. (Vol. 39, pp. 3011-3018)

Mary Ruth McMahan testified regarding the results of the RFLP analyses performed by FDLE. The DNA that was present in the semen found on the t-shirt Kimberly Malnory was wearing was consistent with the DNA of Jimbo Ford. (Vol. 40, pp. 3167-3168) With regard to vaginal swabs from Kimberly Malnory, they matched the DNA profile of Ford at two of the genetic loci, while the other three were inconclusive. (Vol. 40, p. 3176) The profile developed from

testing the seat covers from Ford's truck matched the profile of Kim Malnory "at four loci with one loci or one probe being inconclusive." (Vol. 40, p. 3178)

Michael DeGuglielmo testified regarding the results of the STR testing done at Microdiagnostics. Fingernail scrapings from the right hand of Greg Malnory were consistent with his own DNA type. (Vol. 40, pp. 3238-3240) On one swabbing from the left shoe taken from Ford's truck, Greg and Kim Malnory were excluded as having contributed DNA, and the profile was consistent with that of James Ford at eight markers. (Vol. 40, pp. 3241-3242)⁷ A swab from the right shoe revealed DNA from a female, and matched Kim Malnory's profile at only two markers. (Vol. 40, pp. 3242-3243) Debris from the pocketknife recovered from Ford's residence matched the DNA profile of Greg Malnory at all 12 markers. (Vol. 40, pp. 3243-3244) Tests run on a vaginal swab from Kim Malnory that was taken by Dr. Borges showed DNA consistent with that of Ford (at all 12 markers), as well as a faint or secondary type consistent with Kim Malnory's DNA. (Vol. 40, pp. 3246-3247) A vaginal swab taken by Dr. Robison at the scene where the bodies were found likewise yielded a mixture consistent with the DNA profiles of Ford and Kim Malnory, with Greg Malnory being excluded as a contributor. (Vol. 40, pp. 3247-3250) With regard to a vaginal secretion collected by Robison at the scene, the testimony was confusing, but it appears that De-

⁷ DeGuglielmo testified that Microdiagnostics used 12 markers plus a sex marker in this case. (Vol. 40, p. 3206)

Guglielmo testified that it contained a mixture of male and female DNA, with the female DNA being consistent with that of Kim Malnory. (Vol. 40, pp. 3250-3255) Gregory Malnory was excluded as a contributor. (Vol. 40, p. 3250)⁸

The State also presented the testimony of Dr. Martin Tracy with regard to DNA statistical probabilities. The chance of randomly locating another person in the population with same genetic profile as James Dennis Ford would be either one in 94,000 or one in three and one-half billion or one in 1.9 trillion, depending upon the test that was used. (Vol. 41, pp. 3326-3327, 3345, 3362-3363) For Kimberly Malnory, the figures would be one in 797 or one in 219 million or one in forty-two billion. (Vol. 41, pp. 3326-3327, 3352; Vol. 42, p. 3401) For Gregory Malnory, one in 17,000 or one in 1.3 trillion. (Vol. 41, pp. 3326-3327, 3354) Tracy used the Caucasian data base in making his calculations (Vol. 41, p. 3366)⁹

Guilt Phase--Jimbo Ford's Case

R. L. Griffin, Gregory Malnory's stepfather, was at the Malnorys' residence on the Sunday they went on their last fishing

⁸ Subsequent testimony from Dr. Martin Tracy clarified that the male portion of the DNA in the secretion was consistent with Ford's DNA. (Vol. 41, pp. 3361-3362)

⁹ Ford unsuccessfully moved to strike Tracy's testimony because he used only the Caucasian data base, and there was no evidence that this was the proper data base to apply to Ford. (Vol. 41, pp. 3377-3384)

trip when Jimbo Ford arrived with Greg Malnory in Malnory's truck. (Vol. 42, pp. 3459-3460) Each man had a beer in his hand when he exited the truck. (Vol. 3461) Griffin made himself a drink of Seagram's VO whisky, Coke, and ice. (Vol. 42, p. 3462) Ford asked him if he could have some of the VO, and Griffin agreed. (Vol. 42, p. 3462) Ford then made and consumed two drinks, which he mixed in a beer can with top cut out of it. (Vol. 42, pp. 3462-3464) Each time, he put in ice, filled the can nearly to the top with the whisky, then added a little bit of Coke. (Vol. 42, pp. 3463-3464)

Griffin looked at some kind of steering problem Ford was having with his red pickup truck that day; it had a bad bushing. (Vol. 42, pp. 3464, 3466)

As Ford and the Malnorys were leaving in their respective trucks, Ford backed over a palm tree that was thrown away. (Vol. 42, pp. 3464-3465)

Ford gave Greg Malnory \$20 to buy some chickens gizzards or livers to use as catfish bait and some beer at the U-Save; Ford was going to meet the Malnorys after they stopped at the store. (Vol. 42, pp. 3465-3466)

Before he left, Ford asked Griffin and Greg Malnory if they had any .22 bullets. (Vol. 42, pp. 3467-3468) When both men responded in the negative, Ford said, "'Well, I have four. I guess that's enough. They want to go fishing. I want to go hog hunting, but I guess we'll go fishing.'" (Vol. 42, p. 3468)

It seemed to Griffin that Ford was able to walk, talk, and function as usual while he was at the Malnorys' residence. (Vol 42, pp. 3466-3467)

Crime scene technician Frank Toolan identified a U-Save receipt bearing the date of 4-6-97 and time of 1:32 p.m. that he recovered from the bed of the victims' pickup truck at the sod farm. (Vol. 42, pp. 3469-3470)

Jose Zuniga testified that Ford came to his house around noon on April 6, 1997. (Vol. 42, pp. 3473-3474) Ford offered him a beer, which he obtained from a cooler in his truck. (Vol. 42, p. 3474) It appeared to Zuniga that Ford was somewhat drunk. (Vol. 42, pp. 3474-3475) Although Zuniga had been with Ford in the past when he had two or three beers after work, he seemed different that Sunday. (Vol. 42, p. 3475) Zuniga observed an older rifle with a wooden handle in Ford's truck. (Vol. 42, p. 3476)

Ray Caruthers testified that, although there were law enforcement personnel in and out of the sod farm during the week after the bodies of the Malnorys were found, Jimbo Ford continued to work there, and showed up for work every day until he was arrested. (Vol. 42, pp. 3477-3478)

Sergeant James Kenville testified that during his investigation into the deaths of the Malnorys, Jimbo Ford rode with him around the sod farm, pointing out various locations, including a place that Ford said was his campsite. (Vol. 42, pp. 3479-3481)

Ford was cooperative with Kenville, and not hesitant about showing him around the farm. (Vol. 42, pp. 3480-3481)

Finally, Steve Ubelacker of the Charlotte County Sheriff's Office testified that, when it began to rain on that Monday afternoon at the sod farm when the bodies were found, he and Detective Kevin Smith and Detective John Poudrette covered the bodies with thermal blankets. (Vol. 42, pp. 3482-3485)

Penalty Phase--Jimbo Ford's Case

Ford presented the testimony of some 27 witnesses, two of them mental health professionals, at the penalty phase conducted on April 20-23, 1999.

Jimbo Ford's father, Buddy Ford, was caretaker of the cemetery in Arcadia. (Vol. 45, p. 3887; Vol. 46, pp. 4068-4071) He took over this business from his father, Leonard Ford, when Leonard died. (Vol. 45, p. 3887) Jimbo Ford had a very close relationship with his father. (Vol. 45, pp. 3889, 3893; Vol. 46, pp. 4051, 4057 4090; Vol. 47, pp. 4166-4169) Paige Ford, Jimbo's first wife, described them as closer than any two people she had ever known in her whole life. (Vol. 46, p. 4226)

Buddy Ford drank excessively in his later years. (Vol. 45, p. 3890) "He got to where he was drinking just about around the clock[,] " according to Rodney McCray, a close friend of the family. (Vol. 45, pp. 3885-3886, 3895) He was an alcoholic. (Vol. 47, p. 4166)

Jimbo Ford's mother, Mary Ruth, left the family home when Jimbo was 14, in 1975. (Vol. 45, pp. 3890; Vol. 46, p. 4076; Vol. 47, p. 4165) Even after she moved out, Mary Ruth and Buddy Ford were able to get along for the good of their children. (Vol. 46, pp. 4078-4079; Vol. 47, p. 4165)

Mary Ruth also used to drink, but had to give it up due to the medicine she was taking. (Vol. 47, pp. 4186-4187)

Jimbo's mother was quite stern with him, but his father was lax with his discipline, and let him skip school quite often. (Vol. 45, pp. 3891-3892) Jimbo did not care for school, and his father did not stress the importance of education, although his mother did. (Vol. 45, p. 3892) When Jimbo skipped school, he would spend the day with his father at the cemetery. (Vol. 45, p. 3892; Vol. 47, p. 4168) Ford did not cause trouble at school, but he had trouble with his reading. (Vol. 45, pp. 3907, 3915, 3940-3941) In ninth grade, he "struggled terribly" with his assignments for English class. (Vol. 45, pp. 3940, 3942) Ford did not finish high school. (Vol. 46, p. 4075)

David "Judge" Ford, Jimbo's brother, described their home life as not being "Norman Rockwell." (Vol. 46, p. 4077) There "wasn't anything terrible, but there never was any normality to it." (Vol. 46, p. 4077) The children were not mistreated, and they were loved. (Vol. 46, pp. 4077-4078)

When his father died in 1983 at the age of 52, Jimbo took it very, very hard. (Vol. 45, p. 3893; Vol. 46, pp. 4058-4059, 4066; Vol. 47, p. 4166) He was "devastated" that he had lost his best friend. (Vol. 47, pp. 4168-4169) There were times when Paige Ford would find Jimbo missing at night, and she would find him at the cemetery lying on his father's grave, crying. (Vol. 46, p. 4127) It was the alcohol that killed Buddy Ford. (Vol. 47, p. 4166)

Jimbo Ford began drinking in his late teens, and his drinking became excessive over the years. (Vol. 45, pp. 3895, 3927, 3956) He might drink 18 to 24 beers on a weekend day. (Vol. 45, pp. 3956, 4020) A friend of Ford's named Steven Scott Cline described an incident where the two men had been drinking at a bar, and neither on could remember how they got home. (Vol. 45, p. 4020) Ford was never mean or violent when he was drinking, or when he was sober. (Vol. 45, pp. 3928, 3956, 3965, 3972-3973, 4013, 4015-4016, 4038; Vol. 46, pp. 4154, 4156-4157) He could control his drinking. (Vol. 45, p. 4038)

Jimbo Ford was a very hard worker who excelled at operating heavy equipment. (Vol. 45, pp. 3897-3898, 4037-4038)

Ford was a very likable and friendly person, who treated everybody with respect, and was very kind to others, especially children. (Vol. 45, pp. 3899, 3957-3958, 3965, 3958, 3984; Vol. 46, p. 4191) He used to take his children (he had three girls) and the neighbors and their children fishing, hunting, and airboat riding. (Vol. 45, pp. 3922, 3927, 3954, 3966-3967, 3995-3997; Vol. 46, p. 4080; Vol. 47, pp. 4171-4172, 4198-4199) He also bought the kids ice cream. (Vol. 45, p. 3932)

Among the people Ford helped was Scotty Carnahan, who was confined to a wheelchair because of cerebral palsy. (Vol. 47, pp. 4237-4239, 4241-4246, 4251-4256) Ford would help him eat, take him to the bathroom, help him do whatever he needed. (Vol. 47, p. 4242)

Another person he helped was Beverly Smith. She was teased in school because she was short, and Ford would tell the other kids not to make fun of her. (Vol. 45, pp. 4002-4004, 4025-4026)

During the more than two years that Jimbo Ford had been incarcerated at the Charlotte County Jail prior to his penalty phase, he had followed the rules and regulations of the jail, and not incurred any disciplinary reports. (Vol. 45, pp. 3946, 3950-3951)

Ford had been studying the Bible and other materials since he went to jail, and his reading and writing ability had improved, and his vocabulary had increased. (Vol. 47, p. 4184-4185, 4207-4210) He was also working on math. (Vol. 47, pp. 4184, 4209)

Dr. Bill E. Mosman was a practicing attorney and psychologist who interviewed and tested Jimbo Ford and reviewed a number of records and documents pertaining to his case. (Vol. 48, pp. 4282-4284, 4320) Dr. Mosman concluded that Ford does not have an antisocial personality,¹⁰ is not a sociopath, is not psychotic or insane. (Vol. 48, p. 4285) He was of the opinion that at the time of the offenses, Ford was under the influence of extreme mental and emotional disturbance. (Vol. 48, p. 4286) He also believed that Ford's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially

¹⁰ Mosman testified that most criminal defendants he examined in forensic settings did have antisocial personalities. (Vol. 48, pp. 4297-4298)

impaired. (Vol. 48, pp. 4286-4287) The instant crimes were "an aberration" and were related to and influenced by alcoholism and other factors. (Vol. 48, p. 4311)

Dr. Mosman ascertained from testing that Ford's mental/intellectual age was between 11 and 14, while his emotional/developmental age was about nine. (Vol. 48, p. 4287-4289) He had a history of being physically abused and emotionally neglected as a child. (Vol 48, pp. 4288, 4315) He could not understand why his mother left, and he lacked the necessary family support needed for self-esteem. (Vol. 48, p. 4315) He also had a long history of charitable and humanitarian deeds, helping others in need. (Vol. 48, pp. 4291-4292) Although Ford tried to model himself after his father in many ways, he did not pursue his father's line of work, because he did not like digging graves, and did not like going to funerals because he "could not function when other people were crying and other people were in pain." (Vol. 48, p. 4316)

Ford had "an absolute unbelievable record of the utilization of alcohol" that was related to the crime and to his character, and he was an alcoholic. (Vol. 48, pp. 4292, 4313) The alcoholism came from his mother, father, and other relatives. (Vol. 48, p. 4314) Ford told Mosman that on April 6, 1997 he drank two drinks of VO whiskey and between 12 and 20 beers. (Vol. 48, pp. 4346-4347)

There was no doubt in Mosman's mind from a medical point of view that Ford was deeply saddened and hurt by the death of Greg and Kim Malnory and had feelings about that. (Vol. 48, p. 4292)

One of the tests Mosman administered indicated the presence of some collateral (minimal) organic brain damage, which could account for the fact that Ford is "seriously learning disabled and has been all of his life," although Mosman did not believe that Ford was retarded. (Vol. 48, pp. 4304-4306, 4309)

If Ford were in a prison setting, away from alcohol, he could be expected to try to improve his education and to help others and be a positive influence. (Vol. 48, pp. 4311-4313)

Dr. Richard Greer, a forensic psychiatrist, examined Ford and read various reports and documents pertaining to his case, and interviewed several witnesses. (Vol. 48, pp. 4375, 4380, 4410-4413) Greer found significance in four medical factors: Ford's use of alcohol, his history of diabetes (which was not well-controlled), his intellectual functioning (below average IQ), and his significantly elevated blood pressure. (Vol. 48, pp. 4381-4382, 4384, 4388) Greer noted that high blood sugar can cause various symptoms ranging from "shortness of breath to confusion to disorientation to irritability and aggressiveness to paranoia to flushing of the skin to passing out to seizures." (Vol. 48, pp. 4384-4385) Alcohol could caused the blood sugar to be much higher than it would otherwise be. (Vol. 48, pp. 4385-4386) Greer noted the family's use of alcohol and that Ford seemed to have the genetic predisposition to drink. (Vol. 48, p. 4386) There was no question that Ford had had an alcohol problem for some time. (Vol. 48, pp. 4386-4387) Greer also had no doubt that the interaction of alcohol and blood

sugar was significant in Ford and very likely significantly impaired his mental faculties or his mental abilities. (Vol. 48, pp. 4387-4388) The interaction of the high blood pressure with these factors would further diminish Ford's intellect such that he would not be "thinking anywhere near what his full capability is." (Vol. 48, p. 4388)

Greer ascertained that Ford would drink up to a case of beer on weekends. (Vol. 48, p. 4389) When he began to feel badly, when his blood sugar began going up, he would regulate his use of alcohol. (Vol. 48, p. 4389) When Ford was intoxicated, he was sometimes silly or goofy, but not aggressive or violent. (Vol. 48, p. 4389)

Greer described an "alcohol blackout" as "an amnesia episode, a loss of memory, for a period of time when there is alcohol in the system." (Vol. 48, p. 4391) It does not involve a loss of consciousness or passing out, and the person appears to function normally. (Vol. 48, p. 4391) Such a blackout may have accounted for Ford's actions on the day in question, although Ford did not feel that he suffered an alcohol blackout. (Vol. 48, pp. 4407-4409) In fact, he may have experienced "a period of lunacy" or "madness" due to drinking and the other factors. (Vol. 49, pp. 4431, 4436) On that day, Ford drank 18 to 24 beers (12 ounce cans or bottles), as well as two mixed drinks of VO whiskey. (Vol. 48, pp. 4414, 4424)

The two main mental disorders that Greer found in Ford were alcoholism (although Ford did not feel he was an alcoholic) and borderline intellectual functioning. (Vol. 48, pp. 4412, 4425)

Greer found that Ford did not have an antisocial personality. (Vol. 48, pp. 4392-4394) From Greer's understanding and "talking with so many people," Ford was totally inconsistent with an antisocial personality, as he was "a loving, caring person who looked out for the welfare of people who were disadvantaged, who had problems looking out for themselves, whether they had some kind of infirmity or they were older." (Vol. 48, p. 4393) Ford was not getting into trouble in jail, had no disciplinary reports, was not trying to take advantage of other inmates. (Vol. 48, p. 4394) Nor was Ford a psychopath or sociopath. (Vol. 48, p. 4395) Ford would be "quite rehabilitatable" in the structured setting of jail. (Vol. 48, pp. 4394-4395)

Greer did not believe the death penalty would be an appropriate penalty for Jimbo Ford. (Vol. 49, p. 4441)

Penalty Phase--State's Rebuttal

Prior to the testimony of the State's sole rebuttal witness, Dr. Robert Wald, there was a lengthy discussion and proffer regarding the admissibility of his testimony, with the court ultimately ruling that Wald could testify. (Vol. 49, pp. 4470-4495, 4498-4512) Wald then testified in the presence of the jury that he was a clinical psychiatrist who had examined Jimbo Ford, and

expressed his opinion that Ford did not experience an alcoholic blackout at the time of the murders of Kim and Greg Malnory. (Vol. 49, pp. 4513-4519, 4522) Wald had not received any information, sworn statements, or testimony from anyone who saw Ford on the day of the instant crimes. (Vol. 49, p. 4530) Had Wald received statements of witnesses who saw Ford under the influence, acting strange, acting drunk on that day, "it certainly could" have changed his opinion on whether Ford was suffering from an alcohol blackout, "[d]epending on the specific content" of the information. (Vol. 49, p. 4530)

SUMMARY OF THE ARGUMENT

The court below should have granted a mistrial when two of the prosecutors made improper remarks during their guilt phase closing argument which impugned the integrity of defense counsel, including comments that defense counsel engaged in a "bait and switch legal argument." Although the court sustained defense objections to the remarks, and, in one instance, gave a curative instruction, the cumulative effect of the State's argument in this circumstantial evidence case was to deny James Ford a fair trial and call into question the reliability of the jury's verdicts.

The prosecutor below improperly questioned one of the State's DNA experts, Dr. Martin Tracy, about "flesh" that was allegedly found in a knife recovered from James Ford's residence. This highly prejudicial reference lacked support in the record, as other witnesses referred only to DNA tests conducted on "debris" from the knife, and was so prejudicial that it could not be cured by instruction to the jury to disregard.

Count IX of the indictment in this case failed to charge James Dennis Ford with the crime of "child abuse," or any other offense under Florida law; its omission of an essential element was fatal. Furthermore, the evidence was insufficient to establish Ford's guilt of child abuse or neglect pursuant to the indictment and the relevant statute. There was no proof that he was a "caregiver," or that he willfully committed an act that would constitute a crime under the statute.

The sentencing recommendations of the jury below were tainted by improper prosecutorial argument at penalty phase which sought to restrict the jury's consideration of the evidence James Ford presented in mitigation and injected the element of Ford's alleged lack of remorse into the proceedings.

The evidence presented by the prosecution was insufficient to establish the aggravating circumstance of cold, calculated, and premeditated. Several of the court's findings as to this factor do not enjoy record support and involve mere speculation. The evidence did not show that the instant homicides were planned in advance or involved heightened premeditation, especially in light of the lack of evidence as to any motive for the killings. Because this improper aggravator was not only found by the trial court, but was also submitted to James Ford's jury for its consideration, Ford must be granted a new penalty phase.

The trial court did not give correct and adequate consideration to all evidence James Ford presented in mitigation. She failed to properly consider the evidence as it related to the statutory mitigators of extreme mental or emotional disturbance and impaired capacity, as well as nonstatutory mitigators such as Ford's learning disability, his developmental age, diabetes, chronic alcoholism, organic brain damage, and the lengthy sentences Ford was facing as an alternative to sentences of death.

ARGUMENT

ISSUE I

THE COURT BELOW SHOULD HAVE GRANTED A MISTRIAL DUE TO SEVERAL IMPROPER REMARKS MADE BY THE PROSECUTOR IN ARGUING TO THE JURY DURING THE GUILT PHASE OF JAMES FORD'S TRIAL.

On several occasions during the State's closing argument to the jury at the guilt phase of Ford's trial, defense counsel challenged the propriety of the assistant state attorney's remarks. Although the court sustained the defense objections, the effect of the comments, particularly considered cumulatively, was to deny Ford a fair trial, and a mistrial should have been granted.

After stating the issue in this case to be: "What evidence do we have against the defendant?" the prosecutor made the following argument (Vol. 43, p. 3596):

I suspect that many of you have heard the phrase that the best defense is a good offense. And what that means is in football or in soccer or even in war, the idea is that if one side keeps the other busy defending itself by attacking, then they can't mount their own attack. And in this case, a lot of the questions that relate to numbers and evidence logs and that sort of thing, the defense has very aggressively mounted an offensive to show that in some way this investigation wasn't a perfect investigation. I'm telling you it wasn't perfect. That's quite true.

But the issue is: Does the evidence that you have convince you beyond a reasonable doubt that the Defendant committed these crimes, not whether more could have been done or done differently. And in court a good offense does not cancel the truth. It doesn't cancel the truth. A good offense by the defense--

Thereupon, defense counsel objected and moved for a mistrial. (Vol. 43, pp. 3596-3597) The court denied the motion for mistrial, but cautioned the prosecutor "to make sure that the burden remain with the State and that the argument is consistent with the burden." (Vol. 43, p. 3597)

The prosecutor continued to discuss errors that had been made in the handling of the evidence in this case, and said (Vol. 43, p. 3598):

Now, yes, some of the evidence logs and some of the various documents that were filled out later, were not filled out as meticulously as they could have. No question about it. But something interesting happened during the course of this trial. There were a number of individuals, number of attorneys, myself Mr. Deifik [one of the prosecutors], Mr. Sullivan [one of the defense attorneys], for example, that got the numbers sometimes confused.

Mr. Sullivan, for example, at one point talked about the Fort Myers FDLE crime lab when it was actually the Tampa--

Defense moved for a mistrial. (Vol. 43, pp. 3598-3599) The court sustained the objection, but did not grant a mistrial. (Vol. 43, p. 3600)

A bit further along in his argument, the assistant state attorney was discussing the complexities of DNA technology and how it "is not an easy thing to understand" when he said (Vol. 43, pp. 3609-3610):

But, ladies and gentlemen, we rely on complicated scientific evidence and scientific devices all the time in very serious life and death situations that we don't really have a clue how they work. Think about it for a

minute. When you get in an automobile and you're driving down the road at 65, 70 miles an hour and another vehicle is coming at you in the same state, 65 70 miles an hour, you've got maybe five, ten feet between you and that vehicle as they pass. Do you fully understand all the workings of that automobile you're in? Do you understand that at your feet there's a metal block where gasoline is being pushed into it and there's an explosion of some sort? Do you understand how all of the wires and everything--well, of course not.

Some of you may, but probably most of you don't. But that doesn't prevent you from using that technology and science to drive down the road. I'll give you another example; telephone. We use telephones all the time. But how many of use really understand the very sophisticated science that goes into a telephone.

Look at this. Can't you just hear a defense attorney questioning Alexander Graham Bell.

Whereupon, defense counsel moved for a mistrial and requested a curative instruction. (Vol. 43, p. 3610) The court sustained the objection, but denied the motion for mistrial and request for a curative instruction. (Vol. 43, p. 3610) The prosecutor then rephrased his monologue on the inventor of the telephone, as follows (Vol. 43, pp. 3610-3611):

MR. LEE [one of the prosecutors]: Let me rephrase that. Can't you just see someone questioning Alexander Graham Bell[.] Now, Mr. Bell, do you really expect us to believe that this little box with a couple bells and all these little wires in here that I can rely on this and stake my life on it, that I can summon hospital attendants and ambulances by this thing? And how about these four little wires? Are you really trying to tell us that an electrical impulse goes down these little things and vibrates the metal and that by doing that somebody at the other end cannot

only hear my voice, but recognize what I'm saying? Come on, Mr. Bell.

Later, approaching the end of the State's argument, a different assistant state attorney was discussing the DNA evidence and defense "attempts to cast doubt upon the DNA results as being untrustworthy[,]" when he said (Vol. 43, pp. 3673-3675):

Now, the defense counsel, towards the end of his argument, repeated, let's be fair here. Well, let us not forget that justice is due to the accuser as well as to the accused. An interesting illustration of the probative worth of Mr. Sullivan's arguments can be found in considering how he attacked the DNA evidence from the Defendant's knife.

He starts talking about Greg's DNA being in the knife debris, which is what the evidence from Dr. Ragsdale proved. Then after talking about the lunchtime interlude, how the gentlemen on the sod farm passed the knife around, suddenly the location of the DNA changes from the knife debris to the blade of the knife.

Now, we all know from our recollection of the evidence that the blood or the DNA on the blade of the knife was Mr. Ford's blood, not Gregory's blood, that Gregory's DNA came from the knife debris that Dr. Ragsdale found deep within the knife.

I would submit that a reasonable construction of that argument is similar to what went on during the trial where an exhibit of evidence was introduced by the State, identified by the witnesses, and then upon cross-examination, counsel started with the correct number, but halfway through we wound up with different numbers being talked about, sort of a bait and switch legal argument.

Thereupon, defense counsel requested a mistrial. (Vol. 43, pp. 3675-3677) The court denied the motion, but, upon request, did give a curative instruction, as follows (Vol. 43, pp. 3676-3677):

"The Court will now instruct the jury that you are to disregard the argument of the State in reference to conduct or actions of defense counsel. Instead, you are to focus on the evidence in this case."

The remarks above constituted personal attacks upon defense counsel somewhat similar to, but more egregious than, remarks this Court recently condemned in Brooks v. State, 25 Fla. L. Weekly S417 (Fla. May 25, 2000). (See also cases cited in Brooks at 25 Fla. L. Weekly S425 dealing with improper prosecutorial arguments denigrating defense counsel.) The comments in Brooks (which were made during the penalty phase) were as follows:

I'd like to make this comment to you: During opening statement of the guilt part of the trial, and during closing arguments of the guilt part of the trial about a week and a half ago, those two criminal defense lawyers got up here and they told you that the evidence would show you that the defendants were not guilty of murder and aggravated battery, and they looked you straight in the eye when they told you that. And I would submit to you that the evidence that came out during the trial proved to you beyond a reasonable doubt that the defendants were guilty of first-degree murder and aggravated battery.

The evidence produced at trial disproved what those two criminal defense lawyers argued to you.

* * * *

I submit to you that the evidence that you heard during the guilt part of the trial did not support what the defense lawyers argued to you. They argued to you that the defendants were not guilty, and that's what the evidence, they claim, supported a verdict of. The evidence did not support what they argued to you, and I would submit to you that I expect them to get up here and argue to you that the law and the evidence that you've heard will support a recommendation of life.

I'm going to submit to you that, if you look at all the evidence that's been presented to you in this case and you listen carefully to the law, that, once again, the evidence and the law will not support--is not going to support what those two criminal defense lawyers are going to argue to you.

25 Fla. L. Weekly at S425. This Court concluded that "the trial court abused its discretion in overruling defense counsel's objections to these improper comments." 25 Fla. L. Weekly at S425.

The improper comments of the two prosecutors below were much more damaging to the defense than the remarks in Brooks, particularly the State's suggestion that the defense attorneys were trying to "cancel the truth" by mounting a "good offense," and the outrageous remark that James Ford's lawyer engaged in a "bait and switch" argument, which implied a deliberate attempt to mislead the jury.

Although the court below recognized the impropriety of the State's conduct by sustaining Ford's objections and giving a curative instruction as to one of the improper remarks, this was not enough to remove the taint from the proceedings. In Garron v. State, 528 So. 2d 353 (Fla. 1988), this Court ruled that the totality of the prosecutor's improper argument required a new penalty phase for Garron, even though objections to a number of the improper remarks were sustained and curative instructions given. The instant prosecution was built on circumstantial evidence, with no confession and no eyewitness to the offenses. It was therefore critical that Ford's attorneys be permitted to make their arguments

to the jury challenging the adequacy of the State's evidence to convict their client without having their integrity improperly impugned by the other side. Because of the repeated prosecutorial misconduct below, Ford was denied effective assistance of his counsel, due process of law, and a fair trial in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9, 16, and 22 of the Constitution of the State Florida.

As this Court observed in Gore v. State, 719 So. 2d 1197, 1202 (Fla. 1998), in a death case "both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects." That obligation was not fulfilled in Ford's case. As a result, the jury's verdicts of guilt cannot be deemed reliable, and Ford must be granted a new trial.

ISSUE II

A MISTRIAL SHOULD HAVE BEEN GRANTED
WHEN THE PROSECUTOR BELOW ASKED A
HIGHLY INFLAMMATORY QUESTION OF A
STATE WITNESS THAT WAS NOT SUPPORTED
BY THE EVIDENCE.

Dr. Martin Tracy was the State's expert witness in the fields of "population genetics and molecular genetics," who testified regarding DNA statistics as the final prosecution witness at the guilt phase of James Ford's trial. (Vol. 41, p. 3298-Vol. 42, p. 3409)

During direct examination of Tracy, the prosecutor asked the following question (Vol. 41, p. 3352):

Sir, drawing your attention to the item that is referred to as State's Exhibit 93-4 identified as extracted DNA from the flesh taken from the pocket knife seized from the--

Thereupon defense counsel objected and moved for a mistrial, noting that the term "flesh" had not been used in the case. (Vol. 41, pp. 3352-3353) The trial court denied the motion for mistrial, but instructed the jury as follows (Vol. 41, pp. 3353-3354):

All right. At this time the Court will direct the jury to disregard any reference to the word flesh that was used in the question that was just posed. The Court will now direct counsel to direct the witness' attention to the results of the analysis from the debris that had been located on the knife.

There had been no testimony that any "flesh" was found in the knife seized from Ford's residence; the DNA testing that was performed related to unspecified "debris" that came from the knife,

not "flesh." Comments by counsel on matters outside the evidence are clearly improper. Pope v. Wainwright, 496 So. 2d 798, 803 (Fla. 1986); Huff v. State, 437 So. 2d 1087 (Fla. 1983).¹¹ The prosecutor's questioning raised the inflammatory specter of Gregory Malnory's skin or flesh being in Ford's knife, when there was no evidence to that effect. The nature of the "debris" was never defined.¹² Coming as it did near the end of the State's case, when it would be likely to remain in the minds of the jurors, this reference was highly prejudicial. Although the court below gave a "curative" instruction, it could not "unring the bell" so as to remove the improper question from the jurors' minds. See Cooper v. State, 659 So. 2d 442 (Fla. 2d DCA 1995) (curative instruction insufficient to remove prejudice inherent in testimony).

James Ford was denied a fair trial and must be granted a new one.

¹¹ Although Pope and Huff dealt with arguments of counsel, the same principle should apply to questioning by counsel.

¹² There was testimony that the employees of the sod farm all ate lunch together and passed their knives around (Vol. 36, p. 2533), raising at least the possibility that Greg Malnory's DNA found its way into the knife during one of these lunches.

ISSUE III

THE INDICTMENT HEREIN FAILED TO CHARGE JAMES DENNIS FORD WITH THE OFFENSE OF CHILD ABUSE, AND THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO PROVE THAT FORD COMMITTED THE CRIME OF CHILD ABUSE.

Count IX of the indictment in this case alleged that James Dennis Ford, on or about April 6, 1997,

did unlawfully and willfully deprive a child, to wit: MARANDA MALNORY, or did allow said child to be deprived of, necessary food, clothing, shelter, or medical treatment, or did knowingly inflict or permit the infliction of physical or mental injury to said child.

(Vol. 1, p. 15)

Defense counsel filed a written motion challenging both the adequacy of the indictment to charge Ford with child abuse, and the sufficiency of the evidence to establish this offense, and argued the motion orally as part of Ford's motion for judgment of acquittal after the State rested its case. (Vol. 11, pp. 2013-2018; Vol. 42, pp. 3433-3437, 3455-3457) The court denied the motion. (Vol. 42, p. 3458) It should have been granted.

According to the assistant state attorney, the indictment charged Ford with child abuse pursuant to section 827.03(3)(c) of the Florida Statutes, although the indictment did not cite to any particular subsection of the statute in question. (Vol. 42, pp. 3438-3439, 3445) Section 827.03(3) does not deal with "child abuse," but rather deals with the offense of "neglect of a child," which is defined in 827.03(3)(a) as follows:

1. A caregiver's failure or omission to provide a child with the care, supervision, and services necessary to maintain the child's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the child; or
2. A caregiver's failure to make a reasonable effort to protect a child from abuse, neglect, or exploitation by another person.

Section 827.03(3)(c) states:

A person who willfully or by culpable negligence neglects a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the third degree...

"Caregiver" is defined in section 827.01(1) as follows:

"Caregiver" means a parent, adult household member, or another person responsible for the child's welfare.

Obviously, the indictment failed to track the language of the statute. Perhaps the most glaring defect in the attempted charge is its total omission of the essential allegation that Ford was a "caregiver," or owed any type of duty of care to the child. Where, as here, the indictment wholly fails to allege an essential element of the crime, it fails to charge a crime under the laws of this state, and a conviction cannot rest upon such an indictment. State v. Gray, 435 So. 2d 816 (Fla. 1983).

Similarly, there was no evidence that Ford was a "caregiver" under the meaning of the statute, nor was there any evidence that he willfully committed any acts that might constitute child abuse or neglect consistent with the indictment and the statute. The

fact that Maranda was left unattended in the Malnorys' vehicle was a by-product of what happened at the sod farm, but there was no proof that she was deliberately harmed in any way.

For these reasons, Ford's conviction for child abuse must be vacated.

ISSUE IV

THE PENALTY RECOMMENDATIONS OF JAMES FORD'S JURY WERE TAINTED BY IMPROPER PROSECUTORIAL ARGUMENTS AT THE SENTENCING PHASE OF HIS TRIAL.

Defense counsel lodged several objections to the State's closing argument during the penalty phase of James Ford's trial. The first such objection came near the very beginning of the prosecutor's argument when he said (Vol. 50, p. 4579):

Ladies and gentlemen, there is one common thread that runs through our criminal law that is absolutely essential for those laws to truly produce justice. And that is that people must be held accountable for their actions; that is, punishment must fit the crime.

Thereupon, defense counsel made an objection that this was an incorrect statement of the law, which the court overruled. (Vol. 50, pp. 4579-4580) The prosecutor then continued in the same vein (Vol. 50, pp. 4580-4581):

That common thread is that the punishment should fit the crime. People must be held accountable for their actions. The rule of law in this nation, when it functions properly, is designed to fairly and justly hold the person accountable for their actions. The more serious the crime, the greater the accountability required by the law. That is if there will be true justice.

The prosecutor repeated his "the punishment is to fit the crime" theme later in his argument, and reiterated it near the very end, "As I began, if justice is to be just, the punishment must fit the crime." (Vol. 50, pp. 4610, 4620)

It is improper for an attorney to misstate the law in his arguments to the jury. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Pait v. State, 112 So. 2d 380 (Fla. 1959). The prosecutor's argument misstated the law because it suggested to the jury that only the crime itself was relevant to the punishment James Ford should receive. In fact, however, the jury must consider not only the circumstances of the offense, but matters relating to the character and record of the defendant. In Lockett v. Ohio, 438 U.S. 586, 604 (1978) the Supreme Court of the United States set forth the rule that, in a capital case, "the Eighth and Fourteenth Amendments require that the sentencer...not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [Emphasis in original--footnote omitted.]" Recently, in Hitchcock v. State, 25 Fla. L. Weekly S239 (Fla. March 23, 2000), this Court found error, albeit harmless, in the trial court's overruling of a defense objection to the State's penalty phase argument which attempted to limit the jury's consideration of mitigating circumstances in violation of Lockett. A similar, but harmful, error occurred in the instant case.¹³

¹³ The prosecutor engaged in a similar effort to limit the jury's consideration of mitigating evidence when cross-examining Nancy Ford, Jimbo's aunt. After a photograph of Jimbo Ford as a boy was admitted into evidence, he asked (Vol. 46, p. 4102):

Mrs. Ford, you must honestly admit that
in your wildest imagination this 1967 photo-

The prosecutor engaged in a similar attempt to limit the jury's consideration of mitigating evidence later in his argument. He was discussing the testimony of Ford's family and friends at penalty phase, and said (Vol. 50, p. 4584):

And what that testimony really boils down to is that this defendant has no excuse for his actions; no excuse at all.

Because he had the support of friends and family who cared for him. And he's let those people down. In a lot of ways it makes the crime itself that he committed even worse because by the testimony of his own friends and family he was not abused.

As defense counsel pointed out, it seems that in this argument the prosecutor was attempting "to turn mitigators into aggravators." (Vol. 50, p. 4585) The court properly admonished the prosecutor to stay away from using the term "excuse." (Vol. 50, p. 4587) The issue at penalty phase was not whether Ford would be "excused" for the offenses for which he was convicted, but what the appropriate punishment would be for those offenses. Despite the court's ruling, the prosecutor later used the word "excuse" again, and had to be asked to rephrase his argument. (Vol. 50, p. 4603)

At one point in his argument, the assistant state attorney referred to sympathy, as follows (Vol. 50, p. 4590):

graph of a seven-year-old Jimbo Ford has absolutely nothing to do with a murder of Greg and Kim Malnory. Isn't that true, ma'am?

The court sustained defense objections to this question. (Vol. 46, pp. 4102-4103)

Now, justice is often portrayed as a lady holding scales and those scales are held in her hand, and she has a blindfold. And the blindfold is there for a reason. That reason is that justice, as she holds the scales, is not to be swayed by sympathy or prejudice or bias.

Much of the defendant's mitigation through the testimony of their [sic] friends and family is an attempt to get Lady Justice to peek under the blindfold and tip the scale out of sympathy. And the Court has instructed

you that sympathy is not something that you should consider.

This argument was similar to the argument this Court found improper in Hitchcock, and was another effort to limit the jury's consideration of the evidence Ford presented in support of a sentence less than death.

Perhaps the most egregious error in the prosecutor's argument was his reference to Ford's alleged lack of remorse for the killings, where he said (Vol. 50, pp. 4606-4607):

Dr. Greer said that the defendant was experiencing remorse. Is that really so? The defendant still denies that he killed the Malnorys, even to his own psychiatrist, even as recently as last week; despite the verdict in this case and the evidence in this case. Yet this doctor still doesn't believe that the defendant is lying or malingering.

How can there be true remorse without owning up to one's conduct? There is a difference between remorse and regret. The defendant regrets that the Malnorys are dead. That's what his doctor said. And certainly that's so because that has led him to jail, that has led to hurting his friends and family, that has led to the end of family picnics and good times with drinking buddies; and it has led to the death penalty. Sure he has regrets, but remorse?

Periodically, as the mitigation testimony was coming in through his friends and family, I could not help but notice the defendant occasionally had tears in his eyes. And I'm sure some of you noticed that, too.

But I did not notice any similar tears in his eyes during the heart-wrenching testimony of what he did to the Malnorys. And that is because he feels very differently about his family and friends and he acted very differently around them. He showed a very different face to his family and friends. And he felt and acted very differently with the Malnorys.

The dictionary defines remorse as, quote, moral anguish arising from repentance for the past misdeeds. How can there be anguish, moral or otherwise, for past deeds if one refuses to admit that one did those deeds? You cannot repent from something that you deny. Ladies and gentlemen, this mitigator is not proven. The defendant, according to his own doctors, is not repentant.

Thereupon, defense counsel requested a bench conference, which resulted in the court instructing the jury to disregard the last comment by the prosecutor. (Vol. 50, p. 4608) The court also told the jury that the arguments were the attorneys' personal beliefs, which were not to be considered by the jury during deliberations, and that the jurors were to rely upon their own recollection of the evidence. (Vol. 50, pp. 4608-4609)

"It is error to consider lack of remorse for any purpose in capital sentencing." Colina v. State, 570 So. 2d 929, 933 (Fla. 1990), quoting from Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985). This Court has "clearly stated that lack of remorse is a nonstatutory aggravating circumstance and cannot be considered in a capital sentencing. [Citations omitted.]" Shellito v. State,

701 So. 2d 837, 842 (Fla. 1997). The State apparently was attempting to justify its comments regarding lack of remorse as rebuttal to Ford's mitigating evidence. However, Ford did not present remorse as a mitigator. His penalty phase jury was not instructed that it could consider remorse in mitigation. (Vol. 50, pp. 4682-4683) Nor did the defense adduce testimony that Ford was remorseful. The prosecutor mischaracterized the testimony of Dr. Greer.¹⁴ Remorse was mentioned only twice during Greer's testimony. He stated that a sociopath has little or no human emotion and does not "experience remorse" (but did not say that Ford was remorseful). (Vol. 48, p. 4395) He also stated, in response to the prosecutor's questions on cross-examination about how a person might be impacted by "committing horrible crimes like this" that, "while a person may experience a traumatic situation and be remorseful, their underlying personality is going to be consistent." (Vol. 49, pp. 4435-4436) Thus, there was no testimony about Ford's remorse, and it was error for the prosecutor to inject this subject into the proceedings. Unlike in Shellito, where the Court found a brief reference to lack of remorse to constitute harmless error, the prosecutor below went on at some length, and his remarks cannot be considered harmless when combined with his other improper arguments at penalty phase. Although the trial court gave a

¹⁴ Obviously, the prosecutor's argument was internally inconsistent in that he initially stated that Dr. Greer said that Ford was experiencing remorse, but later stated that, according to Ford's own doctors, he was not repentant.

"curative" instruction, by then it was too late to "unring the bell;" the damage to the fairness of Ford's penalty trial had already been done. See Cooper v. State, 659 So. 2d 442 (Fla. 2d DCA 1995) (curative instruction insufficient to remove prejudice inherent in testimony).

Due to the improper argument of the prosecutor below, the jury's penalty recommendations in this case cannot be considered reliable. The sentencing proceeding that was conducted deprived James Ford of due process of law and a fair sentencing trial and subjected him to cruel and/or unusual punishment in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9, 16, 17 and 22 of the Constitution of the State of Florida.

ISSUE V

THE COURT BELOW ERRED IN SUBMITTING THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE TO JAMES FORD'S PENALTY PHASE JURY AND FINDING THIS FACTOR TO EXIST IN HER ORDER SENTENCING FORD TO DEATH, AS THE EVIDENCE WAS INSUFFICIENT TO SUPPORT IT.

James Ford's penalty phase jury was instructed that one of the aggravating circumstances it could consider, if established by the evidence, was that the crime was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (Vol. 36, pp. 4680-4681) The court also found this aggravating circumstance to exist in her order sentencing Ford to death as follows (Vol. 15, pp.2719-2720):

2. The capital felonies were homicides and were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. § 921-.141 (5) (i) Fla. Stat. 1997).

On Saturday, April 5, 1997, the Defendant, a heavy equipment operator at the sod farm, learned that his co-worker, Greg Malnory, and his wife and child would be alone together in a remote area of the sod farm for a family outing the following day. On Sunday morning, the Defendant, James Dennis Ford, a.k.a. "Jimbo," insinuated himself into the Malnory family outing by driving to their home and inviting himself for what was to be some fishing. "Jimbo" gave Greg money with which to buy beer and chicken livers for use as bait.

At approximately 11:30 a.m., the Defendant asked R. L. Griffin, Kimberly Malnory's stepfather, whether he had any bullets for

a .22 caliber rifle. Mr. Griffin stated that he did not and in response, the Defendant said: "I've got four, that's

enough." The Defendant then led the Malnorys out to the sod farm to the area where the rape and murders occurred. Indeed, the Defendant chose the site and drove his red pickup truck in front of the Malnorys' blue pickup truck.

Although there was evidence that the Defendant consumed some whiskey and that Greg bought three twelve packs of beer, medical evidence revealed that neither Greg nor Kim had consumed alcohol or drugs at the scene of the crimes, Indeed, there were no signs at all at the scene of the crimes that the Malnorys had any idea of what their acquaintance, "Jimbo," had in store for them.

Defense counsel argue stridently against the existence of the cold, calculated and premeditated (CCP) aggravator. Indeed, the essence of this argument is that the crime scene was "frenzied" such that it would militate against a finding of the existence of this aggravating factor. However, the evidence does not support this claim.

The Defendant lured the Malnory family to the remote area where the murders occurred. The Defendant found out clandestinely that the Malnorys intended to be there on Sunday. He insinuated himself into their family outing several hours before the murders. During the commission of these brutal crimes, it was necessary for the Defendant to take the time to reload a single-shot, bolt-action .22 caliber rifle.

The foregoing facts, taken together, plainly indicate to the Court that the Defendant formed the intent to commit these crimes many hours before the afternoon of April 6, 1997. The Defendant

ensured that there would be no witnesses to the murders save and except a 22 month old baby.

The deliberateness with which these crimes was [sic] carried out, the Defendant's actions before the commission of these

offenses and the coolness with which he conducted himself before the offenses plainly indicate to the Court that the cold, calculated and premeditated aggravating circumstance was proven beyond a reasonable doubt and the Court affords it great weight.

In order for CCP to be found, the defendant must have had "a careful plan or prearranged design" to kill. Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994); Clark v. State, 609 So. 2d 513 (Fla. 1992); Capehart v. State, 583 So. 2d 1009 (Fla. 1991); Rogers v. State, 511 So. 2d 526 (Fla. 1987). It involves a heightened "premeditation beyond that normally sufficient to prove premeditated murder." Perry v. State, 522 So. 2d 817, 820 (Fla. 1988). This Court has "consistently held that application of this aggravating factor requires a finding of ... a cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that necessary to sustain a conviction for first-degree murder." Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987). See also Dolinsky v. State, 576 So. 2d 271 (Fla. 1991).

The facts adduced below do not support application of the CCP aggravating factor to this case. It must first be noted that many of the supposed facts recited in the court's finding do not enjoy

record support. For example, there was no evidence as to how or when Ford learned that the Malnorys planned to go fishing on the sod farm property, or that he somehow gained this information "clandestinely;" this was pure speculation on the part of the court. Similarly, there was no testimony that Ford "insinuated" himself into the Malnorys' outing; the record does not reflect exactly how he came to go with them. Nor was there any evidence that Ford "chose the site" where the homicides occurred, or that he "lured" the Malnorys there, except, perhaps, the fact that his truck was in front of the Malnorys' truck as they drove toward the reservoir; however, this fact is ambiguous at best.

In Hamilton v. State, 678 So. 2d 1228 (Fla. 1996), this Court discussed the importance of the State establishing motive if it expects to prove CCP. In rejecting this circumstance in Hamilton, the Court noted that

no motive for the murders was ascertained at trial, much less that they exhibited the "careful plan or prearranged design" required to establish the factor. [Citation omitted.] A careful plan or prearranged design presupposes a reason for the murder, which the State did not prove here. Moreover, the evidence adduced below is equally consistent with a heat-of-passion killing, which by definition cannot fulfill the "coldness" requirement of the factor.

The State failed to establish a motive for these killings at Ford's trial. Keith Worley, an employee of the sod farm, testified that there was no bad blood between Ford and Greg Malnory, and there had been no arguments between them that could have provided a reason

for the homicides. (Vol. 36, pp. 2533-2534) Although the State speculated that it was Ford's lust for Kimberly Malnory that led him to plan and carry out these homicides, this scenario defies belief, particularly in the absence of any evidence whatsoever that Ford was attracted to her, or had ever expressed a desire for her. In this context, it should be noted that Ford had a girlfriend with whom he was living at the time of the instant offenses (Vol. 46, pp. 4144-4145), and thus was not without female companionship. The principles expressed in Hamilton are fully applicable here, and this Court should reject CCP as it did in that case.

In some cases such as Swafford v. State, 533 So. 2d 270 (Fla. 1988) and Phillips v. State, 476 So. 2d 194 (Fla. 1985), which was cited in Swafford, this Court has indicated that reloading may provide evidence to support CCP, as the perpetrator would necessarily have time to contemplate his actions during the reloading process. However, Ford would first observe that, where, as here, there are two victims, this concept would apply only to the second victim, as the time for reflection would only occur after the first victim had already been shot, and so could not support CCP as to the first victim. Furthermore, in Farinas v. State, 569 So. 2d 425 (Fla. 1990), the Court suggested that Phillips is no longer good law, as follows:

The state's reliance upon Phillips v. State, 476 So.2d 194 (Fla.1985) [to support CCP] is misplaced. In Phillips this Court held that

because appellant had to reload his revolver in order for all of the shots to be fired, he was afforded ample time to contemplate his actions and choose to kill his victim, and the record therefore amply supported the finding that the murder was cold, calculated, and premeditated. Our decision in Phillips, however, was predicated on Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984). We receded from this portion of Herring in our decision in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

569 So. 2d at 431, footnote 8. Additionally, the time period involved in reloading a weapon would ordinarily be too short to allow significant reflection sufficient to constitute the heightened premeditation required for this aggravator to apply. In Farinas the court rejected the State's argument that, because Farinas unjammed his gun three times between the first shot and the fatal shots to the back of the victim's head, he had ample time to contemplate his actions, and heightened premeditation was established.

With regard to Ford's statement about four bullets being enough, this is so ambiguous as to be probative of nothing. The record indicates that Ford was an avid outdoorsman who enjoyed fishing and hog hunting, and he very well could have been expressing his belief that four bullets were sufficient ammunition for hunting hogs as part of his outing with the Malnorys. He specifically stated in the presence of R. L. Griffin, Greg Malnory's stepfather, that he wanted to engage in hog hunting on the Sunday

in question. He subsequently told the Gutierrez brothers that he had been hunting hogs, and later told Dr. Greer, the psychiatrist, that he had gone hog hunting after he left the Malnorys (who were alive) that afternoon. (Vol. 49, p. 4465) As the trip to the sod farm was primarily for fishing, Ford's opportunities for hunting hogs that day might be limited, and so four bullets were enough.

Finally, the trial court, while acknowledging that Ford had been drinking on the day of the offenses, failed to come to grips with the effect of his drinking that day and his history of alcohol abuse on his ability to plan and premeditate the instant homicides. In Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999), this Court invalidated the trial court's finding of CCP, in part because "Almeida had a history of alcohol abuse and had been drinking on the night of the crime."

Where, as here, the circumstantial evidence relied upon by the State to establish CCP is susceptible of differing interpretations, the defendant is entitled to the benefit of the doubt. See Gerald v. State, 601 So. 2d 1157 (Fla. 1992) and Peavy v. State, 442 So. 2d 2002, 202 (Fla. 1983).

For these reasons, the State failed to adduce sufficient evidence to prove the applicability of the CCP aggravating circumstance. Because an inapplicable factor was not only found by the trial court, but considered by Ford's sentencing jury, he must be granted a new penalty trial in conformity with such cases as

Bonifay v. State, 626 So. 2d 1310 (Fla. 1993) and Omelus v. State,
584 So. 2d 563 (Fla. 1991).

ISSUE VI

THE COURT BELOW ERRED IN FAILING TO GIVE PROPER CONSIDERATION TO ALL THE EVIDENCE APPELLANT OFFERED IN MITIGATION, AND DID NOT GIVE ANY WEIGHT TO SOME MITIGATORS WHICH THE COURT FOUND TO HAVE BEEN ESTABLISHED.

This Court has "held that a trial court must find as a mitigator each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. [Citation omitted.]" Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995). See also Ferrell v. State, 653 So. 2d 367 (Fla. 1995); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). The trial court may only reject a defendant's claim that a mitigating circumstance has been proved if the record contains "competent substantial evidence to support the rejection[.]" Nibert, 574 So. 2d at 1062; Mansfield v. State, 25 Fla. L. Weekly S245 (Fla. March 30, 2000) "Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight." Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990). Accord, Ferrell v. State, 653 So. 2d 367 (Fla. 1995). The Court has also stressed the importance of issuing specific written findings of fact in support of aggravation and mitigation in capital cases. Van Royal v. State, 497 So. 2d 625 (Fla. 1986); State v. Dixon, 283 So. 2d 1 (Fla. 1973). The sentencing order must reflect that the determination as to which aggravating and mitigating circumstances

apply under the facts of a particular case is the result of "a reasoned judgment" by the trial court. State v. Dixon, supra at 10. Florida law requires the judge to lay out the written reasons for finding aggravating and mitigating factors, then to personally weigh each one in order to arrive at a reasoned judgment as to the appropriate sentence to impose. Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982). The record must be clear that the trial judge "fulfilled that responsibility." Id.

In the instant case, the findings of the court below as to mitigation show that she failed to give adequate and proper consideration to all the evidence the defense produced, in violation of the principles stated above.

First, with regard to the statutory mitigating circumstance that the capital felony was committed while James Ford was under the influence of extreme mental or emotional disturbance, which Dr. Mosman testified was established, the court rejected this mitigator, primarily because the lay witnesses whose testimony Ford presented said that he was never violent when he was drinking, and so Mosman's testimony that Ford's consumption of alcohol sent him "over the edge" on the day of the homicides was unreasonable. (Vol. 15, pp. 2722-2725) There are several problems with the court's treatment of this mitigator. One is that the court's finding completely ignored the testimony of Ford's other mental health expert witness at penalty phase, Dr. Greer, who, as a psychiatrist, was able to provide detailed testimony regarding not only Ford's

drinking, but the interaction of his drinking with other factors such as his diabetes and high blood pressure. Indeed, Greer testified that Ford may well have been experiencing a blackout on the day of the crimes due to his drinking combined with the other factors. Another defect in the finding is the court's ignoring of the testimony which indicated that, on the day in question, Ford was acting strangely, acting differently than he normally did when he was drinking. This may have been due to the extent of his consumption of alcohol being even greater than usual, or because of the specific convergence on that day of alcohol consumption with the other elements referred to by Dr. Greer. Finally, the court assumed that Ford's jury did not believe Dr. Mosman when he testified regarding the mitigating circumstance in question. (Vol. 15, p. 2725) In view of the fact that capital sentencing juries in Florida are not required to specify which aggravating and which mitigating circumstances they found to exist, it is impossible for the trial court or this Court to know what testimony Ford's jury did or did not believe in rendering the death recommendations in this case.

The court below did address Dr. Greer's testimony in her rejection of another statutory mitigating circumstance, that Ford's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (Vol. 15, pp. 2725-2727) The primary, if not the only, reason the court cited for rejecting Greer's testimony that Ford may have

suffered an alcoholic blackout was that Keith Worley testified that, on the day after the homicides, Ford made a spontaneous statement that he had loaned his rifle to the Malnorys for hog hunting. According to the court below, Ford would not have needed to "concoct an alibi for the missing rifle" unless he remembered everything he had done. (Vol. 15, p. 2726) However, Dr. Greer testified that what Ford said to Worley was consistent with a blackout, in that he would have expected Ford to notice his rifle missing from his truck before anyone else, and to have offered an explanation for it being missing. (Vol. 49, p. 4433) Although the court stated that there was no evidence to support Dr. Greer's hypothesis that a combination of factors induced an alcohol blackout in Ford (Vol. 15, p. 2726), perhaps the most compelling evidence is that he had lived some 37 years or so without committing any such acts of violence, and the blackout might be the only possible explanation for the killings of the Malnorys, as Dr. Greer's testimony indicated. (Vol. 49, pp. 4433-4434, 4458-4459) The court's conclusion that Ford's jury "obviously agreed" with her and "rejected Dr. Greer's testimony" is, again, an unwarranted assumption in light of the fact that Florida juries are not required to render specific findings when returning advisory sentences, nor to specify what testimony they accepted or rejected. Finally, in her discussion of this statutory mitigating circumstance, the court completely overlooked the testimony of Dr.

Mosman, who specifically opined that Ford qualified for this mitigating circumstance.

In Nibert this Court noted that it has held that evidence such as that presented by Ford pertaining to chronic and extreme alcohol abuse and drinking of the day of the offenses "is relevant and supportive of the mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of a defendant's capacity to control his behavior." 574 So. 2d at 1063. See also the cases cited in Nibert. The court below did not give Ford's evidence the consideration it deserved in her assessment of the two statutory "mental mitigating" circumstances.

With regard to Ford's learning disability and his developmental age of 14,¹⁵ the court found that these mitigators had been established, but, in contravention of Campbell and Farrell, gave them no weight, citing "the reasons previously stated." (Vol. 15, p. 2828). It is not entirely clear to which "reasons" the court is referring. As this Court held in Mann v. State, 420 So. 2d 578, 581 (Fla. 1982), the "trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found." However, it appears that the court may have been referring back to a portion of her discussion of the statutory mitigating circumstance of extreme mental or emotional disturbance where she wrote that Ford had risen

¹⁵ Dr. Mosman actually testified that Ford's emotional/developmental age was about nine, not 14. (Vol. 48, p. 4287-4289)

above his limitations by working to support his family, marrying and having children, and structuring "his lifestyle according to and within his limitations." (Vol. 15, p. 2724) It is ironic that the court, apparently, used Ford's efforts to overcome his deficits against him; the court's findings did not comport with her responsibility to give effect to all evidence Ford presented in mitigation.

The court also found that it had been established that Ford suffers from diabetes, but found that this fact "does not serve as valid mitigation for the imposition of a death sentence." (Vol. 15, p. 2729) In reaching this conclusion, the court overlooked the interplay between Ford's diabetic condition, his high blood pressure, his alcoholism, and his limited intellectual functioning about which Dr. Greer testified which may have precipitated the instant homicides.

The court similarly erred in giving Ford's chronic alcoholism very little weight because "[n]o nexus was established between the Defendant's alcoholism and the commission of these offenses." (Vol. 15, p. 2728) The "nexus" was provided in the testimony of Ford's mental health professionals, particularly Dr. Greer, as discussed above.

On the matter of Ford's organic brain damage, the court wrote (Vol. 15, p. 2728):

The Court finds that there has been no evidence, no tests, no proof submitted to substantiate this mitigating circumstance.

Indeed, the medical evidence would appear to be to the contrary. In summary, the Court finds that this mitigating circumstance has not been proven and the Court therefore affords it no weight whatsoever.

Ford would first note that there was evidence of brain damage presented through the testimony of Dr. Mosman, whose tests indicated the likelihood of some organic impairment, which would account for Ford's learning disability. The court's statement that "the medical evidence would appear to be to the contrary" is very puzzling, as there was no medical evidence presented to rebut Dr. Mosman's testimony in this regard. Without such evidence, the court's rejection of this mitigator ran afoul of the principles expressed in Mansfield and Nibert, cited above.

Also erroneous was the court's refusal to consider the alternative sentence of life in prison without release. The court wrote (Vol. 15, p. 2730):

While this is a fact which would serve as an alternative to the imposition of the death sentence, it does not mitigate against the imposition of the death sentence. The Court finds that it does not serve as a valid mitigating circumstance and the Court affords it no weight whatsoever.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990), this Court found reversible error in the trial court's refusal to allow defense counsel to argue to the sentencing jury that Jones could be sentenced to two consecutive minimum 25-year prison terms on his murder charges if the jury recommended life.

Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.

569 So. 2d at 1239-1240. See also Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994) (when prosecution relies in part on defendant's future dangerousness in seeking death, due process of law requires that jury be informed that defendant will not be eligible for parole if sentenced to life, either through argument of counsel or an instruction by the court). Similarly, the court below should have considered the length of the alternative sentences Ford was facing when deciding whether it was necessary to impose the ultimate sanction.

The court's failure adequately to consider all evidence James Ford adduced in mitigation deprived him of due process of law and subjected him to cruel and/or unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9 and 17 of the Constitution of the State of Florida. His sentences of death cannot be permitted to stand.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, James Dennis Ford, prays this Honorable Court for relief in the alternative, as follows:

1.) Reversal of his convictions and remand for a new trial.

2.) Reversal of his death sentences and remand for a new penalty trial.

3.) Reversal of his death sentences and remand for resentencing by the court.

Ford also asks the Court to vacate his conviction for child abuse, and to grant him such other and further relief as the Court deems appropriate.

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 12th day of February, 2001.

Respectfully submitted,

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