

IN THE  
SUPREME COURT OF FLORIDA

WILLIAM CODAY,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC02-1920
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____)	)	

INITIAL BRIEF OF APPELLANT

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## **PRELIMINARY STATEMENT**

Appellant was the defendant and Appellee the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County. The parties will be referred to as they appear before this Court.

The Symbol "R" will denote the Record on Appeal and will include transcripts of pretrial hearings (Vol.1-8).

The Symbol "T" will denote the Transcripts.

The Symbol "SR" will denote the Supplemental Record on Appeal.

The Symbol "A" will denote the Appendix to this brief.

## **STATEMENT OF THE CASE**

On November 13, 1997, Appellant, William Coday, was charged by indictment with premeditated murder. R. 9. Jury selection began on March 25, 2002. T. 1-200. At the close of the state's case, and at the close of all the evidence, Appellant moved for a judgment of acquittal. T. 1745, 1749. Appellant's motions were denied. T. 1746, 1749. Appellant was found guilty as charged. R. 633, 822-824.

The jury's recommendation was 9-3 for the death penalty R. 831. On July 26, 2003, the trial court sentenced Appellant to death. R. 828-844. A timely notice of appeal was filed R. 850. This appeal follows.

## **STATEMENT OF THE FACTS**

### **GUILT PHASE**

Thaddeus Janik testified that on July 11, 1997, he went to Appellant's apartment to check on Appellant. T. 890. Janik had been told that Appellant was distressed and

suicidal. T. 890. Janik discovered a women's body on the floor. T. 893. The woman was Gloria Gomez.

Officer Chris Reyes testified that he responded to the scene on July 13, 1997, at 2pm. T. 904. Reyes was the first officer at the scene. T. 904. The body was in a pool of blood in the bedroom by the doorway. T. 901. There didn't seem like a struggle in the living room. T. 903. There was no disturbance at all. T. 903.

Detective Tom Hill testified that he was dispatched to the crime scene on July 12, 1997 at 3 pm. T. 998. The body was located in the back bedroom. T. 1000. There was gift-wrapping paper on a table with a salt and pepper set. T. 1010. Hill only noticed blood in the bedroom and only in a small area T. 1037. The blood was concentrated in one area - the lower part of the room. T. 1038. Everything was waist down for the most part. T. 1038. Nothing in the room appeared to be disturbed. T. 1038. All the blood was found in the bedroom area itself. T. 1039. The body had smears of blood instead of drops of blood. T. 1041. A phone cord was wrapped around her throat - but not as a ligature. T. 1042. Somehow during movement she got caught up in the cord. T. 1042. The cord was never applied in a restrictive manner. T. 1042. A blood splatter on a bookshelf was consistent with a blunt object striking. T. 1043. There were not many blunt force patterns. T. 1043.

Dr. Eroston Price testified he performed the autopsy on Gloria Gomez. T. 1184, 1186. The cause of death was multiple blunt and sharp force trauma injuries. T. 1250. Dr. Price was unable to conclude in this case when consciousness was lost. T. 1253. A number of different blows could have caused a loss of consciousness. T. 1253.

Gomez could have been unconscious even though she was alive. T. 1253. Dr. Price was unable to tell the sequence in which the wounds were received. T. 1214. There were a total of 144 external injuries. T. 1187. Fifty-seven (57) injuries were from blunt force. T. 1187. Blunt force injuries can result from a blunt object or a fall to the ground. T. 1181. There were a total of 87 sharp force injuries. T. 1187. The blunt impact injuries to the scalp and forehead were the most life-threatening injuries Gomez received, as well as stab wounds to the chest, abdomen and right lung. T. 1250. Based on the hemorrhaging she had, Gomez did not live very long. T. 1245. The wounds to her abdomen involved very little hemorrhage which means she was on her last respirations. T. 1233. Gomez Received numerous injuries to her head, neck, face and teeth. T. 1215-17. All the wounds to the head were life-threatening. T. 1224. The head injuries involved significant brain damage. T. 1246. The blunt impact injuries to the scalp and forehead were the most life-threatening. T. 1250. The wounds to the head could render a person unconscious. T. 1224-25. There were also life-threatening stab wounds to the chest and abdomen. T. 1250. There were incised wounds by a knife to the legs as well as multiple cuts to the hands. T. 1198, 1233-34. The wounds to the arms and hand are consistent with defense wounds. T. 1242. However, they might not have been defense wounds because Gomez may have been conscious at that time. T. 1243.

Oriola Laverde testified that her son and Gloria Gomez were planning to get married. T. 1295. Gomez told her that Bill told her he was diagnosed with skin cancer and was going to die. T. 1302. Gomez had promised Bill that she would see him. T.

1297.

Kirk Demyan testified that he works for Delta Airline and Appellant made arrangements on July 10, 1997, to fly from New York to Paris. T. 1409, 1411. The reservation lapsed because he did not buy his ticket by 11 pm. On July 11. T-1412. However, Appellant did purchase the ticket on July 12. T 1412. Records show that he used his credit card and boarded the flight. T. 1413. Every transaction was done in Appellant's name. T. 1415. The ticket cost \$1,285.91. T. 1415.

Al Lopez testified that he works for American Airline and that on July 11 at 3:52pm a one way ticket from Miami to New York was purchased for William Coday. T 1401-04. According to records, Appellant boarded the flight and Maria Stofka sat next to him. T. 1405.

Gary Forsythe testified that he works for U. S. A. Bank. T. 1417. Records show that Appellant' credit card was used on July 11, 1997, to purchase a Miami to New York airline ticket. T. 1424. A round trip New York to Paris ticket was purchased on July 12. T. 1425. A charge to the Marriot in New York occurred on July 13. T. 1426.

Easter Roberts testified that she was Appellant's supervisor at the Broward County Library in 1997. T. 1428-29. Appellant was over the international language collection. T. 1429. Part of his job was to familiarize himself with the availability of books in Spanish, German and French. T. 1445. There were no authorized business trips for Appellant in July of 1997. T. 1432. Roberts had noticed Appellant changing over time. T. 1444. He looked like he was in an overload situation. T. 1444. Co-

workers became concerned when he did not show up for work. T. 1435. His apartment was called but there was no answer. T. 1435.

Salisha Ramdass testified that she worked at City Credit Company and that Appellant had two accounts. T. 1459, 1483. On July 10, 1997, Appellant withdrew \$6,000 and took \$2,000 of that money to purchase traveler's checks. T. 1472, 1488. This left balances of \$645.47 in his savings account and \$653.49 in his checking account. T. 1480-81, 1484.

Eunice Polloway testified that she worked for BellSouth and that Appellant called; American Airlines on July 9, Brazilian Airlines 3 times on July 8 and 9, U. S. Airways on July 9; and United Airlines on July 9. T. 1498-1502.

Darcel Saiz testified that he previously dated Gloria Gomez and was still friends with Gomez at the time of her death. T. 1530, 1538. Saiz saw Appellant and Gomez together in January of 1997. T. 1536. Gomez told Saiz that they were boyfriend and girlfriend. T. 1537.

Sergeant John Russell testified that he was a homicide detective in New York City. T. 1581. On October 15, 1997, he and Detective Greco took Appellant into custody and placed him under arrest. T. 1587, 1588. Appellant had possessions in a blue plastic bag. T. 1588. Appellant would later agree to speak. T. 1597. Russell walked in and out of the interview room a number of times. T. 1599. Russell saw Appellant writing on a pad. T. 1599. Russell identifies state's exhibit AAA which contains his signature on each page. T. 1599. Appellant did not offer resistance or give the police problems. T. 1615. He was very cooperative. T. 1615. Russell testified

that Appellant told him when Gomez first came over they talked about marriage and children. T. 1618. Appellant told her he wanted her back permanently. T. 1618. Appellant told her if he couldn't get her back he was going to kill himself. T. 1618. Appellant offered to give her all his rare books. T. 1618. Appellant never indicated to Russell that he had planned to kill Gomez. T. 1618.

Appellant's statement to police was introduced into evidence as State's Exhibit 53. SR. In the statement it is said that when Gomez came over Appellant told her of the importance of their relationship. SR, T. 1610. Appellant told Gomez that he could not go living without her and intended to get on a plane and go somewhere and kill himself. SR, T. 1610. Appellant indicated that he was serious and had made reservations and pointed to his packed bags. SR, T. 1610. They went into the bedroom where Appellant said that once he was gone she could have everything of his. SR, T. 1610. Appellant said he wanted Gomez back and not to leave. SR. Gomez told Appellant that he had over idolized her. SR. Appellant answered that she had told him she loved him. SR, T. 1612. Gomez responded that she never loved him the way he had thought. SR, 1612. Appellant felt himself entering a state of shock. SR, T. 1612. Appellant then broke into a demonic rage. SR, T.1612. Appellant struck Gomez first with his fist and then he picked up a hammer lying on top of the yellow pages and struck her on the head. SR, T. 1612. She fell. SR, T. 1612. Appellant swung again while screaming and yelling. SR, T. 1612. Appellant lost his balance and landed on top of her. SR, T. 1612. She grabbed the hammer. SR, T. 1612. Appellant picked up another hammer and struck her again. SR, T. 1612. She was bleeding and

tried to get up. SR, T. 1612. Appellant doesn't remember when, but he got a knife from the kitchen top and began to stab her. SR, T. 1612. They were both screaming. SR, T. 1613. Appellant stabbed her in the neck and held the knife there. SR, T. 1613. She muttered some words. SR, T. 1613. Appellant knew she was dead. SR. Appellant felt himself returning to normal. SR, T. 1613. Appellant stood over her and cried out "oh no, not Gloria." SR, T. 1613. He stood over her for some time and finally realized that he had killed her. SR, T. 1613. Appellant wondered why all that demonic rage had not turned itself on him. SR, T. 1613. Appellant decided that he must die. SR, T. 1613. Appellant decided to leave the country and write about what had happened. SR, T. 1613. Appellant thought that perhaps he might come to understand how this happened. SR, T. 1614. Appellant flew to Paris. SR, T. 1614. If Appellant did not succeed in killing himself, he would return and turn himself in. SR.

Detective Michael Wally testified that he used to work for the Fort Lauderdale Police Department. T. 1624. Wally received a call from Tooska Amiri, informing him of Appellant's arrest. T. 1831. Wally went to New York and met with Appellant. T. 1633. Appellant was cooperative. T. 1834. Wally inventoried a blue bag that was in Appellant's possession. T. 1638. Included in the bag was a wallet and a book called "Crepusculo." T. 1638. Appellant said he had taken Gomez's wallet so he would have something of hers. T. 1641. Appellant had no intent of robbing Gomez. T. 1641. Crepusculo consisted of two notebooks containing 250 pages. T. 1641.

Crepusculo was introduced into evidence as part of State's Exhibit #54. SR. In the writing Appellant continuously and obsessively laments over his thoughts of

loving and losing Gomez:

More and more I began to fear the worst: you were leaving me. I would have most likely succumbed to total despair and madness had it not been for that one short, cryptic message you left on my answering machine that Saturday night at 10:30 pm. A message so simple yet so telling; so concise, yet so richly fraught with promise and hope: "Bill, I love you". Your tone, your tempo, the cadence, the pause – all of these things conspired to make that message sound genuine, heart-felt, true. Yes, you still loved me, you had not left me, you were just getting yourself straightened out, pulling yourself together, but you knew where you belonged - - with me. I drew so many optimistic, positive conclusions from that message, dear Gloria, that I was able to find sufficient strength to go on, to maintain the fantasy. I will never know what your motives were in leaving that message, what effect you had intended it to have, if any, on me; all I know is that it affected me considerably, giving me hope when it appeared that all was lost.

\* \* \*

I realized that unless I saw you and talked to you soon, I would end up in a psychiatric hospital, maybe even by the end of the week. I was losing it, dear Gloria. I could not go on any longer. My mind had become a battlefield, where a war raged incessantly on between my emotions/rationalizations/fantasies, and my besieged, but unyielding reason. This mental war had now intensified to such a degree that it occupied my entire mind, all the time. I could think about nothing else. And I felt - - I felt as if I were going to fall apart, disintegrate emotionally at any given moment.

\* \* \*

That night, that Sunday night, as I lay in bed, I contemplated my options. Seek a psychiatrist? No, no, not that again. I didn't have the money I would need on analyst, and lots of sessions. This was not a case of normal depression or existential confusion. This was something worse, something deeper. And I would be stuck in therapy forever, I thought. Broke forever. No, I couldn't go back. A long trip? Just pack up my bags and leave - - go to Paris, then just see what happens? This seemed more reasonable. More appealing and take off, Just...escape, run away. Why not? I couldn't function normally anyway. I couldn't work, I spent all my time depressed, daydreaming, away in some other world; I could no longer read or do anything. For that matter. I was already gone, for all practical purposes. I had enough money to survive for a couple of months. It might work. Suicide? Certainly death was preferable to my current mental anguish. But, I could not kill myself unless I knew you were definitely gone. I decided that running away was the best option.

It left everything open. Unlike death and prolonged therapy, it possessed an element of unpredictability in outcome. But before taking off, leaving everything behind, I would first have to talk to you, see you. And to do that. I would have to take action. I would have to contact you.

\* \* \*

I started to pace, back and forth, as the horrifying sense of helplessness and panic overwhelmed me. I felt my stomach knotting up, my breathing getting rapids, my chest tightening painfully. "This can't be happening. It can't be...surely they're not going to do this to me? Why is Gloria allowing this to happen? Why can't she call me from their phone? Why can't she talk in their presence? What is the hold these people have on her? As I asked myself these questions, aloud, I felt myself on the verge of suffocation from the chest contractions. I was sure that now madness had finally descended upon me. Now I was losing it. Finally. Completely. And all because of something so exceedingly simple as the mere failure to communicate.

Panicking from the physical responses of my body, I flung myself onto the sofa to try to catch my breath. After a few minutes, I felt myself more relaxed, my breathing under control.

\* \* \*

I went to work that day, far off in another world. The world of a man in despair, the world of a man clutching to his last hope, knowing his sanity is at stake. A man counting the hours, the minutes.

That evening, I packed my bags. If I were doomed to go away, to lose it, I would at least try to escape. I would see Paris. If I had no hope left, I would at least die in Rome or in Greece - - not there, in that apartment, surrounded by all those memories, and that stifling atmosphere of confusion and helplessness. Could I leave without seeing you? I didn't know. But I had to believe that this was my only alternative. I couldn't envision myself in a Florida mental hospital at the end of the week. Insanity or suicide in Europe seemed infinitely better.

\* \* \*

I was losing it .... better call and make those reservations for Paris...better...I didn't know what to do, or think.

The next day, Thursday, I saw Ricky at work around 4:30 pm. I told him what was happening to me mentally. He had known about the relationship, but I only told him about the intensity of it, the hopes of marriage, domestic life, etc. Now I told him I was losing it. "You need to get out of here, out of Florida, fast...or you'll crack, Bill." He gave me his pager# and told me to call. He could see what was happening to

me...the others probably could too. I had been, for some time now, off in my own disturbed world. I wanted to tell somebody what was happening but what could anybody do? They would all tell me to seek professional help!

\* \* \*

Yes, you, my Gloria were still there. You were going to be here tomorrow. We would talk it all out. You would come back...

I remember thinking this, repeating it over and over: “you were going to come back.”

I remember saying no, it was only because of the cancer; you were not coming back...

I remember me imagining you there at my doorstep, me falling to my knees and begging forgiveness...

I remember calling your sister that night in Bogota telling her that you had left me, that I was now dying of cancer, and all was lost...

I remember getting in bed with your night gown and photos there with me...yes, you were coming back...

\* \* \*

I waited and waited. At 10:00 I began to look at the window every 10 minutes anxiously expecting to see your car. By 11:00, you had still not reached. I kept waiting. By noon, I had begun to worry. “No, no, no...not again...no, please God no...” at 12:30 I was on the verge of dialing the Laverde’s, but I didn’t want to have to confront a reality I knew I could not handle a second time I began to pace the apartment. “She’s got to come, she’s got to come, she will, she will, she will...” You did. Finally, around 1 pm.

I met you at the patio door. You kissed me, held my right arm, and I escorted you in.

We sat down on the sofa. Yes, you would like a beer. We began to talk. At first, just pleasantries.

\* \* \*

...I told you I didn’t care if I died; in fact, I would just assume die, because I could not continue living without you. I was already planning to leave, to go seek my end, I even showed you my packed flight bag. Nothing mattered, life was not worth preserving if I did not have you.

You were my life, you had given me new life, had enabled me to live in a way that nobody else could offer me. Your love, our love, was the only thing I cherished, the only thing I wanted...

I don't remember anything else, dear Gloria. Only returning to my senses, looking down, seeing me there on top of you, the knife plunged deep into your throat, and blood everywhere, you crying out, why Bill why, and uttering those final words...

I slowly stood up, looked down, felt your arm lose its strength, and watched you die. I watch you die every day, every night, and thousands of moments in between, dear Gloria, the same terrifying image, I see it again now, even as I write these words, thousands of miles away many weeks afterwards, it will never leave me, never, never leave me...

I left you there, blood everywhere. My God, my God what did I do, not Gloria, not Gloria, oh my God, not her, not my Gloria...

\* \* \*

Kill myself first. I would write you, dear Gloria, my poor sweet Gloria, I would write you and tell you why I couldn't live without you, why you meant so much to me, why I had to see you again, how much I suffered during those final 5 weeks. I ran, knowing they would find you, knowing that sooner or later, they would find me, alive or dead. I ran, hoping that at least I could find some place where I could write and tell you everything.

I ran, knowing I had confronted the demon-AGAIN! That, dear Gloria, I could never explain - - to you, to myself, to anybody. Why this horrible, dormant destructive force - - why in me? Why in me? Why did it not destroy me? Why you? Why, why, why??

I ran, dear Gloria, I felt you there, because it was too late, you had died. Forgive me, please forgive me, Gloria - - I never, ever, ever, wanted it to end like this.

SR.

Maria Stofka testified that she flew from Miami to New York on July 11, 1997.

T. 1669. The person seated to her right did not display any unusual behavior. T. 170.

Stofka did not notice any injuries. T. 1671.

Tooska Amiri testified that she used to be married to Appellant. T. 1675.

Appellant was arrested in Amiri's apartment in October of 1997. T. 1690. Appellant called Amiri two weeks before he showed up. T. 1691. Appellant knew he was wanted. T. 1691. Appellant indicated that he would consider turning himself in. T. 1693-94. After Appellant, arrived, he said he was going to call the police but first wanted to call family and friends to say goodbye. T. 1697. The next morning the police arrested Appellant after the phone calls. T. 1698. Amiri was not fearful of being alone with Appellant. T. 1703. Appellant's bed had a problem with its frame. T. 1704. Appellant kept a hammer near the bed in order to keep the frame in place. T. 1704. Amiri also had a hammer. T. 1704. Amiri noticed that Appellant had changed since May of 1997. T. 1705. She first thought he might have aids because he had lost so much weight and was extremely depressed and crying all the time. T. 1705.

### **PENALTY PHASE**

Reverend Fred Guzman of the Cavalry Church testified that he is also the Chaplain at the Broward County Jail. T. 2476. Appellant and Guzman would discuss the Bible. T. 2477. Appellant stated that he had felt bad about what had happened. T. 2477. He expressed remorse on several occasions. T. 2477. They went over the scriptures including forgiveness. T. 2484.

Rayma Coday testified that Appellant is the son of her ex-husband. T. 2485. They were married for 19 years. T. 2485. Bill, Sr., loved Appellant, but they did not know how to connect with one another. T. 2486. Both had problems expressing emotions. T. 2487. The father and son never connected on an emotional level. T. 2487. Appellant was polite and nice, but could not relate emotionally. T. 2487.

Rudy Beatty was an acquaintance of Appellant at work. T. 2493. In July of 1997, Appellant looked terrible and was not dressed like he was normally dressed. T. 2494. He mumbled something about breaking up with his girlfriend. T. 2495. Appellant was making rambling statements and was not making sense. T. 2495. Beatty told Appellant he needed a vacation. T. 2495.

Appellant's father, William Coday, Sr., testified that he is a retired labor relations attorney. T. 2496-97. Appellant was born 2½ months premature. T. 2505. Appellant was placed in an incubator for a month until he reached 4lbs. T. 2505. Appellant was not physically healthy as a youngster. T. 2506. He had a lot of allergies and had asthma attacks. T. 2506. He had all types of respiratory conditions. T. 2506. Appellant had to be kept out of school until the age of 10. T. 2507. Appellant did not bond with other children. T. 2511. Appellant taught himself to play chess. T. 2510. Appellant studied French in high school and would teach junior high school French. T. 2510.

William Coday, Sr., testified that Appellant called him after going to Europe. T. 2513. Appellant was frantic, confused. T. 2513. He was crying and said that he had done something. T. 2513. Appellant said that he thought about suicide and he didn't know what to do. T. 2514. Coday, Sr., told Appellant that he committed suicide Coday, Sr., would understand. T. 2514. Coday, Sr., testified that he put his work first over his children and was not involved with Appellant as he should have been. T. 2521.

Edward Weber knows Appellant from his Library employment and was also a

personal friend. T. 2641-42. Appellant was bookish and a great reader. T. 2642. Weber spoke with Appellant when he had returned to turn himself in. T. 2645. Appellant broke down. T. 2645. Weber could not figure out the murder as it was an extraordinary departure from Appellant's usual nature. T. 2646. Weber never met anyone who did not like Appellant. T. 2647. Appellant went to Europe to write a long statement exploring, as far as he could understand, what demonic quality had come over him. T. 2648. Appellant was highly emotional and talked about how bad he felt. T. 2649. Appellant had terrible remorse. T. 2649. Weber was under the impression that Appellant's father may have been distant and cold during Appellant's childhood. T. 2651. Appellant believed that his father was disappointed in him. T. 2652. Appellant is fluent in French, German, and Spanish. T. 2647. Appellant would be of excellent use in a prison library. T. 2650. Appellant could be a counselor due to his qualities of warmth and human interest. T. 2651.

Marjorie Moorefield testified that she worked with Appellant at the Broward County Library. T. 2654. Appellant was an excellent librarian. T. 2654. Moorefield was concerned about Appellant prior to July 12, because he was very depressed. T. 2657. He had lost a lot of weight and "wasn't with it." T. 2658. Appellant had made a new years resolution to go to Paris in July. T. 2665. Appellant helped Moorefield when she was ill. T. 2665. Appellant had sent two men who had been in the Broward County Jail and Moorefield got them involved in a literacy program. T. 2667.

Paula Coday testified that she is Appellant's mother. T. 2674-5. Appellant is very sick but is on a new medication and seems to be doing better. T. 2678. It would

be devastating to lose Appellant and she doesn't know how she would handle it. T. 2679. Mrs. Coday can't imagine how Gomez's family must feel. T. 2679. Appellant was born significantly premature. T. 2680. He was constantly sick with bronchitis and pneumonia. T. 2680. He picked up other sicknesses easily. T. 2681. Appellant's father did not believe the sicknesses were real. T. 2661. His father was very hard on Appellant. T. 2681. His father was "very, very cold" and rarely gave Appellant affection. T. 2682. His father was more concerned about money than his children. T. 2686.

Lucy Smith testified that Appellant was fearful for Gomez's safety - particularly due to a mafia or drug related situation. T. 2703. There were discussions of Appellant marrying Gomez due to her immigration status. T. 2706-07. Smith received a call from Appellant on September 19, 1997. T. 2707. Appellant was distressed, crying, and sorry for everything. T. 2707. Appellant wanted to kill himself. T. 2708.

A letter from Appellant to Gloria Gomez's mother was introduced into evidence and published to the jury. T. 2711-13, Appendix.

Alan Goldstein testified that he interviewed Appellant. T. 2716. Appellant expressed his feelings of regret and remorse. T. 2717. Appellant felt guilty about what he had done and the only thing he could do is right an explanation and then take his own life. T. 2717. After the murder Appellant sat on the bed and wept because of his feelings of remorse and regret. T. 2717.

Tooska Amiri testified that a week before the incident Appellant looked as if he had Aids and Amiri suggested that he go to Paris. T. 2722-23. After the incident he

called her and said he was thinking of turning himself in. T. 2723. Appellant came to Amiri's residence and they cried all night. T. 2724. Appellant asked to call his family then he would call police. T. 2724-25.

Miss Abrash Coday testified that she had been married to Appellant. T. 2784. After they divorced she still talked with Appellant regularly. T. 2785. Appellant was kind, loving especially with children. T. 2785. On the intellectual side he was a giant but his emotional side was dwarfed. T. 2789. Abrash's daughter is still in touch with Appellant. T. 2795. For the sake of her daughter, as well as family and friends, Appellant has a lot to offer and Abrash wants there to be a chance for Appellant to do what he was sent on earth to do. T. 2800.

Dr. Michael Brannon testified that Appellant suffers from severe depression and sleep disturbance. T. 2806. Appellant also suffers from hallucinations, suicide ideation, and excessive weight loss. T. 2807-08. Appellant also has a borderline personality disorder. T. 2811. He also suffers from "impulsive behavior." T. 2812. When his world comes apart he becomes suicidal. T. 2812. There may be a loss of control when there is fear of abandonment. T. 2812.

Alsaro Paez testified that he is charged with 59 felonies and is incarcerated in the Broward County Jail. T. 2823. Paez was on the phone in jail and asked Appellant if there were any numbers which he wanted Paez to call. T. 2831. Appellant gave Paez some numbers. T. 2831. One of the numbers was to people in Columbia. T. 2831. Appellant said it was Gloria Gomez's sister's house. T. 2832. They did not accept the first call because she did not know Paez's name. T. 2832. Five minutes later Paez

called again and said he was Gloria's friend. T. 2833. She accepted the call. T. 2834. Appellant got happy she accepted the call and had a smile on his face. T. 2835. Appellant would have a smile on his face every time Paez got someone to accept a call. T. 2836. Appellant told Paez to ask for Gloria. T. 2834. The lady on the other end of the line said she had been killed. T. 2835. Appellant told Paez to ask how she died. T. 2835. The lady aid by some white crazy librarian and started crying. T. 2835. Paez said he was sorry and hung up. T. 2835.

### **SPENCER HEARING**

Dr. M. Ross Seligson testified that he was a licensed psychologist and was the Director of Psychological Services for the Indiana Maximum Security Unit for the Criminally Insane. T. 3113. Dr. Seligson has spent between 30 and 50 hours on this case and has examined Appellant. T. 3114, 3116. Dr. Seligson believes that Appellant was under the influence of severe mental or emotional disturbance at the time of the killing. T. 3117. Also, Appellant was not able to conform his conduct to the requirements of the law. T. 3117. Appellant was diagnosed with a borderline personality disorder (under DSM-4 301.83) and a severe depression recurrent with psychotic features (under DSM-4 296.34). T. 3118. Appellant's father did not want him - he was the result of an unplanned pregnancy. T. 3121. Appellant was born premature and placed in an incubator. T. 3121. Appellant missed on the opportunity to bond with his mother. T. 3122. People who do not bond at an early age have later difficulty with relationships. T. 3122-23. Appellant was colic through the first six months of his life and was not able to sleep through the night. T. 3123. This caused

a lot of stress for his parents. T. 3123. When he was two he was diagnosed with pneumonia. T. 3123. From the age of two to twelve, Appellant was seen by an allergist Dr. Strominger. T. 3123. Because of his allergies and being continually ill he missed a lot of school. T. 3123. Appellant's relationship with both parents was unhealthy. T. 3124. His mother at times was very cold and distant. T. 3124, 3125. His father was away from home a lot. T. 3125. Although he came from a materially nice home, inside the home there was no affection. T. 3125. Appellant was not permitted to express anger because anger was a negative emotion. T. 3125. Appellant withdrew and did not develop relationships with his peers. T. 3128. It was easy for Appellant to meet people on a superficial level. T. 3129. Appellant did not learn how to express his feelings. T. 3128. Appellant was so obsessed with Gloria Gomez that if he was unable to have her in his life he contemplated leaving the county and/or killing himself. T. 3132. Major depression has a component of disassociation during the incident where Appellant is not really remembering what happened but is seeing it as a blur in his mind. T. 3132. This explains why Appellant did not recollect how severe the incident was until later looking at photos. T. 3132. Appellant's severe depression resulted in at least one suicide attempt. T. 3134.

Dr. Lenore Walker is a Clinical and Forensic Psychologist who evaluated Appellant in 1999. T. 3163, 3169. Dr. Walker was intrigued because Appellant's IQ test score was lower than his academic record reflected. T. 3170. Emotional problems hindered Appellant's score. T. 3170. Tests measuring emotional disorders showed some very significant serious emotion problems. T. 3170. Dr. Walker also met with

Appellant in 2000. T. 3171. This was after his suicide attempt. T. 3171. Appellant was in a serious psychotic state. T. 3172. Dr. Walker also reviewed case files and test data that she administered and test data administered by Dr. Shapiro. T. 3173. Dr. Walker has spent over 100 hours on this case. T. 3173. Dr. Walker worked with Dr. Vicary in finding the right medication to control Appellant's behavior and thinking. T. 3175. Within a reasonable degree of psychological certainty, at the time of the offense Appellant suffered from a severe mental illness. T. 3176. Within reasonable degree of psychological certainty, Appellant was unable to conform himself to the law because of his mental illness. T. 3176. Appellant suffered from severe depression which had an underlying paranoid delusional disorder. T. 3178. When Appellant was about 5 years old some older children locked him in an empty freezer. T. 3178-79. Appellant was terrified. T. 3179. The other children were laughing at him. T. 3179. After banging and screaming he was finally released. T. 3179. He was hysterical and heard them laughing at him as he ran home. T. 3179. He ran to his mother, but his mother did nothing. T. 3179. Appellant felt terrified and unsupported. T. 3179. Appellant hears those voices when he is terrified - like the time before he tried to kill himself. T. 3179. He heard the voices in jail after the anti-psychotic medication (Risperdal) had ran out. T. 3179. The voices had started when he got a letter from Tooksa filing for divorce. T. 3180. Appellant indicated that at the killing he heard the voices of the girls laughing at him and humiliating him. T. 3181. The killing was an unplanned overkill. T. 3183. Once the explosion was unleashed there was no cognitive ability to control or contain it. T. 3183. Appellant was not malingering. T. 3197. If Dr. Walker had to testify at

the guilt phase her professional opinion would be that Appellant was insane at the time of the offense. T. 3210. Appellant resisted the insanity defense. T. 3210. However, he had a psychotic break when he viewed the photos of the crime scene. T. 3210. Appellant realized after viewing the photos that there must be something wrong with him. T. 3210-11.

Dr. Shapiro is an Assistant Professor of Psychology at Nova S. E. University and also taught at John Hopkins and the University of Maryland. T. 3213. Dr. Shapiro is a Forensic Psychologist. T. 3215. Dr. Shapiro has seen Appellant on eight different occasions for a total of approximately 25 hours. T. 3217-18. The testing of Appellant include the Wechsler Adult Intelligence Scale, The Trauma Symptom Inventory, The Rorschach, The Minnesota Multi phasic Personality Inventory, the Thematic Apperception Test. T. 3220. Appellant did suffer from a severe mental and emotional disorder. T. 3222. Appellant was unable to conform his behavior to the requirements of the law as the result of a severe mental disorder. T. 3223. Appellant was actively psychotic during the time of the incident. T. 3223. Dr. Shapiro's evaluation would have supported an insanity defense. T. 3223. Appellant's score on the Wechsler Memory Scale was extremely deviant from what one would expect for Appellant's intellectual level. T. 3224. There was possible neuropsychological impairment. T. 3224. Appellant had many markers of such a dysfunction. T. 3225. There was evidence of a severe mental illness. T. 3226. Appellant had severe depression with psychotic features and features of borderline personality disorder. T. 3226. Dr. Shapiro first saw Appellant when he was in an actively psychotic state. T. 3226. This

was following a suicide attempt. T. 3227. On October 31, 2000, Appellant was emotionally intense and actively hallucinating. T. 3227. He was hearing voices and reliving an incident of being locked in a freezer and girls laughing at him. T. 3227. Appellant had reported the incident to his parents but they did nothing about it. T. 3227. He had experienced these hallucinations during the incident in Germany. T. 3228. He said he heard the voices on the day that Gloria Gomez came to his apartment. T. 3228. Appellant cried when describing his rage at the girls who locked him in the freezer. T. 3228. Appellant would have the auditory hallucinations when experiencing the feeling that a woman was going to leave him. T. 3228. In the 1980's, Appellant's original psychiatrist would only see Appellant if he committed himself to hospitalization. T. 3228. Appellant was terrified of hospitals and sought another psychiatrist. T. 3229. Dr. Shapiro was careful to differentiate between genuine and faked auditory hallucinations. T. 3230. Appellant's hallucinations were genuine. T. 3231. The tasting did not show malingering. T. 3231. The freezer incident was verified by Appellant's mother. T. 3232. Receiving divorce papers from Tooska triggered Appellant's psychotic deterioration while in jail. T. 3232-33. Psychotic thinking impaired Appellant's ability to think logically. T. 3234. Appellant's testing showed very high scores for psychotic thinking. T. 3235.

Dr. Martha Jacobson testified that she was appointed by Judge Horowitz upon motion of the prosecutor. T. 3241. Dr. Jacobson is a Licensed Clinical Forensic Psychologist. T. 3241. Dr. Jacobson saw Appellant two times and six hours each time. T. 3243. She spent thirty hours on the case. T. 3245. Dr. Jacobson did her

work independent from the other doctors. T. 3246.

Dr. Jacobson testified that Appellant suffered from severe mental or emotion disturbance at the time of the offense. T. 3245. Appellant was not able to conform his conduct to the requirements of the law. T. 3245. Appellant had major depression severe with psychotic features. T. 3246. He also suffered from a severe borderline personality disorder. T. 3246. Borderline personality disorder arises from difficulties in establishing a sense of identity and dealing with other people. T. 3250. Appellant's personal history demonstrates this. T. 3250. At a time when it was not known how important bonding was, mothers were not allowed to hold infants who had been placed in an incubator. T. 3250. Appellant's premature birth combined with serious childhood illnesses including cholic, asthma, and pneumonia would be very traumatic and could lead to issues of insecurity. T. 3250-51. Appellant's mother worked part-time and when she again became pregnant Appellant was sent to the grandparents. T. 3251. Appellant's father traveled a lot and was emotionally distant. T. 3252. Appellant's mother was nurturing at times and distant and not available at times. T. 3252. There were problems with a sense of security. T. 3251. This lead to an imagined abandonment. T. 3252.

The more and more depressed Appellant became the more psychotic he became. T. 3261. Dr. Jacobson administered the Rosehach Inkblot Test, the MMPI, and the Milan Personality test. T. 3265. The test confirmed Dr. Jacobson's diagnostic impressions. T. 3266. The overkill of a prolonged attack is often associated with a disassociative state with little memory of the event. T. 3270. There is little or no

attempt to conceal the crime. T. 3270. Oftentimes there is flight afterwards. T. 3270. It is not a flight to hide but a flight to a familiar place. T. 3270. Thought of depression and suicide come with this. T. 3270. Europe is a place Appellant had often gone to. T. 3271. At the time of the events Appellant was disassociative. T. 3273. Appellant was not experiencing himself as the perpetrator of the offense. T. 3273. It was like he was observing it. T. 3273. Appellant lost sense of reality. T. 3274. Appellant did not see Gomez as a human being but instead Gomez was the personification of a person who was injuring him. T. 3274. Appellant was not able to see the reality of the situation. T. 3275. Appellant lost touch with reality when Gomez said she never loved him. T. 3277-78. The fact that Appellant looked normal on a plane was not inconsistent with Dr. Jacobson's findings. T. 3279. It is common for someone who goes through this type of experience to have some memory loss and to have pieces of their memory come back over time. T. 3287. Appellant's statement to police was consistent with Dr. Jacobson's findings. T. 3287-89.

Dr. Alan Goldstein testified that he is a Clinical Forensic Psychologist who saw Appellant six times totaling 18 to 20 hours. T. 3299-3306. When Dr. Goldstein first went to see Appellant he was held in the North Broward Psychiatric Infirmity Unit. T. 3306. Dr. Goldstein essentially interviewed everyone. T. 3311. He administered eight to ten tests. T. 3312. Testing showed that Appellant was not malingering. T. 3319. It was highly unlikely that he was faking symptoms of mental illness. T. 3320. Psychologists and Psychiatrists who saw Appellant in 1978 had similar results. T. 3321. At the time of the crime Appellant had a major deterioration in his mental state.

T. 3322. His thinking deteriorated and he became paranoid. T. 3322.

Appellant suffered an extreme mental and emotional disturbance at the time of the offense. T. 3327. When Appellant interviewed with Dr. Goldstein he remembered more of the killing than he did in his confession. T. 3328. Appellant talks of seeing himself. T. 3328. He was in a state of disassociation. T. 3328. His feelings and thoughts were all but shut down. T. 3329. During the incident Appellant was collecting images and operating on an emotional level rather than on a deliberative cognitive level. T. 3329. Appellant was still aware of what he was doing. T. 3329. When Dr. Goldstein first saw appellant he had cut his wrists lengthwise to maximize bleeding. T. 3335. Appellant vomited as he lost blood. T. 3335. The suicide attempt was unsuccessful because his blood kept clothing. T. 3335. Appellant then adjusted to prison life and did not act violently toward other inmates. T. 3337. Dr. Goldstein testified that Appellant is not a normal person. T. 3323. He has been predisposed to being a borderline personality disorder with a high rate of psychotic episodes. T. 3324. Dr. Goldstein went on to explain how Appellant's mental illness led to the homicide:

DSM-4 clearly makes that point there's a higher incidence of psychotic episodes in those who have borderline personality disorders. He has a long history of major depression. So this is a person who has a lifelong history of major depression recurrent severe, which means just as it says, with psychotic features; and in Mr. Coday's case that involves delusions, it involves occasional auditory hallucinations, particularly, auditory hallucinations of having women laugh at him and he identifies that as three girls who are ages 12, or 13 who locked him in the freezer for an undetermined period of time, but he described that as a horror that they finally let him out after they laughed. He views that as a major event of his life.

With the victim in this crime, Ms. Gomez, towards the end of the

relationship he began to put on her underwear and surround himself with her pictures.

So this is not merely you and I being disappointed over being jilted by a girlfriend. This is someone who has in effect wiped us off the face of the earth. There's no meaning left. We've invested all of our energy, all of our thoughts, all of our hopes on this woman who is now in your distorted psychotic view laughing at you and you have been played for a fool. At that moment he loses control, and the story that he gives me is one of sitting there with his hands in his knees, his hands over his ears, and he begins to hear the laughing. He jumps up. He pushes her. A fight ensues. It involves the hammer. Then there's another hammer. He remembers striking her a number of times.

T. 3323-26. Dr. Goldstein testified that Appellant was so dissociated that he was focusing on lashing out and not of causing pain:

My view is at the time he was so dissociated that he was focusing solely on lashing out opposed to causing pain. Causing pain, which is deliberately causing pain over and above and incremental to the act of death, is in fact a mental state. It involves cognition. It involves thinking. It involves awareness.

It's my opinion that this is an emotional reactions, not a intellectual one that is though out, and at the time he's attacking Miss Gomez over for whatever period of time it is, he is not thinking about intending to purposely, knowingly, willfully, or any of the 70 odd intent terms that are used in the word deliberately attempting to cause her pain.

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Q. Do you believe he intentionally tortured Gloria Gomez?  
Was he of a state of mind to torture?

A. Again, I would give the same answer. I think it implies a level of thinking that Mr. Coday was not capable of engaging in at the time, because of his emotional arousal and psychotic state.

T. 3360-61. The various tests administered to Appellant supported the diagnosis. T. 3348-53. Dr. Goldstein testified it is very uncommon for six different mental health professionals to come to the exact conclusion as to a diagnosis in a case like this but

the records and tests are so consistent. T. 3351-52.

Dr. William Vicary is a psychiatrist who met with Appellant ten times between November 2, 1999 and July 7, 2002. T. 3389. Dr. Vicary spent 30 to 35 hours on Appellant's case. T. 3390. Appellant suffered a severe mental or emotional disturbance at the time of the offense. T. 3390. Appellant was substantially unable to conform his conduct to the requirements of the law. T. 3390. Dr. Vicary testified that after the German incident Appellant was on Elavil (an anti-depressant) and out-patient psychiatrist care. T. 3391. He discontinued both at the urging of his father and wife. T. 3391. When off the medications Appellant was not mentally stable. T. 3392. There were bizarre irrational outburst. T. 3392. There were periods where Appellant appeared normal. T. 3393. Appellant's intelligence helped hide some of his problems. T. 3393. There was a clear pattern of becoming psychotic when relationships did not work out. T. 3394. Examples go back to Germany when Appellant was on a subway talking so loudly to himself that he was asked to get off because he was frightening other passengers. T. 3394. Appellant suffers major depression severe recurrent. T. 3395, and a borderline personality disorder. T. 3396. Both are productive of attempted suicide episodes. T. 3396. Appellant had two nearly successful suicide attempts at jail. T. 3397. There was a dramatic difference when Appellant was on medications. T. 3400. Before, medication he was not thinking rationally, was very depressed, mood erratic, and hygiene variable. T. 3400. On medication, he was quite rational, very stable, and hygiene exemplary T. 3401. Medications can corroborate diagnosis. T. 3401. Appellant is a textbook case of a severely depressed individual

with psychotic thinking and a borderline personality disorder which is pretty close to a bipolar disorder. T. 3403. The evidence is overwhelming that Appellant was in a psychotic mental state at the time of the crime in Germany and at the time of the murder of Gomez. T. 3403. It is extremely unlikely that either offense would have occurred with medication and proper treatment. Appellant's mental disorders are "the essence of explaining the crimes" in this case. T. 3407.

### **SUMMARY OF THE ARGUMENT**

- 1.** Appellant's theory of defense was that the killing was not premeditated but was done in a heat of passion. Appellant requested a jury instruction on heat of passion. It was reversible error not to give the instruction. See *Palmore v. State*, 838 So. 2d 1222 (Fla. 1st DCA 2003).
- 2.** The instruction on first degree murder was inadequate in this case. It was reversible error to overrule Appellant's objection and to deny his requested instruction on first degree murder.
- 3.** The trial court erred in denying Appellant's motion for judgment of acquittal because the state failed to prove the element of premeditation. Appellant's conviction for first degree murder must be vacated and this cause remanded for imposition of a conviction for a lesser included offense.
- 4.** Appellant sought to suppress evidence which was the fruit of an illegal arrest and detention. Neither the fellow officer rule nor exigent circumstances were properly present in this case. It was reversible error to deny Appellant's motion to suppress.
- 5.** The prosecution did not properly lay a foundation for admitting exhibit AAA

(a statement) into evidence. The document was never properly authenticated. It was error to admit the document in evidence over Appellant's objection.

**6.** The death penalty is not proportionally warranted in this case.

**7.** Six mental health experts all testified that at the time of the offense Appellant's capacity to conform his conduct to the requirements of the law was substantially impaired. This evidence was uncontroverted. The trial court erred in rejecting the mitigating circumstances in Section 921.141(b)(f).

**8.** Florida's death penalty statute is unconstitutional where one is eligible for the death penalty merely by being convicted for violating § 782.04 of the Florida Statutes.

**9.** Appellant's case does not involve a prior violent felony aggravator, a unanimous recommendation of death, a conviction on other felonies which would qualify as an aggravator, nor is it a post-conviction case. Appellant's death sentence violates the United States and Florida Constitutions pursuant to Apprendi v. New Jersey, 530 U. S. 466 (2000) and Ring v. Arizona, \_\_\_ U. S. \_\_\_, 120 S. Ct. 2348 (June 24, 2002). The death sentence must be vacated and a life sentence imposed.

**10.** The trial court erred in finding the killing was especially heinous, atrocious or cruel.

**11.** The trial court failed to make the findings that the aggravating circumstances were sufficient to justify the death penalty. The death sentence must be vacated and the sentence reduced to life where the trial court failed to make the findings required for the death penalty.

**12.** This case had only a single aggravating circumstance. Section 921.141 of the

Florida Statutes does not permit a death sentence when there is only one aggravating circumstance.

13. The trial court erred in ruling that the State could cross-examine the mental health experts as to facts which would not be used as a basis for the expert opinion and where the facts were unduly prejudicial and would not undermine the experts findings.

14. The trial court erred in denying Appellant's motion to interview the jurors.

15. The trial court erred in denying Appellant's requested verdict form which allowed for undecided votes. The form was requested twice after jurors indicated that there were undecided votes. Without the option of being undecided on the verdict form the jurors could reasonably believe they could not be undecided.

16. The trial court erred by instructing the jury that the consequence of an undecided vote is a legal matter for the court to decide. This violates Caldwell v. Mississippi, 105 S. Ct. 2633 (1988).

## ARGUMENT

### POINT I

#### **THE TRIAL COURT ERRED IN DENYING APPELLANT'S INSTRUCTION ON HEAT OF PASSION WHICH WOULD BE A DEFENSE TO PREMEDITATION AND REDUCE THE CONVICTION TO SECOND DEGREE MURDER.**

Appellant presented a jury instruction on heat of passion which would be a defense to premeditation and reduce the conviction to second degree murder. T. 1755; R. 606-607. The trial court denied the instruction on the basis that the standard jury instructions adequately addressed the crime of passion. T.1757. This was error.

The standard of review in denying a requested instruction is abuse of discretion but the discretion is fairly narrow because an accused is entitled to have the jury adequately instructed on his theory of defense. Eg., *Palmore v. State*, 838 So. 2d 1222 (Fla. 1<sup>st</sup> DCA 2003); *Williams v. State*, 588 So. 2d 44, 45 (Fla. 1<sup>st</sup> DCA 1991) (defendant entitled to instruction on defense even if evidence supporting instruction is weak or improbable).

In *Palmore v. State*, 838 So. 2d 1222 (Fla. 1<sup>st</sup> DCA 2003), the conviction was reversed for failing to give the defendant's instruction on heat of passion.<sup>1</sup> The requested instruction would defend against the mens rea element of second degree murder and reduce the conviction to manslaughter. In the lower court the defendant's instruction was rejected because the standard jury instruction on Excusable Homicide referred to heat of passion. The appellate court reversed and found that the excusable homicide instruction was complete defense and was not the defendant's theory of defense (which merely addressed the mens rea element):

In the case at bar, excusable homicide was not the defense theory. The

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<sup>1</sup> In *Palmore*, supra, *Palmore* had stabbed Addie Jones (She had previously lived with him and *Palmore* wanted to reconcile). The appellate court noted *Palmore's* mental state of not fully focusing:

In his statement to police, Appellant described his actions:

I just went to stabbing her. Went to stabbing her. Next thing I know I'm I'm just, after I realized what I was doing, I dropped the knife and I reached down for her...

Appellant didn't know how many times he stabbed Jones because "I did- couldn't really focus."

838 So. 2d. At 1224.

jury was instructed that if they found that Appellant acted in the heat of passion, the killing would be “excusable” and therefore “lawful.” The standard jury instructions do not contain language which would inform the jury that, pursuant to Florida law, if they believed Appellant’s passion resulted in a state of mind “where ‘depravity which characterizes murder in the second degree (is) absent,’” they could return a verdict of manslaughter. *Paz*, 777 So. 2d at 984 (quoting *Disney v. State*, 72 Fla. 492, 73 So. 598, 601 (1916)). Accordingly, the jury was not properly instructed on Appellant’s theory of defense.

838 So. 2d at 1224-1225 (emphasis added). Likewise, in the instant case Appellant’s theory of defense was not that the killing was lawful as an excusable homicide. Rather, Appellant has always stated the killing was unlawful and he should be accountable for the killing. However, Appellant wanted the jury to properly decide accountability. T. 1866, 1879-1780, 1882-83. Appellant’s requested instruction, unlike the instruction on excusable homicide allows the jury to determine whether because of heat of passion Appellant did not premeditate.<sup>2</sup> It was reversible not to give the instruction on Appellant’s theory of defense. The error denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U. S. Const., Art. I, §§ 2, 9, 16, 22, Fla. Const.

This cause should be reversed for a new trial where the jury is instructed on Appellant’s theory of defense.

## **POINT II**

### **THE TRIAL COURT’S INSTRUCTION ON PREMEDITATION WAS HARMFUL REVERSIBLE ERROR.**

Defense counsel objected to the inadequate instruction on first degree murder.

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<sup>2</sup> Heat of passion is a recognized defense in Florida to reduce an unlawful killing from a first degree murder to a second degree murder. See Tein Wang v. State, 426 So. 2d 1004 (Fla. 3<sup>rd</sup> DCA 1983).

R. 168; SR. A. The motion was denied. R. 168; SR. A. The trial court gave the erroneous instruction. T. 1895, This was harmful, reversible error.

When reviewing a trial court’s jury instructions, the standard of review “turns on the nature of the error alleged.” United States v. Knapp, 120 F. 3d 928, 930 (9<sup>th</sup> Cir. 1997), *cert. denied*, 522 U.S. 968, 118 S.Ct. 417, 1139 L. Ed. 2d 319 (1997). Whether a jury instruction misstates the elements of a statutory crime is reviewed *de novo*. See United States v. Petrosian, 126 F. 3d 1232, 1233 n.1 (9<sup>th</sup> Cir. 1997), *cert. denied*, 522 U.S. 138, 118 S.Ct. 1101, 140 L.Ed.2d 156 (1998).

The States’ prosecution was based on premeditated and not felony murder. Section 782.04(1)(a)1 defines first degree murder as:

782.04 Murder

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being. . . .

The following instruction regarding premeditation was given to the jury in this case:

Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the pre-meditated intent to kill, and the killing.

The period of time must be long enough to allow reflection by the defendant. The pre-meditated intent to kill must be formed before the killing.

The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing, and the conduct of the accused, convince you beyond a reasonable doubt of the existence of premeditation, at the time of the killing.

T. 1895.

In McCutchen v. State, 96 So. 2d 152 (Fla. 1957) this Court explained that a premeditated design includes reflection **and deliberation** before and at the time of the killing:

A premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection **and deliberation** on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequence of carrying such purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formation of the intent.

96 So. 2d at 153 (emphasis added).

Deliberation is defined as the act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means. BLACK'S LAW DICTIONARY, Rev. 4<sup>th</sup> Ed, at page 514; see also People v. Hillman, 295 P. 2d 939 (Cal. App. 1956) (deliberate includes weighing of various considerations).

The instruction that was given in this case is misleading and does not accurately define premeditated design referred to in Florida Statute Section 782.04(1)(a)1 and McCutchen under Florida law. The instruction objected to by Appellant fails to inform the jury that premeditated design includes deliberation: the weighing of the reasons for and against the act. The instruction does not reflect the correct law and

permits a verdict of guilty where there is no deliberation by the defendant.

The instruction given here is misleading, as it defines a first degree premeditated murder as a two step process, whereas the elements of first degree murder contain a three step process. The standard instruction informs the jury that “killing with premeditation” is killing after consciously deciding to do so. Thus, the instruction states that consciously deciding to kill and then killing is premeditated murder. The instruction completely omits the process of deliberation. Consciously deciding to do something is not the same as weighing and deliberating over the reasons and means of doing something. Being aware of one’s actions, being “conscious” and cognizant of them, does not entail the level of contemplation, weighing and considering the means and reasons for and against an act that is “deliberation.”

The standard instruction also states that no period of time is needed between the formation of the premeditated intent to kill and the killing, except that period which must be long enough to permit reflection. This is misleading. This does not inform the jury that the defendant must reflect or what the defendant must reflect upon, but only that he have time to do so. The instruction should inform that there must be deliberation: weighing the reasons for or against or the means of accomplishing the act. The instruction does not even require any reflection prior to the act. Indeed, the instruction given is completely contrary to the elements of first degree murder. The law requires actual reflection and not merely time for reflection.

The standard instruction given in this case informs the jury that premeditation is proven **if the premeditation was at the time of the killing:**

It will be sufficient proof of premeditation if the circumstances of the killing, and the conduct of the accused, convince you beyond a reasonable doubt of the premeditation at the time of the killing.

T 1895. This is an incorrect statement of law. The premeditation must be present before the time of the killing. McCutchen v. State, 96 So. 2d 152, 153 (Fla. 1957) (“entertained in the mind before and at the time of the homicide”). The instruction erroneously relieves the State of the burden of proving that the fully formed purpose was before the killing. Telling the jury that premeditation only has to be at the time of the killing along with telling the jury premeditation is killing after consciously deciding to kill allows for the erroneous conclusion that the decision to kill can be without the required deliberation process of McCutchen. The jury should have been given a correct instruction.

Due process requires accurate instructions as to what must be proven for a conviction. See Screws v. United States, 325 U.S. 91, 4107, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). “Amid a sea of facts and inferences, instructions are the jury’s only compass.” U.S. v. Walters, 913 F.2d 388, 392 (7<sup>th</sup> Cir. 1990).<sup>3</sup> Standard jury instructions are not necessarily correct statements of law and do not relieve the trial court from correctly instructing the jury on the law. Yohn v. State, 476 So. 2d 123, 127 (Fla. 1985). In the present case it was reversible error to inadequately instruct the jury on premeditated design. The error denied Appellant due process and a fair trial. Fifth, Sixth, Fourteenth Amend., U. S. Const., Art. I, §§ 2, 9, 16, 22, Fla. Const. This

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<sup>3</sup> Arguments of counsel are not a substitute for valid instructions by the trial court. Taylor v. Kentucky, 436 U.S. 478, 488-489, 92 S.Ct. 1930, 56 L.Ed. 2d 468 (1978).

cause must be reversed for a new trial.

### **POINT III**

#### **THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE STATE FAILED TO PROVE THE ELEMENT OF PREMEDITATION**

Appellant was charged with and convicted of premeditated murder in violation of § 782.04(1)(a)1., Fla. Stat. (1995), which provides:

The unlawful killing of a human being...[w]hen perpetrated from a premeditated design to effect the death of the person killed or any human being...is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

Defense counsel moved for a judgment of acquittal on the ground the state failed to prove the element of premeditation. T. 1745-46, 1749. The trial court denied the motion. T. 1746, 1749-50.

The trial court reversibly erred in denying the motion for judgment of acquittal.

In cases such as this one, where there is no underlying statutorily enumerated felony, premeditation is the essential element that distinguishes first-degree murder from second-degree murder. See Green v. State, 715 So.2d 940, 943 (Fla.1998).

Premeditation is defined as

more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must also exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Wilson v. State, 493 So.2d 1019, 1021 (Fla.1986). Premeditation may be proved by

circumstantial evidence. Hoefert v. State, 617 So.2d 1046 (Fla.1993). However, premeditation sought to be proved by circumstantial evidence must be inconsistent with every other reasonable inference. Cochran v. State, 547 So.2d 928 (Fla.1989). If the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. Coolen v. State, 696 So.2d 738 (Fla.1997).

The evidence in this case showed an ended relationship. Appellant was in love with and obsessed with Gloria Gomez. Appellant was desperately attempting to reconcile with Gomez. Gomez told him that not only would she not come back to him, but that she never loved him. Appellant reacted in a heat of passion:

Then she told me that I had idolized her, that I had over-idealized the relationship. "But you loved me, you told me so many times, you left the message on my phone..." I said, she paused, then she told me that she had never loved me the way I thought. Then she said she had to get her things from my apartment and leave.

I sat there, hearing those words of hers reverberate through my mind - - that she had never loved me the way she made me think - - and then I felt myself entering a state of shock - - then I broke into a rage. A demonic rage.

SR, page 2 of Exhibit 53.

This evidence is not sufficient for premeditation. In Tien Wang v. State, 426 So. 2d 1004 (Fla. 3<sup>rd</sup> DCA)(the defendant's killing of his wife's stepfather was not deemed to be first degree murder where the killing was the result of his impassioned efforts to persuade his wife not to leave him:

The same reasonable possibility exists in this case. The homicide climaxed a day of impassioned efforts by defendant to persuade his wife not to leave him, which, in turn, had been immediately preceded by his

having traveled halfway around the world to see her. Mr. Kirtley, her stepfather thwarted those efforts, and by obstructing defendant gave Pau-Chin an opportunity to leave. Kirtley brusquely rejected the entreaties of the defendant as **Tien Wang** humbled himself before him and begged Kirtley not to take his wife from him. Even as the passion which was found to have motivated the defendants in *Febre* and *Forehand* caused the court to invalidate the first-degree murder convictions in those cases, so too the evidence in this case, although not necessarily establishing that defendant acted “in the heat of passion,” is as consistent with that hypothesis as it is with the hypothesis that the defendant acted with premeditated design. Accordingly, **Tien Wang’s** conviction for first-degree murder is reversed with directions to reduce the conviction to one for second-degree murder sentence.

426 So. 2d at 1007 (emphasis added). Likewise, Appellant’s conviction for first degree murder should be reversed to a lesser degree.

In the present case, the infliction of multiple wounds is not evidence of premeditation. In Austin v. United States, 127 U.S. App. D.C. 180, 382 F.2d 129 (1967), overruled in part on other grounds sub nom., United States v. Foster, 251 U.S. App. D.C. 267, 783 F.2d 1082 (1986)(en banc), the evidence showed a killing caused by twenty-six major stab wounds. The court held such evidence was as consistent with an impulsive and senseless frenzy as with premeditation, and did not permit a reasonable juror to find beyond reasonable doubt that there was premeditation. The court eloquently explained why an extremely brutal murder is more likely to be a depraved mind murder rather than a premeditated one:

The facts of a savage murder generate a powerful drive, almost a juggernaut for jurors, and indeed for judges, to crush the crime with the utmost condemnation available, to seize whatever words or terms reflect maximum denunciation, to cry out murder ‘in the first degree.’ But it is the task and conscience of a judge to transcend emotional momentum with reflective analysis. The judge is aware that many murders most brutish and bestial are committed in a consuming frenzy or heat of

passion, and that these are in law only murder in the second degree. The Government's evidence sufficed to establish an intentional and horrible murder--the kind that could be committed in a frenzy or heat of passion. However the core responsibility of the court requires it to reflect on the sufficiency of the Government's case. We conclude that, making all due allowance for the trial court's function, but applying proper criteria as to the elements of murder in the first degree, the Government's evidence in this case did not establish a basis for a reasoned finding, surpassing speculation, that beyond all reasonable doubt this was not murder committed in an orgy of frenzied activity, possibly heightened by drink, but the act of "one who meditates an intent to kill and then deliberately executes it" (see Bullock v. United States, *supra*, 74 App.D.C. at 221, 122 F.2d at 214).

Austin, 382 F.2d at 138-139.

In the instant case, multiple wounds, although arguably consistent with premeditation, fall short of excluding every reasonable hypothesis of homicide by other than premeditated design. "The mere fact that the killing was attended by much violence or that a great many wounds were inflicted is not relevant [to the issue of premeditation], as such a killing is just as likely (or perhaps more likely) to have been committed on impulse." 2 Wayne R. LaFave and Austin W. Scott, Jr., Substantive Criminal Law, § 7.7, at 240 (1986) (footnote omitted).

In Kirkland v. State, 684 So.2d 732 (Fla. 1996), the State asserted that the following evidence suggested premeditation. The victim suffered a severe neck wound that caused her to bleed to death, or sanguinate, or suffocate. Id. at 734. The wound was caused by many slashes. Id. at 735. In addition to the major neck wound, the victim suffered other injuries that appeared to be the result of blunt trauma. Id. There was evidence indicating that both a knife and a walking cane were used in the attack. Id. Further, the State pointed to evidence indicating that friction existed between

Kirkland and the victim insofar as Kirkland was sexually tempted by the victim. Kirkland, 684 So. 2d at 734-735. This court found, however, that this evidence was insufficient in light of the evidence militating against a finding of premeditation. First, the court noted that “there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide.” Id. at 735. The same is true in the present case. Second, the court stated that “there were no witnesses to the events immediately preceding the homicide.” Id. The same is true here. Third, “there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide.” Id. The same is true in the present case. Fourth, “the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan.” Id. This is also true in the present case. This court reversed Kirkland’s first degree murder conviction with instructions to enter judgment and sentence for second degree murder.

In Green v. State, 715 So.2d 940 (Fla.1998), this court found that the evidence supported the reasonable hypothesis that the victim’s murder was committed without any premeditated design. In Green, the victim was stabbed three times, beaten, and manually strangled to death. Id. at 941, 944. In addition, witnesses overheard Green say the afternoon before the murder that “I’ll get even with the bitch, I’ll kill her” Id. at 942. This court found this insufficient evidence of premeditation:

There were no witnesses to the events immediately preceding the homicide. Although Kulick had been stabbed three times, no weapon was recovered and there was no testimony regarding Green’s possession of

a knife. Moreover, there was little, if any, evidence that Green committed the homicide according to a preconceived plan. Finally, although not controlling, it is undisputed that Green's intelligence is exceedingly low.

The State argues that the nature of Kulick's wounds provides circumstantial evidence of premeditation. See Holton, 573 So.2d at 289. The State also notes that several witnesses testified to hearing Green proclaim in a fit of rage that he was going to kill Kulick. However, the nature of Kulick's wounds and the testimony regarding Green's alleged statements are insufficient evidence of premeditation in light of the strong evidence militating against a finding of premeditation. See Kirkland, 684 So.2d 732 (premeditation not found despite evidence of a prolonged attack against the victim and a history of friction between the victim and the defendant); Hoefert v. State, 617 So.2d 1046 (Fla.1993)(premeditation not found despite evidence that the strangled victim was found partially nude and the defendant had a history of strangling women while raping them).

Green, 715 So.2d at 944.

In Coolen v. State, 696 So.2d 738 (Fla. 1997) , the victim, Coolen, and their wives had been drinking when Coolen suddenly pulled the victim away and started stabbing him. Id. at 740. The medical examiner testified that the victim had six stab wounds, including two defensive wounds to his forearm and hand, a deep stab wound to the right chest, and a deep stab wound to his right back. Id. The victim's wife testified that Coolen suddenly attacked her husband without warning or provocation. Id. at 741. The victim's stepson testified that Coolen had threatened him with the knife earlier in the evening, that he had seen his stepfather and Coolen fight over a beer, and that his stepfather tried to fend off Coolen during the attack. Id. The State contended that this evidence together with the deep stab wounds to the victim's chest and back and the defensive wounds on his forearm and hand were indicative of the premeditated nature of the attack. Id.

This court held that this evidence was insufficient to prove premeditation:

Although this evidence is consistent with an unlawful killing, we do not find sufficient evidence to prove premeditation. Barbara Kellar testified that the two men had not been arguing and that Coolen simply “came out of nowhere” and starting stabbing her husband. Jamie Caughman described an ongoing pattern of hostility between two intoxicated men that culminated in a fight over a beer can. The testimony of these eyewitnesses is contradictory and neither provides sufficient evidence of premeditation. While the nature and manner of the wounds inflicted may be circumstantial evidence of premeditation, Holton v. State, 573 So.2d 284, 289 (Fla.1990), the stab wounds inflicted here are also consistent with an escalating fight over a beer (Jamie Caughman’s account) or a “preemptive” attack in the paranoid belief that the victim was going to attack first (Coolen’s version).

Coolen, 696 So. 2d at 741-742. This court reversed Coolen’s first degree murder conviction with instructions to enter judgment and sentence for second degree murder.

In Castillo v. State, 705 So.2d 1037 (Fla. 3d DCA 1998), the victim was killed by a gunshot fired into the left side of her head from three feet away. Id. at 1038. Castillo and the victim had a “physically abusive sexual relationship” and they were arguing before the killing. Castillo’s varying accounts of the event, “although inconsistent with one another, were tales of sex, drugs, jealousy and rage.” Id. However, “[m]issing from Castillo’s accounts were statements of any conscious purpose to kill Munoz.” Id. The Third District reversed Castillo’s first degree murder conviction. “Here, although the State’s evidence arguably is consistent with premeditation, it falls short of excluding every reasonable hypothesis of homicide by other than premeditated design.” Id.

The evidence of premeditation in the instant case is even less compelling than that found insufficient in the cases discussed above. Accordingly, this court should

reverse the judgment and sentence for first-degree murder and remand with instructions to enter judgment and sentence for second-degree murder.

#### **POINT IV**

#### **THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS**

Appellant moved to suppress evidence which was the fruit of an illegal arrest and detention. R. 1044, 1039. The trial court denied the motion on the basis of the existence of exigent circumstances and a warrant based on the fellow officer rule. This was reversible error.

Appellant was an overnight guest at the residence of Tooska Amiri at the time of his arrest. Appellant had sought shelter at her residence as a safe harbor to contact relatives prior to him turning himself in.<sup>4</sup> Police entered the residence and arrested Appellant without a warrant. R. 956, 964. Without a warrant, police needed probable cause plus exigent circumstances. Kirk v. Louisiana, 112 S. Ct. 2458 (2002). Police did not request permission to enter the residence. After knocking, Amiri was asked whether Appellant was inside the residence and they entered the residence and proceeded to arrest Appellant with guns drawn. R. 941, 960. The trial court did not find consent,<sup>5</sup> but ruled that the arrest was by warrant pursuant to the fellow officer

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<sup>4</sup> The trial court did not take the position that Appellant did not have standing as an overnight guest. See Minnesota v. Olson, 110 S. Ct. 1684 (1990)(Olson was fugitive seeking overnight shelter at friends residence and such status alone gave him an expectation of privacy).

<sup>5</sup> Nor would the evidence support such a finding. As noted the police never sought permission to enter. Amiri did not tell the police verbally they could enter nor was there testimony

rule or that the warrantless arrest was proper based on exigent circumstances. R. 583-584.

The trial court's use of the fellow officer rule was misplaced. The fellow officer rule allows an arresting officer to assume probable cause for arrest from information supplied by other officers. See Whiteley v. Warden, Wyoming State Penitentiary, 91 S. Ct. 1031 (1971). In the present case the New York Police made the arrest without receiving any information from Florida. Thus, the fellow officer rule does not apply. Additionally, it should be noted that New York and Florida were not in a working and relationship on this case so that knowledge of a warrant could be imputed from one to another.. Thus, the arrested was without a warrant - just as it was in reality. The New York Police were bound by the Fourth Amendment.

The arrest and detention of Appellant was illegal. To pass constitutional muster the warrantless arrest and detention must have been based on probable cause and exigent circumstances. Id.

The trial court erred in ruling that the police could go in the residence, without a warrant or consent, because Appellant's status as a fugitive constituted exigent circumstances. See e.g., Minnesota v. Olson, 110 S. Ct. 1684, 1690 (1990)(warrantless arrest of Olson who was wanted in robbery/killing and in residence

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that she gestured or stepped aside. She only stated that Appellant was upstairs. T. 957. This is not consent to enter. Turner v. State, 754 A. 2d 1074, 1084 (Md. App. 2000)(analyzing numerous cases and holding that in absence of police request to enter that opening door and leaving door open is not valid consent to enter).

with two people were with the suspect did not constitute exigent circumstances); Hornblower v. State, 351 So. 2d 716, 718 (Fla. 1977)(police cannot help create exigent circumstances).

Thus, the fruits of the illegal arrest at the residence including Appellant's bag containing his Crepusculo writing should have been suppressed.

In addition, the trial court did not find, nor did the police have, probable cause when they arrested Appellant.<sup>6</sup> See Maxwell v. City of Indianapolis, 998 F. 2d 431 (7<sup>th</sup> Cir. 1993)(identification of defendant as fugitive on "America's Most Wanted" television show does not constitute probable cause to arrest the defendant.) As a result, Appellant's detention was illegal and since there was no break in the chain of illegality,<sup>7</sup> Appellant's written statement to police should have been suppressed. The illegal arrest and detention violated Appellant's rights under the 4th and 14th Amendments to the United States Constitution and Article I, Section 12 of the Florida Constitution. This cause must be remanded for a new trial.

## **POINT V**

### **THE TRIAL COURT ERRED IN ADMITTING EXHIBIT WHICH WAS NEVER ADEQUATELY AUTHENTICATED**

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<sup>6</sup> The basis for the police action was being told that Appellant had been on America's Most Wanted. T. 943.

<sup>7</sup> Such as release from custody, or appearing before a judge, or talking with an attorney. Miranda warnings are not sufficient to attenuate an illegal detention. Taylor v. Alabama, 457 U. S. 687, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982)(5 hour illegal detention was not attenuated by interviewing circumstances even where defendant was given three --- Miranda warnings and was visited by friends).

Evidentiary rulings that are not pure questions of law fall under an abuse of discretion review. However, rulings contrary to the evidence code constitute an abuse of discretion. Taylor v. State, 601 So. 2d 1304, 1305 (Fla. 4<sup>th</sup> DCA 1992) (discretion is “narrowly limited by the rules of evidence.”); Nardone v. State, 798 So. 2d 870, 874 (Fla. 4<sup>th</sup> DCA 2001) (no discretion to make rulings contrary to evidence code).

A hearing was held on the authenticity of exhibit AAA(the alleged statement of Appellant).T.1549-76. At the hearing Sergeant Russell testified that he observed Appellant writing on a pad between 12 pm and 1:30 pm T. 1562. Sometime in the evening or afternoon Detective Greco asked Russell to sign a statement purportedly given by Appellant. T. 1564. Russell signed every page. T. 1565. Russell did not know what Appellant was writing. T. 1567. Russell cannot testify that Appellant wrote the document in question. T. 1567. The last paragraph in the document appears to be written by another person and Russell also does not know whose handwriting it is. T. 1567-68.

Appellant objected to the introduction of state’s exhibit on the ground that the State had not laid the foundation that it was authentic. T. 1574-75. The trial overruled the objection and admitted the document. T. 1578. This was error.

Section 90.901 of the Florida Statutes requires authentication of a document as a condition precedent to its admissibility:

**SECTION 90.901 REQUIREMENT  
OF AUTHENTICATION OR  
IDENTIFICATION**

Authentication or identification of evidence is required as a condition

precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

In the present case Sergeant Russell gave the only testimony regarding the foundation for authenticity. Russell testified that he could not testify that Appellant wrote the document. T. 1567. The document was not authenticated. See Louis v. State, 647 So. 2d 324 (Fla. 2d DCA 1994)(state did not present testimony of deputy who rolled fingerprints onto card thus card was not authenticated and not admissible). It was error to admit the document in this case. Appellant's conviction and sentence must be reversed and this cause remanded for a new trial.

## **PENALTY ISSUES**

### **POINT VI**

#### **THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.**

“Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different.” Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). This Court summarized proportionality review as a consideration of the “totality of circumstances in a case,” and due to the finality and uniqueness of death as a punishment “its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist.” Terry v. State, 668 So. 2d 954, 956 (Fla. 1996).

In Dixon v. State, 283 So. 2d 1 (Fla. 1973) made it clear that similar results would be reached for similar circumstances and results would not vary based on

discretion:

Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in *Furman v. Georgia, Supra*, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

283 So. 2d at 10 (Emphasis added). See also Proffitt v. Florida, 428 U. S. 242, 250 & 252-53 (1976).

Under this Court's proportionality analysis, the death penalty is reserved for the "most aggravated" and "least mitigated" of murders. Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999); Almeida v. State, 748 So. 2d 922, 943 (Fla. 1999):

[O]ur inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of **both** (1) the most aggravated, **and** (2) the least mitigated of murders.

Almeida, 748 So. 2d 943 (emphasis added)(footnote omitted); Cooper v. State, 739 So. 2d at 85; see also, e.g., Besaraba v. State, 656 So. 2d 441, 446 (Fla. 1995)("Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders.")(Quoting Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989)); State v. Dixon, 283 So. 2d 1 (Fla. 1973).

As noted in McKinney v. State, 579 So. 2d 80, 81 (Fla. 1991), the death sentence will be affirmed in cases supported by one aggravating circumstance only where there is either nothing or very little in mitigation:

Having found that two aggravating circumstances are unsupported by the record, this death sentence is now supported by just one aggravating circumstance -- that the murder was committed during the course of a violent felony. As we have previously noted, "this Court has affirmed death sentences supported by one aggravating circumstance only in cases involving 'either nothing or very little in mitigation.'" *Nibert v. State*, 574 So. 2d 1059, 1063 (Fla. 1990) (quoting *Songer v. State*, 544 So. 2d 1010, 1011 (Fla. 1989)). Here, the trial court found as a statutory mitigating circumstance that McKinney had no significant history of prior criminal activity. In addition, McKinney presented substantial mitigating evidence relating to his mental deficiencies and alcohol and drug history. In light of the existence of only one valid aggravating circumstance present here, the sentence of death is disproportional when compared with other capital cases where this Court has vacated the death sentence and imposed life imprisonment. See *Lloyd*, 524 So. 2d at 403 (and cases cited therein).

See also *Clark v. State*, 609 So. 2d 513 (Fla. 1992); *Nibert v. State*, 574 So. 2d 1059, 1063 (Fla. 1990); *Songer v. State*, 544 So. 2d 1010, 1011 (Fla. 1989); *Smalley v. State*, 546 So. 2d 710, 723 (Fla. 1989); *Rembert v. State*, 445 So. 2d 337 (Fla. 1984); *Lloyd v. State*, 524 So. 2d 396 (Fla. 1988). This is consistent with reserving the death penalty for the most aggravated and least mitigated offenses.

In this case there was only one aggravating circumstance. In this case there were significant mitigating factors. The trial court found an important statutory mitigating factor - - the capital felony was committed while Appellant was under the influence of extreme mental or emotional disturbance<sup>8</sup> and 11 non-statutory mitigating factors.

### **1. Extreme Mental or Emotional Disturbance at the time of the offense**

All six experts that testified argued that Appellant suffered from an extreme

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<sup>8</sup>§ 921.141(6)(b), Fla. Stat.

mental or emotional disturbance of at the time of the offense. T. 3117, 3176, 3222, 3245, 3327, 3390. In fact, Dr. Goldstein testified it was very uncommon for six different mental health professionals to come to the same exact conclusion as to a diagnosis in a case like this but the records and tests are so consistent. T. 3351-52. The testimony was that Appellant's mental disorders are "the essence of explaining the crimes" in this case. T. 3402. Appellant suffered from a severe mental illness. T. 3176, 3226. This included major depression, severe recurrent with psychotic features, borderline personality disorder and an underlying severe paranoid delusional disorder. T. 3395, 3396. 3246, 3178, 3418. Appellant had an active psychotic episode at the time of the killing. T. 3223, 3403. The mental disorder included auditory hallucinations. T. 3328. His feelings and thoughts were all but shut down. T. 3329. In fact, a number of the experts testified that if they had testified during the guilt phase they would have testified that Appellant was insane at the time of the offense. T. 3210, 3223.

The important mental mitigating circumstance was also found by the trial court in this case.

**2. Appellant has a good employment history and record.**

**3. Appellant has been suicidal but has been helped by medications.**

**4. Appellant voluntarily returned to the United States to surrender. Appellant cooperated with police after his arrest. Appellant**

**voluntarily confessed and consented to the search of his belongings.**

**5. Appellant missed a great amount of school due to chronic illnesses which impacted his social development.**

**6. It is unlikely that Appellant will endanger others while serving a sentence of life in prison.**

**7. Society would be protected by Appellant serving a sentence of life in prison.**

**8. Appellant will use his foreign language skills to assist needy individuals who seek to learn English or function here. He can thus still be a productive member of society.**

**9. Appellant is a voracious reader and he had already caused two former inmates of the Broward County Jail to seek assistance in learning to read once released. He has helped, and can in the future help other inmates turn their lives around.**

**10. Appellant has expressed sincere regret and remorse for this crime.**

With the presence of the important statutory mental mitigating circumstance as well as numerous other mitigating circumstances, it cannot be said that there is either nothing or very little in mitigation so that the single aggravating circumstance qualifies

this case as the most aggravated and least mitigated of cases for which the death penalty is reserved.

In fact, in cases involving similar circumstances, or even more aggravation or less mitigation, death has been held to be disproportionate. For example, in Farinas v. State, 569 So. 2d 425 (Fla. 1990) the victim moved out of Farinas' home. 569 So. 2d at 431. Like this case, Farinas would unsuccessfully try to see her. Id. Like this case, Farinas was obsessed with having the victim return to him. Id. Farinas would later kidnap the victim. Farinas then ignored her pleas for mercy and shot her in the back paralyzing her. Id. The victim was fully conscious and aware of her impending death as Farinas unjammed his gun and shot her again and again. Id. Despite two aggravating circumstances, including HAC, this Court found death to be disproportionate because although not found by the trial court, the evidence tended to establish that the killing was committed by Farinas when he was under an extreme mental or emotional disturbance. The present case is like Farinas in that the killing was the result of an obsession with having the victim return and an extreme mental or emotional disturbance. However, Farinas was even more aggravated where the victim was kidnaped (whereas the instant case involved a rapid explosion) and less mitigated unlike Farinas Appellant had an extreme mental illness which was unanimously supported by six mental health professionals).<sup>9</sup>

In Huckaby v. State, 343 So. 2d 29 (Fla. 1977) the court found two aggravators,

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<sup>9</sup> In Farinas the trial court found mental mitigation, but did not find it to be substantial and gave it little weight.

including HAC; a history of “sincere threats on the lives of his nine children and wife over the course of many years[;] and he in fact caused them bodily harm from beatings and other forms of wanton cruelty.” Huckaby, 343 So. 2d at 33. Nonetheless, the Court vacated the death sentence because:

There was almost total agreement on Huckaby’s mental illness and its controlling influence on him. Although the defense was unable to prove legal insanity, it amply showed that Huckaby’s mental illness was a motivating factor in the commission of the crimes for which he was convicted. Our review of the record shows that the capital felony involved in this case was committed while Huckaby was under the influence of extreme mental or emotional disturbance, and that while he may have comprehended the difference between right and wrong his capacity to appreciate the criminality of his conduct to conform it to the law has substantially impaired.

343 So. 2d at 33-34. (Emphasis added). Likewise, in this case there was total agreement that Appellant’s mental illness was the controlling factor for the crime -- the mental disorders are “the essence of explaining the crimes” in this case. T. 3407.

In addition, there are other similar types of cases in which death has been deemed disproportionate. See Penn v. State, 574 So. 2d 1079 (Fla. 1991)(sole aggravator HAC was outweighed by heavy drug use and belief that victim stood in way of reconciliation with wife); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985)(death penalty not proper for bludgeoning of wife while she attempted to defend herself where only aggravator was HAC and although no mental illness there was mitigation of drinking at time of attack and attack was result of emotional dispute); Wilson v. State, 493 So. 2d 1019 (Fla. 1986)(HAC by bludgeoning with hammer and shooting and prior violent felony); Wright v. State, 688 So. 2d 298 (Fla. 1996)(death

not proportionate where there was no aggravation unrelated to the struggle with the victim and Wright was under the influence of extreme emotional disturbance and had other mitigation including good employment record, good deeds, mental health problems, cooperated with police).

Also, assuming arguendo that the HAC aggravator applies in this case but (see point X), under the circumstances of this case HAC is not as significant as in other cases. Essentially all murders are heinous and involve pain but what truly narrows the class of murders through the HAC aggravator is the deliberate intent to inflict pain. At the very least, the HAC aggravator is far less significant in his case as compared to other cases which induce an intent to inflict and enjoy pain. In the present case it was never claimed that Appellant was deliberately intending to cause pain.<sup>10</sup> Dr. Goldstein testified that Appellant was so dissociated that he was focusing on lashing out and not of causing pain:

My view is at the time he was so dissociated that he was focusing solely on lashing out opposed to causing pain. Causing pain, which is deliberately causing pain over and above and incremental to the act of death, is in fact a mental state. It involves cognition. It involves thinking. It involves awareness.

It's my opinion that this is an emotional reactions, not a intellectual one that is though out, and at the time he's attacking Miss Gomez over for whatever period of time it is, he is not thinking about intending to purposely, knowingly, willfully, or any of the 70 odd intent terms that are used in the word deliberately attempting to cause her pain.

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<sup>10</sup> The trial court speculated that Gomez must have been in pain, but did not find that Appellant deliberately intended to cause pain.

- Q. Do you believe he intentionally tortured Gloria Gomez?  
Was he of a state of mind to torture?
- A. Again, I would give the same answer. I think it implies a level of thinking that Mr. Coday was not capable of engaging in at the time, because of his emotional arousal and psychotic state.

T. 3360-61. This testimony regarding a disassociative state was unanimous amongst the experts. The bottom line is that the sole aggravating HAC circumstance in this case is far less significant than it usually is. Again, the instant case is not the most aggravated and least mitigated for which the death penalty is reserved. Appellant's death sentence must be vacated.

### **POINT VII**

#### **THE COURT ERRED IN REJECTING THE MITIGATING CIRCUMSTANCE IN SECTION 921.141(6)(f) OF THE FLORIDA STATUTE WHERE IT WAS UNCONTROVERTED THAT APPELLANT'S ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED.**

The six mental health experts all testified that at the time of the offense Appellant's capacity to conform his conduct to the requirements of the law was substantially impaired. T. 3117, 3176, 3223, 3245, 3360, 3390. Their testimony was based on hundreds of hours of evaluations, interviews, testing and review of records of the offense and other parts of Appellant's life.

Dr. Goldstein noted that it was very uncommon for six different mental health professional to come to the same exact conclusion as to a diagnosis but the records and test are so consistent. T. 3351-52. Appellant's mental disorders are "the essence of explaining the crimes" in this case. T. 3402. The experts all agree that Appellant

suffered from mental illnesses and when he was informed by Gloria Gomez that she never loved him he suffered a psychotic break in which he went into a disassociative state where his capacity to conform his conduct was substantially impaired. The mental health experts explained that normally had the capacity to conform but that when he was in the psychotic state his capacity to conform was impaired.

The trial court rejected this mitigator because Appellant had the capacity to follow and abide by the law.<sup>11</sup> First what the trial court is rejecting is not the statutory mitigator of impaired capacity. One does not have to totally lack the capacity to conform one's conduct – the capacity to conform must be substantially impaired rather than totally absent.<sup>12</sup> The trial court rejected the expert testimony and ruled that Appellant had the capacity to conform because he “conform[ed] his conduct for so many years.” R. 837. This analysis is legally and logically flawed. The experts all recognized that Appellant normally had the ability to conform - - it was only during the rare psychotic episodes that the ability to conform was impaired. Under the trial court's reasoning a person with no criminal history could not qualify for this mitigator

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<sup>11</sup> The trial court indicated that it was not convinced that Appellant is “relieved of accountability for his conduct.” R. 837. However in putting forth this mitigator Appellant has never asked to be relieved of accountability for his conduct. Rather, this is a mitigator and not a defense which eliminates accountability.

<sup>12</sup> The total lack of capacity to conform would be the defense of insanity which is not the legal standard for the instant mitigating circumstances. It is interesting to note that the majority of the experts found Appellant to be insane at the time of the offense. Although insanity is not the test for this mental mitigator, the fact that experts found Appellant to be insane at the time of the offense does not detract from this mitigator.

because most of the time the ability to conform would be present. Of course, this is not true.

The key is that this mitigator relates to the ability to conform at the time of the offense and is not negated by the fact that at other times the ability to conform exists and in fact the defendant may be a good father, citizen, etc.

The above facts and experts analysis were uncontroverted and support the circumstances that Appellant's ability to conform his conduct to the requirements of the law was substantially impaired. "The rejection of a mitigating factor cannot be sustained unless supported by competent substantial evidence refuting the existence of the factor." Maxwell v. State, 603 So. 2d 490 (Fla. 1992). As this Court noted in Johnson v. State, 660 So. 2d 637 (Fla. 1995), the uncontroverted factual evidence supported by expert testimony cannot be ignored or rejected:

Johnson also appears to suggest that, had he introduced expert testimony about his mental state in the penalty phase, the trial court could simply have rejected the testimony wholesale under *Walls*. Actually, *Walls* stands for the proposition that opinion testimony *unsupported* by factual evidence can be rejected, but that uncontroverted and believable factual evidence supported by opinion testimony cannot be ignored. *Walls*, 641 So. 2d at 390-391. Johnson did in fact introduce unconverted facts supporting a case for mental mitigation, but the record completely and substantially supports the trial court's determination of weight.

660 So. 2d at 647 (emphasis added). Thus, while the court had discretion as to the weight to give to the impaired capacity mitigator, it was not free to totally reject the experts' testimony which was based on uncontroverted facts. Moreover, the impaired capacity mitigator has been generally recognized to exist when a defendant's obsession or compulsion has been triggered. See Irizarry v. State, 496 So. 2d 822, 824

(Fla. 1986)(impaired capacity mitigator existed because crime resulted in “passionate obsession.” Irizarry was “obsessed” that his ex-wife had jilted him, causing impairment of capacity to appreciate criminality of his conduct); Kampff v. State, 371 So. 2d 1007 (Fla. 1979)(impaired capacity, where Kampff had “obsessive desire to regain former status as husband”).

In addition the trial court rejected that Appellant suffered emotional abuse as a child. The uncontroverted evidence showed that while Appellant was not materially deprived or physically abused as a child, he was emotionally abused in the sense that his parents (particularly his father) were cold and distant. T. 2681-82, 3179. This type of deprivation can be more traumatizing than other forms of abuse. The uncontroverted evidence of emotional abuse should not have been rejected.

The erroneous rejection of the impaired capacity mitigator is not harmless beyond a reasonable doubt. Only one aggravator was present. Under the particular circumstances at bar, this is not one of the most aggravated of murder cases.

On the other side of the scale was ample mitigation. Appellant was under the influence of extreme mental or emotional disturbances at the time he committed the offense and there was also over a dozen non-statutory mitigating circumstance. The erroneous rejection of mitigating evidence denied Appellant due process and a fair reliable sentencing. Fla Const. Art. I, §§9 and 17; U.S. Const. Amend V, VI, VIII, XIV.

### **POINT VIII**

**FLORIDA’S DEATH PENALTY STATUTE IS**

**UNCONSTITUTIONAL WHERE ONE IS ELIGIBLE FOR THE DEATH PENALTY MERELY BY BEING CONVICTED for violating § 784.02 OF THE FLORIDA STATUTES.**

It may be claimed that in Florida one becomes eligible for the death penalty by a mere finding of guilt under § 782.04 of the Florida Statutes. If this is true, Florida's death penalty statute is unconstitutional because aggravating circumstances must be found to make one eligible for the death penalty under the United States Constitution. See Furman v. Georgia, 408 U. S. 238 (1972).

Thus, Appellant's sentence is unconstitutional and must be reversed and remanded for imposition of a life sentence.

**POINT IX**

**THE DEATH SENTENCE VIOLATES THE UNITED STATES AND FLORIDA CONSTITUTIONS PURSUANT TO APPRENDI V. NEW JERSEY, 530 U. S. 466 (2000) AND RING V. ARIZONA, \_\_\_ U. S. \_\_\_, 120 S. CT. 2348 (JUNE 24, 2002).**

Assuming, that this Court rejects Appellant's argument in Point IV because Florida does require an aggravating circumstance for one to become eligible for the death penalty, the death penalty sentence in this cause violates Ring v. Arizona.

Appellant raised the Ring issues at numerous times in the court below. R. 553-556, R. 744-752, R. 753, T. 3047-3099.

In Duest v. State, this Court revisited Ring without rejecting the idea of Ring applying to Florida. Instead, it was noted that there were four categories of cases which were not eligible for relief pursuant to Ring; cases on post-conviction, unanimous recommendations of death, cases with unanimous guilt phase verdicts on

other felonies which would qualify for a statutory aggravator, and cases with a prior violent felony conviction:

### **RING ISSUE**

Duest next asserts that he was denied his right under the Sixth Amendment to the United States Constitution to trial by jury on all the elements of his offense, since there is no requirement under Florida law of a jury trial to determine the existence of facts necessary to impose the death penalty. He bases his claim on Ring v. Arizona, 536 U.S. 584 (2002), in which the United States Supreme Court held that if proof of a fact is necessary to subject a defendant to the death penalty, the Sixth Amendment requires that the fact be found by a jury beyond a reasonable doubt.

This Court, considering the effects of Ring, denied relief in Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 123 S.Ct. 657 (2002) which, like Duest's case, involved a prior-conviction aggravator. Ring rests on Apprendi v. New Jersey, 630 U.S. 466 (2002), which held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. We have previously rejected claims under Apprendi and Ring in cases involving the aggravating factor of a previous felony involving violence. See Lugo v. State, 28 Fla. L. Weekly S160, S173 n.79 (Fla. Feb. 20, 2003) (noting rejection of Apprendi/Ring claims in postconviction appeals, unanimous guilty verdict on other felonies, and "existence of prior violent felonies"); Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"). We likewise decline to grant relief under Ring here.

28 Fla. L. Weekly at S506.

Appellant's case does not fall within any of the four exceptions noted by this Court.

### **JURY FACT FINDING**

In Ring, the United States Supreme Court struck down Arizona’s capital sentencing statute, holding that it violated the Sixth and Fourteenth Amendments for a judge rather than jury to find the aggravating factors necessary to impose a death sentence. The Court based its holding and analysis in Ring on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), where it held that “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)).

Applying that Apprendi test, in Ring the Court noted that “If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact ... must be found by a jury beyond a reasonable doubt.” Ring, 2002 WL at \_\_\_\_\_. “All the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.” Id. (quoting Apprendi, 530 U.S. at 499 (Scalia, J., concurring)).

The Court in Ring agreed with the dissenters in Apprendi that the Arizona death penalty statute could not survive this test: “[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.” Ring, 2002 WL at \_\_\_\_\_ (quoting Apprendi, 530 U.S. at 538 (O’Connor, J., dissenting)). The Court noted that, under Arizona law, “Defendant’s

death sentence required the judge's factual findings." Ring, 2002 WL at \_\_\_\_\_ (quotation omitted).

The Florida capital sentencing statute suffers from the identical flaw that led the Court in Ring to declare the Arizona statute unconstitutional. Under Florida law, a defendant cannot be sentenced to death unless the judge -- not the jury -- makes specific findings of fact. In particular, before a sentence of death may be imposed, under Fla. Stat. Section 921.141(3), the court "shall set forth in writing its findings upon which the sentence of death is based as to the facts . . . [t]hat sufficient aggravating circumstances exist ... and ... [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." (Emphases added.) Thus, Section 921.141 explicitly requires two separate findings of fact by the trial judge before a death sentence can be imposed: the judge must find as a fact that (1) "sufficient aggravating circumstances exist" and (2) "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Id. A defendant thus may be sentenced to death only if the sentencing proceeding "results in findings by the court that such person shall be punished by death." Fla. Stat. § 775.082(1).

The statute is explicit that, without these required findings of fact by the trial judge, the defendant must be sentenced to life imprisonment: "If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose [a] sentence of life imprisonment." Id. Further, the statute requires the trial court to make a determination independent of the jury -- the jury renders merely an "advisory sentence" and the trial court must impose

a sentence of life or death “[n]otwithstanding the recommendation of a majority of the jury.” *Id.* §§921.141(2), 921.141(3). See Ross v. State, 386 So. 2d 1191, 1197-98 (Fla. 1980) (vacating death sentence because the trial judge treated the jury’s recommendation as binding and failed to make independent findings in support of the sentence). Further, for purposes of sentencing, the jury’s guilt-phase findings cannot be conclusive as to the existence of any aggravating factor, and the judge is required by the statute to make separate findings at sentencing to support any such factor.

Because Florida law thus requires fact findings by the trial judge before a death sentence may be imposed, it is unconstitutional under the holding and rationale of Ring. Just as with the Arizona statute, the Florida statute is directly contrary to the rule of law enunciated in Ring and Apprendi that “[i]f a state makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact ... must be found by a jury beyond a reasonable doubt.” 2002 WL at \_\_\_\_\_. Just as with the Arizona statute, the Florida statute is explicit that a defendant “cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.” *Id.* at \_\_\_\_\_. Because the trial judge -- and not the jury -- must make specific findings of fact before a death sentence can be imposed under Florida law, Ring holds squarely that the statute is unconstitutional under the Sixth and Fourteenth Amendments.

### **ADVISORY VERDICT**

Admittedly, unlike the Arizona statute, the Florida statute provides for an

advisory jury verdict. But that has no bearing on the analysis set out above. Indeed in Walton v. Arizona, 497 U.S. 639 (1990), the United States Supreme Court specifically rejected a purported distinction between the Arizona and Florida statutes based on Florida's advisory verdict:

The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

497 U.S. at 648.

The trial judge is directed by Section 921.141(3) to make the fact findings necessary to support a death sentence "notwithstanding the recommendation of a majority of the jury." And unless the court makes the "findings requiring the death sentence," id., the defendant must be sentenced to life. The jury's role thus does not alter the essential point -- the controlling point under Ring -- that the Florida statute is unconstitutional because a death sentence cannot be imposed without fact findings by the trial judge. See Ring, 2002 WL at \_\_\_\_\_ ("All the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.") (quotation omitted).

The State perhaps may argue that this Court can avoid the Ring issues raised by the Florida statute simply by relying on the jury's advisory verdict as the basis for imposing a sentence of death. In this way, the State might argue, this Court could avoid making the findings of fact that would run afoul of Ring.

Any such argument is foreclosed, first of all, by the explicit language of the statute. Section 921.141 requires separate findings by the court “notwithstanding the recommendation of a majority of the jury.” There is no statutory authority under Florida law that would allow the imposition of a death sentence based on the jury’s findings of fact. To the contrary, Florida law provides that the jury’s role is merely “advisory” and that the trial court must undertake its own separate findings. The trial court is required by Section 921.141(3) to make “specific written findings of fact.” And the trial court is required to engage in a separate Spencer hearing. It would be a violation of the statutory requirements to base a death sentence upon the jury’s verdict when Section 921.141(3) explicitly requires the court to “set forth in writing its findings ... as to the facts” supporting a death sentence.

Further, it would be impermissible and unconstitutional to rely on the jury’s advisory sentence as the basis for the fact-findings required for a death sentence, because the statute requires only a majority vote of the jury in support of that advisory sentence. See id. (“recommendation of a majority of the jury”). In Harris v. United States, \_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, 2002 WL 1357277, No. 00-10666 (U.S. June 24, 2002), rendered on the same day as Ring, the U.S. Supreme Court held that under the Apprendi test “those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis.” Id. (U.S. June 24, 2002). And in Ring, the Court held that the aggravating factors enumerated under Arizona law operated as “the functional equivalent of an element of a greater offense” and thus had to be found by a jury. 2002 WL at

\_\_\_\_\_. In other words, pursuant to the reasoning set forth in Apprendi, Jones, and Ring, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

### **SIMPLE MAJORITY VOTE**

Permitting any such findings of the elements of a capital crime by a mere simple majority is improper under the United States Constitution and Florida law. In the same way that the Constitution guarantees a baseline level of certainty before a jury can convict a defendant, it also constrains the number of jurors who can render a guilty verdict. See Apodaca v. Oregon, 406 U.S. 404 (1972) (the Sixth and Fourteenth Amendments require that a criminal verdict must be supported by at least a “substantial majority” of the jurors). Clearly, a mere numerical majority -- which is all that is required under Section 921.141(3) for the jury’s advisory sentence -- would not satisfy the “substantial majority” requirement of Apodaca. See, e.g., Johnson v. Louisiana, 406 U.S. 366, \_\_\_\_ (1972) (Blackmun, J., concurring) (a state statute authorizing a 7-5 verdict would violate Due Process Clause of Fourteenth Amendment). Relying on a mere numerical majority for the fact findings supporting a death sentence would also be directly inconsistent with the requirement of Florida law that a guilty verdict must be unanimous in all criminal cases. Williams v. State, 438 So. 2d 781,784 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1956); Brown v. State, 661 So. 2d 309 (Fla. 1st DCA 1995); Flanning v. State, 597 So. 2d 864 (Fla. 3d DCA 1992); Fla.R.Crim.P. 3.440.

In short, nothing in the existing statute establishes procedures that would allow

this Court to avoid or bypass its unconstitutionality under Ring. The statute requires findings by the Court and does not permit a death sentence based on findings by the advisory jury. Further, the advisory jury's majority-based recommendation would itself be unconstitutional as a basis for imposing a sentence of death. The statute as it exists does not allow for the constitutional imposition of a death sentence in Florida.

### **IMPOSITION OF A LIFE SENTENCE**

In 1972, the Supreme Court invalidated all then-existing state capital punishment laws, holding that they presented an undue risk that the death penalty would be imposed in an arbitrary and capricious manner. See Furman v. Georgia, 408 U.S. 238 (1972). This holding had the effect of rendering Florida's capital sentencing procedures unconstitutional. See Donaldson v. Sack, 265 So.2d 499, 502 (Fla. 1972) (holding that Furman abolished the death penalty "as heretofore imposed in this state").

In light of Furman, the Florida Supreme Court held that Fla. Stat. §775.082(1) mandated life imprisonment upon conviction for capital murder. See Donaldson, 265 So.2d at 503. Section 775.082(1) provides that a "person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life in prison." In Donaldson, the Florida Supreme Court held that this statutory provision provided for a sentence -- life imprisonment -- where the provisions for imposition of a death sentence had been rendered unconstitutional. The Court

reasoned that “eliminating the death penalty from the statute does not of course destroy the entire statute,” observing, “we have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for doing so and of course this clearly exists in these circumstances.” Id.

That same reasoning applies here. The findings required by Section 921.141 cannot be made, consistent with the requirements of the Sixth and Fourteenth Amendment as established in Ring. In this circumstance, just as in Donaldson, the appropriate outcome under Section 775.082(1) is the entry of a life sentence, because as a matter of federal and state constitutional law a judge cannot make the findings “according to the procedure set forth in s. 921.141.” As Section 775.082(1) states, without those findings “otherwise such person shall be punished by life in prison.” The same conclusion is reflected in Section 921.141(3) -- the court “shall impose sentence of life imprisonment” if it does not make the “findings requiring the death sentence” -- and Ring establishes that it would be unconstitutional and prohibited by the Sixth and Fourteenth Amendments for a trial judge to make those findings.

If further confirmation of this conclusion is needed, it is provided by Section 775.082(2), a severability clause, which confirms that if portions of the statute are rendered unconstitutional the balance of the statute is to remain in place. See Waldrup v. Dugger, 562 So. 2d 687, 693 (Fla. 1990) (“When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided ... [that] the unconstitutional provisions can be separated from the remaining valid provision ... [and] the legislative purpose expressed in the valid provisions can be accomplished

independently of those which are void”). Thus, as Donaldson establishes, the fact that the death penalty procedures of Section 921.141 are now unconstitutional does not preclude the entry of sentence but rather requires the entry of the only remaining sentence available if the death penalty cannot be imposed -- namely, a life sentence.

The Supreme Court in Ring did not explicitly address how states like Arizona (and Florida) with facially unconstitutional death penalty statutes should apply the Court’s ruling to pending cases. In Florida, that issue is controlled by this Court’s holding in Donaldson, which interpreted Section 775.082(1) to require the imposition of a life sentence following the determination that the statutory scheme was unconstitutional. Under Donaldson and the specific language of Section 775.082(1), it is not appropriate to engage in a case-by-case inquiry as to whether current law could somehow be lawfully applied in a given case notwithstanding the constitutional defects in the structure of the law.

### **OTHER ERRORS**

Assuming arguendo that this Honorable Court does not find that the statute is facially unconstitutional, there were a series of specific errors in this case rendering the death sentence unconstitutional pursuant to the Florida and United States Constitutions. These errors include: (1) The jury made no finding of aggravating circumstances. (2) The jury made no finding that the aggravating circumstances are of sufficient weight to call for the death penalty. (3) The failure to instruct the jury that this finding must be beyond a reasonable doubt. (4) The jury’s recommendation of death was only by a vote of 9 to 3. (5) The indictment contains no notice of

aggravating circumstances.

Apprendi and Ring require a rethinking of the role of the jury in Florida. The Court in Apprendi described its prior holding in Jones v. United States, 526 U.S. 227 (1999):

The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.

Our answer to that question was foreshadowed by our opinion in Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), construing a federal statute. We there noted that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” Id., at 243, n.6, 119 S.Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

530 U.S. at 476.

In Ring, the United States Supreme Court overruled, in part, its prior opinion in Walton v. Arizona, 497U.S. 639 (1990). The Court stated:

For the reasons stated, we hold that Walton and Apprendi are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule Walton to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U.S., at 647-649. Because Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ Apprendi, 530 U.S. at 497, n. 19, the Sixth Amendment requires that they be found by a jury.

\* \* \*

‘The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and administered.... If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the

single judge, he was to have it.’ Duncan v. Louisiana, 391 U.S. 145, 155-156 (1968).

The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant’s sentence by two years, but not the fact-finding necessary to put him to death. We hold that the Sixth Amendment applies to both. The judgment of the Arizona Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Ring, supra, at \_\_\_\_\_.

It is clear that in Florida, as in Arizona, the aggravating circumstances actually define those crimes which are eligible for the death penalty.

With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them – facts in addition to those necessary to prove the commission of the crime – whether the crime was accompanied by aggravating circumstances sufficient to require death or whether there were mitigating circumstances which require a lesser penalty.

State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

It is clear that under Florida law the conviction of first degree murder alone does not make a person eligible for the death penalty. The jury must also find aggravating circumstances. It is only upon proving aggravating circumstances that the defendant becomes eligible for the death penalty. Thus, in Florida, as in Arizona, the jury must find aggravating circumstances. There was a clear violation of this rule.

An additional constitutional error is that the jury made no finding that the aggravators were sufficiently weighty to call for the death penalty. Florida law requires not only the presence of aggravators, but that they are sufficiently weighty to warrant

the death penalty. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). There was no jury finding that the aggravating circumstances are sufficiently weighty to call for the death penalty.

Apprendi and Ring were also violated in that the jury was not instructed that it had to find, beyond a reasonable doubt, that the aggravating circumstances must be sufficiently weighty to call for the death penalty or that it must find, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating circumstances.

The jury was given no guidance as to by what standard it would have to find the aggravators sufficiently weighty to call for the death penalty.

The jury was also given no guidance as to what standard it would use to determine whether aggravating circumstances outweigh mitigating circumstances. The jury was not told that it must find beyond a reasonable doubt that aggravating circumstances must outweigh mitigating circumstances, they were told that mitigating circumstances must outweigh aggravating circumstances. This violates Apprendi's and Ring's requirement that any fact which increases the punishment, with the possible exception of recidivism, must be proven beyond a reasonable doubt.

An additional violation of Apprendi and Ring is the fact that the jury's verdict in support of death was only by a vote of nine to three (assuming that the jury's recommendation can be taken as satisfying Ring, which appellant disputes). In Johnson v. Louisiana, 406 U.S. 356 (1972), the Court upheld a system whereby verdicts in serious felonies must be by at least nine votes out of twelve and verdicts in capital cases must be unanimous. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court upheld verdicts of 10-2 and 11-1 in non-capital felonies. In Burch v. Louisiana,

441 U.S. 130 (1979), the Court held that a six person jury must be unanimous. The Court took pains to note that Apodaca was a non-capital case. 441 U.S. at 136. The U.S. Supreme Court has not specifically reached the issue of whether a unanimous verdict is required in a capital case. However, it has never upheld a verdict of less than nine to three, even in a non-capital case. Under either test, a verdict of eight to four violates the Federal Constitution after Apprendi and Ring.

Florida law requires a unanimous verdict. Williams v. State, 438 So. 2d 781, 784 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1956); Brown v. State, 661 So. 2d 309 (Fla. 1<sup>st</sup> DCA 1995); Flanning v. State, 597 So. 2d 864 (Fla. 3<sup>rd</sup> DCA 1992); Fla.R.Crim.P. 3.440. The eight to four verdict is in violation of this rule.

The indictment in this case is also defective pursuant to Apprendi. The indictment contains no mention of any aggravating factors or of any allegation that the aggravating factors are sufficiently weighty to call for the death penalty. IR1-2. Thus, appellant was never charged with a capital offense.

The reasoning of Apprendi and Ring is consistent with decisions of the Florida courts. In State v. Overfelt, 457 So. 2d 1385 (Fla. 1984), this Court stated:

The district court held, and we agree, “that before a trial court may enhance a defendant’s sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating.” 434 So. 2d at 948. See also Hough v. State, 448 So. 2d 628 (Fla. 5<sup>th</sup> DCA 1984); Smith v. State, 445 So. 2d 1050 (Fla. 1<sup>st</sup> DCA 1984); Streeter v. State, 416 So. 2d 1203 (Fla. 3<sup>d</sup> DCA 1982); Bell v. State, 394 So. 2d 570 (Fla. 5<sup>th</sup> DCA 1981). But see Tindall v. State, 443 So.2d 362 (Fla. 5<sup>th</sup> DCA 1983). The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the

jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

457 So. 2d at 1387. The District Courts of Appeal have consistently held that a three year mandatory minimum can not be imposed unless the use of a firearm is alleged in the information. Peck v. State, 425 So. 2d 664 (Fla. 2<sup>nd</sup> DCA 1983); Gibbs v. State, 623 So. 2d 551 (Fla. 4<sup>th</sup> DCA 1993); Bryant v. State, 744 So. 2d 1225 (Fla. 4<sup>th</sup> DCA 1999). The requirements of Apprendi and Ring must apply to the penalty determination in a capital case under the Florida and Federal Constitutions.

The denial of a jury trial is a structural error which can never be harmless. See Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). The proper remedy for this error is the imposition of a life sentence. The Court in Ring stated that the aggravating factors operate as the functional equivalent of an element of a greater offense. Ring, supra, at \_\_\_\_\_. Thus, the Court recognized that conviction of first degree murder is not enough to subject a person to the death penalty. It is the presence of sufficiently weighty aggravating circumstances which turns the offense into a death eligible offense, i.e. capital murder. Under Ring, it is only the finding of aggravating circumstances sufficiently weighty to call for the death penalty which turn the offense of first degree murder into a death eligible offense. Thus, first degree murder, without a jury verdict that there are aggravating circumstances sufficiently weighty to call for the death penalty, is a lesser included offense of capital murder. This is analogous to simple battery being a lesser included offense of aggravated battery. Appellant was only charged with, and convicted of, first degree murder. His indictment did not allege

the presence of aggravating circumstances sufficiently weighty to call for the death penalty and his jury did not find such circumstances. Appellant was convicted of ordinary first degree murder. He was not convicted of capital murder. Upon the jury's guilt phase verdict for first degree murder, without a finding of aggravating circumstances sufficiently weighty to call for the death penalty, life imprisonment is the only available penalty. Assuming arguendo, that this deficiency could be cured by a subsequent jury verdict, it did not occur in this case. At no point in the proceedings did the jury make a finding, beyond a reasonable doubt, of death eligibility. It is well-settled that the Double Jeopardy Clauses of the Florida and Federal Constitutions bar a subsequent prosecution after conviction of a lesser included offense based on the same conduct. United States v. Dixon, 509 U.S. 688 (1993); Chikitus v. Shands, 373 So. 2d 904 (Fla. 1979); State v. Witcher, 737 So. 2d 584 (Fla. 1<sup>st</sup> DCA 1999). Here, the indictment, prosecution and conviction of Appellant for ordinary first degree murder bar any subsequent prosecution seeking the death penalty. Thus, this case must be reversed for the imposition of a life sentence.

### **POINT X**

#### **THE TRIAL COURT ERRED IN FINDING THE KILLING WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.**

Because the facts of this case do not show both the intent constitutionally required for narrowing the class eligible for the death penalty and that the victim was conscious so as to experience prolonged suffering, it was error to find the especially heinous, atrocious or cruel (HAC) circumstance. All murders are unnecessary. Any murder could be characterized as heinous, atrocious or cruel (hereinafter "HAC"). However, to avoid such an overboard and unconstitutional application of HAC,

restrictions have been placed on the HAC aggravator. It is well-settled that the especially HAC aggravator does not apply unless it is clear that the defendant intended to cause unnecessary and prolonged suffering. Eg. Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990)(hypothesis consistent with crime not “meant to be deliberately and extraordinarily painful” and thus not HAC); Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Cheshire v. State, 568 so. 2d 908 (Fla. 1990); Mills v. State, 476 So. 2d 172, 178 (1985); Lloyd v. State, 524 So. 2d 396, 403 (Fla. 1988); Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989).

For example, in Bonifay v. State, 626 So. 2d 1310 (Fla. 1993), this Court recognized that the crime was “vile and senseless” where the victim unsuccessfully begged for his life, but held that especially HAC did not apply because the record did not demonstrate that Bonifay intended to inflict a high degree of pain or to torture the victim:

Both Bland and Tatum testified that Bonifay told them the victim begged for his life. Bonifay, himself, said this in his tape-recorded statement as did Barth in his live testimony. Even so, we find that this murder, though vile and senseless, did not rise to one that is especially cruel, atrocious, and heinous as contemplated in our discussion of this factor in State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U. S. 943, 94 S. Ct. 1950, 40 L.Ed.2d 295 (1974). The record fails to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise torture the victim. The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that Bonifay intended to cause the victim unnecessary and prolonged suffering. Santos v. State, 591 So. 2d 160 (Fla. 1991).

Bonifay, 626 So. 2d at 1313 (emphasis added). Likewise, in Santos v. State, 591 So. 2d 160, 163 (Fla. 1991), HAC did not apply as there was “no substantial suggestion

that Santos intended to inflict a high degree of pain or otherwise torture the victim.”

The trial court never found any intent by Appellant to cause prolonged pain and suffering in this case. Instead, the trial court’s finding of HAC was solely based on speculation as to the fear and pain of the victim. However, as explained in Teffeteller v. State, 439 So. 2d 840, 846 (Fla. 1983), the suffering of the victim is not HAC as it does not set the murder apart from the norm of capital felonies:

The fact that the victim lived for a couple hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this sense murder apart from the norm of capital felonies.

It is the intentional design of the perpetrator to torture or inflict pain rather than the pain itself which HAC is designed to cover. Mills v. State, 476 So. 2d 172, 178 (Fla. 1985)(whether victim lingers is pure fortuity, the intent of the wrongdoer is what needs to be examined). Here, the trial court did not find that Appellant had an intentional design to torture or inflict pain. In fact, the mental health testimony was that Appellant’s mental state at the time of the attack was inconsistent with any intent to cause pain.

Dr. Goldstein testified that Appellant was so dissociated that he was focusing on lashing out and not of causing pain:

My view is at the time he was so dissociated that he was focusing solely on lashing out opposed to causing pain. Causing pain, which is deliberately causing pain over and above and incremental to the act of death, is in fact a mental state. It involves cognition. It involves thinking. It involves awareness.

It’s my opinion that this is an emotional reactions, not a intellectual one that is though out, and at the time he’s attacking Miss Gomez over for whatever period of time it is, he is not thinking about intending to

purposely, knowingly, willfully, or any of the 70 odd intent terms that are used in the word deliberately attempting to cause her pain.

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Q. Do you believe he intentionally tortured Gloria Gomez?  
Was he of a state of mind to torture?

A. Again, I would give the same answer. I think it implies a level of thinking that Mr. Coday was not capable of engaging in at the time, because of his emotional arousal and psychotic state.

T. 3360-61.

A killing in an emotional rage or frenzy, or a result of a mental illness is not HAC. See Buford v. State, 403 So. 2d 943, 952 (Fla. 1981) (“a killing committed in an emotional rage was not heinous, atrocious, or cruel”); Huckaby v. State, 343 So. 2d 29 (Fla. 1979) (Court held the crimes were a result of defendant’s mental illness); Jones v. State, 332 So. 2d 615 (Fla. 1976) (paranoid psychosis precluded finding the aggravator).

Also the nature of the attack was frenzied which is inconsistent with torture. See Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994) (HAC struck even though victim was “bludgeoned and had defensive wounds” because due to frenzied attack there was no prolonged suffering or anticipation of death.)

The medical examines was unable to determine the sequence in which the wounds were received. T. 1214. He was unable to tell when consciousness was lost. T. 1253. A number of different blows could have caused a loss of consciousness. T. 1253. Gomez could have been unconscious even though she was alive. T. 1253.

It has merely been surmised that Gomez was conscious and endeared prolonged

suffering. This Court has specifically condemned the finding of HAC based on a trial judge's assumption as to pain, even where the assumption is based on a logical inference. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983)(where degree of pain not proven by state, offense is not HAC - - "logical inferences" by trial court will not suffice where state has not proved the aggravator); King v. State, 514 So. 2d 354 (Fla. 1987)(aggravator may not be based on what might have occurred).

The heinous circumstance is "inapplicable under Florida law where the victim is unconscious or unaware of impending death at the time of the attack. See Zakrzewski v. State, 717 So.2d 488, 493 (Fla.1998) (HAC requires showing of awareness of impending death); Jackson v. State, 451 So.2d 458, 463 (Fla.1984) (events occurring after victim loses consciousness may not be considered in finding HAC)." Cherry v. State, 781 So.2d 1040, 1055 (Fla.2000).

In Zakrzewski, this Court struck the heinousness circumstance where the victim "may have been" rendered unconscious. The evidence was that "Zakrzewski approached Sylvia, who was sitting alone in the living room. He hit her at least twice over the head with a crowbar. The testimony established that Sylvia may have been rendered unconscious as a result of these blows, although not dead. Zakrzewski then dragged Sylvia into the bedroom, where he hit her again and strangled her with rope." 717 So.2d at 490 (e.s.). This Court wrote at pages 492-93, that HAC cannot be based on what happens after the victim is unconscious:

As for Sylvia's death, we find that the trial court's finding of HAC was erroneous. The State has the burden of proving beyond a reasonable doubt that an aggravator has been established. See Rhodes v. State, 547

So.2d 1201, 1208 (Fla.1989). Medical testimony was offered during the trial which established that Sylvia may have been rendered unconscious upon receiving the first blow from the crowbar; Jones v. State, 569 So.2d 1234, 1238 (Fla.1990) (holding that events occurring after the death of a victim cannot be considered in determining HAC); Jackson v. State, 451 So.2d 458, 463 (Fla.1984) (holding that circumstances that contribute to a victim's death after the victim becomes unconscious cannot be considered in determining HAC). Based on the medical expert's testimony, we conclude that the State has failed to meet this burden. Therefore, we find that it was error for the trial court to apply the HAC aggravator to Sylvia's murder.

Similarly, this Court struck the circumstance in Diaz v. State, 28 Fla. Law Weekly S 687, 688-89 (Fla. Sept. 11, 2003) where the victim died of multiple gunshot wounds and the sequence of the shots could not be determined.

At bar, the evidence showed that Appellant deliberately intended to inflict pain and the evidence failed to show that Gomez was conscious so that there was prolonged suffering. HAC must be stricken.

## **POINT XI**

### **THE SENTENCE OF DEATH MUST BE VACATED AND THE SENTENCE REDUCED TO LIFE WHERE THE TRIAL COURT FAILED TO MAKE THE FINDINGS REQUIRED FOR THE DEATH PENALTY**

The legislature has made it clear under § 921.141(3) of the Florida Statutes that if the trial court is to sentence a defendant to death it “shall set forth in writing its findings” that (1) sufficient aggravating circumstances exist to justify the death penalty and (2) there are insufficient mitigating circumstances to outweigh the aggravating circumstances.<sup>13</sup> The legislature directed in § 941.141(3) that if the trial court “does

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<sup>13</sup> This Court has also recognized that both of these circumstances must exist to uphold the death penalty. See

not make the findings requiring the death sentence” within 30 days -- a life sentence must be imposed.<sup>14</sup> In this case, the trial court did file the sentencing order within 30 days, however, the order does not contain “the findings requiring death.” Thus, Appellant’s death sentence must be vacated.

As noted above, there are two specific findings “requiring the death sentence.” One is a finding that “sufficient aggravating circumstances exist” to justify the death

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Rembert v. State, 445 So. 2d 337, 340 (Fla. 1989) (sentence reduced to life even though trial court had found no mitigating circumstances and this Court upheld one aggravating circumstance); Terry v. State, 668 So. 2d 954 (Fla. 1996) (reduced to life where two aggravators were not sufficient for death even where no mitigation).

<sup>14</sup> § 921.141(3) reads as follows:

**(3) Findings in support of sentence of death. --** Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall be set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

sentence. The trial court never made this required finding -- instead it skipped this step:

THIS COURT has carefully considered and weighed the statutory aggravating factor and statutory mitigating and non-statutory mitigating factors found to exist in this case. This Court, having given great weight to the jury's recommendation, finds that the aggravating factor was proven beyond a reasonable doubt and outweighs the mitigating factors found to exist.

Accordingly, it is

ORDERED AND ADJUDGED that the sentence of this Court is as follows:

On the single count of the indictment, charging the Defendant with murder in the first degree, it is the judgement of this Court that the Defendant is **ADJUDICATED GUILTY** and sentenced to **DEATH**.

R 843.<sup>15</sup> The failure to make the required finding that sufficient aggravating circumstances exist requires vacating the death sentence and imposition of a life sentence. § 921.141(3).

## **POINT XII**

### **SECTION 921.141, FLORIDA STATUTES DOES NOT PERMIT A DEATH SENTENCE WHEN THERE IS ONLY ONE AGGRAVATING CIRCUMSTANCE.**

Section 921.141, Florida Statutes, does not authorize a death sentence when

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<sup>15</sup> Again it must be emphasized that the legislature did not state that one aggravating circumstance is sufficient to justify the death penalty unless rebutted by the fact that mitigating circumstances outweigh aggravating circumstances. Instead, the legislature stated that two evaluations must be made and two conditions must exist -- (1) an evaluation and finding of sufficient aggravation [one or even two aggravators may not be sufficient] and (2) the aggravation outweigh the mitigation. If the aggravating circumstances do not justify the death penalty, then the second evaluation is not important -- life is the appropriate sentence. Rembert; Terry.

there is only one aggravating circumstance. Subsection (2) provides that the jury is to determine whether “sufficient aggravating circumstances” exist, and whether there is exist sufficient mitigating circumstances “which outweigh the aggravating circumstances.”(E.s.) Likewise, subsection (3) provides that the judge is to determine whether “sufficient aggravating circumstances” exist, and whether there are sufficient mitigating circumstances to outweigh “the aggravating circumstances”. (E.s.)

If the Legislature intended to allow a death sentence where there was only one aggravating circumstance, it could have said so by express language in the statute. For instance, section 13-703(e), Arizona Statutes, provides for imposition of a sentence of death “if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.” (E.s.)<sup>16</sup>

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<sup>16</sup> Other states with similar provisions include Pennsylvania (42 Pa.C.S. § 9711(c)(1)(iv) (“at least one aggravating circumstance”)), Tennessee (Tenn. Stat. 39-13-204(f)(2) (“a statutory aggravating circumstance or circumstances”)), Maryland (MD Code, Criminal Law, § 2-303(i) (“one or more of the mitigating circumstances”)), Nebraska (Neb. Stat, § 29-2521 (“one or more aggravating circumstances”)), Idaho (ID ST s 19-2515 (“at least one (1) statutory aggravating circumstance”)), Wyoming (WY ST s 6-2-102(e) (“The death penalty shall not be imposed unless at least one (1) of the aggravating circumstances set forth in subsection (h) of this section is found.”)), Oklahoma (OK ST T. 21 s 701.11 (“at least one of the statutory aggravating circumstances enumerated in this act”)), Indiana (West’s A.I.C. 35-50-2-9(a) (“the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged”)), Kansas (KS ST s 21-4624 (“one or more of the aggravating circumstances”)), Louisiana (La. C.Cr.P. Art. 905.3 (“at least one statutory aggravating circumstance”)), Colorado (CO ST s 18-1.3-1302 (“at least one aggravating factor’)), Missouri (MO ST 565.032 (“a statutory aggravating circumstance or circumstances”)), South Carolina (SC ST s 16-3-20(B) (“a statutory aggravating

The Legislature has declared that criminal statutes must be strictly construed in favor of the accused. Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

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

This rule of strict construction arises from fundamental principles of due process. “To the extent that penal statutory language is indefinite or ‘is susceptible of differing constructions,’ due process requires a strict construction of the language in the defendant’s favor under the rule of lenity.” Kobel v. State, 745 So.2d 979, 982 (Fla. 4<sup>th</sup> DCA 1999) (quoting Register v. State, 715 So.2d 274, 278 (Fla. 1<sup>st</sup> DCA 1998)). This Court wrote almost a century ago: “It is a rule too well recognized to require citation of the authorities that penal laws should be strictly construed, and those in favor of the accused should receive a liberal construction.” Sanford v. State, 75 Fla. 393, 400, 78 So. 340, 342 (1918).

The same principle applies to governing sentencing. This Court wrote in State v. Rife, 789 So.2d 288, 294 (Fla.2001) (e.s.):

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circumstance”)), Illinois (IL ST CH 720 s 5/9-1(g) (“one or more of the [aggravating] factors”)), Nevada (NV ST 175.554 2(a) (“an aggravating circumstance or circumstances”)), South Dakota (SD ST s 23A-27A-4 (“at least one aggravating circumstance”)), California (Ca. Pen. Code s 190.4 (“any one or more of the special circumstances”)).

To the extent, however, that there is any ambiguity as to legislative intent created by the confluence of these statutes, the default principle in construing criminal statutes is codified in section 775.021(1), Florida Statutes (1997). See Hayes, 750 So.2d at 3. “The rules of statutory construction require courts to strictly construe criminal statutes, and that ‘when the language is susceptible to differing constructions, [the statute] shall be construed most favorably to the accused.’” *Id.* (quoting section 775.021(1)); see also McLaughlin, 721 So.2d at 1172. The rule of lenity is equally applicable to the court’s construction of sentencing guidelines. See Flowers v. State, 586 So.2d 1058, 1059 (Fla.1991).

The common sense basis for this principle is: While the state is free to write its statutes, rules, and sentencing provisions as it wishes, it is stuck with what it has written. It may not through litigation alter to its advantage the meaning of its enactments produced by the deliberative processes of rule-making and legislation.

Further, a court “may not rewrite statutes contrary to their plain language.” Hawkins v. Ford Motor Co., 748 So.2d 993, 1000 (Fla. 1999). In Hayes v. State, 750 So.2d 1, 4 (Fla.1999), the court wrote: “We are not at liberty to add words to statutes that were not placed there by the Legislature.” The Separation of Powers Clause of our constitution (Article II, Section 3) forbids the courts from substituting their judgment for that of the Legislature. See Sebring Airport Auth. v. McIntyre, 783 So.2d 238, 244-45 (Fla.2001). It is a violation of the separation of powers doctrine for the court to rewrite a statute. Johnson v. State, 660 So.2d 637, 647 (Fla. 1995).

The Florida Legislature decided that the state must prove more than one aggravating circumstance. This is the sort of line-drawing judgment that one expects the political branches to make. It is not in the power of the judicial branch to replace this judgment with its own. This Court wrote in Sebring Airport Auth., 783 So.2d at

244-45 (quoting City of Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769 (1914):

Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy; but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law.

Since the section 921.141 requires a finding of aggravating “circumstances”, imposition of a death sentence where there is only one aggravating circumstance is illegal.

In making this argument, appellant is aware that this Court has at times authorized death sentences in cases involving only a single aggravating circumstances. See, e.g., LeDuc v. State, 365 So.2d 149 (Fla.1978). Nevertheless, such cases fail to take into consideration the express plural language of the statute. Hence, they do not provide precedent for the issue presented here.

One of the two aggravating circumstances used in sentencing appellant was improperly found. Hence, there is only one aggravating circumstance, and this circumstance, alone, does not authorize a death sentence under section 921.141.

### POINT XIII

#### **THE TRIAL COURT ERRED IN RULING THAT THE STATE COULD CROSS-EXAMINE THE MENTAL HEALTH EXPERTS AS TO FACTS WHICH WOULD NOT BE USED AS A BASIS FOR THE EXPERT OPINION AND WHERE THE FACTS WERE UNDULY PREJUDICIAL AND WOULD NOT UNDERMINE THE EXPERTS FINDINGS**

Mental health experts testified that Appellant suffered an extreme mental or emotion disturbance and his ability to conform conduct to the law was impaired. The expert findings were bolstered by consideration of an incident some 20 years earlier in Germany.<sup>17</sup> Appellant proffered the testimony of Dr. Shapiro and Dr. Vicary that they would find the mental mitigators without consideration of the German incident. T. 2760, 2769. The doctors testified that the incident would only bolster their opinion. T. 2760, 2769. Appellant argued that he should be able to offer the mental health experts' opinions which were not based on the German incident, without any reference to the incident on cross-examination, because its probative value was substantially outweighed by its undue prejudice. T. 2750, 2780. The prosecutor argued that he should be allowed to cross-examine on the German incident. The trial court ruled against Appellant. T. 2764. This was error.

Cross-examination of expert witnesses can be limited, even to matters that the expert considered, if the exposure of the jury to those matters would be unfair or prejudicial. See Schwartz v. State, 695 So. 2d 452 (Fla. 4<sup>th</sup> DCA 1997)(expert cannot

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<sup>17</sup> The trial court ruled that the incident was not admissible in either the guilt or penalty phase. As a result evidence of the incident was never referred to in the guilt or penalty phase.

testify that other experts had been conferred with an agreed with his opinion).

Also, the trial court's ruling essentially involves a form of the rule of completeness. See § 90.108 (when part of statement, recording, etc. is introduced the opposing party may require introduction of complete statement, recording, etc.). The foundation of the rule of completeness is fairness. In the present case it is not fair to permit cross-examination by the state to get prejudicial facts before the jury where those facts do not legitimately aid the state.<sup>18</sup>

Finally, there would be no legitimate value of cross-examination of the expert by the state as to his consideration of the German incident. The incident supported the experts findings – it did not detract from his finding. Thus, the incident was not useful to rebut mitigation. The only true use of cross-examination of the expert regarding the incident would be to circumvent the trial court's ruling that it was not admissible and to hope that it would inflame the jury. Such cross-examination would be improper. Cf. Erwin v. Todd, 699 So. Ed 275, 277-278 (Fla. 1997)(Error to permit expert to testify to inadmissible reports even though expert opinions may be based in part on inadmissible evidence – expert may not be used as conduit for otherwise inadmissible evidence and trial court had ruled reports were inadmissible).

The error was not harmless. The jury vote was 9-3 without hearing the mental health evidence. It cannot be said that the jury might not have given a life

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<sup>18</sup> In this case the legitimate use of the facts hurt the state where they strengthened the mental mitigation. It is only the improper consideration of the facts that could help the state.

recommendation once they had been presented the powerful evidence on mental mitigation. This cause must be remanded for a new penalty phase.

#### **POINT XIV**

#### **THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO INTERVIEW THE JURORS.**

During the penalty phase Appellant moved to interview jurors regarding exposure to media reports. T. 2992, 2994. The trial court denied Appellant's motion. This was error.

After the guilt verdict there were a number of media reports about the case. A number of jurors were excused due to exposure to media reports. T. 2406-26. Then during deliberations at the penalty phase the jurors issued the following note:

(1) We have looked at the evidence, and taken several votes. There are a few of us that are still undecided (the votes did not qualify a decision)\* and would like to break for the night and continue deliberations in the morning.

\*the votes did not qualify a decision

(2) Does every juror have to have a recorded vote in favor of death or life? (As opposed to 1 or 2 people voting undecided?)

R. 710. Appellant's counsel was concerned that members of the jury wanted to vote for life but were reluctant to do so because of publicity and possible repercussions. T. 2994, 3014. Appellant also filed a proposed instruction to alleviate possible concerns. R. 717-718. The trial court denied Appellant's requests.

The decision whether to interview jurors is governed by the abuse of discretion standard. Under the unique circumstances of this case where there was much trial

publicity, jurors had been excused after the guilt verdict due to exposure to media reports, some of the remaining jurors were reluctant to decide or record a decision, and defense counsel was concerned over losing votes for life, it was an abuse of discretion to deny Appellant's motion to interview jurors. See Robinson v. State, 438 So. 2d 8 (Fla. 5<sup>th</sup> DCA 1983). This cause must be remanded for a new penalty phase.

### **POINT XV**

#### **THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED VERDICT FORM WHICH ALLOWED FOR UNDECIDED VOTES**

As mentioned in Point XV the jury indicated that there were undecided jurors.

In response the trial court gave the following instruction:

The advisory verdict need not be unanimous. The recommendation for imposition of the death penalty must be by a majority of the jury. A recommendation of incarceration for life without the possibility of parole may be made either by a majority of you, or an even division of the jury, that is even, a tie vote of 6 to 6 is a life recommendation.

T. 3013. The jury later came back again with questions about whether an undecided vote counted as life vote. T. 3014. Defense counsel argued that any further instruction would amount to an Allen charge T. 3029, and requested that the verdict form included a space for undecided votes. T. 3019, 3021. The trial court declined Appellant's requests. T. 3030-31. Appellant objected. T. 3031.

The trial court then gave the following instruction:

Ladies and gentlemen, whether an undecided vote is deemed a life vote, that is a legal matter for me to decide, and you should not concern yourself with that. It's simply a questions and a legal matter for me to decide and you should not concern yourself with that. I encourage you to vote. I cannot force you to vote. I will not force you to vote.

Your verdict forms should reflect the votes of those of you that you feel that you can vote. Nobody is being forced to vote. We encourage you to vote. Again, the verdict form will reflect that vote of those of you that feel you are capable and in a position to vote. But what the affect of a non vote is, that's a legal matter for me to be concerned with.

T. 3033-34. Under the circumstances of this case it was reversible error to deny Appellant's requests.

It is well-settled that giving an undecided jury any instruction that implies that they need to reach a decision is reversible error. See e.g. Warren v. State, 498 So. 2d 472 (Fla. 3d DCA 1986). Such instructions are not to be given in the penalty phase of a capital case. Rose v. State, 425 So. 2d 521 (Fla. 1982). Giving a second instruction to an undecided jury is particularly dangerous. United States v. Seawall, 550 F. 2d 1159 (9<sup>th</sup> Cir. 1977)(court says 2nd instruction is per se reversible error).

In the present case the trial court judge acknowledged that his instruction could be an unintentional "back door" Allen charge, T.3030, lines 13-16. He was correct. The only breakdown example of voting that the trial court gave to the jury was a 6-6 vote. The jury was never informed of a 5-3 vote with the rest undecided. Although the trial court indicated that jurors did not have to vote, the verdict form only had spaces for votes for life or death. In other words, there was no space for an undecided vote on the verdict form. There was no place for an undecided vote in a 6-6 recommendation leaving no place for an undecided vote results in a back door Allen charge. It was reversible error to deny Appellant's requests.

## **POINT XVI**

### **THE TRIAL COURT ERRED BY INSTRUCTING THE JURY**

**THAT THE CONSEQUENCE OF AN UNDECIDED VOTE IS A  
LEGAL MATTER FOR THE COURT TO DECIDE**

As mentioned in Point XVI the trial court responded to an undecided jury with the following instruction:

Ladies and gentlemen, whether an undecided vote is deemed a life vote, that is a legal matter for me to decide, and you should not concern yourself with that. It's simply a questions and a legal matter for me to decide and you should not concern yourself with that. I encourage you to vote. I cannot force you to vote. I will not force you to vote.

Your verdict forms should reflect the votes of those of you that you feel that you can vote. Nobody is being forced to vote. We encourage you to vote. Again, the verdict form will reflect that vote of those of you that feel you are capable and in a position to vote. But what the affect of a non vote is, that's a legal matter for me to be concerned with.

T. 3033-34. Defense counsel had specifically requested the trial court not to tell the jury it was a legal matter for him to consider. T. 3031. The trial court had agreed not to say it was his consideration. T. 3031.

Obviously, telling a penalty phase jury that there recommendation is advisory (as was constantly done in this case) is inadvisable in light of Ring, supra. However, repeatedly telling jurors that their vote is but a legal matter for the trial court to consider certainly gives the jury the impression that their vote is not that important compared to the trial court's decision in violation of Caldwell v. Mississippi, 105 S. Ct. 2633 (1988) and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. This cause must be reversed and remanded for a new penalty phase.

**CONCLUSION**

Based on the foregoing Argument and the authorities cited therein, Appellant

respectfully requests this Honorable Court to reverse the judgment and sentence of the trial court and remand this cause with such directives as may be deemed appropriate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the Initial Brief has been furnished to LESLIE CAMPBELL, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432, by courier this \_\_\_\_\_ day of May, 2004.

Attorney for William Coday

**CERTIFICATE OF FONT COMPLIANCE**

Counsel hereby certifies that the instant brief has been prepared with Courier  
New 12-point font.

JEFFREY L. ANDERSON  
Assistant Public Defender