Electronically Filed 11/12/2013 09:08:06 AM ET

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY,
FLORIDA

CASE NO. 2012-CF-35337-A

STATE OF FLORIDA,

Plaintiff,

vs.

BRANDON LEE BRADLEY

Defendant.
_____/

MEMORANDUM, ENDNOTES, ARGUMENT AND APPENDIX TO OBJECTIONS TO FLORIDA'S STANDARD PENALTY PHASE JURY INSTRUCTIONS.

FLORIDA STANDARD JURY INSTRUCTIONS IN
CRIMINAL CASES

Ladies and gentlemen of the jury, you have found the defendant guilty of Murder in the First Degree.

The punishment for this crime is either death or life imprisonment without the possibility of parole. The *Final decision as to what punishment shall be imposed rests*[2] with the judge of this court; however, the law requires that you, the jury, render to the court an *advisory*[3] sentence as to what punishment should be imposed upon the defendant.

The State and the defendant may now present evidence relative to the nature of the crime and the character, background or life of the defendant. You are instructed that [this evidence when considered with the evidence you have already heard] [this evidence] is presented in order that you might determine, first, whether *sufficient aggravating circumstances*[4] exist that would *justify*[5] the imposition of the death penalty and, second, whether there are mitigating circumstances *sufficient to outweigh*[6] the *aggravating circumstances*[7], if any. At the conclusion of the taking of the evidence and after argument of counsel, you *will be instructed*[8] on the factors in aggravation *and mitigation* that you *may*[9] consider.

It is now your duty to *advise*[10] the court as to the punishment that should be imposed upon the defendant for the crime of First Degree Murder. You must follow the law that will now be given to

you and render an *advisory*[11] sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether *sufficient*[12] mitigating circumstances exist that *outweigh*[13] any aggravating circumstances found to exist. The definition of aggravating and mitigating circumstances will be given to you in a few moments. As you have been told, the final decision as to which punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me. However, the law requires you to render an advisory sentence as to which punishment should be imposed—life imprisonment without the possibility of parole or the death penalty.

Although the recommendation of the jury as to the penalty is advisory in nature and is not binding, the jury recommendation must be given great weight and deference by the Court in determining which punishment to impose.

Your advisory sentence should be based upon the evidence of aggravating and mitigating circumstances that you have heard while trying the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings.

It is up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?

2. Did the witness seem to have an accurate memory?

3. Was the witness honest and straightforward in answering the attorneys' questions?

4. Did the witness have some interest in how the case should be decided?

5. Did the witness' testimony agree with the other testimony and other evidence in the case?

6. Had the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?

7. Had any pressure or threat been used against the witness that affected the truth of the witness' testimony?

8. Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court?

9. Was it proved that the witness had been convicted of a felony or a crime involving dishonesty?

10. Was it proved that the general reputation of the witness for telling the truth and being honest was bad?

You may rely upon your own conclusion about a witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

Expert witnesses are like other witnesses with one exception—the law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given on a subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

Give only if the defendant did not testify.
A defendant in a criminal case has a constitutional right not to testify at any stage of the proceedings. You must not draw any inference from the fact that a defendant does not testify.

Give only if the defendant testified.
The defendant in this case has become a witness. You should apply the same rules to consideration of [his] [her] testimony that you apply to the testimony of the other witnesses.

These are some general rules that apply to your discussion. You must follow these rules in order to return a lawful recommendation:

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your recommendation will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

2. Your recommendation must be decided only upon the evidence that you have heard from the testimony of the witnesses, [have seen in the form of the exhibits in evidence] and these instructions.

3. Your recommendation must not be based upon the fact that you feel sorry for anyone, or are angry at anyone.

4. Remember, the lawyers are not on trial. Your feelings about them should not influence your recommendation.

5. It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his or her testimony.

6. Your recommendation should not be influenced by feelings of prejudice, or by racial or ethnic bias, or by sympathy. Your recommendation must be based on the evidence, and on the law contained in these instructions.

An aggravating circumstance is a standard to guide the jury in making the choice between the alternative recommendations of life imprisonment without the possibility of parole or death. It is a statutorily enumerated circumstance which increases the gravity of a crime or the harm to a victim.

An aggravating circumstance must be proven beyond a reasonable doubt before it may be considered by you in arriving at your recommendation. In order to consider the death penalty as a possible penalty, you must determine that at least one aggravating circumstance has been proven.

The State has the burden to prove each aggravating circumstance beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to disregard an aggravating circumstance if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating circumstance exists, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance has not been proved beyond every reasonable doubt and you must not consider it in rendering an advisory sentence to the court.

Give only to the jury that found the defendant guilty.
It is to the evidence introduced during the guilt phase of this trial and in this proceeding, and to it alone, that you are to look for that proof.

Give only to a new penalty phase jury.
It is to the evidence introduced during this proceeding, and to it alone, that you are to look for that proof.

A reasonable doubt as to the existence of an aggravating circumstance may arise from the evidence, conflicts in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you determine it should receive.

The aggravating circumstances that you may consider are limited to any of the following *that are established*[14] by the evidence:

1. The capital felony was committed by a person previously convicted of a felony and [under sentence of imprisonment] [on community control] [on felony probation].[15]

2. The defendant was previously convicted of [another capital felony] [a felony involving the [use] [threat] of violence to the person].[16]

   a. The crime of (previous crime) is a capital felony.[17]

   b. The crime of (previous crime) is a felony involving the [use] [threat] of violence to another person.[18]

3. The defendant knowingly created a great risk of death to many persons.[19]

4. The capital felony was committed while the defendant was

   [engaged]
   [an accomplice]

   in

   [the commission of]
   [an attempt to commit]
   [flight after committing or attempting to commit]

   any

   [robbery].
   [sexual battery].
   [aggravated child abuse].
   [abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement].
   [arson].
   [burglary].
   [kidnapping].
   [aircraft piracy].
   [unlawful throwing, placing or discharging of a destructive device or bomb].[20]

5. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody..[21]

6. The capital felony was committed for financial gain.[22]

7. The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws[23]

8. The capital felony was especially heinous, atrocious or cruel.

"Heinous" means extremely wicked or shockingly evil.

"Atrocious" means outrageously wicked and vile.

"Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.[24]

9. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.[25]

"Cold" means the murder was the product of calm and cool reflection.

"Calculated" means having a careful plan or prearranged design to commit murder.

A killing is "premeditated" if it occurs after the defendant consciously decides to kill. 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 premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder.

10. The victim of the capital felony was a law enforcement officer engaged in the performance of [his] [her]official duties.[26]

11. The victim of the capital felony was an elected or appointed public official engaged in the performance of [his] [her] official duties, if the motive for the capital felony was related, in whole or in part, to the victim's official capacity. [27]

12. The victim of the capital felony was a person less than 12 years of age.[28]

13. The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.[29]

14. The capital felony was committed by a criminal street gang member.[30]

15. The capital felony was committed by a person designated as a sexual predator or a person previously designated as a sexual predator who had the sexual predator designation removed.

The State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance. Therefore, if you find that two or more of the aggravating circumstances are proven beyond a reasonable doubt by a single aspect of the offense, you are to consider that as supporting only one aggravating circumstance. Some examples are as follows:[31]

If you find the aggravating circumstances[32] do not justify[33] the death penalty, your advisory[34] sentence should[35] be one of life imprisonment without possibility of parole.

Should you find sufficient aggravating circumstances[36] do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine whether the mitigating circumstances[37] outweigh the aggravating circumstances.[38]that you find to exist.

A mitigating circumstance is not limited to the facts surrounding the crime. It can be anything in the life of the defendant which might indicate that the death penalty is not appropriate for the defendant. In other words, a mitigating circumstance may include any aspect of the defendant's character, background or life or any circumstance of the offense that reasonably may indicate that the death penalty is not an appropriate sentence in this case.

A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proved by the greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed.

Among the mitigating circumstances you may[39] consider are[40]:

1. The defendant has no significant history of prior criminal activity.

Conviction of (previous crime) is not an aggravating circumstance to be considered in determining the penalty to be imposed on the defendant, but a conviction of that crime may be considered by the jury in determining whether the defendant has a significant history of prior criminal activity.

2. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. The victim was a participant in the defendant's conduct or consented to the act.

4. The defendant was an accomplice in the capital felony committed by another person and [his] [her] participation was relatively minor.

5. The defendant acted under extreme duress or under the substantial domination of another person.

6. The capacity of the defendant to appreciate the criminality of [his] [her] conduct or to conform [his] [her] conduct to the requirements of law was substantially impaired.

7. The age of the defendant at the time of the crime.

8. The existence of any other factors in the defendant's character, background or life, or the circumstances of the offense that would mitigate against the imposition of the death penalty.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence that should be imposed.

Victim impact evidence. Give 1, or 2, or 3, or all as applicable.

You have heard evidence about the impact of this homicide on the

1. family,
2. friends,
3. community

of (decedent). This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by (decedent's) death. However, you may not consider this evidence as an aggravating circumstance. Your recommendation to the court must be based on the aggravating circumstances and the mitigating circumstances upon which you have been instructed.

The sentence that you recommend[41] to the court must be based upon the facts as you find them from the evidence and the law. If, after weighing the aggravating and mitigating circumstances, you determine that at least one aggravating circumstance is found to exist and that the mitigating circumstances do not outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may

recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole. Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death. If, on the other hand, you determine that no aggravating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or, in the absence of mitigating factors, that the aggravating factors alone are not sufficient, you must recommend imposition of a sentence of life in prison without the possibility of parole rather than a sentence of death.

The process of weighing aggravating and mitigating factors to determine the proper punishment is not a mechanical process. The law contemplates that different factors may be given different weight or values by different jurors. In your decision-making process, you, and you alone, are to decide what weight is to be given to a particular factor.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous.

The fact that the jury can recommend[42] a sentence of life imprisonment or death in this case on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift, and consider the evidence, realizing that human life is at stake, and bring your best judgment to bear in reaching your advisory [43]sentence.

If a majority[44] of the jury, seven or more, determine that (defendant) should be sentenced to death, your advisory[45] sentence will be:

> A *majority* [46] of the jury, by a vote of _____ *advise and recommend*[47] to the court that it impose the death penalty upon (defendant).

On the other hand, *if by six or more votes*[48] the jury determines that (defendant) should not be sentenced to death, your *advisory*[49] sentence will be:

> The jury *advises*[50] *and recommends*[51] to the court that it impose a sentence of life imprisonment upon (defendant) without possibility of parole.

When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson, dated with today's date and returned to the court. There is no set time for a jury to reach a verdict. Sometimes it only takes a few minutes. Other times it takes hours or even days. It all depends upon the complexity of the case, the issues involved and the makeup of the individual jury. You should take sufficient time to fairly discuss the evidence and arrive at a well-reasoned recommendation.

You will now retire to consider your *recommendation.*[52] as to the penalty to be imposed upon the defendant.

ENDNOTES – OBJECTIONS – REQUESTED INSTRUCTIONS

1.

The language in the standard jury instruction is objected to on the basis stated in the respective endnote. Insofar as each objection, correct jury instructions are an integral component of Due Process and a fair trial guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16 and 22 of the Florida Constitution. "Amid a sea of facts and inferences, instructions are the jury's only compass." ***U.S. v. Walters,*** 913 F.2d 388, 392 (7th Cir.1990) (refusal to give theory of defense instruction requires reversal of conviction). Arguments of counsel are no substitute for correct instructions by the court, nor can arguments of counsel cure the error caused by incorrect or incomplete instructions. ***Taylor v. Kentucky,*** 436 U.S. 478, 488-489 (1978). The absence of correct statements of law by the court denies a meaningful opportunity for the defense to effectively argue the law to the jury. This denies effective assistance of counsel, fundamental fairness, Due Process and the right to a jury trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16 and 22 of the Florida Constitution. Proposed instructions to correct identified errors are, when appropriate and whenever possible, contained in the respective endnotes. The objections and the proposed instructions are designed to specifically inform the Court of improper, erroneous, vague, confusing, misleading and/or unconstitutional jury instructions and to provide a correct statement of the law that should be substituted for the standard jury instruction to cure the error. See ***Miami Coca Cola Bottling Co. v. Mahlo***, 45 So.2d 119 (Fla.1950). The defense maintains its objections to the standard instructions even when alternative instructions are proposed. The Defendant is entitled to correct, clear, full and complete jury instructions to the jury. ***Espinosa v. Florida***, 505 U.S. 1079 (1992).

There is no reason for bad, incomplete or misleading jury instructions to be given to this jury. Errors are here expressly identified and, whenever possible, correct statements of the law are offered to replace the faulty instructions. While a defendant is not entitled to a perfect trial, the state and federal constitutions do require a fundamentally fair one. Because capital punishment is different in its finality and severity, heightened standards of due process necessarily attend its imposition. See ***Johnson v. Mississippi***, 486 U.S. 578, 108 S.Ct. 1981, 1986 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."). Faulty jury instructions defeat the requirement that imposition of capital punishment be based on a full understanding of the law. See ***Espinosa v. Florida***, 505 U.S. 1079 (1992). Because the capital sentencing procedure in Florida fails to accommodate the defendant's right to be protected against the violation of the separation of powers by the government under article II, section 3 of the Florida Constitution, and/or to provide the Fifth, Sixth and Fourteenth Amendment rights to notice and a unanimous jury determination of all the factual/statutory elements of capital first degree murder that authorize imposition of that harsh sanction, the undersigned is wholly unable to propose instructions and

procedures to cure the defects, nor should it be the duty of defense counsel to create for the state a proper mechanism whereby the State may inflict capital punishment upon a client.

As they currently exist, Florida's standard jury instructions are improper. A jury is likely to disregard consideration of a sentencing consideration upon which it has been properly instructed but which is unsupported by the evidence, but a jury is "unlikely to disregard a theory flawed in law." ***Sochor v. Florida***, 504 U.S. 527, 537-39 (1992). See ***Griffin v. United States***, 502 U.S. 46, 59 (1991) ("When jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error."). The presence of erroneous jury instructions over timely and specific objection fails to comport with the basic constitutional requirements of Due Process, heightened reliability and fundamental fairness in the context of capital punishment. When a court is provided with timely objections and correct statements of law to correct error and clarify confusion caused by bad standard jury instructions, the use of faulty jury instructions and procedures is fundamentally unfair. ***Bollenbach v. United States***, 326 U.S. 607 (1946); See ***Schweikert v. Palm Beach Speedway, Inc.***, 100 So.2d 804 (Fla.1958). These basic and fundamental principles apply to each and every one of the errors hereafter identified in the endnotes that follow.

2.

The arguments and assertions made in endnote 1 are adopted here by reference. The phrase "*[f]inal* decision as to what punishment shall be imposed rests *solely* with the judge" is an affirmative misstatement of Florida law. It is confusing when considered in the context of the jury being repeatedly, incorrectly informed that the jurors' sentencing determination is "advisory" and a "recommendation." Assuming that a recommendation from the jury is a valid procedure in general, that recommendation does not comport with the Fifth, Sixth and Fourteenth Amendments, see ***Ring v. Arizona***, 536 U.S. 584 (2002), and the undue repetition of the description of the jury determination as "advisory" or a "recommendation" dilutes the importance and significance of their capital sentencing determination:

> I recognize that this Court has held that Florida's standard jury instructions are constitutional under *Caldwell. See Combs,* 525 So.2d 853. However, in light of the decision in *Ring v. Arizona,* it is necessary to reevaluate both the validity, and, if valid, the wording of these jury instructions. The United States Supreme Court has defined the reach of *Caldwell* by stating that "*Caldwell* is relevant only to certain types of comment--those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden v. Wainwright*, 477 U.S. 168, 183 n. 15, 106 S.Ct. 2624, 91 L.Ed.2d 144 (1986).. In *Ring,* the high Court made the jury's role in capital sentencing absolutely clear--the jury must find the aggravating factors. *See Ring*, 536 U.S. at ___, 122 S.Ct. at 2243.. As the Court in Ring stated, "[T]he right to trial by jury ... would be senselessly diminished if it encompassed the factfinding

> necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Id.* Clearly, under *Ring,* the jury plays a vital role in the determination of a capital defendant's sentence through the determination of aggravating factors. However, under Florida's standard penalty phase jury instructions, the role of the jury is minimized, rather than emphasized, as is the necessary implication to be drawn from *Ring.* Under Florida's standard penalty phase jury instructions, the jury is told, even before evidence is presented in the penalty phase, that its sentence is only advisory and the judge is the final decisionmaker. *See* Fla. Std. Jury Instr. (Crim.) 7.11. The words "advise" and "advisory" are used more than ten times in the instructions, while the members of the jury are only told once that they must find the aggravating factors beyond a reasonable doubt. *See id.* The jury is also instructed several times that its sentence is simply a recommendation. *See id.* By highlighting the jury's advisory role, and minimizing its duty under *Ring* to find the aggravating factors, Florida's standard penalty phase jury instructions must certainly be reevaluated under the Supreme Court's *Caldwell v. Mississippi* decision.
>
> Just as the high Court stated in *Caldwell,* Florida's standard jury instructions "minimize the jury's sense of responsibility for determining the appropriateness of death." *Caldwell,* 472 U.S. at 341, 105 S.Ct. 2633. *Ring* clearly requires that the jury play a vital role in determining the factors upon which the sentencing will depend, and Florida's jury instructions tend to diminish that role and could lead the jury members to believe they are less responsible for a death sentence than they actually are. *Ring* has now emphasized the jury's role in this process and may compel Florida's standard penalty phase jury instructions to do the same.

Bottoson v. Moore, 833 So.2d 693, 732-733 (Fla. 2002) (Lewis, J., dissenting). The Defendant here adopts the reasoning and analysis of the Honorable Justice Lewis to explain why Florida's standard jury instructions require modification insofar as the unnecessarily repetitive and misleading use of the description of the jury's function as being "advisory" or a "recommendation."

Assuming that the constitution does not require the jury, as opposed to the judge, to unanimously determine the statutory factual criteria for imposition of capital punishment, it is nonetheless clear that the "final" decision on whether the death penalty will be imposed does NOT in Florida rest "solely" with the trial judge. The determination of whether the death penalty or life imprisonment is to be imposed is substantially impacted by the jury sentencing determination. The "final decision" is made by the Supreme Court of Florida using a proportionality review. See e.g., ***Crook v. State***, 908 So.2d 350 (Fla. 2005) (death sentence vacated and sentence of life imprisonment required where murder was the most aggravated, but not the least mitigated of capital crimes). Further, the federal courts and the

United States Supreme Court review the validity of a capital sentence. The scrutiny provided in the legal proceedings after a jury recommendation is necessarily controlled by that jury recommendation. The affirmative misstatement that the "final" decision on whether to impose a death sentence rests "solely" with the trial judge, when combined with the undue emphasis that the jury determination is "advisory" and a "recommendation" misstates that responsibility for sentencing the defendant rests solely with the judge. These statements unfairly denigrate the importance of the jury sentencing determination and they deny due process and a fair and reliable sentence contrary to article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See ***Caldwell v. Mississippi***, 472 U.S. 320 (1985).

Specifically, the significance of the jury recommendation in Florida impacts not only upon the trial judge, but also on the appellate review performed by the Florida Supreme Court. Rather than presume that the trial court's override of a life recommendation by the jury is proper, the Florida Supreme Court looks to see whether a reasonable basis exists for the recommendation. If such a basis exists, the Florida Supreme Court will vacate the death sentence and impose a life sentence.

> To sustain a jury override, this Court must conclude that the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). In other words, we must reverse the override if there is a reasonable basis in the record to support the jury's recommendation of life. *E.g.*, Scott v. State, 603 So.2d 1275, 1277 (Fla. 1992); Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987).

Barrett v. State, 649 So.2d 219, 223 (Fla. 1994). In ***Barrett***, despite four homicides being committed, the Florida Supreme Court held that the trial court incorrectly overrode the jury's life recommendations because "[t]he facts in this record show a reasonable basis on which the jury could have concluded that life imprisonment was the appropriate sentence." ***Barrett***, *id.*

Because the standard jury instructions contain an affirmative misstatement of the law that misleads the jury and creates the inference that the recommendation of the jury is not of critical importance, this Court is asked to delete the term "solely" from the standard jury instruction so that it correctly states the law. ***Simmons v. South Carolina***, 512 U.S. 154, 173-174 (1994) (Souter, J., concurring); ***Bollenbach***, supra.

Separate, related objections are made concerning the use of a "recommendation" procedure and to not having the jury unanimously find the existence of the statutory aggravating circumstances that authorize imposition of the death penalty after a conviction for first degree murder has been unanimously made by the jury. Under the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections, 2, 9, 16, 17 and 22 of the Florida Constitution, the jury is to determine the elements of an offense. The inconsistent use by the Florida Supreme Court of the standard announced in ***Tedder v. State***, 322 So.2d 908 (Fla.1975) makes a mockery of consistent jury participation in capital

sentencing procedures in Florida. Specifically, the jury determination should not be solely advisory. A trial judge should be bound by a jury determination that an aggravating circumstance has not been proved to exist beyond a reasonable doubt, and/or that a sentence of life is the appropriate punishment. ***Ring***, supra, ***Apprendi v. New Jersey***, 530 U.S. 466 (2001); ***Jones v. United States***, 526 U.S. 227 (1999); ***In re: Winship***, 397 U.S. 358, 364 (1970); ***Mullaney v. Wilbur***, 421 U.S. 684 (1975).

Assuming that the jury determination as to the facts upon which imposition of capital punishment is based case can ever constitutionally be deemed "advisory," the jury must in any event determine the existence of the elements of the offense that authorize imposition of the increased punishment. See ***Shepard v. United States***, 544 U.S. 13 (2005). If a recommendation procedure is also used, the jury must be informed of the correct standards for imposition of capital punishment and the influence the jury's determination will have on the sentence imposed. The standard instructions and procedures now violate the state and federal constitutions. The standard instructions diminish the role of jurors in capital sentencing and lead to an arbitrary, capricious and unreliable result contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 15, 16, 17 and 22 of the Florida Constitution. See ***Caldwell v. Mississippi***, 472 U.S. 320 (1985); ***Bottoson v. Moore***, 833 So.2d 693, 732-733 (Fla. 2002) (Lewis, J., dissenting). The standard announced by the Florida Supreme Court is that a jury life recommendation must be followed unless no reasonable person can agree with it. ***Tedder***, supra. An example of the arbitrary and inconsistent use of that standard is illustrated by ***Keen v. State***, 775 So.2d 263 (Fla.2001) and ***Mills v. Moore***, 786 So.2d 532 (Fla. 2001). In ***Mills***, the court reviewed a death sentence after a death warrant had been signed, and claimed to follow the standard announced in ***Tedder***. A reasonable basis for imposition of a life sentence was undeniably present in the record in ***Mills***, since the co-defendant (Keen) had already received a life sentence. The trial court's override of a life recommendation was upheld, despite a rational basis existing in the record to support the jury decision. This is an example of the arbitrary, capricious, and selective imposition of the death penalty in Florida contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and established principles of international law.

3.

The arguments contained in endnotes 1 and 2 are adopted here as if fully set forth. Further, under the rationale of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985) and based on the holdings of ***Espinosa v. Florida***, 505 U.S. 1079 (1992), ***Sochor v. Florida***, 504 U.S. 527 (1992) and ***Tedder v. State***, 322 So.2d 908 (Fla.1975), the unduly repetitive language referring to the jury function as making a "recommendation" or being "advisory" is incorrect, misleading, and unfairly prejudicial in that it denies Due Process and results in an unreliable death sentence by misleading the jury as to the extent of juror participation in capital sentencing in Florida by leading jurors to believe that the responsibility for imposing a death sentence lies solely, or even substantially only, with the trial judge. The terms "advisory" and "recommendation" are repeated so often in the standard jury instructions that this premise is unduly and prejudicially emphasized. See ***Bottoson v. Moore***, 833 So.2d 693, 733 (Fla. 2002) (Lewis, J., dissenting). As argued in the preceding note concerning use of

the term "solely", the standard instructions are incorrect and they unduly emphasize the "advisory" nature of the jury's determination in a way that diminishes the role of jurors in capital sentencing. This leads to an arbitrary, capricious and unreliable results contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution.

To the extent that Section 921.141(2), Florida Statutes, create a procedure whereby the jury only issues a recommendation rather than make specific and unanimous findings of fact have been proved to exist beyond a reasonable doubt, the statute is not ambiguous and is very clear. Accordingly, the statute is unconstitutional as written because it establishes a specific procedure that fails to accommodate the defendant's rights to Due Process, a fair trial by an impartial jury, a unanimous jury finding beyond a reasonable doubt of the facts that authorize imposition of capital punishment, and a reliable sentencing determination as guaranteed by article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Because the statute is unambiguous insofar as the procedure that it creates, the courts cannot use the rules of statutory construction to circumvent the unconstitutional procedure. The power to construe away constitutional infirmity is limited. "Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." Salina v. United States, 522 U.S. 52, 59-60 (1985). The maxim cannot apply where the statute itself is unambiguous. United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 494 (2001). To the extent that the Florida Legislature has statutorily authorized the jury to make a sentencing recommendation, that procedure does not satisfy the requirements of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The "advice" given to the trial court is statutorily authorized. However, the proceeding that is established to determine what advice should be given is not a substitute for the jury's initial obligation under the Fifth, Sixth and Fourteenth Amendments to return a verdict of capital homicide in Florida.

4.

The arguments contained in endnotes 1, 2 and 3 are adopted here by reference. The term "sufficient" instructs the jurors to determine subjectively whether the death penalty is to be imposed and fails to provide any objective standard, criteria or articulated burden of proof. Section 921.141(2), Florida Statutes, fails to direct the jurors to determine "sufficient" for what, or to what extent that "sufficiency" must be established, e.g., whether "sufficient" beyond a reasonable doubt or "sufficient" by a preponderance of the evidence. While this standard jury instruction accurately reflects the statutory language, it is contrary to heightened requirements for Due Process and the need for increased reliability of capital sentencing called for the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. The statute and instruction fail to provide any objective standard or guidance to the jury as to what amount of aggravating factors are "sufficient" to impose the death penalty. This standard results in arbitrary, capricious and unreliable imposition of death sentences that denies Due Process.

This is the first reference in the standard jury instructions to the term "aggravating circumstances." By referring only generally to "aggravating circumstances" without describing them as being only those contained in Section 921.141(5), Fla. Stat., jurors are caused to speculate about what factors might be "aggravating" and form improper conclusions. Jurors are thus allowed to prematurely form opinions as to the propriety of the death penalty based on their own notions of what should be an aggravating consideration and/or a reason to impose the death penalty. The opinions so formed must later be overcome by the defendant contrary to requirements of a fair and impartial jury, due process and reliability in sentencing set forth in article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. For that reason, the defendant proposes and requests that the jury here be specifically told at this point in the proceedings that "Aggravating circumstances are limited to those set forth in the statute upon which you will be expressly instructed by the Court and which must then be unanimously found by you to be proved to exist beyond a reasonable doubt before they may be considered." Absent this instruction, the standard instruction allows jurors to prematurely form an opinion that the death penalty is appropriate based on fundamentally impermissible considerations such as race, religion, age, gender or nationality. Additionally, the defendant asks that the jury here be told initially, prior to the introduction of any evidence, what the specific aggravating factors are that the State contends exist in this particular case so that the jury can fairly and intelligently receive the evidence and perform its role in sentencing the defendant in a constitutional manner. The absence of such a statement forces the defense to anticipate what the State intends to prove and/or to address all statutory aggravating considerations during the presentation of evidence. The requested instruction is a correct statement of the law that clarifies the jury function in capital proceedings. Omitting the requested instructions violates Due Process and denies a fundamentally fair proceeding. The proceeding thus results in arbitrary and capricious imposition of the death penalty in violation of article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

5.

The arguments set forth in the foregoing endnotes are adopted here. As set forth in the foregoing endnote concerning use of the bare term "sufficient" and as continued here, the term "justify" fails to adequately instruct the jury as to what is required to impose the death penalty and it otherwise is too subjective to be consistently applied and meaningfully reviewed as required by the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the Florida Constitution. Further, the jury is not told that, in order for the death penalty to be "justified," that determination must be unanimous and proved beyond a reasonable doubt. For that reason, the standard jury instructions and procedure violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. See ***Apprendi v. New Jersey***, 530 U.S. 466, 490 (2001). The previous arguments and objections stated concerning the constitutionality of the term "sufficient" made in the foregoing endnotes applies and is fully adopted here. The words

"justified" (as contained in the standard jury instructions) and "sufficient" (as set forth in Section 921.141(2)), either separately or when combined, fail to provide the jury with any objective test that can be consistently applied by jurors, the sentencing court, and/or the appellate court. The rejection of the procedure and omission of the proposed and requested instructions that the State must prove that the death penalty is justified beyond a reasonable doubt is Constitutional error. The law in Florida has evolved to explain that the determination of whether there are "sufficient" aggravating factors to impose the death penalty requires a reasoned weighing, and in that regard the Defendant requests that the jury be instructed as follows:

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. The death penalty is reserved for the most aggravated and least mitigated of first-degree murders. A death sentence is neither required nor compelled even if the statutory aggravating factors outweigh the mitigating considerations.

The foregoing instruction correctly states Florida law and is essential to fully, fairly and correctly instruct the jury on the correct application of the death penalty. See ***Ring***, supra; ***Cox v. State***, 819 So.2d 705, 717 (Fla. 2002); ***State v. Dixon***, 283 So.2d 1, 8 (Fla. 1973); ***Henyard v. State***, 689 So.2d 239 (Fla.1996); ***Urbin v. State***, 714 So.2d 411, 421 fn.12 (Fla. 1998); ***Garron v. State***,528 So.2d 353, 356 (Fla. 1988); ***Alvord v. Sate***, 322 So.2d 533, 540 (Fla. 1975); ***Gregg v. Georgia***, 428 U.S. 153, 203 (1976). The proposed instruction provides an objective threshold that is capable of consistent application and meaningful appellate review. This proposed instruction informs the jurors as to when statutory aggravating circumstances are "sufficient" to "justify" imposition of capital punishment. It is not enough that counsel can make these arguments to the jury. Fundamental requirements of Due Process and a fair trial require the court to fully and fairly apprise the jury of the law that is to be applied by the jury. The bare terms of "justified" and/or "sufficient" fail to fairy apprise the jury of the current standard of law in Florida - especially where the standard jury instructions talk about the determination being one of whether the mitigating considerations outweigh the aggravating circumstances. The standard instruction results in arbitrary, capricious and inconsistent application of the death penalty contrary to article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

6.

The arguments contained in the foregoing endnotes are adopted by reference and asserted here. This instruction requiring that the jury ultimately determine whether "there are mitigating circumstances sufficient to outweigh the aggravating circumstances" comports

with the clear standard set forth in Section 921.141(2), Florida Standard. That language shifts the burden of proof and/or persuasion to the defendant and it creates a higher burden to obtain a life sentence that was initially created to "justify" imposition of the death penalty. The statute (Section 921.141(2), Fla.Stat.) and the standard jury instruction violate the clear holding of ***Mullaney v. Wilbur***, 421 U.S. 684 (1975). The statute and standard jury instruction deny Due Process under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The Court cannot cure this clearly-stated and unambiguous statutory defect in procedure without violating the separation of powers proscription set forth in art. II, section 3 of the Florida Constitution. If the Court attempts to rewrite the clear language of Section 921.141(2), Fla. Stat., to create a standard other than specified in the statute, the resulting violation of the separation of powers under the Florida Constitution denies Due Process under §1 of the Fourteenth Amendment to the United States Constitution. The term "sufficient to outweigh" fails to comport with heightened standards of due process, as set forth in the foregoing endnotes and the following footnote. This instruction mandates imposition of the death penalty based on an "outweigh" standard of a presumption that the death penalty was "justified," perhaps beyond a reasonable doubt, created in the absence of mitigation and as determined by a bare majority of the jury contrary to Due Process and the holdings of ***Ring v. Arizona***, 536 U.S. 584 (2002), ***Apprendi v. New Jersey***, 530 U.S. 466 (2001); ***Jones v. United States***, 526 U.S. 227 (1999); ***In re: Winship***, 397 U.S. 358, 364 (1970); ***Mullaney v. Wilbur***, 421 U.S. 684 (1975). As noted by the Florida Supreme Court, this standard jury instruction incorrectly states the law in Florida by unconstitutionally requiring the defendant to prove that the mitigation "outweighs" the aggravating circumstances, thereby placing the burden on the defendant to prove that the death penalty is unwarranted contrary to Due Process. See ***Arango v. State***, 411 So.2d 172 (Fla. 1982). The term "outweigh" otherwise allows imposition of capital punishment when the aggravation and mitigation are of equal weight. The defendant also adopts the reasoning set forth in ***Kansas v. Marsh***, 278 Kan. 520, 102 P.3d 445 (2005), *cert. granted*, 125 S.Ct. 2517, 161 L.Ed.2d 1109 (May 31, 2005), and ***State v. Kleypas***, 272 Kan. 894, 40 P.3d 139 (2001) as to why the "outweigh" portion of Section 921.141(2) and (3) is unconstitutional and why it cannot be fixed by judicial intervention.

This statutory procedure and the instruction improperly shifts the burden of proof to the defendant and creates a higher burden to receive a life sentence than was created for the State to establish a presumption that death is the appropriate sentence based solely on the presence of aggravating circumstances and without consideration of any mitigating circumstances that exist. The statute/instruction deny Due Process, are prejudicial and unconstitutional under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

7.

The This instruction requiring that the jury ultimately determine whether "there are mitigating circumstances sufficient to outweigh the aggravating circumstances" comports with the clear standard set forth in Section 921.141(2), Florida Standard. That language shifts the burden of proof and/or persuasion to the defendant and it creates a higher burden to obtain a life sentence that was initially created to "justify" imposition of the death penalty. The statute (Section 921.141(2), Fla.Stat.) and the standard jury instruction violate the clear holding of ***Mullaney v. Wilbur***, 421 U.S. 684 (1975). The statute and standard jury instruction deny Due Process under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The Court cannot cure this clearly-stated and unambiguous statutory defect in procedure without violating the separation of powers proscription set forth in art. II, section 3 of the Florida Constitution. If the Court attempts to rewrite the clear language of Section 921.141(2), Fla. Stat., to create a standard other than specified in the statute, the resulting violation of the separation of powers under the Florida Constitution denies Due Process under §1 of the Fourteenth Amendment to the United States Constitution. The term "sufficient to outweigh" fails to comport with heightened standards of due process, as set forth in the foregoing endnotes and the following footnote. This instruction mandates imposition of the death penalty based on an "outweigh" standard of a presumption that the death penalty was "justified," perhaps beyond a reasonable doubt, created in the absence of mitigation and as determined by a bare majority of the jury contrary to Due Process and the holdings of ***Ring v. Arizona***, 536 U.S. 584 (2002), ***Apprendi v. New Jersey***, 530 U.S. 466 (2001); ***Jones v. United States***, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); ***In re: Winship***, 397 U.S. 358, 364 (1970); ***Mullaney v. Wilbur***, 421 U.S. 684 (1975). As noted by the Florida Supreme Court, this standard jury instruction incorrectly states the law in Florida by unconstitutionally requiring the defendant to prove that the mitigation "outweighs" the aggravating circumstances, thereby placing the burden on the defendant to prove that the death penalty is unwarranted contrary to Due Process. See ***Arango v. State***, 411 So.2d 172 (Fla. 1982). The term "outweigh" otherwise allows imposition of capital punishment when the aggravation and mitigation are of equal weight. The defendant also adopts the reasoning set forth in ***Kansas v. Marsh***, 278 Kan. 520, 102 P.3d 445 (2005), *cert. granted*, 125 S.Ct. 2517, 161 L.Ed.2d 1109 (May 31, 2005), and ***State v. Kleypas***, 272 Kan. 894, 40 P.3d 139 (2001) as to why the "outweigh" portion of Section 921.141(2) and (3) is unconstitutional and why it cannot be fixed by judicial intervention.

This statutory procedure and the instruction improperly shifts the burden of proof to the defendant and creates a higher burden to receive a life sentence than was created for the State to establish a presumption that death is the appropriate sentence based solely on the presence of aggravating circumstances and without consideration of any mitigating circumstances that exist. The statute/instruction deny Due Process, are prejudicial and unconstitutional under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

8.

The arguments and analyses contained in the foregoing endnotes are adopted here by reference. The jury is here affirmatively told that it *will be* instructed on the mitigating circumstances that may be considered. If the jury is not thereafter, at any time, instructed that particular considerations are valid mitigating circumstances that may be considered, there is a real danger that jurors will follow the court's instruction and, in the absence of a specific instruction that certain considerations are valid mitigating considerations, refuse to consider valid mitigating factors such as a dysfunctional childhood, mental or emotional distress, impaired capacity to conform conduct to the requirements of law, a potential for rehabilitation, and/or the ability to function well in a structured environment such as prison. A jury is presumed to follow the law and in the absence of specific instructions that these are valid mitigating considerations that are to be considered, the jury will not consider them if only the standard jury instruction is given, viz, the instruction dealing with Section 921.141(6)(h), Fla.Stat.. This exclusion of relevant mitigating evidence from due consideration skews the weighing process and violates the Eighth and Fourteenth Amendments as explained in ***Smith v. Texas***, 543 U.S. ___, 125 S.Ct. 400 (2004). See ***Stringer v. Black***, 503 U.S. 222, 232 (1992). If the jury is not separately instructed on the types of mitigation that have been recognized as valid mitigation but which are not set forth in Section 921.141(6), Florida Statute, this affirmative misstatement results in a denial of Due Process and a fair sentencing proceeding in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. The refusal of the court to instruct the jury as to the validity of specific non-statutory mitigating considerations after giving this misleading and incorrect statement is fundamentally unfair. But see ***Zakrewski v. State***, 717 So.2d 488, 495 (Fla. 1998). To the extent that the court gives the standard jury instruction stating, "The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty," the failure of the court to place its imprimatur on various valid mitigating considerations arbitrarily creates the likelihood that valid mitigating considerations will not be considered and weighed. For instance, jurors may subjectively feel that a person having a dysfunctional childhood or a strong potential for rehabilitation are NOT valid mitigating considerations. It is well established that even some *judges, trained in the law*, fail to perceive those considerations as mitigating in nature, and the only way that is detected and corrected is because of the requirement of written findings of fact by the trial judge when a death sentence is imposed. See e.g., ***Nibert v. State***, 574 So.2d 1059, 1062 (Fla.1990) ("Nibert reasonably proved this nonstatutory mitigating circumstance, and there is no competent, substantial evidence to support the trial court's refusal to consider it."); ***Campbell v. State***, 571 So.2d 415, 419 (Fla. 1990) ("As this case demonstrates, our states courts continue to experience difficulty in uniformly addressing mitigating circumstances under Section 921.141(3), Florida Statutes (1985)." In ***Campbell***, the Florida Supreme Court found it necessary to expressly inform the trial judges that, "Valid mitigating circumstances include but are not limited to the following: 1) Abused or deprived childhood. 2) Contribution to community or society as evidence by an exemplary work, military, family, or other record. 3) remorse and potential for rehabilitation; good prison record. 4) Disparate treatment of an equally culpable codefendant. 5) Charitable or

humanitarian deeds." ***Campell***, 571 So.2d at 420, fn. 4 (Fla.1990). If trial judges experience confusion in properly considering valid mitigating considerations, it follows that jurors likewise experience confusion, and guidance is necessary to insure that the death penalty is being applied in a manner that avoids arbitrary and capricious rejection of valid considerations in some cases that warrant imposition of a life sentence in other cases. For those reasons and as otherwise supported in these endnotes, the Court is asked to instruct the jury on each valid mitigating consideration identified by the defendant and for which evidence has been presented as follows: "The following are mitigating considerations that must be considered in opposition of a death sentence if you find that they have been factually established: (list statutory and non-statutory mitigating considerations)"

9.

The arguments contained in the foregoing endnotes are adopted here by reference. The term "may" erroneously allows the jury to disregard weighing valid mitigating considerations contrary to article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. A trial judge, upon finding a mitigating consideration to be reasonably established by the evidence, must attribute some mitigating worth to that consideration, as discussed in the preceding endnote. If a judge must accord weight to legitimate mitigating considerations that are established by the evidence, so too must the jury. It is arbitrary, capricious and whimsical, and thus a violation of the Eighth and Fourteenth Amendments to the United States Constitution, for mitigating evidence to be weighed in opposition of the death penalty in one case, if in another case the sentencer is free to categorically reject and give no weight to the same factually established mitigation as being irrelevant or insignificant. The standard jury instructions do not require that valid mitigating considerations must receive weight in opposition of imposition of the death penalty. To correct this error and to otherwise provide an objective standard that comports with Due Process and allows consistent use of the death penalty, the defendant asks that the jury be instructed that, "Whenever a reasonable amount of competent, uncontroverted evidence of mitigation has been presented, the mitigating consideration has been proved and it must be accepted. A mitigating circumstance shown by the evidence may only be rejected when competent, substantial evidence contradicts its existence." See ***Mahn v. State***, 714 So.2d 391, 400-401 (Fla.1998); ***Spencer v. State***, 645 So.2d 377, 385 (Fla.1994); ***Nibert v. State***, 574 So.2d 1059, 1062 (Fla.1990); ***Kight v. State***, 512 So.2d 922, 933 (Fla.1987).

10.

The arguments contained in the foregoing endnotes are adopted here by reference. As previously stated and adopted here, the language "advise the court" is improper and unconstitutional under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 17 and 22 of the Florida Constitution. ***Ring***, supra. The unnecessarily repeating of the term "advisory" demeans the importance of the jury recommendation and thereby denies Due Process and a reliable sentencing proceeding under

the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as set forth in endnotes 2 & 3.

11.

The arguments contained in the foregoing endnotes are adopted here by reference. As previously argued and fully adopted here, the term "advise the court" is unconstitutional under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. The unnecessarily repeating of the term "advisory" demeans the importance of the jury recommendation and thereby denies Due Process and a reliable sentencing proceeding under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as set forth in endnotes 2 & 3.

12.

The arguments contained in the foregoing endnotes are adopted here by reference. As argued in the preceding endnote and fully adopted here, the bare term "sufficient" invites the jurors to determine subjectively whether the death penalty is called for without any objective criteria or specific burden of proof contrary to heightened concerns for Due Process and reliability of capital sentencing called for the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. The instruction fails to provide any guidance to the jury and results in arbitrary, capricious and unreliable imposition of death sentences due to an unconstitutionally vague standard. The two words, "sufficient" and "justify", either separately or when combined, fail to provide the jury with an objective test that can be consistently applied by the jurors, the sentencing court, and/or the appellate court, and the omission of an instruction that the state must prove that the death penalty is justified beyond a reasonable doubt contributes to the error.

13.

The arguments contained in the foregoing endnotes are adopted here by reference. This instruction and use of the term "outweigh" improperly shifts the burden of proof to the defendant, creates a higher burden to receive a life sentence than was created to create a presumption that death is the appropriate sentence based solely on the presence of statutory aggravating circumstances and in the complete absence of consideration of mitigation. This "outweigh" standard mandated by Section 921.141(2) and (3), Florida Statutes, denies due process and is incorrect, prejudicial and constitutionally improper under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The instruction mandates imposition of the death penalty based on a presumption resulting from a vote of a bare majority of the jury contrary to Due Process and the holdings of ***Ring v. Arizona***, 536 U.S. 584 (2002); ***Apprendi v. New Jersey***, 530 U.S. 466 (2001); ***Jones v. United States***, 526 U.S. 227 (1999); ***In re: Winship***, 397 U.S. 358, 364 (1970); ***Mullaney v. Wilbur***, 421 U.S. 684 (1975). As

noted previously by the Florida Supreme Court, the standard jury instruction incorrectly states the law and unconstitutionally requires that the defendant prove that the mitigation "outweighs" the aggravating circumstances, thereby placing the burden on the defendant to prove that the death penalty is unwarranted contrary to due process. See ***Arango v. State***, 411 So.2d 172 (Fla. 1982). This unconstitutional standard is unequivocally set forth in Section 921.141(2), Florida Statutes, and the Court is not free to change the statutory language due to the separation of powers limitation set forth in article II, section 3 of the Florida Constitution. Further, in a situation where the aggravating and mitigating circumstances are of the same weight, under the statute and standard jury instruction a death recommendation will be returned because the mitigation does not outweigh the aggravation. This is irrational and a violation of Due Process and the requirement of reliable imposition of capital punishment mandated under the Eighth and Fourteenth Amendments to the United States Constitution. (See endnote 6).

14.

The arguments contained in the preceding endnotes are adopted here by reference. The failure of the instruction to require a unanimous jury determination that each statutory aggravating factor has been proved beyond a reasonable doubt before it can be used to impose a death sentence is unconstitutional. ***Ring***, supra. The "advisory" language and procedure mandated by Section 921.141(2), Florida Statute, has previously been objected to, and those objections are adopted here. Insofar as the determination of the existence of the statutory aggravating circumstances upon which imposition of capital punishment in Florida hinges, the jury "advisory" determination does not replace the defendant's right to notice, grand-jury indictment, and unanimous determination by the jury beyond a reasonable doubt as to the aggravating circumstances that were not present when the initial verdict of guilt was rendered. See ***Ring***, supra; ***Apprendi v. New Jersey***, 530 U.S. 466 (2001); ***Jones v. United States***, 526 U.S. 227 (1999); ***In re: Winship***, 397 U.S. 358, 364 (1970); ***Mullaney v. Wilbur***, 421 U.S. 684 (1975). Further, the language of this sentence, specifically, the factors that "are established by the evidence," can be misunderstood by reasonable jurors to state that the circumstances being enumerated by the Court have already been established by the evidence, thereby relieving the State of its burden of proof. That portion of the standard jury instruction stating "that are established by the evidence" should be replaced by language stating "if you unanimously find them to have been proved to exist as a matter of fact beyond a reasonable doubt."

15.

The arguments contained in the foregoing endnotes are adopted here by reference. An objection is made to instructing the jury on this statutory aggravating circumstance in this case because it is an element of the offense of capital murder that was not alleged in the Indictment, in violation of article I, section 15(a) of the Florida Constitution. No notice was provided that the State would be seeking the death penalty based upon this statutory aggravating circumstance. The absence of adequate notice denies procedural due process and violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The

substantive meaning of this statutory aggravating factor has been created by the Supreme Court of Florida. Accordingly, the factor violates the separation of powers doctrine of the state and federal constitutions. In that regard, the failure of the Florida Supreme Court to apply this factor in conformity with the rules of statutory construction set forth in Section 775.021, Florida Statutes, violates state law and thus the Fourteenth Amendment to the United States Constitution.

16.

The arguments contained in the preceding endnotes are adopted here by reference. This standard jury instruction tracks Section 912.141(5)(b), Florida Statutes. An objection is made to instructing the jury on this statutory aggravating circumstance in this case because it is an element of the offense of capital murder that was not alleged in the Indictment, in violation of article I, section 15(a) of the Florida Constitution. No notice was provided that the State would be seeking the death penalty based upon this statutory aggravating circumstance. The absence of adequate notice denies procedural due process and violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. To the extent that the substance of this statutory aggravating factor has been provided by the Supreme Court of Florida, the factor violates the separation of powers doctrine of the state and federal constitutions. In that regard, the failure of the Florida Supreme Court to apply this factor in conformity with the rules of statutory construction set forth in Section 775.021, Florida Statutes, violates state law and thus the Fourteenth Amendment to the United States Constitution. The aggravating factor and the standard jury instruction violate the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the Florida Constitution for several other reasons. Specifically, section 921.141(5)(b), Florida Statutes (1991) authorizes imposition of the death penalty if "the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." The language is ambiguous as to whether the "previous" conviction must occur prior to the crime for which the defendant is to be sentenced or prior to the sentencing. Contrary to rules of statutory construction that require ambiguous penal statutes to be construed in favor of the defendant, the Supreme Court of Florida interprets this ambiguous factor as requiring only that the defendant be convicted of a violent felony prior to sentencing on a capital crime. Thus, a violent felony committed contemporaneously with the capital crime can support use of this factor if the crime involved multiple victims or a separate episode of violence. ***Pardo v. State***, 563 So.2d 77 (Fla.1990). The Florida Supreme Court has interpreted the "use of threat or violence" language to mean "life-threatening crimes in which the perpetrator comes in direct contact with a human victim." ***Lewis v. State***, 398 So.2d 432, 438 (Fla.1981); ***Ford v. State***, 374 So.2d 496 (Fla.1979). However, the State is permitted to go behind a conviction of an apparently non-violent crime to show, through testimony, that violence was involved. ***Johnson v. State***, 465 So.2d 499 (Fla.1985); ***Mann v. State***, 453 So.2d 784 (Fla.1984). This procedure violates the Sixth and Fourteenth Amendments to the United States Constitution. See ***Shepard v. United*** States, 544 U.S. 13 (2005). The details of a prior violent felony are considered under Section 921.141(5)(b) factor. See ***Francois v. State***, 407 So.2d 885 (Fla.1981); ***Elledge v. State***, 346 So.2d 998

(Fla.1977). Such evidence is unfairly prejudicial. ***Castro v. State***, 547 So.2d 111, 115 (Fla.1989) (improper admission of irrelevant collateral crimes evidence is presumed harmful). Allowing such prejudicial testimony to come before the jury without restriction or direction as to its use permits the jury to use improper considerations to formulate conclusions and to impose the death penalty. The practice fails to genuinely limit the class of persons that are eligible for the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 9, 16, 17 and 22 of the Florida Constitution. Because use of this aggravating factor is qualitative, the facts of other crimes are introduced into evidence. See ***Slawson v. State***, 619 So.2d 255 (Fla.1993). The jury's consideration and/or use of unspecified factors introduced under the guise of this statutory factor is unlimited, unguided, unfettered and unrestricted, which fails to genuinely limit the class of persons eligible for the death penalty and which results in arbitrary and capricious imposition of the death penalty without sufficient standards to guide its imposition. By defining what the statutory aggravating factor means, the Supreme Court of Florida is developing substantive law on an *ad hoc* basis contrary to principles of notice, due process and separation of powers in violation of the state and federal constitutions.

17.

The arguments contained in the foregoing endnotes are adopted here by reference. This Standard Jury Instruction is objectionable and it denies due process, a fair trial and a reliable sentence under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the court is commenting on the evidence and removing a question of fact from the jury. See ***Fenelon v. State***, 594 So.2d 292, 294 (Fla.1992) ("no valid public policy reason why a trial judge should be permitted to comment on evidence of flight as opposed to any other evidence adduced at trial").

18.

The arguments contained in the foregoing endnotes are adopted here by reference. This Standard Jury Instruction is objectionable and it denies due process, a fair trial and a reliable sentence under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the court is commenting on the evidence and removing a question of fact from the jury. See ***Fenelon v. State***, 594 So.2d 292, 294 (Fla.1992) ("no valid public policy reason why a trial judge should be permitted to comment on evidence of flight as opposed to any other evidence adduced at trial"). This is precisely the type of factual determination that requires a unanimous finding beyond a reasonable doubt by the jury because it increases the punishment that may be imposed.

19.

The arguments contained in the foregoing endnotes are adopted here by reference. An objection is made to instructing the jury on this statutory aggravating circumstance in this

case because it is an element of the offense of capital murder that was not alleged in the Indictment, in violation of article I, section 15(a) of the Florida Constitution. The violation of the Florida Constitution in turn violates the Due Process clause of the Fourteenth Amendment to the United States Constitution. Objection is made to instructing the jury on this aggravating circumstance because no notice was provided that the State would be seeking the death penalty based upon this statutory aggravating circumstance. The absence of adequate notice denies procedural Due Process and violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. A further objection is made because this statutory consideration and standard jury instruction are constitutionally invalid. This jury instruction tracks section 921.141(5)(c), which authorizes imposition of the death penalty if "[t]he defendant knowingly created a great risk of death to many persons." Cases interpreting this factor now hold that the term "many persons" requires more than three persons, not counting the homicide victim, to be placed in jeopardy of death. ***Lucas v. State***, 490 So.2d 943 (Fla. 1986); ***Johnson v. State***, 393 So.2d 1069 (Fla.1981). Two people other than the homicide victim are not enough. See ***Alvin v. State***, 548 So.2d 1112 (Fla.1989); ***Lewis v. State***, 398 So.2d 432 (Fla. 1981); ***Kampff v. State***, 371 So.2d 1007 (Fla.1979). Three, without more, are not enough. ***Bello v. State***, 547 So.2d 914 (Fla.1989). For those reasons alone, the instruction in this case is improper as a matter of law. The general rule is that a killing in a public place does not establish the aggravating circumstance *per se*. ***Brown v. State***, 381 So.2d 689 (Fla.1979); ***Jacobs v. State***, 396 So.2d 713 (Fla.1981).

However, these guidelines are often violated. In ***Alford v. State***, 322 So.2d 533 (Fla.1975), the court held that the killing of three people in different rooms of the same house supported this factor while, in ***White v. State***, 403 So.2d 331 (Fla.1981), the court held that killing six people in different rooms of the same house did not support this factor. At times, the defendant must create "a high probability" of death to others. E.g., ***Jackson v. State***, 599 So.2d 103 (Fla.1992). At other times, a "reasonably foreseeable" standard of death to others has been sufficient to establish this factor. ***King v. State***, 390 So.2d 315 (Fla.1980), receded from, ***King v. State***, 514 So.2d 354, 360 (Fla.1987). By defining what the statutory aggravating factor means, the Supreme Court of Florida is making substantive law on an *ad hoc* basis contrary to requirements of notice, due process and separation of powers in violation of the state and federal constitutions. The subjective adjectives used in this factor, including the terms "many" and "great" fail to genuinely limit the class of persons eligible for the death penalty contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. If an instruction is given on this aggravating consideration, the Defendant maintains his objections and asks this Court to supplement the standard jury instruction with the law supplied by the Florida Supreme Court that is used to narrow the application of this statutory aggravating factor. Specifically, the standard jury instruction must be supplemented with the following language in order to fully, fairly, and correctly state the law of Florida as to who this particular statutory aggravating factor is to be applied: "To apply this aggravating consideration, it must be proved beyond a reasonable doubt that the defendant knowingly created an immediate and present risk of death to many persons. The term 'many persons' means that the immediate and present risk of death be posed to more than three other persons besides the homicide victim." ***Howell v. State***, 707 So.2d 674,

680 (Fla.1998); ***Williams v. State***, 574 So.2d 136, 138 (Fla.1997); ***Fitzpatrick v. State***, 437 So.2d 172 (Fla.1983). Even if the supplemental instruction is given, Defendant maintains the objections stated herein.

20.

The arguments contained in the foregoing endnotes are adopted here by reference. An objection is made to instructing the jury on this statutory aggravating circumstance in this case because it is an element of the offense of capital murder that was not alleged in the Indictment, in violation of article I, section 15(a) of the Florida Constitution. Objection is made to instructing the jury on this aggravating circumstance because no notice was provided that the State would be seeking the death penalty based upon this statutory aggravating circumstance. The absence of adequate notice denies procedural Due Process and violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. A further objection is made because this statutory aggravating factor and the respective standard jury instruction are constitutionally infirm. This standard instruction tracks section 921.141(5)(d), which authorizes imposition of the death penalty if "[t]he capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb." This factor fails to genuinely limit the class of persons eligible for the death penalty because the factor is subsumed by and is necessarily a part of the conviction for felony first-degree murder. Nothing further is needed to impose the death penalty if a defendant is convicted of felony first-degree murder. Eligibility for a death sentence in a felony-murder situation is thus automatic and arbitrary because no narrowing of the class of persons eligible for the death penalty has occurred following a conviction for first-degree murder. "An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty ***AND*** must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." ***Zant v. Stephens***, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 249-50 (1983) (emphasis added). This factor fails to meet either prong of the ***Zant*** standard, in that it fails to genuinely limit the class of persons eligible for the death penalty because all persons convicted of felony first-degree murder become eligible for the death penalty and, further, no justification is given for imposing the more severe sentence on any member of that class of persons. The Defendant here objects based on the reasoning and analysis of Justices Anstead and Kogan in ***Blanco v. State***, 706 So.2d 7, 12-14 (Fla. 1997) (Anstead, J., concurring). But see, ***Parker v. State***, 873 So.2d 270, 286 (Fla. 2004).

Because this factor can be found in the absence of notice, a conviction and a jury determination of the defendant's guilt on the underlying felony denies due process, a fair trial, notice, confrontation, assistance of counsel, and a jury trial guaranteed by art. I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The Supreme Court of Florida does not require that the State provide notice or secure a jury determination that the

defendant committed the underlying felony in order to use this statutory aggravating factor. See ***Delap v. State***, 440 So.2d 1242 (Fla.1983) (evidence found to be insufficient in first trial for felony murder did not preclude using those felonies to apply this aggravating factor following conviction of premeditated first-degree murder at second trial of same offense.). A jury trying a charge of first-degree murder is not given a special verdict form whereby it can be determined that a conviction was based on a theory of felony or premeditated murder, or both. Thus, basic constitutional guarantees do not attend the finding this factor which itself may authorize imposition of the death penalty. For example, in ***Ruffin v. State***, 397 So.2d 277 (Fla.1981), the Florida Supreme Court held:

> Ruffin argues that the trial court erred in finding as an aggravating circumstance that the murder occurred during the course of a kidnapping and robbery, first, because he was not on notice that these offenses would be considered and, second, because he was not tried for these particular offenses by the jury. Ruffin's first contention is without merit. A defendant has no right to a statement of particulars as to the aggravating circumstances upon which the State will rely to support its request for the death penalty. *Clark v. State*, 379 So.2d 97 (Fla. 1979). His second contention is also without merit. It was not necessary that Ruffin be charged and convicted of the robbery and the kidnapping that led to the murder of Mrs. Hurst. The State proved beyond a reasonable doubt that concomitant with the murder Ruffin also committed the robbery and the kidnapping. The State has clearly met its burden, and the court properly found and applied this aggravating circumstance.

It is a denial of the state and federal constitutional rights to due process, notice, a jury trial, confrontation of witnesses and equal protection to impose a death penalty based on the commission of a crime or crimes of which the defendant is never charged, tried, nor convicted by jury. Further, the absence of any findings by the jury defeats meaningful appellate review and results in arbitrary, capricious and inconsistent imposition of the death penalty in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. Further, application of this statutory aggravating factor to a crime that was committed prior to the creation, amendment and modification/ interpretation, through the legislative process and/or through judicial *fiat,* of this factor constitutes *ex post facto* application of the law in violation of article I, sections 2, 9, 10 and 16 of the Florida Constitution and/or the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Further, to the extent that the substance of the operative terms of this statutory aggravating factor has been provided by the Supreme Court of Florida, use of this aggravating consideration violates the separation of powers proscription set forth in article II, section 3 of the Florida Constitution. Additionally, an instruction on this aggravating consideration causes doubled consideration of a single aspect of a homicide to impose the death penalty, thereby improperly tipping the

weighing process unfairly on the side of imposition of the death penalty. See ***Stringer v. Black***, 503 U.S. 222, 232 (1992).

21.

The arguments contained in the foregoing endnotes are adopted here by reference. An objection is made to instructing the jury on this statutory aggravating circumstance in this case because it is an element of the offense of capital murder that was not alleged in the Indictment, in violation of article I, section 15(a) of the Florida Constitution. A violation of the indictment provision of Florida's constitution is a denial of Due Process under the Fourteenth Amendments to the United States Constitution. The absence of adequate notice denies procedural due process and violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This standard instruction tracks section 921.141(5)(e), which authorizes imposition of the death penalty if "[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." The Florida Supreme Court interprets this factor as authorizing imposition of the death penalty where the dominant or sole motive of a defendant in killing a person was to eliminate a witness. ***Scull v. State***, 533 So.2d 1137 (Fla.1988). In that regard, the standard jury instruction fails to correctly and completely state the law for applying this particular statutory aggravating consideration. The defendant requests that the standard language be clarified by adding the following language: "In order to find and weigh this aggravating consideration, it must be proved beyond a reasonable doubt that the sole or dominant motive for the killing was the elimination of a witness. Mere speculation that witness elimination was the sole or dominant motive for the murder cannot support the avoid-arrest aggravating circumstance. Likewise, the mere fact that the victim knew and could identify the defendant, without more, is insufficient to prove this statutory aggravating factor." See ***Consalvo v. State***, 697 So.2d 805, 819 (Fla. 1996); ***Scull v. State***, 533 So.2d 1137, 1147 (Fla. 1988), cert. denied, 430 U.S. 1032, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989); ***Geralds v. State***, 607 So.2d 1157 (Fla. 1992); ***Davis v. State***, 604 So.2d 794, 798 (Fla. 1992). By defining the operative terms of this factor the Florida Supreme Court is violating the separation of powers doctrine. The omission from the standard instruction of the construction placed on this factor by the Supreme Court of Florida otherwise renders the standard instruction deficient and misleading in violation of article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Further, use of this statutory aggravating factor to a crime that was committed prior to the creation, amendment and codification/interpretation, through the legislative process and/or through judicial *fiat,* of this factor constitutes *ex post facto* application of the law in violation of article I, sections 2, 9, 10 and 16 of the Florida Constitution and/or the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Further, to the extent that the substance of the operative terms of this statutory aggravating factor has been provided by the Supreme Court of Florida, use of this aggravating consideration violates the separation of powers doctrine of the state and federal constitutions.

22.

The arguments contained in the foregoing endnotes are adopted here by reference. An objection is made to instructing the jury on this statutory aggravating circumstance in this case because it is an element of the offense of capital murder that was not alleged in the Indictment, in violation of article I, section 15(a) of the Florida Constitution. A violation of the indictment provision of the Florida Constitution denies Due Process and violates the Fourteenth Amendment to the United States Constitution. No notice was provided that the State would be seeking the death penalty based upon this statutory aggravating circumstance. The absence of adequate notice denies procedural due process and violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. To the extent that the substance of the operative terms of this statutory aggravating factor has been provided by the Supreme Court of Florida, use of this aggravating consideration violates the separation of powers doctrine set forth in article II, section 3 of the Florida Constitution. Assuming that the homicide in this case was committed for financial gain, that consideration has already been fully put before the jury in the context of the aggravating consideration of a homicide committed during the commission of a robbery. Allowing both considerations to be placed before the jury unconstitutionally in a manner that allows the jury to repeatedly consider the same aggravating nature of a homicide places a thumb on the death side of the weighing process and it otherwise fails to genuinely limit the class of persons eligible for the death penalty. If this jury is instructed on this aggravating consideration, this Court is asked to supplement the standard jury instruction with the law supplied by the Florida Supreme Court that is used to narrow the application of this statutory aggravating factor. Specifically, the standard jury instruction must be supplemented with the following language in order to fully, fairly, and correctly state the law of Florida as to who this particular statutory aggravating factor is to be applied, specifically, "Before you can find and consider that a homicide was committed for financial gain, it must be shown beyond a reasonable doubt that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain." ***Walker v. State***, 707 So.2 d 300, 317 (Fla.1997); ***Finney v. State***, 660 So.2d 674, 680 (Fla. 1995), cert. denied, 517 U.S. 1107, 116 S.Ct. 1326, 134 L.Ed.2d 477 (1996)

23.

The arguments contained in the foregoing endnotes are adopted here by reference. An objection is made to instructing the jury on this statutory aggravating circumstance in this case because it is an element of the offense of capital murder that was not alleged in the Indictment, in violation of article I, section 15(a) of the Florida Constitution. A violation of the indictment provision of the Florida Constitution denies Due Process and violates the Fourteenth Amendment to the United States Constitution. No notice was provided that the State would be seeking the death penalty based upon this statutory aggravating circumstance. The absence of adequate notice denies procedural due process and violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. To the extent that the

substance of the operative terms of this statutory aggravating factor has been provided by the Supreme Court of Florida, use of this aggravating consideration violates the separation of powers doctrine of the state and federal constitutions.

24.

The arguments contained in the foregoing endnotes are adopted here by reference. An objection is made to instructing the jury on this statutory aggravating circumstance in this case because it is an element of the offense of capital murder that was not alleged in the Indictment, in violation of article I, section 15(a) of the Florida Constitution. A violation of the indictment provision of the Florida Constitution denies Due Process and violates the Fourteenth Amendment to the United States Constitution. No notice has been provided that the State would be seeking the death penalty based upon this statutory aggravating circumstance. The absence of adequate notice denies procedural due process and violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Further objection is made on the basis that the statutory aggravating factor and the respective standard jury instruction are constitutionally invalid. The standard instruction not only tracks the language of section 921.141(5)(h), which authorizes imposition of the death penalty if "the capital felony was especially heinous, atrocious or cruel," but also includes the definitions of these terms found in ***State v. Dixon***, 283 So.2d 1 (Fla. 1973). The statutory language, the language of the standard jury instruction and the standard for application of this statutory aggravating factor all fail to genuinely limit the class of persons eligible for the death penalty. The bare terms of "especially heinous, atrocious or cruel" are impermissibly vague under the Eighth and Fourteenth Amendments to the United States Constitution. ***Maynard v. Cartwright***, 486 U.S. 356 (1988); ***Godfrey v. Georgia***, 446 U.S. 420, 429 (1980). In recognition of the fact that the jury recommendation in Florida has a nearly determinative impact on whether a death sentence can and/or will be imposed initially and/or upheld on appeal, the United States Supreme Court has Court concluded that constitutional error occurs when a jury is instructed, solely in the bare terms of the statute, to consider as a basis for imposition of the death penalty whether the murder was "especially heinous, atrocious or cruel," because those bare terms fail to adequately guard against arbitrary or capricious imposition of the death penalty. 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) The definitions found in the standard instruction were supplied by the Florida Supreme Court as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means that designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one that is accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1973).

The terms of the standard jury instruction are unconstitutionally vague and they fail to genuinely limit the class of persons eligible for the death penalty. The Florida Supreme Court has, in conducting twenty years of appellate review of death sentences since ***Dixon***, used these very definitions to regulate use of the "especially heinous, atrocious or cruel" statutory aggravating factor. Thus, a track record exists as to whether these definitions genuinely limit application of the HAC factor. If the ***Dixon*** definitions are indeed sufficiently definite to ensure consistent and controlled application of the "especially heinous, atrocious or cruel" ("HAC") statutory factor, then there should be little inconsistency in the decisions of the Florida Supreme Court that has used that standard to monitor use of the "heinous, atrocious or cruel" statutory factor in Florida.

It is evident that the supplemental definitions are as vague and unconstitutional as are the bare terms of the statute condemned in ***Espinosa v. Florida***, 505 U.S. 1079 (1992). The actual use of this standard, as evidenced by reported decisions of the Florida Supreme Court, negates any claim that the ***Dixon*** definitions actually guide sentencing discretion so that improper considerations, such as race of the defendant and/or race of the victim, cannot affect sentencing decision(s) at the trial and/or appellate level. It can be readily shown that, time and again, under the very strictures of the ***Dixon*** definitions which purportedly guarantee a constitutional, "narrow construction" of the terms "heinous, atrocious or cruel," diametrically opposed results occur when the HAC factor has been approved or rejected on identical operative facts. The fact that this factor is framed in the disjunctive allows the unconstitutional use of this factor based on the definition of one term, even assuming the definition of another term is constitutionally adequate.

One of the most blatant examples of how arbitrary the use of this factor is can be found in the case of ***Raulerson v. State***, 358 So.2d 826 (Fla.1978). In ***Raulerson***, the Florida Supreme Court approved the trial court's application of the HAC factor. After re-sentencing was ordered by the Middle District of Florida, ***Raulerson v. Wainwright***, 408 F.Supp. 381 (M.D. Fla. 1980), the factor was again found by the trial judge. Its use was then condemned by the Florida Supreme Court on direct appeal and on the same facts. The court stated, "We have held that killings similar to this one were not heinous, atrocious, and cruel." ***Raulerson v. State***, 420 So.2d 567, 571 (Fla. 1982). The vacillation in application of the HAC factor, using the ***Dixon*** definitions on direct appellate review, is not confined to the court's perception of the facts in a given case, but instead on its perception of what is meant by the term, "heinous, atrocious or cruel murder." The standard itself changes as the particular facts of any given case come before the court. The failure of the definitions used by the Florida Supreme Court and contained in this standard instruction to supply any real guidance or limitation on the use of this factor renders the factor unconstitutionally vague under article I, section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution. The HAC factor, as defined in the disjunctive by the standard jury instructions, can be found to exist in virtually any murder.

For instance, in ***Hitchcock v. State***, 578 So.2d 685 (Fla. 1990), cert. denied, 502 U.S. 912 (1991), the Florida Supreme Court explained that the focus for application of the HAC factor is on the *victim's* perception of the circumstances and not on the perpetrator's perception:

> That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious or cruel. This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's. See, *Stano v. State*, 460 So.2d 890 (Fla. 1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).

Hitchcock, 578 So.2d at 692.

Thus, irrespective of whether the perpetrator intended for the murder to be prolonged or painful, the scrutiny was on the *victim's* perception of the facts. In ***Omelus v. State***, 584 So.2d 563, 566 (Fla. 1991), the Supreme Court of Florida held that, even though an otherwise "heinous, atrocious or cruel" murder occurred, the HAC factor could not be applied vicariously to the defendant who hired another to commit the murder with a gun rather than a knife. And in ***Teffeteller v. State***, 439 So.2d 840, 847 (Fla. 1983), the court rejected application of the HAC factor even though the victim languished for hours after being shot. The court explained, "The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm." The disapproval of the HAC factor was based solely on the apparent conclusion that neither Omelus nor Teffeteller necessarily intended that a torturous murder occur which, according to ***Mills***, supra, is irrelevant in applying the HAC factor, again using the standard definitions now contained in the standard jury instruction that arise from ***Dixon***. See ***Porter v. State***, 564 So.2d 1060, 1063 (Fla. 1990) (HAC factor rejected where record is consistent with the hypothesis that crime "was not meant to be deliberately and extraordinarily painful."); ***Amoros v. State***, 531 So.2d 1256, 1260 (Fla. 1988) (HAC factor rejected where victim shot three times after making "a futile attempt to save his life by running to the rear of the apartment, only to find himself trapped at the back door."). These results are patently at odds with each other. They are arbitrary. The results are arbitrary because the ***Dixon*** definitions are vague, as malleable and elusive as are the bare statutory terms "heinous, atrocious or cruel."

The concluding portion of the ***Dixon*** standard states, "The kind of crime intended to be included as heinous, atrocious, or cruel is one that is accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim." The "accompanied by additional acts" language is a nebulous catch-all that permits unconstitutional considerations to invade the sentencing equation based on the facts present in any particular case. It has been widely used to justify application of the HAC factor, even where the additional acts have nothing to do with showing that 'the crime was conscienceless or pitiless and was unnecessarily torturous to the victim."

The instruction that HAC is properly weighed when a murder is "accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim" further injects arbitrariness and indefiniteness into the sentencing determination. This is so because, even when facially constitutionally permissible acts are the distinguishing component controlling when the HAC factor is and is not to be applied, those acts are not *consistently* applied, which is another way of saying the results are arbitrary. For instance, where (geographically) a person is when he or she was killed is

essentially irrelevant to whether the killing was "conscienceless, pitiless, or unnecessarily torturous to the victim." Apparently for that reason, the Supreme Court of Florida at one time expressly disapproved application of the HAC factor based on the fact that a victim was at home when killed. See ***Simmons v. State***, 419 So.2d 316, 319 (Fla. 1982) ("The finding that the victim was murdered in his own home offers no support for the [HAC] finding."). Yet, two years later in ***Troedel v. State***, 462 So.2d 392, 398 (Fla. 1984), the same court stated, "the fact that the victims were killed in their home sets the crime apart from the norm." See ***Perry v. State***, 522 So.2d 817, 821 (Fla. 1988) ("We note also that this vicious attack was within the supposed safety of Mrs. Miller's own home, a factor we have previously held adds to the atrocity of the crime.").

This inexplicable vacillation is an arbitrary result made possible by loose definition of what is meant by a murder that is "accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim." Succinctly stated, in one case the court says that being killed in one's own home is an additional act showing that the crime was conscienceless or pitiless and unnecessarily torturous to the victim - in another case being killed in one's own home is not an aggravating consideration. What is less obvious than express application of the factor, but extant nonetheless, is the silent arbitrariness of NOT acknowledging this consideration when it is present in a case and left not addressed by the trial and appellate court when dealing with application of the HAC factor. By way of example, in ***Proffitt v. State***, 315 So.2d 461 (Fla. 1975), affirmed, ***Proffitt v. Florida***, 428 U.S. 242 (1976), the HAC factor was found by the trial court and approved on appeal because a man was stabbed in the chest while asleep in his bed. The factor was **not** applied by the trial court or the Florida Supreme Court after a new penalty phase was conducted. ***Proffitt v. State***, 510 So.2d 896, 897 (Fla. 1987). The same operative facts were present - a man was stabbed in the chest while he slept in his bed in his own house. Yet, in the same case based on the same facts, different results occur. This is arbitrary application of the HAC factor.

The "additional acts" language is unconstitutionally vague based on its use of "defensive" wounds to authorize a death sentence. At times, the Supreme Court of Florida concludes that the fortuitous position of a victim's hands when he or she was assaulted is irrelevant to find this factor. See ***Menendez v. State***, 368 So.2d 1278, 1282 (Fla. 1979) (Although his arms may have been in a submissive position at the time when he was shot - a fact which is subject to other reasonable interpretations - there is nothing to set his execution murder 'apart from the norm of capital felonies.'"). At, at other times, the HAC factor is based on the infliction of "defensive" wounds. See ***Perry v. State***, 522 So.2d 817, 821 (Fla. 1988) ("Evidence that a victim was severely beaten while warding off blows before being fatally shot has been held sufficient to support a finding that the murder was especially heinous, atrocious and cruel.").

The fact that "defensive wounds" exist logically suggests that the victim struggled and that more force was therefore "necessary" to accomplish the premeditated killing. Hence, the murder would not be "unnecessarily" torturous to the victim. Yet, the very presence of wounds that are characterized as "defensive wounds" at times justifies finding and weighing the HAC factor:

> [W]e affirm the finding that the murder was heinous, atrocious, and cruel. ***The victim had a defensive wound.*** He was struck six times in the head with a claw hammer. Even though Lamb delivered each blow with sufficient force to penetrate the skull, the victim did not die instantaneously. The evidence shows that he fell to his knees and then to the floor after Lamb pulled his feet out from under him. The victim moaned, rolling his head from side to side, until Lamb kicked him in the face. This evidence supports the court's finding that the murder was heinous, atrocious, and cruel. See, e.g., *Roberts v. State*, 510 So.2d 885 (Fla. 1987) (***defensive wounds*** with blows to back of head support finding that the murder was heinous, atrocious, and cruel), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988); *Wilson v. State*, 493 So.2d 1019 (Fla. 1986) (***defensive wounds*** and brutal beating with blows to head supports finding that murder was heinous, atrocious, and cruel); *Thomas v. State*, 456 So.2d 454 (Fla. 1984) (bludgeoned skull supports finding that murder was heinous, atrocious, and cruel); *Heiney v. State*, 447 So.2d 210 (Fla.) (seven claw hammer blows to victim's head and ***defensive wounds*** support finding that murder was heinous, atrocious, and cruel), *cert. denied*, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984).

Lamb v. State, 532 So.2d 1051, 1053 (Fla. 1988) (emphasis added).

A murder is not more heinous, atrocious or cruel simply because a victim's hands are extended outward rather than upward when he is killed or if, fortuitously, frenetic blows strike hands or fingers rather than vital organs. See ***Shere v. State***, 579 So.2d 86, 96 (Fla. 1991); ***McKinney v. State***, 579 So.2d 80, 84 (Fla.1991). In short, the definitions provided in ***Dixon*** by the Florida Supreme Court have failed to genuinely narrow the discretion of when the heinous, atrocious or cruel statutory aggravating factor is properly applied in support of a death sentence. The language is in the disjunctive, that is, this statutory factor can be found if the murder is especially heinous, atrocious or cruel. The definitions of these terms are so vague that this factor does not meaningfully restrict the class of persons eligible for the death penalty. The definitions of the terms "heinous - means extremely wicked or shockingly evil" and "atrocious means outrageously wicked and file" do not genuinely narrow the class of persons eligible for the death penalty because those definitions could reasonably be found to fit any first-degree murder. These definitions, first articulated in ***Dixon***, frustrates the clear import of ***Maynard v. Cartwright***, 486 U.S. 356 (1988) and ***Espinosa v. Florida***, 505 U.S. 1079 (1992). The standard instruction violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Further, application of this statutory aggravating factor to the facts of a crime that was committed prior to the creation, amendment and modification/interpretation, through the legislative process and/or through judicial *fiat*, of the substance of this factor constitutes *ex post facto* application of the law in violation of article I, sections 2, 9, 10 and 16 of the Florida Constitution and/or the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Further, to the extent

that the substance of the operative terms of this statutory aggravating factor has been provided by the Supreme Court of Florida, use of this aggravating consideration violates the separation of powers doctrine set forth in article II, section 3 of the Florida Constitution, and a denial of Due Process and a violation of the Fourteenth Amendment to the United States Constitution results. Those same considerations prevent defense counsel from proposing any adequate jury instruction to correct the vague terms used by the Florida Legislature and the Florida Supreme Court. It is not within the province of defense counsel to divine what the Florida Legislature intended by the bare, unconstitutionally vague statutory language and/or what the Florida Supreme Court means when different and opposing lines of cases are created applying this factor in ways expressly denounced in other lines of cases. Further, the supplemental instruction provided by the Florida Supreme Court invites the jury to weigh in support of imposing the death sentence the fact that the defendant exercised his constitutional rights because doing so shows that the defendant is "conscienceless."

25.

The arguments contained in the foregoing endnotes are adopted here by reference. An objection is made to instructing the jury on this statutory aggravating circumstance in this case because it is an element of the offense of capital murder that was not alleged in the Indictment, in violation of article I, section 15(a) of the Florida Constitution. A violation of the indictment provision of the Florida Constitution denies Due Process and violates the Fourteenth Amendment to the United States Constitution. No notice was provided that the State would seek imposition of the death penalty based on this factor. The absence of adequate notice denies procedural due process and violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. A further objection is made as to this statutory aggravating factor and the respective standard jury instruction on the bases of constitutional invalidity. This instruction is unconstitutionally vague and lacks sufficient objective criteria for consistent application of the death penalty. Using this same standard, the Florida Supreme Court has failed to consistently apply the death penalty. Section 921.141(5)(i) authorizes imposition of the death penalty if the "capital felony was a homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification." In ***Caruthers v. State***, 465 So.2d 496 (Fla. 1985), the court disapproved finding this ("CCP") factor where a robber shot a store clerk three times. The Court stated, "the cold, calculated and premeditated factor *applies to a manner of killing* characterized by heightened premeditation beyond that required to establish premeditated murder." ***Caruthers***, 465 So.2d at 498, (emphasis added). Eight pages later, in the next reported decision, use of the factor was approved because "this factor focuses more on the perpetrator's state of mind than on the method of killing." ***Johnson v. State***, 465 So.2d 499, 507 (Fla. 1986). In ***Provenzano v. State***, 497 So.2d 1177, 1183 (Fla. 1986), the court held, "as the statute indicates, if the murder was committed in a ***manner*** that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable." (emphasis in original). Then, in ***Banda v. State***, 536 So.2d 221, 225 (Fla. 1988), the Court disapproved use of the factor because "a colorable claim exists that this murder was motivated out of self-defense." The foregoing standards governing use of this factor are

inconsistent. They fail to provide any guidance as to when the CCP factor is to be properly found and weighed by the jury. The constitutional principles of substantive due process and equal protection require that a provision of law be rationally related to its purpose. ***Reed v. Reed***, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). See also ***Moore v. City of East Cleveland***, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). This principle applies to criminal laws. See ***State v. Walker***, 461 So.2d 108 (Fla. 1984). Thus, criminal statutes "must bear a reasonable relationship to the legislative objective and must not be arbitrary." ***Potts v. State***, 526 So.2d 104 (Fla. 4th DCA 1987), aff'd., ***State v. Potts***, 526 So.2d 63 (Fla. 1988). Due process requires that criminal provisions be strictly construed. ***Bifulco v. United States***, 447 U.S. 381 (1980); ***Dunn v. United States***, 442 U.S. 100, 112 (1979). See Section 775.021, Florida Statutes.

The Legislature expressly created the "CCP" statutory aggravating circumstance in 1979 "to include execution-type killings as one of the enumerated aggravating circumstances." Senate Staff Analysis and Economic Impact Statement, SB 523 (May 9, 1979, revised). See also, Barnard, "Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 936-37 (1989). The standard construction is that it "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." See ***McCray v. State***, 416 So.2d 804, 807 (Fla. 1982). The qualifier "ordinarily" thus opens the class of death eligible persons, and has resulted in application of this factor to situations far afield from what the Legislature intended. E.g., ***Duest v. State***, 462 So.2d 446 (Fla. 1985) (killing during course of robbery without more); ***Herring v. State***, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989 (1984) (defendant shot store clerk who made threatening move); ***Phillips v. State***, 476 So.2d 194 (Fla. 1985) (defendant had to reload before firing final shot). Indeed, as of 1987, 80% of cases in which CCP was applied did not involve execution-style killings. J. Kennedy, Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases, XVII Stetson Law Review 47, 96-97 (1987). It has been applied in a manner inconsistent with its legislative purpose and without regard to the requirement of strict construction of penal statutes.

In ***Porter v. State***, 564 So.2d 1060, 1063-64 (Fla.1990), the court wrote the following concerning use of this statutory circumstance:

> To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (footnote omitted). Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder.
>
> Notwithstanding the above discussion, the CCP circumstance has seldom been applied such that it has a different meaning from mere premeditation. The circumstance has been sometimes construed to require "heightened" premeditation, but has also often been construed in a manner consistent with mere premeditation. It

has not been strictly construed to conform to its legislative purpose, and has not been consistently interpreted or adequately narrowed.

The eighth amendment requires that an aggravating factor "must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." ***Lewis v. Jeffers***, 110 S.Ct. 3092, 3099 (1990). The use of the CCP factor in Florida has not met this constitutional requirement. For example, in ***Herring v. State***, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989 (1984), the court upheld use of the CCP circumstance where the defendant shot a store clerk who made an apparently threatening move and then shot the clerk again after he fell to the floor. In dissent, Justice Ehrlich noted the following:

The majority relies on the second shot, fired after the clerk was on the floor, as evidence of the heightened premeditation. But the record clearly shows the shot was fired within the same time-frame as the first. While I agree that more than enough time elapsed to allow for premeditation, I cannot agree that appellant had sufficient time for cold calculation. We have, since *McCray* and *Combs*, gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated in section 921.141(5)(i), Florida Statutes (1981). Loss of that distinction would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, **as applied**, of Florida's death penalty statute.

Later, in ***Rogers v. State***, 511 So.2d 526 (Fla. 1987), the court expressly receded from the standard used in ***Herring***:

> Where there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation." *Since we conclude that "calculation" consists of a careful plan or pre-arranged design, we recede from our holding in Herring v. State, 446 So.2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984), to the extent it dealt with this question.*

Id. at 533 (emphasis added). However, in ***Swafford v. State***, 533 So.2d 270, 277 (Fla. 1988), the court returned to the ***Herring*** standard:

> * * * This aggravating factor can be found when the evidence shows such reloading, *Phillips v. State,* 476 So.2d 194, 197 (Fla. 1985), because reloading demonstrates more time for reflection and therefore "heightened premeditation."

> *See Herring v. State*, 447 So.2d 1049, 1057 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

Then, in ***Farinas v. State***, 569 So.2d 425 (Fla. 1990), the court rejected ***Phillips*** and ***Herring*** (and apparently ***Swafford*** on the issue of reloading, writing in footnote 8:

> The state's reliance upon *Phillips v. State*, 476 So.2d 194 (Fla. 1985), is misplaced. In *Phillips*, this Court held that because appellant had to reload his revolver in order for all of the shots to be fired, he was afforded ample time to contemplate his actions and choose to kill his victim, and the record therefore amply supported the finding that the murder was cold, calculated, and premeditated. Our decision in *Phillips* however was predicated on *Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989 (1984). We receded from this portion of *Herring* in our decision in *Rogers v. State* 511 So.2d 526 (Fla. 1986), *cert. denied*, 108 S.Ct. 733 (1988).

From the foregoing, it can only be concluded that the application of the CCP circumstance in Florida does not meet the requirements set out by the Supreme Court in ***Lewis*** and thus is unconstitutional under the eighth and fourteenth amendments. Simply said, aggravating circumstance (5)(i) of Section 921.141, Florida Statutes is unconstitutionally vague, overly broad, arbitrary, and capricious on its face and as applied in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16 and 17 of the Florida Constitution.

This factor purportedly applies when "The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." Section 921.141(5)(i), Florida Statutes. The CCP circumstance was added to the statute subsequent to ***Proffitt v. Florida***, 428 U.S. 242 (1976), and thus it has not yet been expressly reviewed by the United States Supreme Court. It is well established that a statutory aggravating circumstance that is used to authorize imposition of the death penalty must genuinely limit the class of persons eligible for the death penalty: "Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition, they circumscribe the class of person eligible for the death penalty." ***Zant v. Stephens***, 462 U.S. 862, 879, 103 S.Ct. 2733, 2743 (1983). These factors are also elements of the offense. ***Ring v. Arizona***, supra.

Concern over the severity and finality of the death penalty has mandated that discretion in imposing the death penalty be narrowly limited by the Eighth and Fourteenth Amendments, and presumably by article I, section 17 of the Florida Constitution. ***Gregg v. Georgia***, 428 U.S. 153, 188-89 (1976); ***Furman v. Georgia***, 408 U.S. 238 (1972).

> Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that

> created a substantial risk that it would be inflicted in an arbitrary and capricious manner.

Gregg, 428 U.S. 153, 188 (1976). Statutory aggravating factors that authorize imposition of the death penalty must channel sentencing discretion by clear and objective standards.

> [I]f the state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

In ***Godfrey***, the Supreme Court held that capital sentencing discretion can be suitably directed and limited only if aggravating circumstances are sufficiently limited in their application to provide principled, objective bases for determining the presence of the circumstances in some cases and their absence in others. Although the state courts remain free to develop their own limiting constructions of aggravating circumstances, the limiting construction must, as a matter of Eighth Amendment law, be both provided to sentencing juries through instruction by the court and be consistently applied from case to case. Id. at 429-433. Because in Florida the jury is also participates in the sentencing, the "limiting construction" must be passed on to the jury or its recommendation violates the above-discussed constitutional considerations. An aggravating factor must genuinely narrow the class of persons eligible for the death penalty, according to rational criteria, which are rationally and consistently applied. ***McClesky v. Kemp***, 481 U.S. 279 (1987):

> [Our] decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the state must establish rational criteria that narrow the decision-maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.

McClesky, 481 U.S. 279 (1987).

Although a state's death penalty statute may be facially constitutional, an individual aggravating circumstance may be so vague, arbitrary, or overly broad as to be unconstitutional. ***State v. Chaplin***, 437 A.2d 327, 330 (Del. Super. Ct. 1981); ***State v. White***, 395 A.2d 1082 (Del. 1978); ***People v. Superior Court (Engert)***, 647 P.2d 76 (Cal.

1982); ***Arnold v. State***, 224 S.E.2d 386 (Ga. 1976); ***Cartwright v. Maynard***, 822 F.2d 1477 (10th Cir. 1987); ***Collins v. Lockhart***, 754 F.2d 958 (8th Cir.), cert. denied, 106 S.Ct. 546 (1985). Section 921.141(5)(i), on its face and as applied, has failed to "genuinely narrow the class of persons eligible for the death penalty." First, the circumstance can be applied by the Florida Supreme Court to virtually every type of first-degree murder. This aggravating circumstance has become a "catch-all" aggravating circumstance that can be, and that is, used at whim. This directly violates the teachings of ***Furman***, ***Greg***, ***Godfrey***, and ***McCleskey***. Even where the Florida Supreme Court has developed principles for applying the (5)(i) circumstance, those principles have not been applied with any consistency whatever by the trial court or the appellate court, as shown by the examples discussed previously by memorandum.

Section 921.141(5)(i) is vague. The words of the statute give no real indication as to when it should be applied. It is well established that a statute, especially a criminal statute, must be definite to be valid. "No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids." ***Lanzetta v. New Jersey***, 306 U.S. 451, 453 (1939). Definiteness is essential to the constitutionality of a statute:

> If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution and an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . .

Grayned v. City of Rockford, 407 U.S. 104, 109 (1972). The United States Supreme Court has re-emphasized that the danger of arbitrary enforcement, rather than actual notice, is actually the more important aspect of the vagueness doctrine. ***Kolender v. Lawson***, 461 U.S. 356, 358-59 (1983); ***Smith v. Goguen***, 415 U.S. 566, 574 (1974). The need for definiteness is dramatically heightened in the context of capital sentencing. The United States Supreme Court has recognized that death is different from any other punishment that can be imposed and calls for a greater degree of reliability due to its severity and finality. See ***Lockett v. Ohio***, 438 U.S. 586, 605-06 (1978).

This aggravating circumstance requires that the homicide be "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." Section 921.141(5)(i), Florida Statute. The requirement of commission in a "cold, calculated, and premeditated manner" gives little guidance as to when this factor should be found. While the word "premeditated" may be meaningful, definitions of the adjectives "cold" and "calculated" are vague and subjective and those qualities are otherwise contained in any premeditated homicide. These terms are directed to the emotions, and they fail to genuinely limit the class of persons eligible for the death penalty because these terms have meanings that can be found by reasonable persons to apply to virtually every premeditated murder.

Websters New Twentieth Century Unabridged Dictionary (Second Edition) defines cold, as follows:

1. of a temperature much lower than that of the human body; very chilly, frigid.

2. lacking heat; having lost heat; of less heat than is required; as, this soup is cold.

3. having the sensation of cold; feeling chilled, shivering; as, I am cold.

4. bland; lacking pungency or acridity. Cold plants have a quicker perception of the heat of the sun than the hot herbs. Bacon.

5. dead; lifeless. Ere the placid lips be cold. Tennyson.

6. without warmth of feeling; without enthusiasm, indifferent, as a cold personality.

7. not cordial; unfriendly; as a cold reception.

8. chilling; gloomy; dispiriting; as, they had a cold realization of their plight.

9. calm; detached; objective; as, cold logic.

10. designating colors that suggest cold, as, those of blue, green, or gray.

11. still far from what is being sought and of the seeker.

12. completely mastered; as, the actor has his lines down cold (Slang).

13. insensible; as, the boxer was knocked cold. (Slang).

14. in hunting, faint; not strong; said of a scent.

cold comfort; little or no comfort at all; in cold blood; without the excuse of passion, with deliberation.
to catch cold; to become ill with a cold; also to take cold.

to throw cold water on; to discourage where support was expected; to introduce unlooked for objections.

syn. -- wintry, frosty, bleak, indifferent, unconcerned, passionless, apathetic, stoical, unfeeling, forbidding, distant, reserved, spiritless, lifeless.

Id. at 354. There are fourteen different definitions of this word. The five most common definitions are not helpful to the question here. However, definitions 6, 8, and 9 above all

are arguably relevant and are highly subjective attempts to describe emotional states. The word "cold" is subject to many interpretations, all of which are highly subjective.

The word "calculated" is equally subjective. It is defined as follows:

1. relating to something which may be or has been subjected to calculation; as, a calculated plot.

2. designed or suitable for; as, a machine calculated for rapid work. [Colloq.]

Websters, *supra*, at 255. The term "calculate" means:

1. to ascertain by computation; to compute; to reckon; as, to calculate distance.
2. to ascertain or determine by reasoning; to estimate.

3. to fit or prepare by adaption of means to an end; to make suitable; generally in the past participle.

This letter was admirably calculated to work on those to whom it was addressed. McCauley.

4. to intend; to plan; used in the passive.

5. to think; to suppose; to guess; as, I calculate it will rain. (Coloq.)

Syn. -- compute, estimate, reckon, count.

Websters, *supra* at 255. This word is subject to differing meanings, all of which are highly subjective.

The terms "cold" and "calculated" suffer from the same deficiency as terms held vague in ***Espinosa***, supra, ***Maynard v. Cartwright***, supra and ***People v. Superior Court of Santa Clara County (Engert)***, supra. Here, as in ***Engert***, "The terms address the emotions and subjective, idiosyncratic values. While they stimulate feelings of repugnance, they have no direct content." 647 P.2d at 78. Here, as in ***Arnold v. State***, supra, the terms are "highly subjective." 224 S.E.2d at 392. The finding of this aggravating circumstance depends on a finding that the homicide is "cold, calculated, and premeditated. The terms cold and calculated are unduly vague and subjective. This is especially true when considered in the context of the special need for reliability in capital sentencing.

Further, the "without any pretense of legal or moral justification" phrase renders the aggravating circumstance unconstitutional because it has resulted in arbitrary, capricious and inconsistent application of this factor. The CCP factor is the only one that requires the jury and court to make a finding that two seemingly unrelated elements apply before it may be used to support a sentence of death. It reads, in full: "(i) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner **without any pretense of moral or legal justification.**" Section 921.141, Fla.Stat. (emphasis supplied). The "without any pretense of moral or legal justification" language is vague, unrelated to the first part of the circumstance, incapable of a narrowing construction, and has not been consistently or narrowly construed. "Pretense" means "pretending, make-believe." Oxford

American Dictionary. It tells the jurors not to apply the circumstance unless they find a false reason for the killing that does not justify it on real moral or legal grounds. Compare ***Banda v. State***, 536 So.2d 221, 224-25 (Fla.1988) (claim of self-defense rejected at guilt phase, but testimony of prior threats by victim, when given by disinterested witnesses, sufficient to preclude finding of circumstance) with ***Cannady v. State***, 427 So.2d 723, 730-31 (Fla. 1983) (circumstance properly found where only self defense evidence came from defendant himself). See also, ***Williamson v. State***, 511 So.2d 289, 293 (Fla. 1987). These distinctions are not sufficient under the Eighth Amendment, and in any event are never explained to jurors, who hear only the standard instruction that comes right from the statutory language, supplemented by the interpretation of the Florida Supreme Court that is also unconstitutionally vague.

The standard jury instruction on the CCP circumstance is unconstitutional and renders the death penalty unconstitutional as applied because it is subjected to the judgment of unguided juries. The jury participates in capital sentencing in Florida. Jurors must unanimously determine the existence of aggravating factors beyond a reasonable doubt pursuant to ***Ring***, supra, and ***Apprendi***, supra. The just must also unanimously determine whether the death penalty is justified beyond a reasonable doubt. Nevertheless, the jury instruction on the instant circumstance assures arbitrariness and maximizes discretion in reaching the penalty verdict. The Florida Supreme Court has promulgated standard jury instructions for use in the trial courts of this state. Although the trial courts may substitute correct statements of the law when standard jury instructions are incorrect, the institutional effect of the standard instructions renders Florida's capital sentencing scheme unconstitutional. All jury recommendations in cases resulting in a death sentence in the trial court affect proportionality review, leading to arbitrary application of the death penalty in Florida where the jury recommendation has been infected by the unconstitutional circumstance.

> [Caselaw] produces a scattershot pattern of virtually identical cases, in some of which the ["CCP"] aggravating factor is applied and in the remainder of which it is not. The constitutional requirement of consistency, as well as Florida's legal mandate for proportionality in capital sentencing, are both clearly violated by such a pattern.

Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases, XVII Stetson Law Review 47, 96-97 (1987). The CCP circumstance and the standard jury instruction contain vague, subjective language and they have not been consistently construed or applied. This instruction and standard for application of the cold, calculated and premeditated murder statutory aggravating factor fail to genuinely narrow the class of persons eligible for the death penalty. Hence, the factor, the instruction and the standard for application of the statutory aggravating factor are unconstitutional under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. To the extent that the substance of the operative terms of this statutory aggravating factor has been provided by the Supreme Court of Florida, use of this aggravating consideration violates the separation of powers

doctrine set forth in article II, section 4 of the Florida Constitution. The "gloss" created by the Florida Supreme Court to direct application of this aggravating factor is itself flawed, in that it is so subjective that it fails to genuinely limit the class of persons eligible for the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

26.

The arguments contained in the foregoing endnotes are adopted here by reference. An objection is made to instructing the jury on this statutory aggravating circumstance in this case because it is an element of the offense of capital murder that was not alleged in the Indictment, in violation of article I, section 15(a) of the Florida Constitution. A violation of the indictment provision of the Florida Constitution denies Due Process and violates the Fourteenth Amendment to the United States Constitution. No notice was provided that the State would be seeking the death penalty based upon this statutory aggravating circumstance. The absence of adequate notice denies procedural due process and violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

27.

The arguments contained in the foregoing endnotes are adopted here by reference. An objection is made to instructing the jury on this statutory aggravating circumstance in this case because it is an element of the offense of capital murder that was not alleged in the Indictment, in violation of article I, section 15(a) of the Florida Constitution. A violation of the indictment provision of the Florida Constitution denies Due Process and violates the Fourteenth Amendment to the United States Constitution. No notice was provided that the State would be seeking the death penalty based upon this statutory aggravating circumstance. The absence of adequate notice denies procedural due process and violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

28.

The arguments contained in foregoing endnotes are adopted here by reference. An objection is made to instructing the jury on this statutory aggravating circumstance in this case because it is an element of the offense of capital murder that was not alleged in the Indictment, in violation of article I, section 15(a) of the Florida Constitution. A violation of the indictment provision of the Florida Constitution denies Due Process and violates the Fourteenth Amendment to the United States Constitution. No notice was provided that the State would be seeking the death penalty based upon this statutory aggravating circumstance. The absence of adequate notice denies procedural due process and violates

article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

29.

The arguments contained in the foregoing endnotes are adopted here by reference. An objection is made to instructing the jury on this statutory aggravating circumstance in this case because it is an element of the offense of capital murder that was not alleged in the indictment, in violation of article I, section 15(a) of the Florida Constitution. A violation of the indictment provision of the Florida Constitution denies Due Process and violates the Fourteenth Amendment to the United States Constitution. Further objections are made to instructing the jury on this aggravating circumstance on the bases that it is unsupported by competent evidence and no notice was provided that the State would be seeking the death penalty based upon this statutory aggravating circumstance. The absence of adequate notice denies procedural due process and violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

30.

The arguments contained in the foregoing endnotes are adopted here by reference. An objection is made to instructing the jury on this statutory aggravating circumstance in this case because it is a statutory element of the offense of capital murder that was not alleged in the indictment, in violation of article I, section 15(a) of the Florida Constitution. No notice has been given that the State would be seeking the death penalty based upon this statutory aggravating circumstance. The absence of adequate notice denies procedural due process and violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This statutory aggravating circumstance denies substantive due process and punishes persons who merely are the member of "a criminal street gang" in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution. See ***State v. O.C.***, 748 So.2d 945 (Fla. 1999). The statute and jury instruction are unconstitutional because they do not require any rational nexus between the criminal conduct and the imposition of the death penalty, and instead punish the class of "street gang members" more harshly than other citizens who commit the same act.

31.

The arguments contained in the foregoing endnotes are adopted here by reference. This requested instruction comes as a part of the requirement contained in Florida's Standard Jury Instructions in Criminal Cases requiring that the defense identify those statutory aggravating circumstances that overlap and cause repeated consideration of the same aspect

of an offense to impose the death penalty. See ***Castro v. State***, 597 So.2d 259, 261 (Fla. 1992). Adequate appellate review of the imposition of a death sentence and the erroneous use of statutory aggravating factors by the jury cannot be meaningfully and consistently obtained in the absence of express findings by the jury that demonstrate the adherence to the "anti-doubling" requirement. At a minimum, the defense requests that the jury be instructed, as required by the standard jury instruction, as follows: "Some examples are as follows: The especially heinous, atrocious or cruel aggravating circumstance is so broad that it encompasses all other aggravating circumstances."

32.

The arguments contained in the preceding endnotes are adopted here by reference. This instruction is based on the standard set forth in section 921.141(2), Florida Statutes. Because there is no standard of proof given, the jury may find that there are "sufficient" aggravating circumstances to "justify" imposition of the death penalty based upon a mere preponderance of the evidence. Indeed, because the jury is not instructed at this point to consider the mitigation that exists, the procedure creates a presumption that death is the appropriate sanction based solely on the consideration of aggravating circumstances. That presumption must later be overcome by showing that the mitigating circumstances "outweigh" the aggravating circumstances found to exist. This places the burden of persuasion on the defendant, and it creates a higher burden for imposition of a life sentence than existed when the presumption that the death penalty is "justified" was created. This procedure violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See ***In re: Winship***, 397 U.S. 358 (1970) and ***Mullaney v. Wilbur***, 421 U.S. 684 (1975).

33.

The arguments contained in the foregoing endnotes are adopted here by reference. As previously stated in endnotes and adopted by reference and re-asserted here, the term "justify" is too subjective for consistent application and it otherwise is part of an unconstitutional procedure whereby the burden of persuasion is shifted to the defendant to prove that a life sentence is justified, and the burden is higher than was on the State to create a presumption that the death penalty is the appropriate sanction. This violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution, as articulated in the preceding endnotes pertaining to this language.

34.

The arguments contained in the foregoing endnotes are adopted here by reference. Under the rationale of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985) and based on the holdings of ***Espinosa v. Florida***, 505 U.S. 1079 (1992), ***Sochor v. Florida***, 504 U.S. 527 (1992) and

Tedder v. State, 322 So.2d 908 (Fla.1975), this unduly repetitive language is incorrect, misleading, and is unconstitutionally prejudicial in that it denies due process and results in an unreliable death sentence by affirmatively misinforming the jury as to the extent of juror participation in capital sentencing in Florida. It leads jurors to believe that the responsibility for imposing a death sentence lies solely with the trial judge. The deference given to the jury recommendation at the trial and the appellate level are not adequately explained to the jury. The standard instruction diminishes the perception of the jurors as to their role in capital sentencing and leads to an arbitrary, capricious and unreliable result contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. Further, the rendition of an "advisory" sentence by the jury does not satisfy the Fifth, Sixth and Fourteenth Amendment requirements that capital crimes be alleged in the indictment in Florida, that notice of the charged offense be provided, and that a unanimous jury determine beyond a reasonable doubt the existence of the elements of an offense that subject the defendant to the punishment that is to be inflicted. See ***Shepard v. United States***, 544 U.S. 13 (2005); ***United States v. Booker***, 543 U.S. 220 (2005), ***Ring* v. Arizona**, 536 U.S. 584 (2002), ***Apprendi v. New Jersey***, 530 U.S. 466 (2001), and ***Jones v. United States***, 526 U.S. 227 (1999). But see, ***Winkles v. State***, 894 So.2d 842 (Fla. 2005); ***Bottoson v. Moore***, 833 So.2d 693 (Fla. 2002).

35.

The arguments contained in the foregoing endnotes are adopted here by reference. The term "should" does not require that a course of conduct be followed. The jury instruction should state that mitigating circumstances "must" or "shall" be considered and weighed in opposition of the death penalty if that circumstance is established by the evidence. Accordingly, the term "should" is objectionable because it erroneously allows the jury to disregard valid mitigation that has been presented. This violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the holding of ***Smith v. Texas***, ___ U.S. ___, 125 S.Ct. 400 (2004). See ***Stringer v. Black***, 503 U.S. 222, 232 (1992). The equivocal instruction should be replaced with the mandatory term "must."

36.

The arguments contained in the foregoing endnotes are adopted here by reference. The term "sufficient aggravating circumstances" is too subjective a standard. It denies Due Process and fails to provide meaningful guidance as to when a death sentence is to be imposed. The law in Florida concerning imposition of capital punishment has established that the death penalty is reserved for the most aggravated and least mitigated of capital offenses. Even when the aggravating circumstances outweigh the mitigating circumstances, imposition of the capital punishment is neither required nor compelled. The determination of whether there are "sufficient" aggravating circumstances is not a counting process, but instead a reasoned weighing. The standard jury instructions create a presumption that death is

appropriate when solely aggravating circumstances are considered to determine whether the aggravation is "sufficient" without any consideration of the mitigating circumstances. This vague term in the context of imposition of the death penalty violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. In any event, the failure of the jury to unanimously find the existence of "sufficient aggravating circumstances" to justify imposition of capital punishment denies the right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Florida Constitution. ***Ring v. Arizona***, 536 U.S. 584 (2002), ***Apprendi v. New Jersey***, 530 U.S. 466 (2001); ***Jones v. United States***, 526 U.S. 227 (1999); ***Mullany v. Wilbur***, 421 U.S. 684 (1975); ***State v. Overfelt***, 457 So.2d 1385 (Fla. 1984).

37.

The arguments contained in the foregoing endnotes are adopted here by reference. The complete omission in the standard jury instructions of any definition explaining what forms a "mitigating consideration" results in arbitrary and whimsical imposition of the death penalty and denies due process and results in arbitrary, capricious and unguided imposition of the death penalty contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. The absence any definition of what constitutes mitigation as a matter of law is tantamount to the absence of an instruction on reasonable doubt, and the error is identical to that discussed in ***Cage v. Louisiana***, 498 U.S. 39 (1990) and ***Sullivan v. Louisiana***, 508 U.S. 275 (1993). Because Florida is a "weighing" state, the judge and the jury must be given clear guidelines so that the factors used in one case to sentence a defendant to life or death receive the same consideration when the factors are present in another case. Vacillation in consideration the use of identical considerations renders imposition of the death penalty arbitrary, capricious and whimsical. Violations of the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the Florida Constitution result. ***Furman v. Georgia***, 408 U.S. 238 (1972). This Court is asked provide a definition of mitigation by instructing the jury that "A mitigating consideration is anything shown by believable evidence that, in fairness or in the totality of the defendant's life or character, extenuates or reduces the degree of moral culpability for the crime committed or that reasonably serves as a basis for imposing a sentence less than death." See ***Crook v. State***, 813 So.2d 68, 74 (Fla. 2002); ***Wichkham v. State***, 503 So.2d 191, 194 (Fla. 1991).

38.

The arguments contained in the foregoing endnotes are adopted here by reference. The failure of the standard instruction to clearly specify that only statutory considerations may be used to determine the propriety of imposition of the death penalty allows the use of non-statutory aggravating considerations to be used to determine whether imposition of a death sentence in "justified." The omission of such an instruction allows the jury to impose the death penalty on fundamentally improper considerations, such as race, nationality or gender, without any adequate means of appellate review or detection being afforded. This instruction fails to genuinely restrict the class of persons eligible for the death penalty and otherwise results in arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution and article I,

section 17 of the Florida Constitution. Further, the absence of an adequate record for the performance of truly meaningful appellate review of the jury use of unconstitutional considerations for imposition of the death penalty violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

39.

The arguments contained in the foregoing endnotes are adopted here by reference. The use of the conditional term "may" allows jurors to disregard competent mitigating evidence that is otherwise adequately proved to exist. Allowing the jury to disregard valid mitigating considerations that are proved to exist results in arbitrary and capricious and unreliable imposition of the death penalty contrary to the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the Florida Constitution. In ***Smith v. Texas***, 543 U.S. ___, 125 S.Ct. 400 (2004); ***Stringer v. Black***, 503 U.S. 222, 232 (1992). Competent mitigating evidence must be afforded weight in the process of determining whether a sentence of life or death should be imposed. ***Lockett v. Ohio***, 438 U.S. 586, 604, (1978): ***Crook v. State***, 813 So.2d 68, 74 (Fla. 2002). The standard jury instruction does not mandate that all relevant mitigating circumstances that are established by the evidence *must* be considered when determining whether a sentence of life imprisonment without parole or the death penalty is appropriate. See ***Stanford v. Kentucky***, 492 U.S. 361, 375 (1989); ***Penry v. Lynaugh***, 492 U.S. 302 (1989). This Court is asked to amend the standard jury instruction so that it reads, "Among the mitigating circumstances you must consider, if established by the evidence are . . ."

40.

The arguments contained in the foregoing endnotes are adopted here by reference. The use of modifiers such as "extreme" and "substantial" in the definition of mitigating circumstances unconstitutionally limit the consideration of valid mitigating considerations. Use of the modifiers such as "extreme" and "substantial" implies that lesser degrees are not recognized as valid mitigation. This results in valid mitigation not being considered by the jury contrary to Due Process and the Eighth and Fourteenth Amendments to the United States Constitution. Allowing the jury to disregard valid mitigating considerations that are proved to exist results in arbitrary and capricious and unreliable imposition of the death penalty contrary to the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the Florida Constitution. In ***Smith v. Texas***, 543 U.S. ___, 125 S.Ct. 400 (2004); ***Stringer v. Black***, 503 U.S. 222, 232 (1992). Competent mitigating evidence must be afforded weight in the process of determining whether a sentence of life or death should be imposed. ***Lockett v. Ohio***, 438 U.S. 586, 604 (1978): ***Crook v. State***, 813 So.2d 68, 74 (Fla. 2002). The use of descriptions that seek to quantify a threshold level of mitigation before it may be considered is unconstitutional. The inclusion of those modifiers in the definition of mitigating circumstances prevents the consideration of valid mitigating considerations where the defendant is under mental or emotional disturbance, lacks some

capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, or is under the influence of another person when a homicide is committed. The lack of consideration of valid mitigation that fails to rise to the level of that specified by the statute and standard jury instructions renders imposition of capital punishment in Florida unconstitutional and a violation article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

41.

The arguments contained in the foregoing endnotes are adopted here by reference. Under the rationale of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985) and based on the holdings of ***Espinosa v. Florida***, 505 U.S. 1079 (1992), ***Sochor v. Florida***, 504 U.S. 527 (1992) and ***Tedder v. State***, 322 So.2d 908 (Fla. 1975), this language is incorrect, misleading, and is unconstitutionally prejudicial in that it denies due process and results in an unreliable death sentence by misinforming the jury as to the extent of juror participation in capital sentencing in Florida. The repeated description of the role of the jury as being "advisory" and/or a "recommendation" demeans the responsibility of the jury and the significance of the jury sentencing determination by leading jurors to believe that the responsibility for imposing a death sentence lies solely with the trial judge. The standard instruction diminishes the role of jurors in capital sentencing and leads to an arbitrary, capricious and unreliable result contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. The language should be replaced with language indicating that the jury has made a sentencing determination.

The Fifth, Eighth and Fourteenth Amendments to the United States Constitution require that heightened Due Process attend imposition of capital punishment due to the severity and finality of that punishment. A determination that death is the appropriate sanction based on less than a super-majority of the jury fails to comport with the heightened Due Process that must attend imposition of capital punishment to insure reliability and consistency in its imposition. This standard directly contravenes the holdings of in ***In re: Winship***, 397 U.S. 358 (1970), ***Mullaney v. Wilbur***, 421 U.S. 684 (1975), ***Shepard v. United States***, 544 U.S. 13, (2005); ***United States v. Booker***, 543 U.S. 220 (2005), ***Ring v. Arizona***, 536 U.S. 584 (2002), ***Apprendi v. New Jersey***, 530 U.S. 466 (2001), and ***Jones v. United States***, 526 U.S. 227 (1999). In any event, the failure of the jury to unanimously find the existence of "sufficient aggravating circumstances" to justify imposition of capital punishment denies the right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Florida Constitution. ***Ring v. Arizona***, 536 U.S. 584 (2002), ***Apprendi v. New Jersey***, 530 U.S. 466 (2001); ***Jones v. United States***, 526 U.S. 227 (1999); ***Mullany v. Wilbur***, 421 U.S. 684 (1975); ***State v. Overfelt***, 457 So.2d 1385 (Fla. 1984).

42

The arguments contained in the foregoing endnotes are adopted here by reference. Consistent with the arguments and objects set forth in the preceding endnotes, under the rationale of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985) and based on the holdings of ***Espinosa v. Florida***, 505 U.S. 1079 (1992), ***Sochor v. Florida***, 504 U.S. 527 (1992) and ***Tedder v. State***, 322 So.2d 908 (Fla. 1975), this language is incorrect, misleading, and is unconstitutionally prejudicial in that it denies due process and results in an unreliable death sentence by misinforming the jury as to the extent of juror participation in capital sentencing in Florida. The repetitive instruction to the jury that a "recommendation" or "advice" is being rendered by the jury denigrates the importance of their determination and leads jurors to believe that the responsibility for imposing a death sentence lies solely with the trial judge. The standard instruction diminishes the role of jurors in capital sentencing and leads to an arbitrary, capricious and unreliable result contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution.

43

The arguments contained in the foregoing endnotes are adopted here by reference. Consistent with the arguments and objects set forth in the preceding endnotes, under the rationale of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985) and based on the holdings of ***Espinosa v. Florida***, 505 U.S. 1079 (1992), ***Sochor v. Florida***, 504 U.S. 527 (1992) and ***Tedder v. State***, 322 So.2d 908 (Fla. 1975), this language is incorrect, misleading, and is unconstitutionally prejudicial in that it denies due process and results in an unreliable death sentence by misinforming the jury as to the extent of juror participation in capital sentencing in Florida. The repetitive instruction to the jury that a "recommendation" or "advice" is being rendered by the jury denigrates the importance of their determination and leads jurors to believe that the responsibility for imposing a death sentence lies solely with the trial judge. The standard instruction diminishes the role of jurors in capital sentencing and leads to an arbitrary, capricious and unreliable result contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution.

44

The Fifth, Eighth and Fourteenth Amendments to the United States Constitution require that heightened Due Process attend imposition of capital punishment due to the severity and finality of that punishment. A determination that death is the appropriate sanction based on less than a super-majority of the jury fails to comport with the heightened Due Process that must attend imposition of capital punishment to insure reliability and consistency in its imposition. This standard directly contravenes the holdings of in ***In re: Winship***, 397 U.S.

358 (1970), ***Mullaney v. Wilbur***, 421 U.S. 684 (1975), ***Shepard v. United States***, 544 U.S. 13 (2005); ***United States v. Booker***, 543 U.S. 220 (2005), ***Ring v. Arizona***, 536 U.S. 584 (2002), ***Apprendi v. New Jersey***, 530 U.S. 466 (2001), and ***Jones v. United States***, 526 U.S. 227 (1999).

45

The arguments contained in the foregoing endnotes are adopted here by reference. As stated in the preceding endnotes, under the rationale of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985) and based on the holdings of ***Espinosa v. Florida***, 505 U.S. 1079 (1992), ***Sochor v. Florida***, 504 U.S. 527 (1992) and ***Tedder v. State***, 322 So.2d 908 (Fla.1975), this language is incorrect, misleading, and is unconstitutionally prejudicial in that it denies Due Process and results in an unreliable death sentence by misinforming the jury as to the extent of juror participation in capital sentencing in Florida by leading jurors to believe that the responsibility for imposing a death sentence lies solely with the trial judge. As explained in previous endnotes, this unduly-repetitive standard instruction diminishes the role of jurors in capital sentencing and leads to an arbitrary, capricious and unreliable result contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution.

46

The Fifth, Eighth and Fourteenth Amendments to the United States Constitution require that heightened Due Process attend imposition of capital punishment due to the severity and finality of that punishment. A determination that death is the appropriate sanction based on less than a super-majority of the jury fails to comport with the heightened Due Process that must attend imposition of capital punishment to insure reliability and consistency in its imposition. This standard directly contravenes the holdings of in ***In re: Winship***, 397 U.S. 358 (1970), ***Mullaney v. Wilbur***, 421 U.S. 684 (1975), ***Shepard v. United States***, 544 U.S. 13 (2005); ***United States v. Booker***, 543 U.S. 220 (2005), ***Ring v. Arizona***, 536 U.S. 584 (2002), ***Apprendi v. New Jersey***, 530 U.S. 466 (2001), and ***Jones v. United States***, 526 U.S. 227 (1999).

47

The arguments contained in the foregoing endnotes are adopted here by reference. Consistent with the arguments and objects set forth in the preceding endnotes, under the rationale of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985) and based on the holdings of ***Espinosa v. Florida***, 505 U.S. 1079 (1992), ***Sochor v. Florida***, 504 U.S. 527 (1992) and ***Tedder v. State***, 322 So.2d 908 (Fla. 1975), this language is incorrect, misleading, and is unconstitutionally prejudicial in that it denies due process and results in an unreliable death sentence by misinforming the jury as to the extent of juror participation in capital sentencing in Florida by leading jurors to believe that the responsibility for imposing a death sentence lies solely with the trial judge. The Florida Legislature has in fact recognized that currently

the role of the jury in the penalty phase is more than advisory and that the trial judge is bound by the jury decision unless no reasonable person could agree. The standard instruction diminishes the role of jurors in capital sentencing and leads to an arbitrary, capricious and unreliable result contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. The language should be replaced with language indicating that the jury has made a sentencing determination.

48

The Fifth, Eighth and Fourteenth Amendments to the United States Constitution require that heightened Due Process attend imposition of capital punishment due to the severity and finality of that punishment. A determination that death is the appropriate sanction based on less than a super-majority of the jury fails to comport with the heightened Due Process that must attend imposition of capital punishment to insure reliability and consistency in its imposition. This standard directly contravenes the holdings of in ***In re: Winship***, 397 U.S. 358 (1970), ***Mullaney v. Wilbur***, 421 U.S. 684 (1975), ***Shepard v. United States***, 544 U.S. 13 (2005); ***United States v. Booker***, 543 U.S. 220 (2005), ***Ring v. Arizona***, 536 U.S. 584 (2002), ***Apprendi v. New Jersey***, 530 U.S. 466 (2001), and ***Jones v. United States***, 526 U.S. 227 (1999).

49

The arguments contained in the foregoing endnotes are adopted here by reference. Consistent with the arguments and objects set forth in the preceding endnotes, under the rationale of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985) and based on the holdings of ***Espinosa v. Florida***, 505 U.S. 1079 (1992), ***Sochor v. Florida***, 504 U.S. 527 (1992) and ***Tedder v. State***, 322 So.2d 908 (Fla.1975), this language is incorrect, misleading, and is unconstitutionally prejudicial in that it denies due process and results in an unreliable death sentence by misinforming the jury as to the extent of juror participation in capital sentencing in Florida by leading jurors to believe that the responsibility for imposing a death sentence lies solely with the trial judge. The Florida Legislature has in fact recognized that currently the role of the jury in the penalty phase is more than advisory and that the trial judge is bound by the jury decision unless no reasonable person could agree. The standard instruction diminishes the role of jurors in capital sentencing and leads to an arbitrary, capricious and unreliable result contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. The language should be replaced with language indicating that the jury should retire to make its sentencing determination.

50

The arguments contained in the foregoing endnotes are adopted here by reference. Consistent with the arguments and objects set forth in the preceding endnotes, under the rationale of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985) and based on the holdings of

Espinosa v. Florida, 505 U.S. 1079 (1992), ***Sochor v. Florida***, 504 U.S. 527 (1992) and ***Tedder v. State***, 322 So.2d 908 (Fla.1975), this language is incorrect, misleading, and is unconstitutionally prejudicial in that it denies due process and results in an unreliable death sentence by misinforming the jury as to the extent of juror participation in capital sentencing in Florida by leading jurors to believe that the responsibility for imposing a death sentence lies solely with the trial judge. The Florida Legislature has in fact recognized that currently the role of the jury in the penalty phase is more than advisory and that the trial judge is bound by the jury decision unless no reasonable person could agree. The standard instruction diminishes the role of jurors in capital sentencing and leads to an arbitrary, capricious and unreliable result contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. The language should be replaced with language indicating that the jury has made a sentencing determination.

51

The arguments contained in the foregoing endnotes are adopted here by reference. Consistent with the arguments and objects set forth in the preceding endnotes, under the rationale of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985) and based on the holdings of ***Espinosa v. Florida***, 505 U.S. 1079 (1992), ***Sochor v. Florida***, 504 U.S. 527 (1992) and ***Tedder v. State***, 322 So.2d 908 (Fla.1975), this language is incorrect, misleading, and is unconstitutionally prejudicial in that it denies due process and results in an unreliable death sentence by misinforming the jury as to the extent of juror participation in capital sentencing in Florida by leading jurors to believe that the responsibility for imposing a death sentence lies solely with the trial judge. The Florida Legislature has in fact recognized that currently the role of the jury in the penalty phase is more than advisory and that the trial judge is bound by the jury decision unless no reasonable person could agree. The standard instruction diminishes the role of jurors in capital sentencing and leads to an arbitrary, capricious and unreliable result contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. The language should be replaced with language indicating that the jury is to make a sentencing determination in conformity with the court's instructions.

52

The arguments contained in the foregoing endnotes are adopted here by reference. Consistent with the arguments and objects set forth in the preceding endnotes, under the rationale of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985) and based on the holdings of ***Espinosa v. Florida***, 505 U.S. 1079 (1992), ***Sochor v. Florida***, 504 U.S. 527 (1992) and ***Tedder v. State***, 322 So.2d 908 (Fla.1975), this language is incorrect, misleading. It denies due process and results in an unreliable death sentence by misinforming the jury as to the extent of juror participation in capital sentencing in Florida by leading jurors to believe that the responsibility for imposing a death sentence lies solely with the trial judge. The Florida Legislature has in fact recognized that currently the role of the jury in the penalty phase is more than advisory and that the trial judge is bound by the jury decision unless no

reasonable person could agree. The standard instruction diminishes the role of jurors in capital sentencing and leads to an arbitrary, capricious and unreliable result contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. The language should be replaced with language indicating that the foreman is to sign the jury sentencing determination. The repeated use of the terms "advisory" and "recommendation" tend to demean the importance, significance and effect of the jury role in the capital sentencing process in Florida and, accordingly, the death penalty so imposed violates the Eighth and Fourteenth Amendments of the United States Constitution and article I, section 17 of the Florida Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service to the Office of the State Attorney, Brevard County, Florida, this 8 day of November, 2013.

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