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Recent Florida Capital Decisions

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Abstract

The death penalty applies to two offenses under Florida law; first degree murder¹ and capital drug trafficking.² Although Florida law also defines sexual battery of a minor as a capital offense, the Florida Supreme Court has ruled that the death penalty does not apply to that offense.

KEYWORDS: capital, sentence, murder

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I. INTRODUCTION

The death penalty applies to two offenses under Florida law; first degree murder¹ and capital drug trafficking.² Although Florida law also defines sexual battery of a minor as a capital offense, the Florida Supreme Court has ruled that the death penalty does not apply to that offense.³ Section 921.141 of the Florida Statutes governs sentencing proceedings in first degree murder cases and Section 921.142 governs sentencing proceedings for capital drug trafficking offenses. As of this writing, Section 921.142 has not been used to sentence anyone to death. Accordingly, this article will examine only first degree murder cases and Section 921.141 sentencing proceedings.

The foregoing statute sets out a three-stage procedure for sentenc-

1. FLA. STAT. § 782.04(1) (1991).

2. FLA. STAT. § 893.135 (1991).

3. See *Coler v. State*, 418 So. 2d 238 (Fla. 1982) (construing what is now FLA. STAT. § 794.011(2) (1991)).

ing in capital cases. Subsection 2 of the statute provides that, after the defendant has been found guilty, the jury is to render a penalty verdict:

- (2) **ADVISORY SENTENCE BY THE JURY.** — After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
 - (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
 - (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.⁴

Subsection 3 provides for the trial court to engage in its own weighing of aggravating and mitigating circumstances, notwithstanding the jury's recommendation, and enter written findings of fact supporting the sentencing decision.⁵ Nevertheless, the trial judge may not override a life verdict unless the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ."⁶ Subsection 4 provides for automatic appellate review by the supreme court.⁷

During the period from January 1, 1990 through July 1, 1991, this author notes the Florida Supreme Court issued a total of 82 opinions on direct capital appeals.⁸ In thirty-six cases, the supreme court affirmed the death sentences. In three, it ordered new sentencing proceedings before the trial judge. In eight, it ordered new sentencing proceedings with a new jury. In twenty, it reduced death sentences to terms of life imprisonment. In fourteen, it ordered new trials.⁹ And, in

4. FLA. STAT. § 921.141(2) (1991).

5. FLA. STAT. § 921.141(3) (1991).

6. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). The supreme court has followed this "*Tedder* doctrine" with uneven fidelity. In *Cochran v. State*, 547 So. 2d 928, 933 (Fla. 1989), noting that it had been inconsistent in applying *Tedder* over the years, the court asserted that it would be more consistent in the future. Apparently keeping this promise, the court reversed all but one of the override sentences to come before it in the survey period. Thus, at least as of now, a life verdict almost guarantees a life sentence. Hence, defects in the penalty verdict procedure will necessarily result in defective sentencing decisions.

7. FLA. STAT. § 921.141(4) (1991).

8. One case, *Bryant v. State*, 565 So. 2d 1298 (Fla. 1990) involved the appeals of four co-defendants. The convictions of all four were reversed.

9. Again, *Bryant* is counted as one case here although the court reversed the convictions of all four appellants.

one, it ordered the defendant discharged. The author will not undertake to discuss each of these cases at length in this article. Rather, the author will examine pertinent changes or questions created by these recent decisions. This article, as shown in its table of contents, will evaluate capital cases in a step-by-step approach which follows a format beginning with the charge of a capital crime, proceeding through sentencing issues, and concluding with appellate issues.

II. THE CHARGE AND DETERMINATION OF GUILT

A. *The Charge*

Article 1, section 15(a) of the Florida Constitution provides that “[n]o person shall be tried for capital crime without presentment or indictment by a grand jury.”¹⁰ Although this requirement has been relaxed for capital sexual battery, a grand jury indictment is still a necessary predicate for a prosecution for first degree murder. In the past, Florida law has taken a dim view of attempts to open up grand jury proceedings: grand jurors, witnesses, and prosecutors are forbidden from discussing the proceedings; the defense has been denied access to transcripts of grand jury proceedings; and there have been no restrictions on the evidence presented to the grand jury by the prosecution. Recent decisions have called into question this traditional attitude toward grand jury proceedings.

1. Presentation of Evidence

In *Anderson v. State*,¹¹ the court ended its long-standing prohibition of judicial inquiry into evidence presented to the grand jury and incorporated a long set of principles from other jurisdictions into Florida law. In Richard Harold Anderson’s trial for first degree murder, an important state witness, Connie Beasley, admitted that her grand jury testimony differed from her trial testimony. Ms. Beasley testified to the grand jury that she saw Mr. Anderson with the decedent shortly before the murder, and that she later saw Mr. Anderson with blood on his clothes and hands, but that she did not see the murder. At trial, she testified that she was present when Mr. Anderson killed the decedent in accordance with a prearranged plan. Mr. Anderson unsuccessfully

10. FLA. CONST. art. 1, sect. 15, cl. (a).

11. 574 So. 2d 87 (Fla. 1991).

moved to dismiss the indictment on the ground that it was based on perjured testimony. On appeal, the supreme court upheld the trial court ruling, concluding that the change in testimony did not "remove the underpinnings of the indictment," and that the perjurious portion of the grand jury testimony could not have affected the decision to indict.¹² Although it ultimately ruled against Mr. Anderson, the court substantially rewrote Florida law regarding grand jury proceedings:

We agree with the authorities cited by *Anderson* that due process is violated if a prosecutor permits a defendant to be tried upon an indictment which he or she knows is based on perjured, material testimony without informing the court, opposing counsel, and the grand jury. This policy is predicated on the belief that deliberate deception of the court and jury by the presentation of evidence known by the prosecutor to be false "involve[s] a corruption of the truth-seeking function of the trial process," *United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 2398, 49 L.Ed.2d 342 (1976), and is "incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 765, 31 L.Ed.2d 104 (1972) (citation omitted). Moreover, deliberate deception is inconsistent with any principle implicit in "any concept of ordered liberty," *Napue v. Illinois*, 360 U.S. 264, 269, (1959), and with the ethical obligation of the prosecutor to respect the independent status of the grand jury. Standards For Criminal Justice Section 3-3.5, 3-48—3-49 (2d ed.1980); *United States v. Hogan*, 712 F.2d 757, 759-60 (2d Cir.1983); *Pelchat*, 62 N.Y.2d at 108-09, 464 N.E.2d at 453, 476 N.Y.S.2d at 85 (the "cardinal purpose" of the grand jury is to shield the defendant against prosecutorial excesses and the protection is destroyed if the prosecution may proceed upon an empty indictment).

The Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. The state violates that section when it requires a person to stand trial and defend himself or herself against charges that it knows are based upon perjured, material evidence. Governmental misconduct that violates a defendant's due process rights under the Florida constitution requires dismissal of criminal charges. *State v. Glosson*, 462 So.2d 1082, 1085 (Fla. 1985).¹³

Anderson is in keeping with a general trend toward opening up

12. *Id.* at 92.

13. *Id.* at 90-92.

grand jury proceedings. A United States Supreme Court case during the survey period addressed the constitutionality of section 905.27, Florida Statutes, which forbids witnesses from discussing their grand jury testimony. In *Butterworth v. Smith*,¹⁴ the Court held the statute unconstitutional insofar as it prevented a witness from discussing his own grand jury testimony.¹⁵ The witness, a journalist, wished to write a news story about his testimony and experiences in dealing with the grand jury.¹⁶ The Court ruled that Florida's interest in grand jury secrecy, when weighed against the first amendment rights of grand jury witnesses, diminished substantially in importance after conclusion of the grand jury proceedings.¹⁷ It further noted that under present day criminal procedure requiring the disclosure of witnesses, the interest in grand jury secrecy is further diminished.¹⁸

2. Access to Evidence by Defense

Anderson and *Butterworth* point toward further litigation of grand jury issues. One likely area for controversy concerns access to transcripts of grand jury proceedings. Section 905.27(1) of the Florida Statutes allows for court orders for disclosure of grand jury testimony to ascertain whether it is consistent with testimony in court, to determine whether the witness is guilty of perjury, and for the purpose of "furthering justice."¹⁹ In *Jent v. State*,²⁰ the supreme court affirmed denial of the defendants' motion for access to grand jury testimony, writing without further discussion that a "proper predicate" must be laid to obtain access to grand jury testimony. The court has never said what might constitute a "proper predicate." Subsequent decisions of other courts may provide the answer.

In *Pennsylvania v. Ritchie*,²¹ the Court held that a defendant charged with rape of a minor was entitled to *in camera* review of the minor's welfare file notwithstanding that the file was confidential under state law. He was entitled to this review upon his assertion that the file

14. 110 S. Ct. 1376 (1990).

15. *Id.* at 1379.

16. The grand jury was investigating alleged improprieties committed by the Charlotte County State Attorney's Office and Sheriff's Department.

17. *Id.* at 1380-83.

18. *Id.* at 1382.

19. FLA. STAT. § 905.27(1) (1991).

20. 408 So. 2d 1024 (Fla. 1981).

21. 480 U.S. 39 (1987).

“might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence.”²² Thereafter, the Pennsylvania Supreme Court held that *in camera* review of the records by the trial judge was not a sufficient safeguard for the defendant’s confrontation rights, and that therefore defense counsel is entitled to see the records.²³

In *Hopkinson v. Shillinger*,²⁴ the court held that *Ritchie* applied to state grand jury testimony where exculpatory evidence “could have been presented” to a post-trial grand jury investigating Hopkinson’s cohorts. On rehearing *en banc*, the court affirmed denial of the writ of habeas corpus on other grounds, but let stand the panel decision on the grand jury issue.²⁵

In *Miller v. Dugger*,²⁶ the appeals court applied *Ritchie* to Florida grand jury proceedings, requiring *in camera* review in federal district court.

In view of the foregoing, it seems likely that the defense will obtain greater access to grand jury testimony. But what if the grand jury testimony is not recorded? It would then be almost impossible for the defense to make a showing of improprieties regarding grand jury proceedings or testimony. In *Thompson v. State*,²⁷ the supreme court showed little regard for such concerns:

Thompson made three claims regarding the grand jury proceedings, two of which merit brief discussion. First, he contends that the trial court erred by denying his pretrial request to record the grand jury proceedings. Sections 905.17 and 905.27 of the Florida Statutes (1987), do not establish a duty to record grand jury proceedings, nor do we find any constitutional basis to impose such a duty in all cases. *In re Report of the Grand Jury*, 533 So.2d 873, 875 (Fla. 1st DCA 1988); accord *United States v. Head*, 586 F.2d 508 (5th Cir.1978). Although recordation may be the best and most desirable practice, e.g., *State v. McArthur*, 296 So.2d 97, 100 (Fla. 4th DCA), cert. denied, 306 So.2d 123 (Fla.1974); *United States v. Head*, 586 F.2d at 511, that choice generally is one for the legislature. We agree with *McArthur* that the interests of jus-

22. *Id.*

23. *Commonwealth v. Lloyd*, 567 A.2d 1357 (Pa. 1989).

24. 866 F.2d 1185 (10th Cir. 1989).

25. *Hopkinson v. Shillinger*, 888 F.2d 1286 (10th Cir. 1989) (*en banc*).

26. 820 F.2d 1135 (11th Cir. 1987). Mr. Miller and Mr. Jent were co-defendants.

27. 565 So. 2d 1311, 1313 (Fla. 1990).

tice may require trial courts to order recordation in some instances. *McArthur*, 296 So.2d at 100. However, no showing was made to establish that Thompson had a particular need to preserve grand jury testimony through recording. Under these circumstances, the trial court did not abuse its discretion by denying the motion.

We also know of no statutory or constitutional authority to support Thompson's second contention, that the state should be precluded from conducting voir dire of prospective grand jurors. Implicit in the statutory right to challenge individual prospective grand jurors, section 905.04, Florida Statutes (1987), is the opportunity to obtain information from them about their qualifications. We have been presented with no argument to show why that should not be done through voir dire. Certainly, Thompson has a right to fair treatment by a lawfully composed grand jury. However, he did not present us with the record of the voir dire, nor did he present any evidence to show that his rights were jeopardized by the voir dire. This claim has no merit.²⁸

It is curious for the court to uphold the refusal to record grand jury proceedings and then complain that Mr. Thompson did not provide a record of the voir dire of the grand jurors. Also curious is the court's failure to mention Rule 2.070(a) of the Florida Rules of Judicial Administration which provides for reporting of grand jury proceedings.

B. *The Elements*

Under section 782.04(1)(a) of the Florida Statutes, first degree murder is the unlawful killing when "perpetrated from a premeditated design to effect the death of the person killed or any human being" or when "committed by a person engaged in the perpetration of, or in the attempt to perpetrate" one of eleven listed felonies.²⁹

1. Murder Perpetrated From Premeditated Design

Although Section 782.04 refers to murder perpetrated from a premeditated design, the term "premeditated design" is seldom used in the cases, and it is not defined for the jury. Instead, the cases and jury

28. *Id.* at 1313.

29. FLA. STAT. § 782.04(1)(a) (1991). The felonies are: drug trafficking; arson; sexual battery; robbery; burglary; kidnapping; escape; aggravated child abuse; aircraft piracy; unlawful throwing, placing or discharging of a destructive device or bomb; and unlawful distribution of various drugs.

instructions generally refer to "premeditated murder."³⁰

2. Felony Murder

Can a defendant be guilty of felony murder if the felony occurs after the murder? The statute provides that an unlawful killing is first degree murder when it is committed by someone perpetrating or attempting to perpetrate an enumerated felony.³¹ Strictly construed, this should mean that the felony cannot occur after the murder. But the Florida Supreme Court has not always been strict in its construction of the statute. For instance, it has construed "in the perpetration of" as

30. The court defined "premeditated design" in *McCutchen v. State*, 96 So. 2d 152, 153 (Fla. 1957) as including an element of "deliberation" separate from "premeditation":

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

The standard jury instructions are not so complete:

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

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

If a person had a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated.

FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 827, 854 (1990).

The last paragraph has the following annotation: "Transferred intent; give if applicable."

31. FLA. STAT. § 782.04 (1991).

including flight after completion of the felony.³² Recent cases reflect the tension between the court's tendency toward loose construction and its duty of strict construction.

In *Jones v. State*,³³ the evidence showed that Randall Scott Jones and another man killed a man and woman and that Mr. Jones then had sexual union with the woman's body. He was convicted both of first degree murder and of sexual battery, but the supreme court reversed the sexual battery conviction because a victim of sexual battery must be alive at the time the battery occurs and, in *Jones*, the victim was dead at the time of the battery.³⁴ Although the court did not address the issue in the context of felony murder, it would stand to reason that, under *Jones*, a defendant could not be convicted of felony murder where the state did not prove that the decedent was alive at the time of the felony.

But *Holton v. State*,³⁵ decided only two weeks after *Jones*, suggested a different result:

As his next issue, Holton claims the evidence at trial was insufficient to support a conviction for first-degree arson. He correctly points out that an element of first-degree arson requires that the structure be occupied by a human being. However, even though the medical examiner testified that the victim's death occurred before the fire was set, the jury reasonably could have inferred from all of the evidence that Holton believed the victim was alive at the time the fire was set.

Holton also challenges his conviction for sexual battery with great force. This challenge is based on two grounds. The first centers on Holton's belief that the use of the word "person" in section 794.011(3), Florida Statutes (1985), contemplates that the victim of sexual battery must be alive. Holton argues, therefore that because the evidence could not conclusively establish the bottle was inserted in the victim's anus before death but could only prove that insertion occurred prior to the fire, the evidence was insufficient to support his conviction under section 794.011

.....

Again, we are persuaded that the jury could have believed that Holton thought the victim was alive at the time he initiated the sexual battery. Under the facts of this case, we find there was sub-

32. *Hornbeck v. State*, 77 So. 2d 876 (Fla. 1955).

33. 569 So. 2d 1234 (Fla. 1990).

34. *Id.* at 1237.

35. 573 So. 2d 284 (Fla. 1990).

stantial, competent evidence to support Holton's conviction for sexual battery with great force.³⁶

The court cited no authority for the mental element it read into the crimes of arson and sexual battery and also did not note that it had previously held that arson and sexual battery are general intent crimes requiring no specific intent.³⁷

III. DETERMINATION OF THE SENTENCE

A. *The Jury Verdict Procedure*

The supreme court has frequently turned down opportunities to make the verdict more reliable by use of more accurate penalty phase jury instructions. During the previously-mentioned survey period, the supreme court continued to refuse to acknowledge problems with the standard jury instruction on the "especially heinous, atrocious, or cruel" and "cold, calculated, and premeditated manner without any pretense of moral or legal justification" aggravating circumstances.³⁸ Similarly, it affirmed trial court judges' refusals to instruct on various nonstatutory mitigating circumstances.

1. The Jury as Finder of Fact

The traditional role of the jury is that of finder of fact. It would seem that in capital cases, this would involve making factual findings regarding aggravating and mitigating circumstances. On the other hand, the role of the capital sentencing jury has been characterized less as a fact-finder and more as a voice of the community; it is to make "a reasoned *moral* response to the defendant's background, character, and crime."³⁹ The characterization of the penalty verdict as "advisory" makes the jury's role yet more ambiguous.

Section 921.141 of the Florida Statutes provides that the jury is to determine whether sufficient aggravating circumstances exist and whether there are insufficient mitigating circumstances to outweigh the

36. *Id.* at 290 (footnote omitted).

37. *Linehan v. State*, 476 So. 2d 1262 (Fla. 1985) (arson); *Buford v. State*, 492 So. 2d 355 (Fla. 1986) (sexual battery).

38. FLA. STAT. §§ 921.141(5)(h), (i) (1991).

39. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (emphasis in original).

aggravating circumstances; but does not provide for special verdicts as to the circumstances.⁴⁰ The statute provides that the verdict is to be rendered by majority vote, but does not provide whether a majority is needed to find particular aggravating or mitigating circumstances.⁴¹ Suppose that four jurors find the existence of only one aggravating circumstance, and four others find only the existence of a different circumstance, so that a majority of the jury rejects both circumstances. Has there been a finding of one of the circumstances, of both, or of neither? Neither the statute nor any decision of the Florida Supreme Court answers these rather basic questions.

2. Jury Instructions

a. *The Heinousness Circumstance*

The “especially heinous, atrocious, or cruel” circumstance has been the subject of controversy and criticism for years. Commentators have written that it has not been applied consistently by the Florida Supreme Court and that the supreme court has adopted confusing and contradictory guidelines for its application.⁴² This in turn has led to controversy regarding the standard jury instruction on the circumstance promulgated in 1981 and still in use during the early 1990s. That jury instruction states without elaboration that the jury may consider as an aggravating circumstance that the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.⁴³ Some historical perspective is necessary for an understanding of

40. FLA. STAT. § 921.141(2) (1991). The court has routinely denied arguments in favor of special verdicts on the sentencing circumstances. *Jones v. State*, 569 So. 2d 1234, 1238 (Fla. 1990) (citing such cases).

41. FLA. STAT. § 921.141(3) (1991).

42. See Craig Barnard, *Death Penalty (1988 Survey of Florida Law)*, 13 NOVA L. REV. 908 (1989); Rosen, *The “Especially Heinous” Aggravating Circumstance in Capital Cases — The Standardless Standard*, 64 N.C.L. REV. 941 (1986); and Mello, *Florida’s “Heinous, Atrocious or Cruel” Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523 (1984). For an example of the confusion in the case law, compare *Mills v. State*, 476 So. 2d 172, 178 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986) (intent and method employed by the wrongdoers is what needs to be examined) and *Card v. State*, 453 So. 2d 17 (Fla.), cert. denied, 469 U.S. 989 (1984) (fact that defendant enjoyed killing one consideration in finding factor) with *Pope v. State*, 441 So. 2d 1073, 1078 (Fla. 1984) (rejecting use of defendant’s mental state to show heinousness).

43. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 827, 859

the present controversy concerning this instruction.

In *State v. Dixon*,⁴⁴ the court upheld the constitutionality of the circumstance, writing:

The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravated capital felony. Fla.Stat. §921.141(6)(h), F.S.A. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies — the conscienceless or pitiless crime which is unnecessarily torturous to the victim.⁴⁵

The court subsequently promulgated the following standard jury instruction regarding the circumstance:

That 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 designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless.⁴⁶

In *Proffitt v. Florida*,⁴⁷ the United States Supreme Court wrote concerning the heinousness circumstance:

[The Florida Supreme Court] has recognized that while it is arguable “that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something ‘especially’ heinous, atrocious or

(1990).

44. 283 So. 2d 1 (1973), cert. denied, 416 U.S. 943 (1974).

45. *Id.* at 9. One can only speculate as to the difference between “extremely wicked” and “outrageously wicked.”

46. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 78 (1975).

47. 428 U.S. 242 (1976) (opinion of the Court joined by three justices with four justices concurring).

cruel when it authorized the death penalty for first degree murder." *Tedder v. State*, 322 So.2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So.2d, at 9. See also *Alford v. State*, 307 So.2d 433, 445 (1975); *Halliwell v. State*, *supra*, 323 So.2d at 561. We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See *Gregg v. Georgia*, *ante*, 428 U.S., at 200-203.⁴⁸

It is noteworthy that the part of the *Dixon* definition on which the Supreme Court focused [that the killing must be "conscienceless or pitiless" and "unnecessarily torturous to the victim"] is not directly mentioned in the 1975 jury instruction.

In 1981, the Florida Supreme Court promulgated the standard instruction ["The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel"] in use through the survey period, deleting the *Dixon* definitions.⁴⁹

So was the state of things when the supreme court decided *Pope v. State*.⁵⁰ There, relying on prior decisions of the Florida Supreme Court, the trial court applied the heinousness circumstance based on a finding that the defendant had not shown any remorse "having elected to steadfastly deny his guilt."⁵¹ Holding this finding improper, the supreme court went on to condemn the *Dixon* definition of the circumstance as being too broad.⁵² The supreme court specifically disapproved

48. *Proffitt*, 428 U.S. at 255-56 (footnotes omitted). The Court mentioned *Spinkellink v. State*, 313 So. 2d 666 (1975) ("career" criminal shot sleeping traveling companion) in a footnote. It is somewhat ironic in view of subsequent decisions holding that the heinousness circumstances does not apply when a person is killed while asleep or unconscious. The Florida Supreme Court's decision in *Spinkellink* does not specify what facts justified finding the circumstance.

49. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES (1981). The substitution of "wicked" for "heinous" in the instruction is a mystery.

50. 441 So. 2d 1073 (Fla. 1984).

51. *Id.* at 1077.

52. *Id.* In a previous case, *Vaught v. State*, 410 So. 2d 147 (Fla. 1982), the court had disapproved of the *Dixon* definition as too narrow, writing:

Appellant contends that the trial court erred in finding that the killing was especially heinous, atrocious, and cruel. He argues that since the shooting was spontaneous and caused nearly instantaneous death, it cannot come within the meaning of this aggravating circumstance, which, under the interpretations given by this Court, focuses on the infliction of physical pain

of the “conscienceless or pitiless” phrase on the ground that it improperly focused on the “mindset of the murderer,” thus leading to improper application of the circumstance.⁵³ On the same ground it disapproved of the “utter indifference to, or enjoyment of, the suffering of others. . . ,” “the pitiless” portion of the definition of “cruel” in the 1975 instruction. It approved of use of the 1981 instruction, adding: “No further definitions of the terms are offered, nor is the defendant’s mindset ever at issue.”⁵⁴ Thus, the court eliminated the construction that had made the circumstance constitutional under *Proffitt*. The *Pope* instruction gives the jury no suggestion of the constitutional limitations on the circumstance. The jury is free to apply the circumstance to any homicide, for reasonable jurors could conclude that any murder is especially wicked, evil, atrocious, or cruel.

At this point, the Oklahoma death sentence of William Cartwright enters the story.⁵⁵ In sentencing Mr. Cartwright, an Oklahoma jury employed that state’s “especially heinous, atrocious, or cruel” aggravating circumstance.⁵⁶ The court’s instructions to the jury defined the circumstance in terms taken directly from *Dixon*.⁵⁷ Cartwright’s death sentence ultimately came before the United States Supreme Court, which unanimously held that the Oklahoma circumstance was uncon-

or mental anguish. *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); *White v. State*, 403 So.2d 331 (Fla.1981). In response the state correctly points out that the factor heinous, atrocious, or cruel has also been approved based on the fact that a killing was inflicted in a “cold and calculating” or “execution-style” fashion. *See, e.g., Magill v. State*, 386 So.2d 1188 (Fla.1980), *cert. denied*, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981); *Alvord v. State*, 322 So.2d 533 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976); *Sullivan v. State*, 303 So.2d 632 (Fla.1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

Id. at 151.

53. *Pope*, 441 So. 2d at 1077.

54. *Id.* at 1078.

55. *See Cartwright v. State*, 695 P.2d 548 (Okla. Crim. App. 1985).

56. *Id.*

57. *Id.* On habeas review of the death sentence, the Tenth Circuit wrote: “The jury at Cartwright’s trial had been instructed that the term ‘heinous’ means extremely wicked or shockingly evil; ‘atrocious’ means outrageously wicked and vile; ‘cruel’ means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.” *Cartwright v. Maynard*, 822 F.2d 1477, 1488 (10th Cir. 1987) (en banc). The federal appeals court traced the history of the circumstance and showed that Oklahoma’s definition derived from *Dixon*. *Id.* at 1487.

stitutionally vague because it gave the jury no guidance as to its application.⁵⁸ In reaching this result, the Court relied on its decision in *Godfrey v. Georgia*,⁵⁹ which found unconstitutional a Georgia death sentence based on a jury finding that the murder “was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.” The *Maynard* Court wrote:

[T]he language of the Oklahoma aggravating circumstance at issue — “especially heinous, atrocious, or cruel” — gave no more guidance than the “outrageously or wantonly vile, horrible or inhuman” language that the jury returned in its verdict in *Godfrey*. The State’s contention that the addition of the word “especially” somehow guides the jury’s discretion, even if the term “heinous” does not, is untenable. To say that something is “especially heinous” merely suggests that the individual jurors should determine that the murder is more than just “heinous,” whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is “especially heinous.” *Godfrey*, *supra*, at 428-429, 100 S.Ct. at 1764-1765. Likewise, in *Godfrey* the addition of “outrageously or wantonly” to the term “vile” did not limit the overbreadth of the aggravating factor.⁶⁰

58. *Maynard v. Cartwright*, 486 U.S. 356 (1988).

59. 446 U.S. 420 (1980).

60. *Maynard*, 486 U.S. at 363-64. The premise underlying *Maynard* is that the Eighth Amendment requires greater definiteness in the definition of aggravating circumstances than the Due Process Clause requires of criminal statutes:

The difficulty with the State’s argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. *United States v. Powell*, 423 U.S. 87, 92-23, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975); *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975); *Palmer v. City of Euclid*, 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed.2d 98 (1971) (*per curiam*); *United States v. National Dairy Corp.*, 372 U.S. 29, 32-33, 36, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963). Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a

The Florida Supreme Court has repeatedly refused to declare the *Pope* instruction unconstitutional. In *Smalley v. State*,⁶¹ the court wrote:

His first claim involves the aggravating circumstance that the killing was especially heinous, atrocious, or cruel. His argument is predicated on the United States Supreme Court's recent decision in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). In that case, the Court relied upon its early [sic] decision in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), to hold that Oklahoma's aggravating factor of "especially heinous, atrocious, or cruel" was unconstitutionally vague. Smalley argues that because Florida uses the same words (section 921.141(5)(h), Florida Statutes (1987)), Florida's aggravating factor also is unconstitutionally vague under the eighth amendment.

Initially, we note that Smalley did not object to the standard jury instruction given on this subject which explained that in order for this circumstance to be applicable, it was necessary for the crime to have been especially wicked, evil, atrocious, or cruel. Therefore, to the extent that Smalley now complains of the jury instruction, the point has been waived. *Sullivan v. State*, 303 So.2d 632 (Fla. 1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976). However, Smalley's claim has broader implications because he contends that the aggravating circumstance of heinous, atrocious, or cruel is unconstitutionally vague under the eighth and fourteenth amendments. In order to set the issue at rest, we will discuss the merits of Smalley's argument.

It is true that both the Florida and Oklahoma capital sentencing laws use the phrase "especially heinous, atrocious, or cruel." However, there are substantial differences between Florida's capital sentencing scheme and Oklahoma's. In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence. The trial judge must make findings that support the determination of all aggravating and mitigating circumstances. Thus, it is possible to discern upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel.

result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Maynard, 486 U.S. at 361-62.

61. 546 So. 2d 720 (Fla. 1989).

This Court has narrowly construed the phrase “especially heinous, atrocious, or cruel” so that it has a more precise meaning than the same phrase has in Oklahoma. In *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), we said:

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies — the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

It was because of this narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious, or cruel against a specific eighth amendment vagueness challenge in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. *E.g.*, *Garron v. State*, 528 So.2d 353 (Fla. 1988); *Jackson v. State*, 502 So.2d 409 (Fla. 1986), *cert denied*, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); *Jackson v. State*, 498 So.2d 906 (Fla. 1986); *Teffeteller v. State*, 439 So.2d 840 (Fla. 1983), *cert. denied*, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). That *Proffitt* continues to be good law today is evident from *Maynard v. Cartwright*, wherein the majority distinguished Florida’s sentencing scheme from those of Georgia and Oklahoma. *See Maynard v. Cartwright*, 108 S.Ct. at 1859.⁶²

Thus, the supreme court avoided the jury instruction issue on the ground of procedural default, but went on to assert that the circumstance was constitutional as construed in *Dixon*.⁶³ The supreme court

62. *Id.* at 722.

63. Close below the surface in *Smalley* is the notion that accurate penalty phase jury instructions are not necessary because the trial judge will apply the “correct” construction of the circumstance. This idea is contrary to the many cases in which the

apparently forgot that in *Pope* it had read *Dixon* out of the statute and jury instructions. Since *Smalley* did not purport to deal with the question of the constitutionality of the jury instruction, it would have seemed that another case would have to deal with that issue.

But thereafter, the supreme court acted as though *Smalley* had disposed of the issue. In *Brown v. State*,⁶⁴ the supreme court rejected an argument that the jury instruction on the premeditation aggravating circumstance was unconstitutionally vague under *Maynard* and wrote:

In *Maynard* the Court held the Oklahoma instruction on heinous, atrocious, and cruel unconstitutionally vague because it did not adequately define that aggravating factor for the sentencer (in Oklahoma, the jury). We have previously found *Maynard* inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor. *Smalley v. State*, 546 So.2d 720 (Fla.1989). We find Brown's attempt to transfer *Maynard* to this state and to a different aggravating factor misplaced. See *Jones v. Dugger*, 533 So.2d 290 (Fla.1988); *Daugherty v. State*, 533 So.2d 287 (Fla.1988). We therefore find no error regarding the penalty instructions.⁶⁵

Similar findings resulted in *Roberts v. State*⁶⁶ and *Occhicone v. State*.⁶⁷ In the meantime, the court "approve[d] for publication" the following jury instruction resurrecting the *Dixon* definition condemned in *Pope*:

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

. . . .

court has reversed for resentencing where the trial court committed error in instructing the penalty jury. It is also contrary to *Cochran v. State*, 547 So. 2d 928 (Fla. 1989) and other cases emphasizing the importance of the penalty verdict. Most curious of all, is how *Smalley* interplays with the presumption (espoused in *Gilliam v. State*, 582 So. 2d 610 (Fla. 1991)) that the judge is presumed to follow the jury instructions. If the judge follows the jury instructions, and the jury instructions are unconstitutional, how can there be a presumption of correctness regarding the trial court's findings in the sentencing order?

64. 565 So. 2d 304 (Fla. 1990).

65. *Id.* at 308. *Jones* and *Daugherty* involved collateral attacks on death sentences. In both cases, the court held without analysis that *Maynard* did not apply where the trial court did not find the heinousness circumstance.

66. 568 So. 2d 1255 (Fla. 1990).

67. 570 So. 2d 902 (Fla. 1990).

8. 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 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.⁶⁸

In originally submitting the instruction,⁶⁹ the chairman of the jury instruction committee wrote that the committee decided that additional language, based on *Dixon*, improved the instruction enough to address any problems posed by *Maynard v. Cartwright*.

The supreme court made no mention of *Pope, Vaught*, or the *Smalley* line of cases. One can only wonder why it is necessary to amend the jury instructions if, as the supreme court has asserted, *Maynard* does not apply to Florida.

It is questionable whether the new instruction satisfies the requirements of *Maynard*. The new instruction's definitions of "heinous," "atrocious," and "cruel" are virtually identical to the definitions used at Mr. Maynard's Oklahoma trial, and are exactly identical to definitions declared unconstitutional in *Shell v. Mississippi*.⁷⁰ Although the final sentence includes the terms "conscienceless or pitiless" and "unnecessarily torturous" approved in *Proffitt*, the instruction does not inform the jury that the circumstance applies *only* to the conscienceless or pitiless crime that is unnecessarily torturous. Further, *Proffitt* itself is suspect on this point because it did not use *Maynard*'s Eighth Amendment analysis in ruling on the constitutionality of Section 921.141 of the Florida Statutes. The Court wrote in *Proffitt* that the aggravating and mitigating circumstances

require no more line drawing than is commonly required of a

68. Standard Jury Instructions, 579 So. 2d 75 (Fla. 1990).

69. After the court initially approved the instruction, the Florida Public Defenders' Association and the Volunteer Lawyers Resource Center sought reconsideration. The court then remanded the matter to the jury instruction committee for further consideration, and the committee proposed a different instruction, incorporating language from *Porter v. State*, 564 So. 2d 1060 (Fla. 1990). The supreme court rejected the *Porter* instruction, and denied rehearing, thus approving again the *Dixon* instruction and the original committee note.

70. 111 S. Ct. 313 (1990).

factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.⁷¹

Proffitt held only that the conscienceless/pitiless construction saved the circumstance from attack as being facially constitutional, but did not decide whether it defined the circumstance adequately for lay jurors. Finally, the new instruction does not inform the jury of various other restrictions on application of the circumstance, such as that acts performed on the dead body cannot be considered in determining the circumstance,⁷² that lack of remorse cannot be considered,⁷³ and that there must be a showing of torturous intent.⁷⁴

b. Other Aggravating Circumstances

In *Brown* and other cases discussed above, the court has flatly refused to apply the principles of *Maynard* to the premeditation aggravating circumstance.⁷⁵ Now the jury instruction on this circumstance merely tracks the language of the statute,⁷⁶ so it is likely to violate *Maynard* if the statutory language is unconstitutionally vague under the eighth amendment.⁷⁷ In *Rogers v. State*,⁷⁸ the supreme court as

71. *Proffitt*, 428 U.S. at 257-58.

72. See *Jones v. State*, 569 So. 2d 1234 (Fla. 1990).

73. *Id.* at 1240.

74. An on-again, off-again requirement.

75. "The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." FLA. STAT. § 921.141(5)(i) (1991).

76. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 827, 859 (as amended through March 30, 1989).

77. The Florida Supreme Court has never adopted a precise and authoritative construction of this circumstance. For a detailed discussion of the circumstance, see Jonathan Kennedy, *Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases*, 17 STET. L. REV. 47, 96-97 (1987) and Craig Barnard, *Death Penalty (1988 Survey of Florida Law)*, 13 NOVA L. REV. 907 (1989). As discussed in this article, the court produced considerable confusion in trying to define

much as acknowledged that the circumstance was on its face susceptible to misapplication, receded from prior applications, and wrote that it was to apply only where there was "heightened" premeditation.⁷⁹ Nevertheless, the court has not promulgated any jury instruction narrowing the circumstance as required by *Rogers*, and seems to consider the present instruction acceptable. Similarly, although the court has adopted narrowing constructions as to almost all of the other aggravating circumstances, the standard jury instructions merely track the statute and give no hint of these limiting constructions. The failure of the standard instructions to define the circumstances would seem to make them unconstitutional under *Maynard*.

c. Mitigation

As originally promulgated, Section 921.141 of the Florida Statutes contained a list of eight mitigating circumstances.⁸⁰ During the first few years of the statute's operation, it was thought that the jury and judge could consider only the listed circumstances in reaching their sentencing decisions.⁸¹ But, subsequent decisions by the United States Supreme Court have made clear that such a limitation on mitigation violates the Eighth Amendment.⁸² Accordingly, the Florida Supreme

and apply the circumstance during the survey period.

78. 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988).

79. As discussed in this article, *Rogers* purported to define only the "calculated" element of the circumstance. In *Porter v. State*, 564 So. 2d 1060, 1063-1064 (Fla. 1990), the court indicated that the Constitution required the narrowing construction given in *Rogers*.

80. FLA. STAT. § 921.141 (1991). Over the years, the list has been shortened and otherwise modified in ways that narrow the application of the circumstances. One circumstance ("The capital felony was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.") has been eliminated. The duress circumstance ("The defendant acted under duress or under the domination of another person.") has been narrowed by requiring that the duress be "extreme" or the domination "substantial." The impairment circumstance ("At the time of the capital felony the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or intoxication.") now requires that the defendant's capacity be "substantially" impaired, although it no longer requires that the impairment be caused by mental disease or intoxication. On the other hand, the youth circumstance has been changed so that the "age" (rather than the "youth") of the defendant may be considered in mitigation.

81. See *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

82. *Id.*

Court has promulgated a "catchall" jury instruction to allow consideration of so-called nonstatutory mitigating circumstances.⁸³ But, although it has gone so far as to formally recognize "categories" of nonstatutory circumstances in *Campbell v. State*,⁸⁴ and to recognize various nonstatutory circumstances as "particularly compelling" in *Songer v. State*,⁸⁵ the court has refused without discussion to allow penalty phase instructions bearing directly on different nonstatutory circumstances.

In *Jackson v. State*,⁸⁶ the court gave short shrift to an argument that the trial court erred by refusing to instruct the jury according to a written list of nonstatutory mitigating circumstances prepared by the defense: "We find these contentions without merit. Florida's standard jury instruction complies with the constitutional principles set forth in *Lockett v. Ohio*."⁸⁷

During the survey period, the court continued to disfavor jury instructions on nonstatutory circumstances. In *Randolph v. State*,⁸⁸ the court listed as "meritless and warranting no discussion" argument that "the trial court erred in refusing to instruct the jury separately on specific nonstatutory circumstances."⁸⁹

In *Stewart v. State*,⁹⁰ a state witness testified that the defendant was "drunk most of the time" in the period after the shooting, and one Dr. Merin, a psychologist, testified that the defendant was (in the court's phrase) "impaired but not substantially so" at the time of the offense.⁹¹ The defense sought a jury instruction on the "substantially impaired" statutory mitigating circumstance,⁹² and, alternatively, an instruction on the same circumstance without the adverb "substantially." The trial court denied both requests.⁹³ Without comment or elaboration, the supreme court wrote that the trial court "properly re-

83. "Any other aspect of the defendant's character or record, and any other circumstance of the offense." FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES §27, 860 (as amended through March 30, 1989).

84. 571 So. 2d 415 (Fla. 1990).

85. 544 So. 2d 1010 (Fla. 1989).

86. 530 So. 2d 269, 273 (Fla. 1988), *cert. denied*, 109 S. Ct. 882 (1989).

87. *Id.* at 273 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978)).

88. 562 So. 2d 331 (Fla. 1990).

89. *Id.* at 339.

90. 558 So. 2d 416 (Fla. 1990).

91. *Id.* at 420.

92. "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." FLA. STAT. § 921.141(6)(f) (1991).

93. *Stewart*, 558 So. 2d at 420.

fused" to give the instruction without the adverb, but then held that the trial court erred by not instructing the jury on the "substantially impaired" circumstance:

The trial court determined that the instruction on impaired capacity was inappropriate on the basis of Dr. Merin's additional testimony that he believed that Stewart was impaired but not substantially so. The qualified nature of Dr. Merin's testimony does not furnish a basis for denying the requested instruction. As noted above, an instruction is required on all mitigating circumstances "for which evidence has been presented" and a request is made. Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows "substantial" impairment. (No instruction required upon bare presentation of controverted evidence of alcohol and marijuana consumption, without more). To allow an expert to decide what constitutes "substantial" is to invade the province of the jury. Nor may a trial judge inject into the jury's deliberations his views relative to the degree of impairment by wrongfully denying a requested instruction.

The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be pre-conditioned by the judge's view of what they were allowed to know.

We are unable to say beyond a reasonable doubt that the failure to give the requested instruction had no effect on this jury's recommended sentence. This error mandates a new sentencing proceeding.⁹⁴

Thus, the supreme court upheld the refusal to instruct on a nonstatutory circumstance⁹⁵ directly supported by the evidence and reversed the

94. *Id.* at 420-21.

95. There can be little doubt that less than substantial impairment is a mitigating circumstance. *Cf. Perry v. State*, 522 So. 2d 817, 821 (Fla. 1988) (jury could properly consider "psychological stress" as nonstatutory mitigation) and *Cheshire v. State*, 568 So. 2d 908 (Fla. 1990) (error for judge to limit consideration of mental disturbance to "extreme" mental disturbance - Florida's capital sentencing statute does in

refusal to instruct on a statutory circumstance directly contradicted by the evidence.

Another paradox arises from *Nixon v. State*,⁹⁶ and *Jones v. State*.⁹⁷ After Joe Elton Nixon was convicted of first degree murder, kidnapping, robbery, and arson, the trial court at the penalty phase refused to give a defense requested jury instruction on the maximum penalties for the noncapital offenses of which he was convicted [defense counsel wished to argue that the jury could consider in mitigation the possibility that Mr. Nixon would receive long consecutive sentences for those offenses and would therefore never be released from prison].⁹⁸ The supreme court approved of the trial court's ruling on two grounds: first, that Rule 3.390(a), Florida Rules of Criminal Procedure, forbids jury instructions on the penalties for noncapital offenses; and second, that "[t]he fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime."⁹⁹ The court went on to note that, in any event, the proposed instruction did not state that the noncapital sentences could be considered as mitigation, that counsel did argue them as mitigation, and that the jury was instructed that the factors which it could consider in mitigation were unlimited.¹⁰⁰

Nixon seems irreconcilably contrary to *Jones*, which had been decided less than three months earlier. In *Jones*, the court held that the trial court had erred by not letting defense counsel argue that the jury could consider in mitigation that the defendant could receive consecutive sentences for the two murders of which he was convicted:

fact require that emotional disturbance be "extreme," however, it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, *any* emotional disturbance relevant to the crime must be considered and weighed by the sentencer).

96. 572 So. 2d 1336 (Fla. 1990).

97. 569 So. 2d 1234 (Fla. 1990).

98. *Nixon*, 572 So. 2d at 1344-45.

99. *Id.* at 1345.

100. *Id.* To the extent that *Nixon* stands for the principle that argument of counsel is a substitute for jury instructions, it is contrary to, e.g., *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978) (failure to instruct on presumption of innocence - arguments of counsel cannot substitute for instructions by the court) and *Mellins v. State*, 395 So. 2d 1207, 1209 (Fla. 4th Dist. Ct. App. 1981) (argument of counsel no substitute for complete jury instructions - it is not a sufficient refutation of appellant's argument to suggest that her counsel's summation sufficiently apprised the jury of the effect of intoxication on the scienter required to support the charge to relieve the Court of its duty to give an appropriate instruction).

The standard for admitting evidence of mitigation was announced in *Lockett v. Ohio*, 438 U.S. 586, (1978). The sentencer may not be precluded from considering as a mitigating factor, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604. Indeed, the Court has recognized that the state may not narrow a sentencer's discretion to consider relevant evidence "that might cause it to *decline to impose* the death sentence." *McClesky v. Kemp*, 482 U.S. 279, 304, (1987) (emphasis in original; footnote omitted). Counsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consideration of "the circumstances of the offense" which the jury may not be prevented from considering.¹⁰¹

In *Randolph, Stewart, and Nixon*, the supreme court refused to authorize various jury instructions regarding specific nonstatutory mitigating circumstances. The supreme court has not offered any detailed explanation for this refusal, and it is difficult to reconcile it with the announcement in *Campbell* that "categories" of nonstatutory circumstances are to be treated like the statutory circumstances, and with the general trend toward greater reliance on the jury's penalty verdict.¹⁰² How, one wonders, can the penalty verdict be reliable where the jury does not receive instructions on the rather elaborate body of law governing the consideration of aggravating and mitigating circumstances?

The court's response would seem to be that the "catchall" instruction sufficiently directs the jury's attention to the nonstatutory evidence and gives the jury sufficient guidance in evaluating them. *Blystone v. Pennsylvania*,¹⁰³ lends support for such a position. Scott Wayne Blystone was convicted of first degree murder, robbery, conspiracy to commit homicide, and conspiracy to commit robbery. The evidence showed that he and others picked up a hitchhiker, and took him to a field where Mr. Blystone robbed and killed him.¹⁰⁴ The defense presented no

101. *Jones*, 569 So. 2d at 1239-40. In *Cooper v. State*, 581 So. 2d 49, 52 (1991) (Barkett, J., concurring), Justice Barkett pointed out that evidence that the defendant would not be released from prison even after service of the mandatory minimum twenty-five years supported the mitigating circumstance that the defendant did not "in the future pose a danger to the community if he were not executed."

102. See *Campbell*, 571 So. 2d at 415.

103. 110 S. Ct. 1078 (1990).

104. *Id.* at 1080.

mitigating evidence at sentencing. After affirmance of his conviction and resulting death sentence on appeal, the United States Supreme Court granted certiorari "to decide whether the mandatory aspect of the Pennsylvania death penalty statute renders the penalty imposed upon petitioner unconstitutional because it improperly limited the discretion of the jury in deciding the appropriate penalty for his crime."¹⁰⁵ Mr. Blystone's principle argument attacked as unconstitutional the provision of the statute requiring imposition of the death sentence where the jury found at least one aggravating circumstance and no mitigating circumstances.¹⁰⁶ A subsidiary argument was that jury instructions pursuant to 42 Pennsylvania Consolidated Statutes section 9711(e) [which contains a list of mitigating circumstances similar to the list in section 921.141(6) of the Florida Statutes] were unconstitutional.¹⁰⁷ The Court wrote regarding this subsidiary argument:

Next, petitioner maintains that the mandatory aspect of his sentencing instructions foreclosed the jury's consideration of certain mitigating circumstances. The trial judge gave the jury examples of mitigating circumstances that it was entitled to consider, essentially the list of factors contained in § 9711(e). Among these, the judge stated that the jury was allowed to consider whether petitioner was affected by an "extreme" mental or emotional disturbance, whether petitioner was "substantially" impaired from appreciating his conduct, or whether petitioner acted under "extreme" duress. This claim bears scant relation to the mandatory aspect of Pennsylvania's statute, but in any event we reject it. The judge at petitioner's trial made clear to the jury that these were merely items they could consider, and that it was also entitled to consider "any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense." App. 12-13. This instruction fully complied with the requirements of *Lockett and Penry*.

Three Terms ago, in *McCleskey v. Kemp*, 481 U.S. 279, we sum-

105. *Id.* at 1081. The Pennsylvania statute is generally similar to the Florida Statute in that it contains lists of aggravating and mitigating circumstances to be considered at sentencing. It differs in that it leaves the sentencing decision with the jury, and mandates that the jury sentence the defendant to death "if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." 42 PA. CONS. STAT. § 9711(c)(1)(iv) (1990).

106. *Blystone*, 110 S. Ct. at 1084.

107. *Id.*

marized the teachings of the Court's death penalty jurisprudence:

In sum, 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 decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

We think petitioner's sentence under the Pennsylvania statute satisfied these requirements. The fact that other States have enacted different forms of death penalty statutes which also satisfy constitutional requirements casts no doubt on Pennsylvania's choice. Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished.¹⁰⁸

Blystone does not address the question of whether the trial court must instruct on specific recognized nonstatutory circumstances.¹⁰⁹ Thus it does not resolve the following questions arising from *Stewart*:¹¹⁰ If the "catchall" instruction acts as a panacea by permitting consideration of all mitigation why was a new sentencing hearing required in *Stewart* and the cases cited in it? Could the jury not have used the "catchall" instruction as license to consider Dr. Merin's testimony? Why have jury instructions on the statutory circumstances at all, yet not have them on the *Campbell* categories? The Florida Supreme

108. *Id.*

109. Curiously, neither the majority nor the dissent considered Mr. Blystone's specific argument, which was that the jurors could reasonably have concluded that they were forbidden from considering duress or disturbance that was not extreme or impairment that was not substantial.

110. 558 So. 2d at 416.

Court has yet to address these questions.

B. *Reliance on the Penalty Verdict*

Florida's capital sentencing statute provides for an "advisory" penalty verdict rendered by the jury, but places on the trial court judge the responsibility for imposition of sentence.¹¹¹ But a jury verdict for life imprisonment is not merely "advisory." It has a powerful presumption of correctness and is to be overridden by the trial court only where "virtually no reasonable person" could agree with it.¹¹² The override procedure and the *Tedder* doctrine have been criticized both in and out of the court. Justice Shaw has written at some length in favor of abolition of the *Tedder* doctrine.¹¹³ Other commentators have suggested that the override procedure itself cannot be administered consistently.¹¹⁴ Both Justice Shaw and these commentators agree that the court has not been consistent in its application of *Tedder*.

Over the years, a recurring problem in the application of *Tedder* has arisen when the sentencing judge has had information typically from a pre-sentence investigation report¹¹⁵ unavailable to the jury. In

111. FLA. STAT. § 921.141(2), (3) (1991).

112. *Tedder*, 322 So. 2d at 910. As noted in a previous section of this article, the supreme court de-emphasized the importance of the jury's role in *Smalley*, indicating that, since the judge knows the law and will therefore apply it accurately, it is not necessary that the jury be accurately instructed on the law.

113. *Grossman v. State*, 525 So.2d 833, 846-51 (Fla. 1986) (Shaw, J., concurring), *cert. denied*, 489 U.S. 1071 (1989).

114. Skene, *Review of Capital Cases: Does The Florida Supreme Court Know What It's Doing?*, 15 STET. L. REV. 263, 298-306 (1986). Mr. Skene writes that "it is hypocritical to deem a jury 'unreasonable' in discounting its sentence recommendation while upholding a verdict of guilt 'to the exclusion of and beyond every reasonable doubt.'" *Id.* at 305. See also Mello and Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U.L. REV. 31 (1985).

115. The use of pre-sentence investigation reports (generally referred to as PSI's) promises to be the source of litigation in years to come. Prepared by probation officers, these reports typically contain specific sections for "Victim Impact Statements" and for personal remarks and recommendations by police officers and prosecutors. Also, their preparation typically involves interviews with defendants without notice to, or the presence of, counsel. Thus the preparation of such reports often involves substantial violations of the principles set out in cases such as *Booth v. Maryland*, 482 U.S. 496 (1987) (victim impact statement), *Jackson v. Dugger*, 547 So. 2d 1197 (Fla. 1989) (effect of killing on law enforcement officers), and *Powell v. Texas*, 109 S. Ct. 3146 (1989) (statement of defendant to state psychiatrist for use at sentencing). See *Mills v. Dugger*, 574 So. 2d 63 (Fla. 1990) (declining to address issue on ground of procedural

Cochran v. State,¹¹⁶ the court directly confronted this problem. Guy Cochran was convicted of first degree murder in the death of Carol Harris. The penalty phase of the jury proceeding occurred immediately after the guilt phase and resulted in a life verdict.¹¹⁷ Prior to sentencing by the judge in that case, Mr. Cochran was tried and convicted of another first degree murder. Using, as an aggravating circumstance, this subsequent capital conviction of which the Harris jury was unaware,¹¹⁸ the trial court overrode the life verdict and imposed a death sentence.¹¹⁹ In reducing the sentence to one of life imprisonment, the Florida Supreme Court wrote that the existence of the additional aggravating circumstance did not make the jury's life verdict so unreasonable as to justify the override. The court recognized that in the past it had upheld override sentences in such circumstances, but wrote that the life verdict retains its strong presumption of correctness even when based on less information than is available to the judge. After examining the mitigating evidence presented by the defense, the court concluded that the evidence was sufficient to support a life sentence.¹²⁰ In response to a vigorous dissent by Justice Ehrlich, joined by Justices Shaw and Grimes,¹²¹ and belatedly, to Justice Shaw's concurring opinion in *Grossman v. State*,¹²² the *Cochran* majority acknowledged that the supreme court had not consistently applied *Tedder* in the past:

Finally, we agree with the dissent that "legal precedent consists more in what courts do than in what they say." However, in expounding upon this point to prove that *Tedder* has not been applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. This is not indicative of what the present court does, as Justice Shaw noted in his special concurrence to *Grossman v. State*, 525 So. 2d 833, 851 (Fla. 1988) (Shaw, J., specially concurring):

During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have

default).

116. 547 So. 2d 928 (Fla. 1989).

117. *Id.* at 929.

118. A prior conviction of a capital offense is a statutory aggravating circumstance. FLA. STAT. § 941.141(5)(b) (1991).

119. *Cochran*, 547 So. 2d at 929.

120. *Id.* at 932.

121. *Id.* at 933.

122. 525 So. 2d 833, 846-51 (Fla. 1986) (Shaw, J., concurring).

affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation. . . .

Clearly, since 1985 the Court has determined that *Tedder* means precisely what it says, that the judge must concur with the jury's life recommendation unless 'the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.'¹²³

During the survey period, the court seemed committed to keeping the promise of *Cochran*, reversing all but one¹²⁴ of the override sentences that came before it. The court substantially ratified *Tedder* in two cases. In the first, *Cheshire v. State*,¹²⁵ the court subtly extended *Tedder* by casting the sentencing judge's role as more like an appellate court than a factfinder. In the second, *Buford v. State*,¹²⁶ it applied *Tedder* even when there was a gulf of more than ten years between the life verdict and the ultimate imposition of sentence.

Steven Cheshire was convicted of two counts of first degree murder in the deaths of his estranged wife and a man with whom she was living. Although the defense presented no mitigating evidence, the jury rendered life verdicts as to both murders, but the trial court overrode one of the verdicts, and imposed a death sentence for the wife's mur-

123. *Cochran*, 547 So. 2d at 933. The admission in *Cochran* that *Tedder* has not been consistently applied in the past may bode ill for the continuing constitutionality of the override procedure. In *Spaziano v. Florida*, 468 U.S. 447 (1984), the Court upheld the procedure against a facial attack, but left open the question of whether it could later be challenged upon a demonstration that it was applied in an arbitrary manner: "We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case. . . . [T]here is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence, either in cases in which both the jury and the trial court have concluded that death is the appropriate penalty or in cases when the jury has recommended life and the trial court has overridden the jury's recommendation and sentenced the defendant to death." 468 U.S. at 466. It may be that *Cochran* supplies the evidence found lacking in *Spaziano*.

124. *Zeigler v. State*, 16 FLW S257 (Apr. 11, 1991).

125. 568 So. 2d 908 (Fla. 1990).

126. 570 So. 2d 923 (Fla. 1990).

der.¹²⁷ On appeal, the Florida Supreme Court reduced the sentence to life imprisonment, finding that the jury could reasonably have extracted from the state's case evidence that could support a life sentence. The court's approach was novel in that it discounted the judge's rejection of controverted mitigating evidence.¹²⁸ In a prior felony conviction override case, the court had accepted the trial court's rejection of controverted mitigating evidence, apparently treating the trial court judge as the ultimate factfinder.¹²⁹ In *Cheshire*, however, the court seemed to consider it improper for the judge to make an independent evaluation of the mitigating evidence, writing that "under *Tedder*, the trial court's role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment."¹³⁰ If followed in subsequent cases, *Cheshire* will constitute a substantial advance toward regularizing the procedure by which trial court judges are to make sentencing decisions in cases involving life verdicts.

Buford involved an unusual example of the vitality of a life verdict. Robert Buford was convicted in 1978 for the rape and murder of a seven-year-old girl. Although the jury rendered a life verdict, the trial court imposed a death sentence. After lengthy litigation, resentencing was ultimately ordered by a federal court on the ground that the trial court had improperly limited its own consideration of mitigating evidence.¹³¹ When the case came up for resentencing more than ten years after the original trial, a considerable amount of evidence was presented to the judge that was not available to the 1978 jury. Noting "the anomaly that the jury did not hear the additional mitigating evidence which must be considered in determining whether the life recom-

127. *Cheshire*, 568 So. 2d at 910.

128. *Id.* at 911. Thus, the court wrote: ". . .there was some evidence that Cheshire had been drinking at the time of the murder. Although the judge concluded that Cheshire was not sufficiently intoxicated, we nevertheless must acknowledge that a reasonable jury could have relied upon this evidence to conclude that Cheshire was not in control of his faculties." *Id.*

129. In *Thompson v. State*, 553 So. 2d 153 (Fla. 1989), the supreme court upheld an override sentence where the trial judge rejected the testimony of a defense psychiatrist that the defendant suffered from organic brain damage so that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

130. *Cheshire*, 568 So. 2d at 911.

131. *Buford*, 570 So. 2d at 924. The federal appeals court noted that the trial court's improper limitation was in violation of *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

mentation was reasonable” and that the override had previously been upheld on direct appeal, the court applied *Tedder* and found the override improper given the new evidence.¹³² Thus, the supreme court held that the presumption in favor of the life verdict continues to apply even where the evidence presented to the judge differs considerably from the evidence heard by the jury.¹³³

McCrae v. State,¹³⁴ extended the effect of *Buford*. James McCrae’s override death sentence was initially affirmed in 1980,¹³⁵ but the sentence was eventually vacated because of a *Hitchcock* violation.¹³⁶ At the new sentencing hearing, much of the new mitigating evidence involved Mr. McCrae’s life after he was initially sentenced to death: “while in prison and receiving treatment, McCrae has demonstrated an above-average intelligence and writing ability; has developed and evidenced strong spiritual and religious standards; has contributed to the lives of others; has demonstrated a high potential for rehabilitation and for making a contribution to the community; and has expressed sincere remorse for his actions.”¹³⁷

Contrary to the foregoing cases is *Zeigler v. State*,¹³⁸ in which the supreme court seemed to resort to the approach condemned in *Cochran*. Under *Cochran* and like cases, the Florida Supreme Court has looked to see whether the evidence could reasonably support the jury’s life verdict and has resolved conflicts in the evidence in favor of the verdict. But in *Zeigler*, as in *Thompson*, the supreme court accorded the judge’s sentencing order the presumption of correctness, and resolved conflicts in favor of the order rather than in favor of the verdict. It approved the trial court’s rejection of mitigating evidence regarding Mr. Zeigler’s character and involvement in church and community activities noting that it found “no error in the weight the trial

132. *Buford*, 570 So. 2d at 924-25.

133. *Douglas v. State*, 575 So. 2d 165 (Fla. 1991) involved a similar situation. After convicting Mr. Douglas of a 1973 murder, the jury rendered a life verdict, which the trial court overrode. After many years of litigation, a new sentencing hearing was ordered at which a substantial amount of additional mitigating evidence was presented. As in *Buford*, the supreme court reversed Mr. Douglas’s resulting death sentence in light of the additional mitigating evidence.

134. 582 So. 2d 613 (Fla. 1991).

135. *McCrae v. State*, 395 So. 2d 1145 (Fla. 1980), *cert. denied*, 454 U.S. 1041 (1981).

136. *McCrae v. State*, 510 So. 2d 874 (Fla. 1987).

137. 582 So. 2d at 616.

138. 580 So. 2d 127 (Fla. 1991).

judge assigned to this mitigating evidence. The judge could properly consider the witnesses' relationships to the defendant and their personal knowledge of his actions in deciding what weight to give to their testimony."¹³⁹

C. *The Sentencing Order*

Section 921.141(3) of the Florida Statutes contemplates specific factual findings of the trial court respecting mitigating evidence. It provides in pertinent part that the trial court shall produce written findings upon which its sentence of death is based and also that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In holding Section 921.141 constitutional in *Proffitt v. Florida*,¹⁴⁰ the United States Supreme Court anticipated that this requirement of written findings would result in meaningful appellate review and therefore prevent arbitrary application of the death penalty.¹⁴¹ Nevertheless, the Florida Supreme Court has sometimes held in the past that there is no requirement of specific findings as to nonstatutory mitigating circumstances.¹⁴²

Eventually, the supreme court realized that the absence of specific factual findings resulted in uneven application of the death penalty and undertook to regularize the sentencing procedure.¹⁴³

During the early 1990s, the court struggled with the obvious tensions between the principles espoused in *Rogers* and *Proffitt* and the practice upheld in *Mason*.

139. *Id.* at 130.

140. 428 U.S. 242 (1976).

141. *Id.* at 251.

142. *E.g.*, *Mason v. State*, 438 So. 2d 374 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984). The supreme court wrote: "The trial judge need not have expressly addressed each non-statutory mitigating factor in rejecting the same, and we will not disturb his judgment simply because appellant disagrees with the conclusions reached." *Id.* at 380. The court did not seem to consider the absence of such express findings to be an impediment to its appellate review.

143. *See Rogers v. State*, 511 So. 2d 526, 534 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988).

1. Specific Findings Required

In *Campbell v. State*,¹⁴⁴ the court took a hard line against the *Mason*-sanctioned practice of not specifically considering mitigating factors in the sentencing order. Observing that "our state courts continue to experience difficulty in uniformly addressing mitigating circumstances," the court established the following guidelines to clarify the issue:

When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. *See Rogers v. State*, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla. Std. Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." *Brown v. Wainwright*, 392 So. 2d 1327, 1331 (Fla. 1981). Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law.¹⁴⁵

144. 571 So. 2d 415 (Fla. 1990).

145. *Id.* at 419-20. The quotation is from the opinion on rehearing. In the original opinion, the clause between the citation to *Rogers* and the quotation from the standard jury instructions stated: "The Court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature". 15 Fla. L. Weekly at S344. It also included a footnote, since deleted, saying, "We note that where uncontroverted evidence of a mitigating factor has been presented, a reasonable quantum of competent proof is required before the factor can be said to have been established." *Id.* at n.5.

Although the foregoing raises questions, as discussed in this article, it represents a fresh start toward regularizing consideration of mitigation; thus improving the quality of appellate review in capital cases. Further, it addresses an issue that has been the source of some criticism in the past: the rejection of un rebutted mitigating evidence.¹⁴⁶

2. Specific Findings Not Required

In other cases, the court declined to reverse sentencing orders which did not comply with *Campbell*. Further, although *Campbell* seems to be dictated by *Proffitt* and *Rogers*, the court has refused to apply it to cases where the sentencing order preceded the court's decision in *Campbell*.

In *Floyd v. State*,¹⁴⁷ which was decided three months after *Campbell*, the court upheld a sentencing order, entered prior to *Campbell*, in which the trial judge apparently said only the following about the mitigating evidence: "[t]his court [sic] heard everything at the sentencing hearing that the Defendant chose to present. This court [sic] now finds that sufficient mitigating circumstances which would require a lesser penalty do not exist."¹⁴⁸

Similarly, in *Bruno v. State*,¹⁴⁹ the court upheld a death sentence, entered prior to *Campbell*, where there were three statutory aggravating circumstances and no statutory mitigating circumstances. In that case there was no consideration of nonstatutory mitigation.¹⁵⁰ *Bruno*

146. See Waters, *Uncontroverted Mitigating Evidence in Florida Capital Sentencings*, 63 FLA. B.J. 11 (1989). Of course, the general rule is that uncontradicted evidence must be accepted as proof of a contested issue. *E.g.* *M. Stevens Dry Dock v. G & J Inv. Corp.*, 506 So. 2d 30 (Fla. 3d Dist. Ct. App. 1987) (citing cases). In the past, the court had declined to apply this elementary principle to capital sentencing. *See, e.g.*, *Pope v. State*, 441 So. 2d 1073 (Fla. 1983) (approving of trial court's rejection of un rebutted evidence that defendant suffered from post-traumatic stress syndrome as a result of service in Viet Nam).

147. 569 So. 2d 1225 (Fla. 1990).

148. *Id.* at 1233 (emphasis in original).

149. 574 So. 2d 76 (Fla. 1991)

150. *Id.* at 83. The trial court rejected evidence that Mr. Bruno was "extremely" disturbed and suffered "substantial" impairment of his ability to conform his conduct to the requirements of the law, but apparently did not consider the nonstatutory circumstances of less than extreme disturbance and less than substantial impairment. The supreme court has acknowledged the existence of such nonstatutory circumstances. *See Cheshire v. State*, 568 So.2d 908, 912 (1990) (error to fail to consider nonstatutory mitigation). *Bruno* contains no mention of *Cheshire*.

does not reflect the express evaluation of nonstatutory circumstances required by *Campbell*.

In yet another case, *Gilliam v. State*,¹⁵¹ the court wrote:

Appellant's penultimate argument is that the sentencing order does not reflect reasoned judgment because it fails to enumerate the *statutory* mitigating factors on which he presented evidence. We find the sentencing order sufficient. The order recites the statutory aggravating circumstances that were found proved, and the reasons supporting the findings. The order also recites the *nonstatutory* mitigating circumstances that the court found proved. In view of the trial judge's findings regarding nonstatutory mitigating circumstances, we can assume he followed his own instructions to the jury in considering the statutory mitigating circumstances, despite the fact that he did not enumerate them. As we noted in *Johnson v. Dugger*, 520 So. 2d 565, 566 (Fla. 1988): "When read in its entirety, the sentencing order, combined with the court's instructions to the jury, indicates that the trial court gave adequate consideration to the evidence presented." Appellant nevertheless argues that our recent decision in *Campbell v. State*, 571 So. 2d 415 (Fla. 1990), issued after the order under review was rendered, requires a different result. *Campbell* directs that "the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." *Id.* at 419 (footnote omitted). It is unnecessary for us to reach the question whether this order complies, because *Campbell* is not a fundamental change of law requiring retroactive application. As we said in *Witt v. State*, 387 So. 2d 922, 929 (Fla. 1990), only "fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding" — in effect, "jurisprudential upheavals" — require retroactive application; "evolutionary refinements" do not.¹⁵²

Taken literally, *Gilliam* seems to stand for the proposition that, if the judge has instructed the jury to consider mitigating factors, then it is to be assumed that the trial court has correctly considered mitigating factors. This proposition is in stark contrast to the observations in *Rogers* and *Campbell* that trial courts are often confused in how to go about

151. 582 So. 2d 610 (Fla. 1991).

152. *Id.* at 612 (emphasis in original).

considering mitigating evidence.¹⁵³

Another case which seems directly contrary to *Campbell* is *Sochor v. State*.¹⁵⁴ Dennis Sochor was convicted of first degree murder and kidnapping in the strangling death of a young woman he met at a bar on New Year's Eve. The only eyewitness testified that Mr. Sochor looked like a man "possessed" at the time of the murder, and several experts testified to Mr. Sochor's psychiatric problems.¹⁵⁵ Finding four aggravating circumstances¹⁵⁶ and no mitigating circumstances, the trial court sentenced him to death. The Florida Supreme Court struck one of the aggravating circumstances¹⁵⁷ but upheld the death sentence because the supreme court determined that to strike one aggravating factor where there were no mitigating factors was not a cause for re-sentencing.¹⁵⁸

As an initial matter, it is impossible to square the statement in *Sochor* that evidence of childhood abuse can be ignored¹⁵⁹ with the statements in *Campbell*¹⁶⁰ that, as a matter of law, an abused childhood is a "valid" mitigating circumstance and in *Rogers*¹⁶¹ that the sentencer must, as a matter of law, consider all mitigating circumstances. It is also impossible to square with those authorities the hold-

153. The court's unwillingness to apply *Campbell* to Mr. Gilliam's sentence on the basis of *Witt* is somewhat puzzling: *Witt* involved a bar against collateral challenges to convictions and sentences. It did not purport to limit claims on direct appeal. In *Gilliam* the court did not note this distinction.

154. 580 So. 2d 595 (Fla. 1991). EDITOR'S NOTE: Subsequent to the completion of this article, the United States Supreme Court vacated Dennis Sochor's death sentence and remanded the case for further action. Mr. Sochor's attorney was the author of this article and successfully argued a violation of Sochor's Eighth Amendment rights. Readers should refer to *Sochor v. Florida*, 112 S. Ct. 2114 (1992). Any further reference to *Sochor* should be taken in light of the court's opinion.

155. *Id.* at 599.

156. *Id.* The four circumstances were: that Mr. Sochor was previously convicted of a violent felony, that the killing occurred while he was engaged in the commission of a felony, that the killing was especially heinous, atrocious or cruel, and that the killing was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

157. *Id.* at 603. The circumstance that the killing was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification was struck.

158. *Id.* at 604.

159. "Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion." *Id.*

160. 571 So.2d at 419 n.4.

161. 511 So.2d at 534.

ing in *Sochor* that it is discretionary with the judge and jury whether to consider in mitigation evidence of a psychiatric disorder.¹⁶²

3. Other Sentencing Order Issues

Campbell is in keeping with a general trend toward improving the procedures governing sentencing orders. During the survey period, the supreme court continued to require that sentencing orders be rendered at the time of sentencing¹⁶³ although it has declined to apply this requirement to "pipeline" cases.¹⁶⁴ In keeping with the trend toward improving sentencing procedures, the court reduced a death sentence to life imprisonment in a case where the trial court's sentencing order contained no findings as to individual aggravating or mitigating factors.¹⁶⁵

D. *Aggravating Circumstances and Mitigating Evidence*

1. Aggravating Circumstances

a. *Sentence of Imprisonment*

Under section 921.141(5)(a), the jury and judge may consider in aggravation that the murder was committed by a person under sentence of imprisonment. Although a strict construction of the statute would be that the circumstance was directed at prison murders, cases have construed this circumstance to apply to sentencing alternatives or variations in which the defendant was not actually incarcerated at the

162. *Sochor*, 580 So. 2d at 604.

163. The court established this requirement in *Grossman v. State*, 525 So. 2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989).

164. *See Stewart v. State*, 558 So. 2d 416 (1990). In *Christopher v. State*, 583 So. 2d 642 (Fla. 1991), the court reduced a death sentence to life imprisonment on this ground where the sentencing hearing occurred after *Grossman* was decided.

165. In *Bouie v. State*, 559 So. 2d 1113 (Fla. 1990), the trial court's sentencing order apparently said only the following by way of consideration of sentencing factors: "The court has considered the aggravating and mitigating circumstances presented in evidence in this cause and determines that sufficient aggravating circumstances exist, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *Id.* at 1116. The supreme court noted that the trial court's written assessment of sentencing factors is necessary for meaningful appellate review: "A trial judge's justifying a death sentence in writing provides 'the opportunity for meaningful review' in this Court." *Id.*

time of the murder.

In *Haliburton v. State*,¹⁶⁶ the evidence showed that Jerry Haliburton committed a murder after being released from prison under a program called "mandatory conditional release." This program (referred to as "MCR") involved release from prison after serving one's term less allowable gain-time and other credits, with continuing supervision "subject to all statutes relating to parole."¹⁶⁷ The Florida Supreme Court upheld application of the imprisonment circumstance, by analogy with previous cases upholding its application to parolees.¹⁶⁸

In *Gunsby v. State*,¹⁶⁹ the court extended the circumstance to cover the time before the defendant actually began to serve his sentence. In upholding Donald Gunsby's death sentence, the court wrote:

[T]he record clearly establishes that Gunsby had been sentenced to incarceration but had not reported to jail as ordered and that a warrant had been issued for his arrest. These circumstances justify a finding that Gunsby was under a sentence of imprisonment at the time of this offense. We reject the contention that there must be an escape for this aggravating circumstance to apply, and we conclude that this aggravating circumstance was properly found. *See Songer v. State*, 544 So. 2d 1010 (Fla.1989).¹⁷⁰

Haliburton and *Gunsby* were in keeping with a general trend against strict construction of aggravating circumstances. As such, they stand in marked contrast to *Trotter v. State*.¹⁷¹ In that case, the trial court had applied the imprisonment circumstance where Melvin Trotter committed a murder while released to a "community control" program. The Florida Supreme Court reversed, writing:

Subsection 948.10(1), Florida Statutes (1985), provides that community control is "an alternative, community-based method to pun-

166. 561 So. 2d 248 (Fla. 1990).

167. FLA. STAT. § 944.291 (1979).

168. *Haliburton*, 561 So. 2d at 252. The cases applying the circumstance to parolees stem from *Aldridge v. State*, 351 So. 2d 942 (Fla. 1977). Curiously, Mr. Aldridge did not contest this use of the circumstance, so the court was not called upon to decide the propriety of its use.

169. 574 So. 2d 1085 (Fla. 1991).

170. *Id.* at 1090. Mr. Songer "did not break out of prison but merely walked away from a work-release job." 544 So. 2d at 1011. *Gunsby* certainly creates new law if it holds that walking away is not escaping.

171. 576 So. 2d 691 (Fla. 1990).

ish an offender in lieu of incarceration." Moreover, we have held that violation of probation is not an aggravating circumstance — probation is not equivalent to being under sentence of imprisonment, for the appellant was not incarcerated. *Bolender v. State*, 422 So. 2d 833 (Fla. 1982), *cert.denied*, 461 U.S. 939 (1983); *Ferguson v. State*, 417 So. 2d 631 (Fla. 1982); *Peek v. State*, 395 So. 2d 492 (Fla. 1980), *cert.denied*, 451 U.S. 964 (1981). Penal statutes must be strictly construed in favor of the one against whom a penalty is to be imposed. *Reino v. State*, 352 So. 2d 853 (Fla. 1977), *receded from on other grounds*, *Perez v. State*, 545 So. 2d 1357 (Fla. 1989).¹⁷²

b. Prior Violent Felony

Under section 921.141(5)(b) of the Florida Statutes, the sentencing jury and judge may consider as an aggravating circumstance that the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. For the first eighteen years of this circumstance's existence, it was thought that it did not apply to juvenile adjudications of delinquency for violent offenses. But in 1990, the court suggested that it could apply to such adjudications. In *Campbell v. State*,¹⁷³ the court wrote, without further discussion that the trial court "correctly found that Campbell was previously convicted of a felony involving the use or threat of violence. He cites no authority in support of his assertion that prior juvenile convic-

172. *Id.* at 694. *Reino* involved construction of a statute of limitation. Although *Trotter* appears to be the first Florida case to apply the rule of strict construction to an aggravating circumstance, the rule is hardly novel. Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

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

This principle, known as the "rule of lenity," is not merely a maxim of statutory construction: it is rooted in fundamental principles of due process. *Dunn v. United States*, 442 U.S. 100, 112 (1979) (rule of lenity rooted in fundamental principles of due process mandating that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "plainly and unmistakably" proscribed). The principle of strict construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. *Bifulco v. United States*, 447 U.S. 381 (1980).

173. 571 So. 2d 415 (Fla. 1990).

tions cannot be considered in aggravation.”¹⁷⁴ This somewhat cryptic statement is remarkable because it is directly contrary to the principle of strict construction of aggravating circumstances espoused seven days later in *Trotter*. It is also contrary to indications in *Young v. State*,¹⁷⁵ that it would be improper to consider the defendant’s juvenile record. In *Young*, the court held that there was no error in using a pre-sentence investigation report where the trial court stated that it did not rely on Mr. Young’s juvenile record.¹⁷⁶

Other recent cases involving this circumstance show uncertainty as to its purpose and as to what evidence may be used to support it. For example, in *Stewart v. State*,¹⁷⁷ the court reiterated a prior interpretation that the purpose of the circumstance was to demonstrate violent propensity: “Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge.”¹⁷⁸ But violent propensity, *per se*, is not an aggravating circumstance under the statute, and in *Freeman v. State*,¹⁷⁹ the court held it was improper for the prosecutor to imply to the jury that the defendant was likely to commit future crimes if not incarcerated. In *Freeman*, the court simply took no notice of *Stewart* and *Elledge*.

Even more curious is the fact that *Freeman* overruled *sub silentio* the portion of *Elledge* on which the court relied in *Stewart*. In *Elledge*, the court had held admissible, as relevant to Mr. Elledge’s propensity to commit violent crimes, the testimony of the widow of a man he had killed in the course of a prior violent felony. But in *Freeman*, the court held that such testimony was impermissible under *Booth v. Maryland*.¹⁸⁰

On the other hand, the court wrote in *Lucas v. State*,¹⁸¹ “that [t]estimony by the victims, or others, about prior crimes is admissible if

174. *Id.* at 418.

175. 579 So. 2d 721 (Fla. 1991).

176. *Id.* at 725.

177. 558 So. 2d 416 (Fla. 1990).

178. *Id.* at 419 (quoting *Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977)). In *Hallman v. State*, 560 So. 2d 223 (Fla. 1990) the supreme court suggested a purpose the defense might have to present evidence regarding the facts of a prior violent felony, writing that the jury could have concluded that the circumstance was “entitled to little weight” given un rebutted evidence of the defendant’s limited involvement in the prior offense.

179. 563 So. 2d 73 (Fla. 1990).

180. *Id.* at 75-76 (citing *Booth v. Maryland*, 482 U.S. 496 (1987)).

181. 568 So. 2d 18 (Fla. 1990).

the defendant is given the opportunity to confront the witness.”¹⁸² *Lucas* cited, among other authorities, *Rhodes v. State*.¹⁸³ In *Rhodes*, the court reached the odd conclusion that, although the confrontation clause applies to capital proceedings, the clause is not necessarily violated by the introduction of testimony founded on hearsay provided by persons whom the defendant cannot confront.¹⁸⁴ At the penalty phase of Richard Rhodes’ capital trial, the state produced the testimony of a Nevada police captain. The trial court allowed the captain to testify about his investigation of a violent felony committed by Mr. Rhodes, and allowed him to play a tape of an interview with the victim of that crime, who was unable to travel to Florida to testify.¹⁸⁵ The Florida Supreme Court held that use of the tape violated the confrontation clause, but ruled that the captain’s testimony, manifestly based on hearsay, was admissible because “the defendant [was] accorded a fair opportunity to rebut any hearsay statements.”¹⁸⁶

c. *Great Risk*

Under section 921.141(5)(c), the jury may consider in aggravation that the defendant “knowingly created a great risk of death to many persons.” The supreme court has in the past held that the circumstance does not apply simply because bystanders are present at the time of the murder.¹⁸⁷ It has also held that the circumstance cannot be based on mere possibilities. For instance, in *White v. State*,¹⁸⁸ the defendant committed six murders in a house. The trial court applied the great risk circumstance, reasoning that anyone [such as a friend or delivery person] coming to the house during the episode would have been in danger. The Florida Supreme Court reversed, holding that such speculation could not support application of the circumstance.¹⁸⁹

During the survey period, the court reached apparently contradic-

182. *Id.* at 21.

183. 547 So. 2d 1201 (Fla. 1989).

184. *Id.* at 1204.

185. *Id.*

186. *Id.* at 1204-05. *Rhodes* is difficult to reconcile with *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990) in which the court upheld the exclusion, on hearsay grounds, of the testimony of a defense witness at sentencing regarding interviews made during his investigation of mitigation.

187. *Kampff v. State*, 371 So. 2d 1007 (Fla. 1979) (two bystanders present in store when defendant shot ex-wife).

188. 403 So. 2d 331 (Fla. 1981).

189. *Id.*

tory results in two cases applying the circumstance. In *Hallman v. State*,¹⁹⁰ the evidence showed that Darrell Wayne Hallman engaged in a gun battle with a security guard outside a bank which he had just robbed. After shooting the guard, he hijacked an automobile, forcing the driver to take him from the scene.¹⁹¹ The trial court applied the great risk circumstance in sentencing Mr. Hallman, but the state supreme court disapproved of the finding:

Next Hallman attacks the finding that he knowingly created a great risk of death to many persons. The trial court listed ten persons who were in the area of the shoot-out and could have been struck and remarked that the shoot-out occurred near a busy thoroughfare. Hallman argues that he and Hunick fired at each other from close range and that none of the bullets was aimed in the direction of a large number of people. At most, he maintains, there was only the chance that a bystander would be struck by a stray shot, and that such a danger is insufficient to support the aggravating circumstance.

Again, we agree with Hallman. We set out the standard for this aggravating circumstance in *Kampff v. State*, 371 So. 2d 1007 (Fla. 1979). We said:

“Great risk” means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon’s actions must be to “many” persons. By using the words “many” the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance.

Id. at 1009-10. We have held that great risk of death to three people was insufficient. *Bello v. State*, 547 So. 2d 914 (Fla. 1989). The state’s reliance on *Suarez v. State*, 481 So. 2d 1201, 1209 (Fla. 1985), *cert.denied*, 476 U.S. 1178, 106 S. Ct. 2908, 90 L. Ed. 2d 994 (1986), is misplaced. In that case the defendant fired more than a dozen shots in the area of a migrant labor camp, three persons other than the victim were in the line of fire and his four nearby accomplices ran the risk of death from return fire.

The trial judge referred to the presence of numerous people in the bank, and passersby on busy U.S. 98 to support his finding. The

190. 560 So. 2d 223 (Fla. 1990).

191. *Id.*

evidence showed, however, that the seven persons in the bank ran almost no risk of being struck, as they were behind partitions and away from doors or windows and not in the line of fire. Five of the witnesses outside the bank either saw or heard the shooting, but only one of them was ever in the line of fire. It is true that there were a number of passersby on U.S. 98, but of the eight shots only one was definitely aimed in the direction of the highway and only two others could have been. We do not believe that the possibility that no more than three gunshots could have been fired toward a busy highway is proof beyond a reasonable doubt that Hallman knowingly created a great risk of death to many persons.¹⁹²

The court was less indulgent in *Van Poyck v. State*,¹⁹³ in which the evidence showed that William Van Poyck and Frank Valdez, in an unsuccessful attempt to free an inmate from a prison van, killed one guard at close range, attempted to kill another at close range, and then, in their flight from the scene fired numerous shots at the police cars in pursuit, hitting three of them.¹⁹⁴ The Florida Supreme Court rejected without discussion Mr. Van Poyck's argument against application of the great risk circumstance.¹⁹⁵

On its face, *Van Poyck* seems at odds with *Hallman*. The evidence recited in *Van Poyck* shows, at most, that several police officers were endangered. It does not show a great risk to "many persons" as required by *Hallman* and *Bello*.

d. Felony Murder

Section 921.141(5)(d) provides for consideration as an aggravating circumstance the fact that the murder 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, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb."¹⁹⁶

In *Holton v. State*,¹⁹⁷ the court seemed to expand this circum-

192. *Id.* at 225-26.

193. 564 So. 2d 1066 (Fla. 1990).

194. *Id.*

195. *Id.* In all, the court rejected fifteen penalty arguments without comment, and discussed only one penalty issue at length on Mr. Van Poyck's appeal.

196. FLA. STAT. § 921.141(5)(d) (1991).

197. 573 So. 2d 284 (Fla. 1990).

stance. The evidence at Rudolph Holton's trial showed that the decedent was already dead at the time of the sexual union.¹⁹⁸ Therefore, under prior case law, there was no sexual battery. Nevertheless, the court upheld Mr. Holton's sexual battery conviction on the theory that Mr. Holton may have thought that the woman was still alive. The court extended this novel principle to the felony murder aggravating circumstance, upholding its application to Mr. Holton.¹⁹⁹

e. Avoiding Arrest

The sentencer may consider in aggravation that the murder "was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."²⁰⁰ In some cases, the Florida Supreme Court has held the state to a high burden of proof and has stricken the circumstance where it would otherwise arguably apply.²⁰¹ At other times, though, under seemingly similar circumstances, it has upheld the circumstance.²⁰² At least where a law enforcement officer has not been killed, the court will uphold the circumstance only where there is "strong proof" that avoiding arrest by eliminating a witness was the sole or dominant motive for the murder.²⁰³ During the survey period, the supreme court did not undertake to further define the circumstance. But in *Derrick v. State*,²⁰⁴ the supreme court did discuss its relationship to the premeditation circumstance.

In *Derrick*, Samuel Jason Derrick murdered Rama Sharma during a robbery. He killed Mr. Sharma to "shut him up" when he started screaming.²⁰⁵ In sentencing Mr. Derrick to death, the trial court employed both the premeditation and the avoiding arrest circumstances.

198. *Id.*

199. *Id.*

200. FLA. STAT. § 921.141(5)(e) (1991).

201. *E.g.*, *Garron v. State*, 528 So. 2d 353, 360 (Fla. 1988) (evidence insufficient to prove circumstance even though victim was on phone with operator asking for the police at the time she was shot); *Perry v. State*, 522 So. 2d 817, 820 (Fla. 1988) (no direct evidence of motive; defendant may have merely panicked when committing robbery).

202. *E.g.*, *Harmon v. State*, 527 So. 2d 182, 188 (Fla. 1988) (defendant became frightened when decedent spoke his name, indicating that decedent could identify him); *Swafford v. State*, 533 So. 2d 270, 276 (Fla. 1988) (circumstantial evidence of existence of witness elimination sufficient).

203. *See, e.g.*, *Perry*, 522 So. 2d at 817.

204. 581 So. 2d 31 (Fla. 1991).

205. *Id.*

The Florida Supreme Court disapproved:

The trial judge found that the murder was cold, calculated, and premeditated and that the murder was committed for the purpose of avoiding arrest. Under the facts as the judge found them, it appears to this Court that it is inconsistent to find that both of these factors apply. In finding that the murder was committed to prevent lawful arrest, the judge relied on Derrick's confession that he had to kill Sharma after Sharma recognized him. Yet, the judge also found the murder to be cold, calculated and premeditated because Derrick hid in the bushes with a knife waiting for Sharma and then chased Sharma twenty feet after the original attack to finish killing him. If Derrick did not decide to kill Sharma until Sharma recognized him, then it seems unlikely that the facts would support the finding of the heightened premeditation necessary to find the murder was cold, calculated, and premeditated.²⁰⁶

f. Pecuniary Gain

The aggravating circumstance that the murder was committed for pecuniary gain²⁰⁷ usually arises where the murder occurs during a robbery or burglary, in which case it is "merged" with the felony murder circumstance, so that the two become a single circumstance.²⁰⁸ In two recent cases, the trial judges merged the pecuniary gain circumstance with the premeditation circumstance. In *Downs v. State*,²⁰⁹ which involved a contract murder, the trial court judge reasoned that the two circumstances would have to be established in every such case, so that they should be treated as one.²¹⁰ And, in *Anderson v. State*,²¹¹ the judge treated them as one where there was a prearranged design to commit robbery and murder.²¹²

206. *Id.*

207. FLA. STAT. § 921.141(5)(f) (1991).

208. *E.g.* Bruno v. State, 574 So. 2d 76 (Fla. 1991). The jury instructions do not inform the jury of this merger doctrine, and the supreme court upheld the denial of a requested jury instruction on the issue in Mendyk v. State, 545 So. 2d 846, 849 (Fla. 1989). Hence, juries consistently apply the circumstance in an incorrect manner.

209. 572 So. 2d 895 (Fla. 1990).

210. *Id.* at 898 n.3.

211. 574 So. 2d 87 (Fla. 1991).

212. *Id.* at 90 n.2.

g. *Hindering Law Enforcement*

The law enforcement circumstance²¹³ also usually disappears from consideration, being merged with the avoid arrest circumstance.²¹⁴

h. *Heinousness*

As noted in this article, the survey period saw no end to controversy regarding the heinousness circumstance. In addition to addressing or avoiding questions regarding jury instructions, the Florida Supreme Court experimented with formulae for application of the circumstance.

In *Porter v. State*,²¹⁵ the evidence showed that after threatening his estranged lover, Evelyn Williams, George Porter, Jr. shot and killed her in the hallway of her home early one morning. Mr. Porter then threatened the woman's daughter, at which point the woman's new lover, Walter Burrows, entered the room, struggled with Mr. Porter, and forced him outside. Mr. Porter apparently shot Mr. Burrows in the yard. The opinion discloses no further details about the shootings.²¹⁶ After Mr. Porter plead guilty to two counts of first degree murder and separate counts of armed burglary and aggravated assault, sentencing proceedings were held before a jury, which recommended death sentences in both murders. Finding, among other things, that the murder of Ms. Williams was especially heinous, atrocious, or cruel, the trial court sentenced Mr. Porter to death for that offense.²¹⁷ On appeal, the Florida Supreme Court wrote, regarding the heinousness circumstance:

Porter next argues that Williams' murder was not especially heinous, atrocious, or cruel. In the seminal case of *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974), the Court addressed the meaning of "especially heinous, atrocious or cruel":

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outra-

213. "The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." FLA. STAT. § 921.141(5)(g) (1991).

214. *E.g.* Valle v. State, 581 So. 2d 40 (Fla. 1991).

215. 564 So. 2d 1060 (Fla. 1990).

216. *Id.*

217. *Id.* The court imposed a sentence of life imprisonment for the Burrows murder, finding that the aggravating circumstances were merely "technical."

geously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felons — the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

We agree that the murder of Williams did not stand apart from the norm of capital felonies, nor did it evince extraordinary cruelty. We see little distinction between this case and *Amoros v. State*, 531 So. 2d 1256, 1261 (Fla. 1988), wherein the Court struck the trial court's finding of especially heinous, atrocious, or cruel on a finding that the murderer fired three shots into the victim at close range. Moreover, this record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was *meant* to be deliberately and extraordinarily painful. The state has not met its burden of proving this factor beyond a reasonable doubt, and the trial court erred in finding to the contrary.²¹⁸

Similarly, in *Cheshire v. State*,²¹⁹ the court wrote:

As his third issue, Cheshire argues that the trial court improperly found the aggravating factor of heinous, atrocious or cruel. We agree. The factor of heinous, atrocious or cruel is proper only in torturous murders — those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. *State v. Dixon*, 283 So. 2d 1 (Fla. 1973). The physical evidence simply does not support such a finding here. At best, we can only conjecture as to the exact events of the murder. Since the evidence at hand is entirely consistent with a quick murder committed in the heat of passion, we believe the state has failed to prove beyond a reasonable doubt that the factor of heinous, atrocious or cruel existed.²²⁰

From the foregoing, it would seem that the heinousness circum-

218. *Id.* at 1063 (emphasis in original).

219. 568 So. 2d 908 (Fla. 1990).

220. *Id.* at 912.

stance applies only where the murderer intended that the killing be deliberately and extraordinarily painful.²²¹ But in *Hitchcock v. State*,²²² the court reached an opposite conclusion. In 1977, a jury convicted James Ernest Hitchcock of first degree murder based on evidence that he had sexual intercourse with his brother's thirteen-year-old step-daughter and then choked and beat her to death when she said she was going to tell her mother.²²³ On habeas corpus review, the United States Supreme Court held that the sentencing jury and judge had been improperly limited in the consideration of mitigating evidence.²²⁴ At resentencing, the jury recommended imposition of the death sentence. The trial court imposed that sentence, finding among other things, that the murder was especially heinous, atrocious, or cruel. On appeal, the Florida Supreme Court rejected Mr. Hitchcock's challenge to this finding:

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. *Stano v. State*, 460 So. 2d 890 (Fla. 1984), *cert. denied*, 471 U.S. 1111 (1985). Hitchcock stated that he kept "chokin' and chokin'" the victim, and hitting her, both inside and outside the house, until she finally lost consciousness. Fear and emotional strain can contribute to the heinousness of a killing. *Adams v. State*, 412 So. 2d 850 (Fla.), *cert. denied*, 459 U.S. 882 (1982). As Hitchcock concedes in his brief, "[s]trangulations are nearly per se heinous." *See Doyle v. State*, 460 So. 2d 353 (Fla. 1984); *Adams; Alvord v. State*, 322 So. 2d 533 (Fla. 1975), *cert. denied*, 428 U.S. 923 (1976). The court did not err in finding this murder to have been heinous, atrocious, or cruel.²²⁵

221. *Porter* and *Cheshire* are difficult to square with the many cases applying the circumstance where the defendant has repeatedly stabbed, or has violently throttled, the decedent in a berserk frenzy with little or no evidence of torturous intent. *E.g.* *Campbell v. State*, 571 So. 2d 415 (Fla. 1990) (defendant repeatedly stabbed decedent) and *Rivera v. State*, 561 So. 2d 536 (Fla. 1990) (while under extreme disturbance defendant strangled decedent).

222. 578 So. 2d 685 (Fla. 1990).

223. *Hitchcock v. State*, 413 So. 2d 741, 743 (Fla.), *cert. denied*, 459 U.S. 960 (1982).

224. *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987).

225. *Hitchcock*, 578 So. 2d at 692-93.

Thus, in *Hitchcock*, the court wrote that torturous intent was not necessary to application of the circumstance, without any mention of *Porter* and *Cheshire*, which had emphasized the necessity of such an intent. The tension between these cases is typical of the caselaw regarding this circumstance. *Hitchcock*, *Cheshire* and *Porter* show that the court is still far from finding uniform rules for its application.²²⁶

i. Premeditation

The premeditation circumstance²²⁷ was promulgated in 1979 in apparent response to a controversy regarding whether the heinousness circumstance applied where there was an "execution-type killing."²²⁸ The Florida Supreme Court's interpretation of the circumstance has varied considerably from case to case. Commentator Jonathan Kennedy has written that the decisions on the circumstance through 1987 resulted in "a fully incoherent pattern."²²⁹ The supreme court sought to narrow application of the circumstance in *Rogers v. State*,²³⁰ holding that the "calculated" element required "heightened premeditation," meaning "a careful plan or prearranged design."²³¹ Cases during the survey period reflect the tension between the narrowing construction in *Rogers* and the court's previous tendency to read the circumstance broadly.

i. Reloading or Rearming

Prior to 1990, the Florida Supreme Court had held with middling

226. Two cases decided on the same day highlight the problem. In *Sochor v. State*, 580 So. 2d 595 (Fla. 1991), the supreme court focused only on the decedent's state of mind: "The evidence supports the conclusion of horror and contemplation of serious injury or death by the victim." But in *McKinney v. State*, 579 So. 2d 80 (Fla. 1991), the focus was on the defendant's state of mind: "The evidence does not show that the defendant intended to torture the victim."

227. FLA. STAT. § 921.141(5)(i) (1991).

228. For the history of the circumstance, see Kennedy and Barnard, *supra* note 77.

229. Jonathan Kennedy, *Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases*, 17 STET. L. REV. 47 (1987).

230. 511 So. 2d 526 (Fla. 1987).

231. *Id.* at 533. Subsequently, the supreme court suggested in *Porter v. State*, 564 So. 2d 1060, 1063-64 (Fla. 1990) that the Constitution requires the narrowing construction given in *Rogers*. But in *Eutzy v. State*, 541 So. 2d 1143, 1147 (Fla. 1989), the court characterized the *Rogers* construction as "a mere evolutionary refinement in the law," so as not to be applied retroactively.

consistency that the premeditation circumstance may be established by proof that the murderer rearmed himself or reloaded his weapon before delivering the fatal wound.²³² In two 1990 cases, the court refused to expand, and then eliminated, this body of law.

In *Campbell v. State*,²³³ the evidence showed that James Campbell went to a house with the intent of robbing the occupants, who were apparently unknown to him. Sue Zann Bosler, who was in the bathroom at that time, heard the doorbell ring and then heard her father, Billy, grunting and groaning. When she came out, Mr. Campbell, who had been stabbing the father, attacked and stabbed her. After he stabbed Ms. Bosler, Mr. Campbell then resumed the attack on her father, who thereafter died from his injuries.²³⁴ On appeal from Mr. Campbell's conviction and death sentence, the supreme court disapproved of the use of the premeditation circumstance:

We disagree with the court's finding that the stabbing was committed in a cold, calculated, and premeditated manner. The state argues that because Campbell stabbed Billy, then stopped when he attacked Sue Zann, and then returned to stabbing Billy, he had time to reflect upon and plan his resumed attack on Billy. See *Swafford v. State*, 533 So.2d 270 (Fla.1988), *cert. denied*, 109 S.Ct. 1578 (1989) (cold, calculated, and premeditated aggravating circumstance present where defendant shot victim, reloaded, then resumed shooting). This factor generally is reserved for cases showing "a careful plan or prearranged design." *Rogers v. State*, 511 So.2d 526, 533 (Fla.1987), *cert. denied*, 484 U.S. 1020 (1988). Campbell's actions took place over one continuous period of physical attack. His assault on Sue Zann provided him with no respite during which he could reflect upon or plan his resumption of attack on Billy, unlike the situation in *Swafford* wherein the act of reloading the gun provided a break in the attack.²³⁵

Although one might wonder how reloading a weapon, without more, shows "a careful plan or prearranged design," *Farinas v. State*,²³⁶ rendered such speculation unnecessary. There, the court rejected the application of the premeditation circumstance where Alberto Farinas had to unjam his pistol three times before firing the fatal bul-

232. See Kennedy, *supra* note 229, at 88-92.

233. 571 So. 2d 415 (Fla. 1990).

234. *Id.*

235. *Id.* at 418.

236. 569 So. 2d 425 (Fla. 1990).

lets while his estranged lover lay helpless on the ground. The court rejected the state's reliance on cases involving reloading, and overruled the reloading cases in a footnote:

The state's reliance upon *Phillips v. State*, 476 So. 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.1987), *cert. denied*, 108 S.Ct. 733 (1988).²³⁷

ii. The Cold, Calculated Crime of Passion

Rogers did not purport to define the other elements of the circumstance ("cold," "premeditated," and "without a pretense of moral or legal justification"). As the statute is written, the state should have to prove these additional elements even where the murder was "calculated" as defined in *Rogers*.²³⁸ In subsequent cases, the court seems to have missed this point and simply considered a showing of such a plan or design sufficient to establish the circumstance without more.

It would stand to reason that a crime of passion would not satisfy the "cold"²³⁹ element of the premeditation circumstance. Thus in *Mitchell v. State*,²⁴⁰ the court wrote:

We recently defined the cold, calculated and premeditated factor as requiring a careful plan or prearranged design. *Rogers v. State*, 511 So.2d 526 (Fla.1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The medical examiner testified that the number of stab wounds and the force with which they were delivered were consistent with a killing consummated by one in a

237. *Id.*

238. 511 So. 2d at 533.

239. Webster defines "in cold blood" as "without the excuse of passion; with deliberation." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 354 (Deluxe 2d ed.)

240. 527 So. 2d 179 (Fla. 1988).

rage. A rage is inconsistent with the premeditated intent to kill someone, and there was no other evidence of premeditation. Accordingly, we reverse the trial court on the finding that the murder was cold, calculated and premeditated.²⁴¹

But in *Porter v. State*,²⁴² the supreme court upheld the application of the circumstance to "a crime of passion." It may be remembered from the discussion of the heinousness circumstance that, in *Porter*, the supreme court struck down application of that circumstance because the evidence was consistent with the theory that Porter's crime was one of passion. However, notwithstanding this finding, the supreme court upheld the application of the premeditation circumstance:

The Court has adopted the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder. See, e.g., *Hamblen v. State*, 527 So. 2d 800, 805 (Fla. 1988); *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Heightened premeditation can be demonstrated by the manner of the killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began. *Hamblen*, 527 So.2d at 805; *Rogers*, 511 So.2d at 533. See, e.g., *Koon v. State*, 513 So.2d 1253 (Fla.1987), cert. denied, 485 U.S. 943, 108 S.Ct. 1124, 99 L.Ed.2d 284 (1988). *Hamblen* and *Rogers* show that heightened premeditation does not apply when a perpetrator intends to commit an armed robbery of a store but ends up killing the store clerk in the process. Nor does it apply when a killing occurs during a fit of rage because "rage is inconsistent with the premeditated intent to kill someone," unless there is other evidence to prove heightened premeditation beyond a reasonable doubt. *Mitchell v. State*, 527 So.2d 179, 182 (Fla.), cert. denied, 488 U.S. 960, 109 S.Ct. 404, 102 L.Ed.2d 392 (1988). This is not a case involving a sudden fit of rage. Porter previously had threatened to kill Williams and her daughter. He watched Williams' house for two days just before the murders. Apparently he stole a gun from a friend just to kill Williams. Then he told another friend that she would be reading about him in the newspaper. While Porter's motivation may have been grounded in passion, it is clear that he contemplated this murder

241. *Id.* at 182; see also *Thompson v. State*, 565 So. 2d 1311 (Fla. 1990).

242. 564 So. 2d 1060 (Fla. 1990). *Porter* and *Thompson* were decided the same day, but make no mention of each other.

well in advance.²⁴³

Thus, in *Porter* the court substituted one element of the circumstance, "calculated",²⁴⁴ for the entire circumstance.

iii. The Unreasonable Pretense

In *Banda v. State*,²⁴⁵ the court interpreted the "without any pretense of moral or legal justification" portion of the circumstance as follows:

Florida law requires that, before a murder can be deemed cold, calculated, and premeditated, it must be committed "without any pretense of moral or legal justification." § 921.141(5)(i), Fla.Stat. (1985). The state must prove this last element beyond a reasonable doubt, in addition to the other elements of this particular aggravating factor. See *Jent v. State*, 408 So.2d 1024, 1032 (Fla.1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982).

Our decisions in the past have established general contours for the meaning of the word "pretense" as it applies to capital sentencings. For instance, we have held that a "pretense" of moral or legal justification existed where the defendant consistently had made statements that he had killed the victim only after the victim jumped at him and where no other evidence existed to disprove this claim. *Cannady v. State*, 427 So.2d 723, 730-31 (Fla.1983). We reached this conclusion even though the accused himself, an obviously interested party, was the only source of this testimony.

On the other hand, we have upheld the trial court's finding that no "pretense" existed where the defendant's statements were wholly irreconcilable with the facts of the murder. Thus, we have upheld a finding that no pretense existed where the accused said the victim intended to kill him over a \$15.00 debt, but where the evidence showed that the victim had never been violent or threatening and

243. *Id.* at 1064.

244. In *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988), the supreme court quoted at length from the portion of *Rogers* defining "calculated" as involving a prearranged design or plan. Both *Hamblen* and *Rogers* involved killings during the course of robberies. *Koon v. State*, 513 So. 2d 1253 (Fla. 1987), also did not involve a "crime of passion". Mr. Koon killed a person who was going to testify against him in a counterfeiting case. Hence, none of those cases involved any question regarding the "cold" element.

245. 536 So. 2d 221 (Fla. 1988).

had been attacked by surprise and stabbed repeatedly. *Williamson v. State*, 511 So.2d 289, 293 (Fla.1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1098, 99 L.Ed.2d 261 (1988).

We conclude that, under the capital sentencing law of Florida, a "pretense of justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.²⁴⁶

In two cases during the survey period, the supreme court upheld application of the premeditation circumstance where the record showed some claim of legal or moral justification of the offense.

In *Pardo v. State*,²⁴⁷ Manuel Pardo, Jr., a former police officer, was charged with killing nine people over a four-month period. Mr. Pardo admitted killing these persons but said he should avoid culpability "because he believed all the victims to be drug dealers, who 'have no right to life.'"²⁴⁸ The court affirmed application of the premeditation circumstance without discussion of this claim of justification.

In *Gunsby v. State*,²⁴⁹ the evidence showed that a friend was hospitalized after an altercation with an Iranian proprietor of a nearby grocery store. Announcing that he was "tired of those damn Iranians messing with the black," Donald Gunsby went to the grocery store with a shotgun and killed the brother of the man who had hurt his friend.²⁵⁰ The supreme court rejected Mr. Gunsby's assertion that his delusion of being a protector of the black community formed a pretense of moral or legal justification so that the premeditation circumstance should not apply:

Gunsby claims that the trial judge erred in finding that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Gunsby asserts that his delusion that he was a protector of the black community helped form a pretense of justification which renders this aggravating factor inapplicable. We disagree. The record is clear that Gunsby himself was never harassed or threatened in any way by the victim or by the victim's brother. In fact, the evidence reflects that Gunsby's delusion seemed to be directed toward ridding his neigh-

246. *Id.* at 224-25.

247. 563 So. 2d 77 (Fla. 1990).

248. *Id.* at 78.

249. 574 So. 2d 1085 (Fla. 1991).

250. *Id.*

borhood of drug dealers. However, this murder was not predicated upon the fact that the victim was a drug dealer. We find that there exists no reasonable pretense of moral or legal justification under the circumstances of this case. Further, we find that this record clearly supports the heightened premeditation necessary to support this aggravating circumstance.²⁵¹

In requiring that the pretense be reasonable, the court did not discuss the *Banda* definition of "pretense" as something alleged or believed on slight grounds; an unwarranted assumption.

iv. Slightly Heightened Premeditation

"Simple premeditation of the type necessary to support a conviction for first-degree murder is not sufficient to sustain a finding that a killing was committed in a cold, calculated, and premeditated manner."²⁵² In *Holton v. State*,²⁵³ evidence showed that Rudolph Holton bound and garrotted Katrina Grady with pieces of nylon cloth.²⁵⁴ One might imagine that this method of killing would involve a level of coldness and calculation sufficient to satisfy the premeditation circumstance, but the Florida Supreme Court disapproved of its application, stating that the strangulation "could have been a spontaneous act in response to the victim's refusal to participate in consensual sex."²⁵⁵

It would obviously be impossible to define the point at which "simple" premeditation becomes "heightened" such that the premeditation circumstance applies. Several cases indicate that the premeditation must have preceded the defendant's encounter with the decedent. The supreme court has repeatedly held that *Rogers* requires that the defendant "plan or arrange to commit murder before the crime begins."²⁵⁶ In *McKinney v. State*,²⁵⁷ the supreme court rejected the trial

251. *Id.*

252. *Holton v. State*, 573 So. 2d 284, 292 (Fla. 1990). *But see Valle v. State*, 581 So. 2d 40 (Fla. 1991), holding that the Ex Post Facto Clause did not bar retroactive application of the circumstance because it "only reiterated" the premeditation of first degree murder.

253. 573 So. 2d 284 (Fla. 1990).

254. *Id.* at 292. Apparently the evidence showed that Ms. Grady was aware of the strangulation.

255. *Id.*

256. *McKinney v. State*, 579 So. 2d 80 (Fla. 1991); *see also Hamblen v. State*, 527 So.2d 800 (Fla.1988) (angered when robbery victim set off alarm, defendant forced her into another room and shot her; error to find premeditation circumstance).

court's application of the premeditation circumstance. The evidence showed that Franz Patella stopped his car to ask Boris McKinney, a stranger, for directions. Mr. McKinney then jumped into Mr. Patella's car, hit him, and ordered him to drive to an overpass two blocks away. The entire sequence "took only minutes."²⁵⁸ In striking the circumstance, the supreme court stated that there was no evidence that Mr. McKinney "planned to commit any crime at all until the opportunity presented itself. Since this crime occurred only through a chance encounter, the evidence does not rise to the level of 'heightened premeditation' required by this circumstance."²⁵⁹

McKinney and *Holton*, lead one to think that the premeditation circumstance could not apply where the defendant kills a police officer during a routine traffic stop lasting only a few minutes. *Farinas* adds support to such a conclusion. There, the court held that evidence showing the defendant abducted his estranged lover and shot and killed her when she tried to escape even though it took him several moments to unjam his gun was insufficient to support a conclusion of premeditation.²⁶⁰ The supreme court thought otherwise in *Valle v. State*.²⁶¹ Upon being stopped for a traffic violation, Manuel Valle told his companion that he was going to waste the officer. He then walked over to the patrol car and shot the officer.²⁶² The trial court noted that "approximately 2 to 5 minutes [had] elapsed from the time the defendant left Officer Pena's car to get the gun and slowly walk back to shoot and kill Officer Pena."²⁶³ Without any mention of *Rogers*, the supreme court breathed old life into new law by relying on the reloading cases of *Swafford* and *Phillips* in upholding the trial court's finding.

j. Law Enforcement Officers and Public Officials

The remaining two aggravating circumstances allow consideration of the decedent's status as a law enforcement officer²⁶⁴ or a public offi-

257. 579 So. 2d 80 (Fla. 1991).

258. *Id.*

259. *Id.*

260. See *Farinas v. State*, 569 So. 2d 425 (Fla. 1990).

261. 581 So. 2d 40 (Fla. 1991). Although decided on the same day as *McKinney*, *Valle* contains no mention of the principles set out there.

262. *Id.*

263. *Id.*

264. "The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties." FLA. STAT. § 921.141(5)(j) (1991).

cial.²⁶⁵ The law enforcement officer circumstance has never been used independently of the other law enforcement circumstances (avoiding arrest and hindering law enforcement),²⁶⁶ and the public official circumstance has apparently never been used.

2. Mitigating Evidence

Since the promulgation of Section 921.141, there has been considerable litigation regarding the nature of mitigation and the concept of "mitigating circumstances." As already noted, the consideration of mitigation was originally limited to the statutory mitigating circumstances. The process by which the trial court is to determine the existence of mitigation was not rationalized until *Rogers* and *Campbell* [observing that "our state courts continue to experience difficulty in uniformly addressing mitigating circumstances"] and the supreme court has not allowed jury instructions on various nonstatutory circumstances. As discussed above, the supreme court reached diametrically opposed results in *Nixon* [sentence for other offenses not relevant to defendant's "character, prior record, or the circumstances of the crime") and *Jones* [sentence for other offense constituted factor that might cause jury to decline to impose the death sentence]. Other cases during the survey period show similar confusion about the mitigation process.

In *Floyd v. State*,²⁶⁷ the defendant unsuccessfully sought to argue to the jury the absence of various aggravating circumstances as mitigation. The Florida Supreme Court, in upholding the trial court's ruling, relied on the holding in *Stewart v. State*.²⁶⁸ In so ruling, the supreme

265. "The victim of the capital felony was an elected or appointed public official engaged in the performance of appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity." FLA. STAT. § 921.141(5)(k) (Supp. 1990).

266. *Valle v. State*, 581 So. 2d 40 (Fla. 1991). Although this circumstance was merged by the trial court with the other two law enforcement circumstances, the supreme court wrote that its retroactive application would not violate the Ex Post Facto Clause because it duplicated those circumstances.

267. 569 So. 2d 1225 (Fla. 1990).

268. 549 So. 2d 171 (Fla. 1989), *cert. denied*, 110 S. Ct. 3294 (1990). In *Stewart*, the court wrote:

The trial court properly rejected Stewart's confusing request that the jury be instructed on all possible aggravating factors so that he could argue that the absence of many of these factors was a reason for imposing a lesser sentence. Florida Standard Jury Instructions state that the jury be instructed only on those factors for which evidence has been presented.

court ignored the fact that, in the past, it had used the absence of aggravating circumstances in support of its decision to reverse a death sentence,²⁶⁹ and made no mention in *Jones* that mitigation consists of anything that might support a life sentence. Since the court has stressed that the death penalty is to be reserved for the least mitigated and most aggravated of murders,²⁷⁰ it stands to reason that absence of aggravating circumstances will take a murder from the class of "most aggravated" murders and, therefore, support a life sentence. In its summary discussion in *Floyd*, the supreme court does not seem to have considered these matters.

In *Campbell v. State*,²⁷¹ the supreme court introduced the notion of "categories" of nonstatutory mitigation. Its nonexclusive list somewhat arbitrarily differentiates between "contribution to community or society" (category 2) and "charitable or humanitarian deeds" (category 5), and also differentiates between the preceding two and "potential for rehabilitation" (category 3). Furthermore, it does not list the most powerful of all mitigating circumstances; that the killing was the product of a heated domestic confrontation.²⁷²

Perhaps more important is the question of how the categories fit into the equation resulting in the sentencing decision. Although the

Fla.Std.Jury Instr. (Crim.) 78 (1981).

Id. at 174.

269. *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988) (defendant took hostages and killed deputy who arrived and pointed gun at him; reversing death sentence, court observed that "the aggravating circumstances of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent." *Id.* at 812).

270. *Songer v. State*, 544 So. 2d 1010 (Fla. 1989).

271. 571 So. 2d 415 (Fla. 1990).

272. Usually without recognizing this as a mitigating factor (the court typically addresses it in the context of proportionality review), the court has repeatedly asserted its importance. *E.g.*, *Blakely v. State*, 561 So. 2d 560 (Fla. 1990) ("'[T]his Court [has] stated that when the murder is a result of a heated domestic confrontation, the death penalty is not proportionally warranted.' *Garron v. State*, 528 So. 2d 353, 361 (Fla. 1988). We have expressly applied this proportionality review to reverse the death penalty in a number of domestic cases. On the other hand, we have affirmed the death sentence under express proportionality review where the defendant has been convicted of a prior 'similar violent offense.' In the instant case, *Blakely* had committed no prior similar crime. The killing resulted from an ongoing and heated domestic dispute and was factually comparable to that in *Ross v. State*, 474 So. 2d 1170 (Fla. 1985), wherein the husband bludgeoned the wife to death with a hammer or other blunt instrument. We reversed the death penalty there on proportionality grounds.") In *Douglas v. State*, 575 So. 2d 165 (Fla. 1991), the court did (perhaps for the first time) specifically refer to a domestic relationship as a mitigating circumstance.

court often states that the sentencing decision is not to be reached by merely counting the aggravating and mitigating circumstances,²⁷³ the number of circumstances is often of great importance in appellate decisions. For instance, the court will rarely uphold a death sentence where there is only a single aggravating circumstance.²⁷⁴ Similarly, it will rarely reverse a death sentence where there are no mitigating circumstances.²⁷⁵ In the eighteen cases in which death sentences were affirmed on direct appeal, the supreme court approved of an average of just over three aggravating circumstances per case. In those same eighteen cases, there was an average of between one and two mitigating circumstances [whether statutory or nonstatutory] found per case. Numbers do seem to count for quite a bit.

The question of how the "categories" of mitigation count is of much practical importance. How these "categories" fit into the sentencing calculus is open to question. On the one hand, a broad "category," such as category 2 ("contribution to community or society") may subsume a variety of nonstatutory "circumstances" (such as "exemplary work, military, family, or other record") which might count as several "circumstances" but as only one "category." On the other hand, a single "circumstance" (exemplary work record) may fit into two "categories" ("contribution to community or society" and "potential for rehabilitation"). Presumably further litigation will be needed to determine how the "categories" are to be used.

273. *E.g.* *White v. State*, 403 So. 2d 331, 336 (Fla. 1981). The standard jury instructions do not inform the jurors of this principle.

274. In 1990, the supreme court reversed all three death sentences to come before it on direct appeal in which the trial court found only one aggravating circumstance. *Morris v. State*, 557 So. 2d 27 (Fla. 1990), *Thompson v. State*, 565 So. 2d 1311 (Fla. 1990), *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990). Section 921.141(2)(a) speaks of a determination of whether "sufficient aggravating circumstances exist." FLA. STAT. § 921.141(2)(a) (1991). Taken literally, the use of the plural should forbid a death sentence where there is but one aggravating circumstance.

275. In 1990, the court upheld all eight death sentences to come before it on direct appeal where the trial court found no mitigation. *Reed v. State*, 560 So. 2d 203 (Fla. 1990), *Ventura v. State*, 560 So. 2d 217 (Fla. 1990), *Haliburton v. State*, 561 So. 2d 248 (Fla. 1990), *Porter v. State*, 564 So. 2d 1060 (Fla. 1990), *Van Poyck v. State*, 564 So. 2d 1066 (Fla. 1990), *Floyd v. State*, 569 So. 2d 1225 (Fla. 1990), *Sanchez-Velasco v. State*, 570 So. 2d 908 (Fla. 1990), and *Lewis v. State*, 572 So. 2d 908 (Fla. 1990). In three of these cases (*Ventura*, *Floyd*, and *Sanchez-Velasco*), the trial court found only two aggravating circumstances.

IV. APPELLATE REVIEW: CLOSE ENOUGH FOR GOVERNMENT WORK?

An enduring theme of the United States Supreme Court's capital cases is the idea of heightened due process.²⁷⁶ In upholding Florida's capital punishment statute in 1976, the Court emphasized the importance of full appellate review as a means of effectuating this principle.²⁷⁷ Since 1976, the Florida Supreme Court has experienced considerable difficulty in trying to comply with the Eighth Amendment requirement of appellate review.

A. *Parker v. Dugger*

The United States Supreme Court expressed puzzlement about the Florida Supreme Court's procedure in review of death sentences in *Parker v. Dugger*.²⁷⁸ At Robert Lacy Parker's capital sentencing proceeding for two murders, his attorney presented substantial statutory and nonstatutory mitigating evidence. Apparently giving this evidence some credit, the jury rendered life verdicts for both crimes. Nevertheless, the trial court imposed a death sentence for one of the murders. The sentencing order made no mention of nonstatutory circumstances, but did include a statement that "[t]here are no mitigating circumstances that outweigh the aggravating circumstances."²⁷⁹ On appeal, the Florida Supreme Court struck two of the aggravating circumstances found by the trial court, but nevertheless affirmed the death sentence on the ground that the trial court "found no mitigating circumstances to balance against the aggravating factors."²⁸⁰

Eventually the case came to the Supreme Court on collateral review. In writing for the Court, Justice O'Connor agreed with Mr.

276. "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S.:153 (1976) (plurality opinion) (citing cases). "In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds." *Mills v. Maryland*, 108 S.Ct. 1860, 1866 (1988). See also *Proffitt v. Wainwright*, 685 F.2d 1227, 1253 (11th Cir. 1982) ("reliability in the factfinding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty decisions]") and *Beck v. Alabama*, 447 U.S. 625, 638 (1988) (same principles apply to guilt determination).

277. *Proffitt v. Florida*, 428 U.S. 242 (1976).

278. 111 S. Ct. 731 (1991).

279. *Id.*

280. *Parker v. State*, 458 So. 2d 750, 754 (Fla. 1984), *cert. denied*, 470 U.S. 1088 (1985).

Parker that the Florida courts had acted arbitrarily and capriciously in failing to treat his mitigating evidence adequately.²⁸¹ Since much of the mitigating evidence was uncontroverted, and since the trial court sentenced Mr. Parker to life imprisonment for one of the murders, she reasoned that the trial judge had necessarily found the existence of some mitigating evidence.²⁸² Noting that the Florida Supreme Court presents itself as a reviewing court rather than a reweighing court, Justice O'Connor stated that a purely reviewing court would have ordered a new sentencing proceeding rather than weigh the mitigating evidence against the diminished list of aggravating circumstances, and find it lacking.²⁸³ In the alternative, she reasoned that a reweighing court would have reweighed the evidence or conducted a harmless error analysis based on the mitigating evidence found by the trial court, and noted that the Florida Supreme Court had not done so because it refused to recognize the existence of the mitigating evidence:

What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.²⁸⁴

Reinforcing the importance of full appellate review in Florida's capital sentencing scheme, the Court found that the state supreme court had failed in its duty, stating:

The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker's sentence at all.

The Florida Supreme Court affirmed Parker's death sentence neither based on a review of the individual record in this case nor in reliance on the trial judge's findings based on that record, but in reliance on some other nonexistent findings.²⁸⁵

281. *Parker*, 111 S. Ct. at 759.

282. *Id.* at 736-38.

283. *Id.* at 738.

284. *Id.* at 739.

285. *Id.* at 739-40. The comment that "there is a sense in which the court did not review Parker's sentence at all" can apply with equal force to other Florida capital decisions. *See, e.g.*, *Lewis v. State*, 572 So. 2d 908, 912 (Fla. 1990), in which the court conducted no independent review, writing only that the trial court's findings were "sup-

Thus, while holding that the Florida Supreme Court had failed to act as either a reviewing court or a reweighing court, the Court indicated that the state system of appellate review had failed to comport with the requirements of the Eighth Amendment.

B. *Reweighing*

As noted in *Parker*, the Florida Supreme Court has declined to engage in the appellate reweighing of aggravating and mitigating circumstances contemplated in *Proffitt*.²⁸⁶ During the survey period, the supreme court reaffirmed its position by stating, in *Freeman v. State*, “[t]he trial judge carefully weighed the aggravating and mitigating circumstances and concluded that death was the appropriate penalty. It is not this Court’s function to reweigh these circumstances.”²⁸⁷

C. *Procedural Obstacles to Appellate Review*

More generally, *Proffitt* contains the notion of consistency in resolution of the merits of issues on appeal.²⁸⁸ In keeping with the principle of full appellate review in capital cases, the general rule in this country is to limit the use of technical obstacles to appellate review in capital cases.²⁸⁹ Florida, however, has fostered the application of the contemporaneous objection rules²⁹⁰ and other procedural obstacles to appellate review, although this policy has not been without inconsistency, as shown by recent decisions.

In *Floyd v. State*,²⁹¹ the supreme court held that even though the

ported by the record and we find no error.”

286. See *Atkins v. State*, 497 So. 2d 1200 (Fla. 1986); *Smith v. State*, 407 So. 2d 894 (Fla. 1981), *cert. denied*, 456 U.S. 984 (1982).

287. *Freeman*, 563 So. 2d at 77.

288. *Proffitt*, 428 U.S. at 242.

289. 41 C.J.S., *Homicide* § 414, nn. 23-28.

290. Florida actually has several codified contemporaneous objection rules. The ones that usually apply to criminal cases are section 90.104, Florida Statutes (pertaining to evidentiary objections), and Rule 3.390 (d) and (e), Florida Rules of Criminal procedure (pertaining to jury instructions). Various other rules and statutes (such as Rules 3.600, Florida Rules of Criminal Procedure pertaining to motions for new trial and Rule 2.070, Florida Rules of Judicial Administration, pertaining to recording of court proceedings, and section 90.107, Florida Statutes, pertaining to limiting instructions) also bear on preservation issues, as does a confused and sometimes contradictory body of ever-evolving case law.

291. 569 So. 2d 1225 (Fla. 1990).

trial court erred by refusing to grant the defendant's cause challenge to a juror named Hendry, an obvious lesson is that, to preserve such an issue for appeal, one should exhaust peremptory challenges, request additional peremptory challenges, and have such a request denied by the trial court.²⁹²

However, in *Trotter v. State*,²⁹³ when Melvin Trotter's attorney did exactly that in his capital trial, the Florida Supreme Court held that the issue was not preserved for review:

Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted. The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial.²⁹⁴

The purpose of the contemporaneous objection rule is to prevent the defense from raising for the first time on appeal matters that were not presented to the trial court.²⁹⁵ It would appear that this purpose

292. *Id.* One might say that in *Floyd* the court confused the logically distinct issues of preservation for appellate review and demonstration of prejudice. The court obviously reached the merits of the issue of whether the trial court erred by denying the cause challenge. Strictly speaking, it held that the defense failed to show that it was prejudiced by running out of peremptory challenges because it did not show that an objectionable person remained on the jury. See *Hill*, 477 So. 2d at 556.

293. 576 So. 2d 691 (Fla. 1990).

294. *Id.* at 693.

295. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). In *Castor*, defense counsel did not object to an incomplete re-instruction to the jury on manslaughter. The court wrote:

As a general matter, a reviewing court will not consider points raised for the first time on appeal. *Dorminey v. State*, 314 So. 2d 134 (Fla. 1975). Where the alleged error is giving or failing to give a particular jury instruction, we have invariably required the assertion of a timely objection. *Febre v. State*, 30 So. 2d 367 (1947); see *Williams v. State*, 285 So. 2d 13 (Fla. 1973). The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

would be satisfied where the trial court directly rules on the merits of the issue that is later advanced on appeal. However, in *Nixon v. State*,²⁹⁶ the supreme court held unpreserved an issue directly ruled on by the trial court. At the end of the prosecutor's argument to the jury in the guilt phase of his trial, Mr. Nixon's attorney moved for a mistrial arguing that the prosecutor had made an improper "Golden Rule" argument, noting that "at this time to instruct the jury to disregard it would be to no avail."²⁹⁷ Although defense counsel had made no objection at the time of the challenged remark, the trial court treated the motion as an objection and ruled that the prosecutor's argument was not improper. On appeal, Mr. Nixon argued that his counsel's motion for a mistrial had preserved the issue for appeal under *State v. Cumbie*.²⁹⁸ Rejecting this argument, the supreme court stated:

Id. at 703.

To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal. See *Rivers v. State*, 307 So. 2d 826 (Fla. 1st Dist. Ct. App.), cert. denied, 316 So. 2d 382 (1975); *York v. State*, 232 So. 2d 767 (Fla. 4th Dist. Ct. App. 1969).

296. 572 So. 2d 1336 (Fla. 1990).

297. *Id.* A "Golden Rule" argument is one that invites jurors to imagine themselves in the place of one of the parties (or, in a criminal case, in the place of the victim). *Joan W. v. City of Chicago*, 771 F.2d 1020, 1022 (7th Cir. 1985) (such argument has been universally condemned by the courts). In *Nixon*, the prosecutor, in a somewhat confused discussion of his role in the litigation and of the emotions generated by the facts of the case, told the jury that he had "an obligation to make you feel just a little bit, just a little bit, of what [the decedent] felt because, otherwise, sometimes I think it's easy to forget that." 572 So. 2d at 1340.

298. 380 So. 2d 1031 (Fla. 1980). In *Cumbie*, the supreme court ruled that a motion for mistrial made after the jury retired to deliberate did not preserve for appeal an issue of improper prosecutorial argument, writing:

Clark requires that a motion for mistrial be made "at the time the improper comment is made." In the present case, to have met this requirement, we hold that it would have been sufficient if *Cumbie* had moved for mistrial at some point during closing argument or, at the latest, at the conclusion of the prosecutor's closing argument. To avoid interruption in the continuity of the closing argument and more particularly to afford defendant [sic] an opportunity to evaluate the prejudicial nature of the objectionable comments in the context of the total closing argument, we do not impose a strict rule requiring that a motion for mistrial be made in the next breath following the objection to the remark. Here, *Cumbie* objected to the prosecutor's comment, and the trial court sustained the objection and instructed the jury to disregard this remark. If *Cumbie* felt that the judge's admonition was inadequate, he should have informed the judge of

We do not construe *Cumbie* to obviate the need for a contemporaneous objection. The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system. A contemporaneous objection places the trial judge on notice that an error may have been committed and thus, provides the opportunity to correct the error at an early stage of the proceedings. *Castor v. State*, 365 So.2d 701, 703 (Fla.1978). While the motion for mistrial may be made as late as the end of the closing argument, a timely objection must be made in order to allow curative instructions or admonishment to counsel. As noted by defense counsel in this case, in many instances a curative instruction at the end of closing argument would be of no avail. Accordingly, defense counsel's motion for mistrial at the end of closing argument, absent a contemporaneous objection, was insufficient to preserve this claim under our decision in *Cumbie*. Even if the issue were properly preserved, we agree with the trial court that taken in context the comments complained of did not amount to a Golden Rule argument.²⁹⁹

The supreme court's reliance on *Castor* is somewhat questionable, since *Castor* merely stands for the proposition that one cannot raise on appeal arguments that one did not make in the trial court. It would seem that one would be in compliance with *Castor* where the trial court rules on the merits of one's objection. In *Nixon*, the trial judge did rule on the merits and found the prosecutor's argument unobjectionable. Given this ruling, there is no likelihood that the trial court would have corrected the matter by giving a curative instruction, so that a request for such an instruction would have been useless under *Simpson v. State*.³⁰⁰ Thus, the underlying premise of *Nixon* (that the trial court was not afforded the opportunity to remedy the situation) is invalid since the trial court would not have remedied the situation.

Moreover, the court in *Nixon* made no mention of the fact that a

this fact at the time of his objection or, at the latest, at the end of the prosecutor's closing argument. The judge then may have been able to give additional curative instructions which may have remedied *Cumbie's* objection. The motion for mistrial in the present case, made after jury instructions and retirement of the jury for deliberation, however, came too late to preserve *Cumbie's* objection for appeal.

Id. at 1033-34.

299. *Nixon*, 572 So. 2d at 1341.

300. 418 So. 2d 984 (Fla. 1982).

month earlier, in *Occhicone v. State*,³⁰¹ it had not found a procedural bar where the trial court had refused to rule on the merits of an issue on the ground of procedural default. At Dominick Occhicone's trial, the state introduced evidence that he had been uncooperative when a deputy had tried to swab his hands for an atomic absorption test.³⁰² The trial court denied counsel's objection to this testimony as untimely because counsel had not objected at a previous bench conference concerning the deputy's testimony. Defense counsel subsequently objected when the prosecutor referred to the testimony in final argument. Without addressing the apparent procedural bar, the court directly reached the merits and held the prosecutor's argument proper.³⁰³

D. Counsel

From the foregoing, the Florida Supreme Court is not entirely consistent in the application of procedural bars to appellate review. Even if the court applied the bars with absolute consistency, the result would be inconsistent application of the law and hence of the death penalty. Contemporaneous objection rules do not discriminate between meritorious and nonmeritorious claims, but only between good and bad lawyering. It is the defendant with the bad lawyer rather than the defendant with the bad case whose conviction and sentence are affirmed. One obvious solution to this uneven application of the law would be to relax technical bars to appellate review. In *Sochor v. State*,³⁰⁴ the supreme court specifically refused to do so. Another solution would be to raise the quality of counsel. The history of Florida capital litigation reflects a general inadequacy of counsel in capital cases. Over the years virtually every decision affirming a death sentence has revealed one or more substantial legal issues not preserved for appeal.³⁰⁵ Yet Florida

301. 570 So. 2d 902 (Fla. 1990).

302. *Id.*

303. *Id.*

304. 580 So. 2d 595 (Fla. 1991).

305. Most of the decisions affirming a death sentence on direct appeal in 1990 show some major issue not preserved for appeal. *Reed v. State*, 560 So. 2d 203 (Fla. 1990) (*Booth* issue); *Ventura v. State*, 560 So. 2d 217 (Fla. 1990) (neither appellate challenge to death sentence raised in trial court); *Pardo v. State*, 563 So. 2d 77 (Fla. 1990) (failure to move to sever counts); *Freeman v. State*, 563 So. 2d 73 (Fla. 1990) (improper testimony and argument; jury instruction); *Floyd v. State*, 569 So. 2d 1225 (Fla. 1990) (jury selection issues and collateral crimes evidence); *Holton v. State*, 573 So. 2d 284 (Fla. 1990) (prosecutorial argument); *Occhicone v. State*, 570 So. 2d 902

has not adopted, and does not seem inclined to adopt, any minimum standards for counsel in capital cases.³⁰⁶ Nevertheless, two recent cases address questions involving the adequacy of counsel in post-conviction proceedings.

Remeta v. State,³⁰⁷ involved the compensation of counsel in executive clemency proceedings. Section 925.035(4), Florida Statutes provides for the appointment of counsel to represent indigent death row inmates in such proceedings and allows for compensation “not to exceed \$1,000” in attorney’s fees and costs. When a circuit court awarded \$3,000 in attorney’s fees (based on a rate of \$60 per hour) and \$622.78 in costs to Daniel Remeta’s clemency attorney, the state sought certiorari review in the district court of appeal. That court held that the award violated the statute.³⁰⁸ Mr. Remeta thereafter obtained discretionary review in the supreme court which upheld the original award.³⁰⁹ The supreme court stated that the statutory right to counsel in clemency proceedings “necessarily carries with it the right to have effective assistance of counsel.”³¹⁰ Noting that it had previously spotted a “link between compensation and the quality of representation,”³¹¹ the

(Fla. 1990) (jury instruction); *Nixon v. State*, 572 So. 2d 1336 (Fla. 1990) (prosecutorial argument).

306. Guideline 5.1 of the ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES sets out minimum qualifications for counsel and co-counsel in capital cases. Lead counsel should have: a minimum of five years of experience in criminal defense; prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion; prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought; and familiarity with and experience in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and should have attended and successfully completed, within the past year, a training or educational program focussing on the trial of cases in which the death penalty is sought. Co-counsel should have: at least three years of litigation experience in criminal defense; and prior experience as lead counsel or co-counsel in no fewer than three jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder, or, alternatively, at least one of the three jury trials was for murder and one was for another felony; and should have within the past year completed at least one training or educational program focussing on the trial of cases in which the death penalty is sought.

307. 559 So. 2d 1132 (Fla. 1990).

308. *Id.* at 1134.

309. *Id.* at 1136.

310. *Id.* at 1135.

311. This “link” was observed in *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986), *cert. denied*, 479 U.S. 1043 (1987) (holding unconstitutional fee cap for

court wrote that fair compensation of counsel was the "only way to ensure effective representation and give effect to the right to counsel in these death penalty clemency proceedings."³¹²

Two weeks after the decision was rendered in *Remeta*, the supreme court addressed a claim of ineffectiveness of post-conviction counsel in *Lambrix v. State*.³¹³ Cary Lambrix asserted in an unsuccessful motion to vacate his murder conviction and death sentence, that the attorney who had represented him in a prior collateral proceeding had failed to provide effective assistance of counsel.³¹⁴ The supreme court affirmed the trial court's denial of the motion to vacate. The court stated that Mr. Lambrix had failed to demonstrate ineffectiveness under the test enunciated in *Strickland v. Washington*.³¹⁵ However, it specifically left open the question of whether there is a right to effective assistance of counsel in collateral relief proceedings.

E. Relief

What relief should the court give if it finds the evidence insufficient as to a particular aggravating circumstance? The Florida Supreme Court has not established any set procedure. To the contrary, it has adopted radically different approaches from case to case.

An example of the court's confused approach was its decision to reverse Thomas Trotter's death sentence on the ground that the sentence of imprisonment circumstance had been improperly applied.³¹⁶ In its initial decision, the court ordered a judge resentencing.³¹⁷ But on rehearing, the court ordered a jury resentencing, with no explanation for the change in the relief granted.³¹⁸

Two decisions rendered on the same day further muddied the waters. In *Capehart v. State*,³¹⁹ the court affirmed Gregory Capehart's death sentence even though the trial court had improperly relied on the premeditation circumstance in justifying the death sentence,³²⁰ writing:

appointed counsel in capital cases).

312. *Remeta*, 559 So. 2d at 1135.

313. 559 So. 2d 1137 (Fla. 1990).

314. *Id.*

315. *Id.* at 1138 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

316. *See Trotter v. State*, 576 So. 2d 691 (Fla. 1990).

317. *Trotter*, 16 Fla. L. Weekly at S18.

318. 576 So. 2d at 694.

319. 583 So. 2d 1009 (Fla. 1991).

320. In addition to the premeditation circumstance, the trial court found three

Having determined one aggravating circumstance was erroneously considered by the trial judge, we must determine whether this error was harmless. The record before us reflects three valid aggravating circumstances and one nonstatutory mitigating circumstance. Having carefully scrutinized the record in this case, we are persuaded beyond a reasonable doubt that even without the aggravating circumstance of cold, calculated, and premeditated murder, the trial court still would have found that the aggravating circumstances outweighed the mitigating evidence. Thus, the error was harmless beyond a reasonable doubt. *See, e.g., Holton*, 573 So.2d at 293. We therefore affirm the sentence of death.³²¹

The supreme court gave no explanation for how it arrived at the conclusion that the trial court would have sentenced Mr. Capehart to death without the premeditation circumstance. Curiouser still is the court's failure to give any consideration to the effect that improper use of the circumstance might have had on the jury. Although the judge rejected most of Mr. Capehart's mitigating evidence, there is no reason to think that the jury did. One additional vote for life would have resulted in a life verdict, which could scarcely be overridden, given the substantial amount of mitigating evidence presented to the jury.

Capehart is difficult to reconcile with *Omelus v. State*.³²² At Ulrick Omelus's sentencing proceeding after his conviction for acting as a principal in a contract murder, the state argued three aggravating circumstances: the pecuniary gain, premeditation, and heinousness circumstances. The trial court did not find the heinousness circumstance, but did apply the other two in sentencing Mr. Omelus to death pursuant to the jury's eight-to-four recommendation. The trial court found as a mitigating circumstance that the co-defendant, who actually committed the murder, was sentenced to life imprisonment. The supreme court found that the heinousness circumstance could not apply to Mr. Omelus,³²³ and reversed the sentence for a jury resentencing, stating:

other aggravating circumstances (prior conviction of violent felony, engaged in sexual battery at time of murder, and especially heinous, atrocious, or cruel) and one mitigating circumstance ("Defendant is a poor black man exploding in anger over his frustration due to the ills of a discriminatory society heaped upon him"), rejecting various other nonstatutory mental mitigating evidence. The jury recommended a death sentence by a vote of seven to five.

321. *Id.* at 1015.

322. 584 So. 2d 563 (Fla. 1991).

323. Although the evidence apparently showed that the killing itself would qualify for application of the circumstance, the evidence did not show that Mr. Omelus

Since the trial judge correctly did not include heinous, atrocious, or cruel as a factor in imposing the death sentence, the question that must be resolved in our harmless error analysis is whether the error in allowing this factor to be presented and considered by the jury requires a new sentencing proceeding. We find it difficult to consider the hypothetical of whether the trial court's sentence would have been an appropriate jury override if the jury had not received the argument on the heinous, atrocious, or cruel factor and had recommended a life sentence. Further, because the issue is not in this record, the parties have not argued the propriety of a jury override in the briefs or at oral argument. We conclude that it is not appropriate for us to attempt to address that question in this case under these circumstances. Although the circumstances of a contract killing ordinarily justify the imposition of the death sentence, we are unable to affirm the death sentence in this case because, given the state's emphasis on the heinous, atrocious, or cruel factor during the sentencing phase before the jury, the fact that the trial court found one mitigating factor, and the fact that the jury recommended the death sentence by an eight-to-four vote, we must conclude that this error is not harmless beyond a reasonable doubt under the standard set forth in *DiGuilio*.³²⁴

Omelus, on the other hand, is difficult to square with *Herring v. State*.³²⁵ In 1981, Ted Herring was charged with first degree murder of a convenience store clerk. The trial court followed the jury's eight-to-four recommendation of a death sentence, notwithstanding evidence of Mr. Herring's troubled childhood, psychological problems, learning disabilities, and low IQ. There was no evidence that he intended to kill the clerk prior to the robbery, but the trial court used the premeditation circumstance in sentencing him to death,³²⁶ and the supreme court affirmed. Three years later, in *Rogers*,³²⁷ the court specifically disapproved of the use of the circumstance in Mr. Herring's case. Accordingly, Mr. Herring argued on post-conviction that, under *Rogers*, his sentence was illegal. The supreme court rejected his claim:

intended that the co-defendant inflict a high degree of pain.

324. *Id.* at 567.

325. 580 So. 2d 135 (Fla. 1991).

326. In all, the trial court found four aggravating circumstances and two mitigating circumstances.

327. The court wrote in *Rogers*: "Since we conclude that 'calculation' consists of a careful plan or prearranged design, we recede from our holding in *Herring v. State* [cit.], to the extent it dealt with this question." 511 So. 2d at 533.

While the cold, calculated, and premeditated aggravating factor no longer applies to the circumstances in *Herring*, we find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a "conviction of a prior crime of violence" had been eliminated, that would have changed the facts and circumstances before the jury.

The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. *Herring I* at 1057. Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury. *See Hill v. State*, 515 So.2d 176 (Fla.1987), *cert. denied*, 485 U.S. 993 (1988).³²⁸

Caphart, *Omelus*, and *Herring* reflect completely different approaches to the issue. Under *Caphart*, the court looked only at the effect of the aggravating circumstance on the judge's sentencing decision, without regard to its possible effect on the jury. In *Omelus*, however, the court did look to the potential effect on the jury, even though the evidence would have been the same without the circumstance. But, in *Herring*, the court held that striking the circumstance could not have affected the verdict where the striking did not affect the evidence.³²⁹

F. *Proportionality*

In *Proffitt*, the Supreme Court emphasized the importance of proportionality review as a means of limiting arbitrary application of the death penalty in Florida. The Florida Supreme Court has not adopted a precise procedure for the conduct of proportionality review, and its cases are sometimes difficult to reconcile with one another, as shown by the cases of Ernest Fitzpatrick and James Ernest Hitchcock.

328. *Herring*, 580 So. 2d at 138.

329. *See also Jones v. State*, 569 So. 2d 1234 (Fla. 1990) (new jury sentencing ordered where striking of heinousness circumstance would result in exclusion of evidence of sexual abuse on corpse).

In *Fitzpatrick v. State*,³³⁰ the court reversed Mr. Fitzpatrick's death sentence where the trial judge had followed a jury recommendation of death. The court specifically wrote that it was reweighing aggravating and mitigating circumstances and that it was reversing solely because it believed that, in comparison to other cases involving the imposition of the death penalty, capital punishment was unwarranted in this case.³³¹

Both cases relied upon in *Fitzpatrick* involved life verdicts. Hence, one would safely assume from *Fitzpatrick* that one could rely on life verdict cases in making a proportionality argument. However, in *Hitchcock v. State*,³³² the supreme court disapproved of reliance on life verdict cases in making a proportionality argument:

We also disagree with Hitchcock's claim that his death sentence is disproportionate. The court conscientiously weighed the aggravating circumstances against the mitigating evidence and concluded that death was warranted. The cases Hitchcock relies on are distinguishable, being primarily jury override cases, e.g., *Holsworth v. State*, 522 So.2d 348 (Fla.1988); *Welty v. State*, 402 So.2d 1159 (Fla.1981), cases dealing with domestic disputes, e.g., *Garron v. State*, 528 So.2d 353 (Fla.1988); *Wilson v. State*, 493 So.2d 1019 (Fla.1986), and cases with few valid aggravating circumstances and considerable mitigating evidence, e.g., *Songer v. State*, 544 So.2d 1010 (Fla.1989). On the circumstances of this case, and in comparison with other cases, we find Hitchcock's sentence of death proportionate to his crime. E.g., *Tompkins*; *Doyle*; *Adams*.³³³

V. FINAL NOTE

As noted in the foregoing discussion, there are many capital crimes issues which will continue to be hotly argued in the years to come. This will be especially true if the Florida Supreme Court continues its frequent pattern of ignoring its own precedents.

330. 527 So. 2d 809 (Fla. 1988).

331. See *Ferry v. State*, 507 So. 2d 1373 (Fla. 1987); *Amazon v. State*, 487 So. 2d 8 (Fla.), cert. denied, 479 U.S. 914 (1986).

332. 578 So. 2d 685, 693 (Fla. 1990).

333. *Id.*