

Nova Law Review

Volume 14, Issue 3

1990

Article 5

Criminal Law

Pamela Cole Bell*

*

Copyright ©1990 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

Criminal Law

Pamela Cole Bell

Abstract

This article is a survey of substantive criminal law cases decided by the Florida Supreme Court between December 1, 1988 and December 1, 1989.

Criminal Law

Pamela Cole Bell*

I. Introduction

This article is a survey of substantive criminal law cases decided by the Florida Supreme Court between December 1, 1988 and December 1, 1989. Areas surveyed include criminal offenses, defenses, sentencing guidelines, and death penalty.

II. Criminal Offenses

A. DUI Manslaughter

In *Magaw v. State*, the Florida Supreme Court addressed the issue of whether or not the 1986 amendment to the DUI statute created an element of causation in DUI manslaughter charges.¹ Prior to the amendment, the court held that it was not necessary to prove causation in order to convict one of manslaughter by intoxication.² Manslaughter by intoxication was chargeable under section 316.1931 of the Florida Statutes.³ The 1986 amendment renumbered the manslaughter charge to section 316.193.⁴

In determining whether or not the amendment created an element of causation, the supreme court analyzed the legislative history and the Senate debate pertinent to the amendment.⁵ The court found that the legislative intent was clear and that causation was introduced as an element of DUI manslaughter.⁶

B. Armed Burglary

In *Hardee v. State*, the supreme court resolved conflict between

* J.D., Stetson College of Law; Member, Pinellas County Criminal Defense Lawyers Association; practices in Clearwater, Florida.

1. 537 So. 2d 564 (Fla. 1989).

2. *Armenia v. State*, 497 So. 2d 638 (Fla. 1986).

3. FLA. STAT. § 316.1931 (1985).

4. FLA. STAT. § 316.193 (1987).

5. *Magaw*, 537 So. 2d at 564.

6. *Id.*

the district courts of appeal and clarified under what circumstances possession of a firearm constitutes first degree armed burglary under Florida Statute section 810.02(2)(b).⁷ The First District Court of Appeal has held that the mere theft of a gun after entering a structure is insufficient to establish armed burglary under section 810.02(2)(b).⁸ The Third and Fourth District Courts of Appeal have held that theft of a loaded gun during a burglary is sufficient to establish armed burglary under the statute.⁹ The Second and Fifth District Courts of Appeal have held that the theft of an unloaded gun during a burglary may be sufficient to establish armed burglary if the perpetrator later loads the gun or has bullets in his possession.¹⁰

In *Hardee*, a co-perpetrator of the defendant stole a handgun from a burglarized dwelling.¹¹ The district court held that such possession was sufficient to convict the defendant of armed burglary.¹² In reaching its ruling, the district court analogized this case to previous supreme court rulings which held that whether a firearm is loaded or not is immaterial to the imposition of minimum mandatory sentences prescribed when a firearm is used during the commission of a felony.¹³ The supreme court agreed and affirmed the defendant's conviction for first degree armed burglary.¹⁴

III. Defenses

The Florida Supreme Court reviewed only one defense during the survey period—diminished capacity.¹⁵ In a lengthy opinion, the supreme court considered the following certified question:

7. 534 So. 2d 706 (Fla. 1988). FLA. STAT. §810.02(2)(b) (1987) states, "Burglary is a felony of the first degree . . . if, in the course of committing the offense, the offender: . . . (b) Is armed, or arms himself within such structure or conveyance, with explosives or a dangerous weapon." *Id.*

8. *Sanders v. State*, 352 So. 2d 1187 (Fla. 1st Dist. Ct. App.), *cert. denied*, 362 So. 2d 1056 (Fla. 1978).

9. *State v. Rodriguez*, 402 So. 2d 86 (Fla. 3d Dist. Ct. App. 1981); *State v. Dopson*, 323 So. 2d 1056 (Fla. 1978).

10. *Fowler v. State*, 375 So. 2d 879 (Fla. 2d Dist. Ct. App. 1979); *Mills v. State*, 400 So. 2d 516 (Fla. 5th Dist. Ct. App.), *rev. denied*, 408 So. 2d 1094 (Fla. 1981).

11. *Hardee*, 534 So. 2d at 706.

12. *Id.*

13. *Hardee v. State*, 516 So. 2d 110 (Fla. 4th Dist. Ct. App. 1987).

14. *Hardee*, 534 So. 2d at 706.

15. *Chestnut v. State*, 534 So. 2d 820 (Fla. 1989).

Is evidence of an abnormal mental condition not constituting legal insanity admissible for the purpose of proving either that the accused could not or did not entertain the specific intent or state of mind essential to proof of the offense, in order to determine whether the crime charged, or a lesser degree thereof, was in fact committed?¹⁶

In *Chestnut v. State*, the trial court, pursuant to the state's pre-trial motion, excluded evidence of the defendant's mental condition.¹⁷ The defendant had not raised insanity as a defense.¹⁸ Upon review of the district court's decision affirming the exclusion, the supreme court reviewed previous Florida cases which supported the trial court's ruling.¹⁹ Only one case, *Gurganus v. State*,²⁰ departed from the line of cases which held that such evidence was inadmissible.²¹ The supreme court pointed out that the *Gurganus* court found, in *obiter dictum*, that "evidence of any condition relating to the accused's ability to perform a specific intent" is relevant."²² The supreme court found that *Gurganus* simply reaffirmed the long-standing rule in Florida that evidence of voluntary intoxication is admissible in cases involving specific intent.²³

Several jurisdictions have allowed the diminished capacity defense, usually on the basis that mentally deficient persons should be treated the same as intoxicated persons.²⁴ The supreme court discussed recent cases that reject such an analogy.²⁵ The supreme court concluded that

16. *Id.*

17. *Id.*

18. *Id.*

19. *Chestnut*, 538 So. 2d at 821-22; *Kight v. State*, 512 So. 2d 922 (Fla. 1987), *cert. denied*, 485 U.S. 929 (1988) (in absence of insanity defense, evidence of mental retardation is inadmissible); *Tremain v. State*, 336 So. 2d 705 (Fla. 4th Dist. Ct. App. 1976), *cert. denied*, 348 So. 2d 954 (Fla. 1977) (absent plea of insanity, evidence of defendant's mental condition is inadmissible); *Everett v. State*, 97 So. 2d 241 (Fla. 1957), *cert. denied*, 355 U.S. 941 (1958) (not error for trial court to refuse to instruct jury that defendant's mental condition can be considered in determining if defendant is capable of forming premeditated design); *Ezzell v. State*, 88 So. 2d 280 (Fla. 1956) (evidence of mental defects less than insanity inadmissible where defendant withdraws his insanity plea).

20. 451 So. 2d 817 (Fla. 1984).

21. *Chestnut*, 538 So. 2d at 822; *Gurganus*, 451 So. 2d at 817.

22. *Id.* at 823 (citing *Gurganus*, 451 So. 2d at 817).

23. *Id.*

24. *Id.*

25. *Id.* at 823-24. The court cites *Bethea v. United States*, 365 A.2d 64 (D.C.

mental deficiencies can only serve as a defense to the commission of a crime if the deficiency meets the definition of insanity; otherwise, any mitigation which is justified will be considered at sentencing.²⁶ Thus, diminished capacity is not recognized as a defense in Florida.²⁷

IV. Sentencing Guidelines

The majority of the cases decided by the Florida Supreme Court during the survey period dealt with sentencing. This section shall discuss the cases involving the sentencing guidelines.

A. In General

The sentencing guidelines as adopted by the legislature on July 1, 1984, have been held to be constitutional and valid.²⁸

A defendant may elect to be sentenced under the sentencing guidelines if he is convicted of a crime committed prior to the effective date of the guidelines.²⁹ The guidelines to be used upon such an election are the guidelines in effect at the time of the election.³⁰

B. Departure Sentences

In 1987, the legislature amended Chapter 921, to provide that a departure sentence is to be affirmed when at least one reason or circumstance is found to be a valid reason for departure.³¹ This amendment may not be applied where the crime for which a defendant is being sentenced occurred prior to July 1, 1987.³² In pre-amendment

1976), *cert. denied*, 433 U.S. 911 (1977) (intoxication easily understood by lay people, while psychological abnormalities are not); *State v. Wilcox*, 70 Ohio St. 2d 182, 436 N.E.2d 523 (1982) (significant evidentiary distinctions exist between intoxication and mental deficiencies); *Lineham v. State*, 442 So. 2d 244 (Fla. 2d Dist. Ct. App. 1983), *affirmed*, 476 So. 2d 1262 (Fla. 1985) (defense of diminished capacity would result in arbitrary application because of the difficulty in distinguishing between specific and general intent crimes).

26. *Chestnut*, 538 So. 2d at 825.

27. *See also* *Stevens v. State*, 549 So. 2d 187 (Fla. 1989).

28. *Smith v. State*, 537 So. 2d 982 (Fla. 1989).

29. *Connell v. Wade*, 538 So. 2d 854 (Fla. 1989).

30. *Id.*

31. FLA. STAT. § 921.001(5) (1987).

32. *State v. McGriff*, 537 So. 2d 107 (Fla. 1989); *Abt v. State*, 541 So. 2d 614 (Fla. 1989); *Felts v. State*, 549 So. 2d 1373 (Fla. 1989); *Scott v. State*, 549 So. 2d

cases, if the appellate court finds that a departure is based on both valid and invalid reasons, the defendant is entitled, upon remand, to a new and full sentencing hearing.³³

As provided by the sentencing guidelines, the trial court must provide written reasons for any departure imposed.³⁴ These written reasons must be issued at the time of sentencing.³⁵ If a judge imposes what he believes to be a non-departure sentence and the appellate court finds that the sentence actually is a departure from the guideline range, the case should be remanded so that the sentencing judge may consider whether a departure is appropriate.³⁶

Reasons held by the supreme court to be invalid for departure include violation of probation,³⁷ habitual offender,³⁸ and prior record within fourteen months.³⁹ However, the prohibition against using the defendant's status as a habitual offender as a reason for departure will only be applied in cases decided after *Whitehead v. State*, which was decided in 1986.⁴⁰ Additionally, the supreme court has held that continuous and repeated criminal activity may be a valid reason for departure.⁴¹

1385 (Fla. 1989).

33. *McGriff*, 537 So. 2d at 107.

34. FLA. STAT. § 921.001(6) (1987); FLA. R. CRIM. P. 3.701(d)(11).

35. *Ree v. State*, 14 Fla. L. Weekly 565 (Nov. 16, 1989).

36. *State v. Betancourt*, 552 So. 2d 1107 (Fla. 1989) (trial court imposed a split sentence of four years incarceration followed by two years of community control where the sentence recommended by the guidelines was 3½—4½ years incarceration—sentence was a departure).

37. *Lambert v. State*, 545 So. 2d 838 (Fla. 1989) (factors relating to violation of probation or community control cannot be used as grounds for departure; cannot depart more than one cell as provided by FLA. R. CRIM. P. § 3.701(d)(14)); *State v. Tuthill*, 545 So. 2d 850 (Fla. 1989); *Franklin v. State*, 545 So. 2d 851 (Fla. 1989) (resentencing was a split sentence); *Bell v. State*, 545 So. 2d 861 (Fla. 1989); *Eldridge v. State*, 545 So. 2d 1356 (1989); *Hamilton v. State*, 548 So. 2d 234 (Fla. 1989); *Ree*, 14 Fla. L. Weekly at 565; *Welch v. State*, 536 So. 2d 225 (Fla. 1988).

38. *McCuiston v. State*, 534 So. 2d 1144 (Fla. 1988) (rule enunciated in *Whitehead v. State*, 498 So. 2d 863 (Fla. 1986) (rule that finding a defendant to be a habitual offender is not a legally sufficient reason for departure reiterated but held not to be applied retroactively)); *Jones v. State*, 553 So. 2d 702 (Fla. 1989).

39. *Gibson v. State*, 553 So. 2d 701 (Fla. 1989).

40. *Whitehead*, 498 So. 2d at 863; *McCuiston*, 534 So. 2d at 1144.

41. *Jones*, 553 So. 2d at 702 (valid factors for departure: defendant committed offense eight days after release from his third separate prison commitment, his behavior demonstrated a continuing escalating pattern of criminal conduct, and he had been convicted of three additional grand thefts while on probation that cannot be scored).

C. Guidelines to be Used upon Resentencing

Generally, when a departure sentence is reversed, resentencing must be within the prescriptive guideline range.⁴² However, if a defendant is resentenced because of an incorrect guidelines scoresheet, the trial judge may consider reasons for entering a departure sentence upon remand by the appellate court.⁴³ The same procedure applies if the original sentence is deemed to be a departure sentence where the trial judge did not know he was imposing a departure sentence.⁴⁴

V. Death Penalty Sentencing

The majority of death sentences reviewed by the Florida Supreme Court during the survey period involved a weighing of the aggravating and mitigating factors present. Other issues included overriding the jury's recommendation of life imprisonment, victim impact testimony, and nonstatutory mitigating factors.

A. Jury Recommendation of Life

During the survey period, the supreme court reviewed seven cases wherein the trial court overrode the jury's recommendation of life imprisonment.⁴⁵ The supreme court vacated the death sentence in all

42. *Riley v. State*, 536 So. 2d at 1021 (Fla. 1988).

43. *Roberts v. State*, 547 So. 2d 129 (Fla. 1989).

44. *Betancourt*, 552 So. 2d at 1107.

45. *Pentecost v. State*, 545 So. 2d 861 (Fla. 1989) (disparate treatment of equally culpable accomplices was valid basis for jury recommendation, and defendant's alcohol and drug use was mitigating factor); *Thomas v. State*, 546 So. 2d 716 (Fla. 1989) (nonstatutory mitigating evidence should be considered by trial court); *Cochran v. State*, 547 So. 2d 928 (Fla. 1989) (lack of remorse and acts of defendant after victim unconscious not proper aggravating factors, and emotional problems, mental deficiency, and age as mitigating factors outweighed aggravating factor of conviction of a prior murder); *Freeman v. State*, 547 So. 2d 125 (Fla. 1989) (statutory and nonstatutory mitigating factors existed and could provide reasonable basis for jury's recommendation); *Fuente v. State*, 549 So. 2d 652 (Fla. 1989) (disparate treatment of co-perpetrators can serve as reasonable basis of jury's recommendation even if aggravating factors are present); *Burr v. State*, 550 So. 2d 444 (Fla. 1989) (collateral crime evidence where defendant not convicted was harmless error in guilt phase but not a proper aggravating factor in determining sentencing); *Christian v. State*, 550 So. 2d 450 (Fla. 1989) (defendant had at least a pretense of moral or legal justification, so aggravating factor of cold, calculated, and premeditated, and without pretense of legal or moral justification not present, and sufficient mitigating factors present).

seven cases.⁴⁶ In five of the cases, the supreme court remanded the case to the trial court for imposition of a life sentence.⁴⁷ In two cases, the supreme court remanded the case for a new sentencing hearing before the trial judge.⁴⁸

The Florida Supreme Court continues to apply the standard enunciated in *Tedder v. State*, wherein it held that before a trial court can override a jury recommendation of life imprisonment, "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."⁴⁹ The supreme court emphasizes that the jury's recommendation is to be given great weight. If it appears in the record that the jury had a reasonable basis for its recommendation, the trial court should follow the recommendation.⁵⁰

B. Victim Impact Testimony

The supreme court continues to prohibit victim impact testimony in capital sentencing proceedings in compliance with the United States Supreme Court case of *Booth v. Maryland*.⁵¹ As held in *Grossman v. State*, *Booth* applies retroactively.⁵² The court, however, will not apply *Booth* retroactively if a contemporaneous objection to the victim impact evidence is not made.⁵³

The standard of review where impact evidence has been improperly introduced is whether the reviewing court can say beyond a reasonable doubt that the jury would have recommended death even if such evidence had not been admitted.⁵⁴

46. *Id.*

47. *Christian*, 550 So. 2d at 450; *Fuente*, 549 So. 2d at 652; *Freeman*, 547 So. 2d at 125; *Cochran*, 547 So. 2d at 928; *Pentecost*, 545 So. 2d at 861.

48. *Freeman*, 547 So. 2d at 125; *Thomas*, 546 So. 2d at 716.

49. 322 So. 2d 908, 910 (Fla. 1975).

50. *Freeman*, 547 So. 2d at 125; *Cochran*, 547 So. 2d at 928.

51. 482 U.S. 496 (1988) (victim impact testimony in a capital case violates the eighth amendment to the U.S. Constitution); *Jackson v. Dugger*, 547 So. 2d 1197 (Fla. 1989) (testimony regarding the victim officer's good reputation among fellow officers equivalent to testimony regarding the impact of a victim's family; both inflame the jury).

52. *Jackson*, 547 So. 2d at 1197; *Grossman v. State*, 525 So. 2d 833 (Fla. 1988).

53. *Jackson*, 547 So. 2d at 1197.

54. *Id.*

C. Nonstatutory Mitigating Factors

In *Hitchcock v. Dugger*, the United States Supreme Court held that it is error for the trial court to instruct a jury that it may consider only statutory mitigating factors and to consider only such statutory factors in a capital sentencing proceeding.⁵⁵ During the survey period, the Florida Supreme Court reviewed several alleged *Hitchcock* violations.⁵⁶

The Florida Supreme Court has held that because the ruling in *Hitchcock* represents a significant change in law, any alleged violation may be brought in postconviction proceedings.⁵⁷ If the defendant is prohibited from introducing nonstatutory mitigating evidence, or if the jury is instructed or led to believe that it can only consider statutory circumstances in mitigation, a *Hitchcock* violation has occurred.⁵⁸ If, however, the *Hitchcock* claim involves a mere feeling of constraint on the part of the defense in introducing certain evidence in mitigation, the claim may not establish a violation of *Hitchcock*.⁵⁹

Once the reviewing court determines that a *Hitchcock* violation has occurred, it must consider whether or not the error was harmless.⁶⁰ The standard of review is whether the reviewing court can conclude beyond a reasonable doubt that the jury's recommendation would have

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

56. *Meeks v. Dugger*, 548 So. 2d 184 (Fla. 1989); *Thomas*, 546 So. 2d at 716; *Adams v. State*, 543 So. 2d 1244 (Fla. 1989); *O'Callaghan v. State*, 542 So. 2d 1324 (Fla. 1989); *Hall v. State*, 541 So. 2d 1125 (Fla. 1989); *Alvord v. Dugger*, 541 So. 2d 598 (Fla. 1989).

57. *Hall*, 541 So. 2d at 1125 (*Hitchcock* claims should be presented in a 3.850 motion for postconviction relief and will not be cognizable in habeas corpus proceedings hereafter).

58. *Id.* (trial court limitation of the jury's and its own consideration of statutory mitigating factors constituted *Hitchcock* violation); *Alvord*, 541 So. 2d at 598 (prosecutor, defense counsel, and trial judge told the jury that it could only consider statutory mitigating circumstances, so *Hitchcock* violation admitted); *O'Callaghan*, 542 So. 2d at 1324 (jury improperly instructed and could not have known it could consider nonstatutory factors); *Thomas*, 546 So. 2d at 716 (jury informed it could not consider nonstatutory factors, and record indicated judge did not consider nonstatutory factors); *Meeks*, 548 So. 2d at 184 (state conceded violation when judge believed he could not consider nonstatutory factors, and instructed the jury accordingly and excluded nonstatutory mitigating evidence).

59. *Adams*, 543 So. 2d at 1244.

60. *Hall*, 541 So. 2d at 1125; *Meeks*, 548 So. 2d at 184; *O'Callaghan*, 542 So. 2d at 1324; *Alvord*, 541 So. 2d at 598.

been the same if there had been no violation.⁶¹ If it cannot, a new sentencing hearing will be ordered.⁶²

D. Aggravating Factors

Once a jury has made its recommendation, aggravating factors to be considered by the trial court are dictated by statute.⁶³ The court cannot consider nonstatutory aggravating factors.⁶⁴

In the cases surveyed in this subsection, the jury recommended death. The Florida Supreme Court found sufficient aggravating circumstances present to justify imposition of the death penalty in seven cases. Aggravating factors reviewed and discussed in those cases include murdering for pecuniary gain or during commission of a burglary, robbery, etc.; heinous, atrocious, or cruel murder; cold, calculated, and premeditated murder without pretense of moral or legal justification; avoidance of lawful arrest; under sentence of imprisonment at time of murder; and conviction of prior violent felonies.⁶⁵ Improper doubling (a finding

61. *Hall*, 541 So. 2d at 1125; *Meeks*, 548 So. 2d at 184.

62. *Meeks*, 548 So. 2d at 184; *Thomas*, 546 S. 2d at 716; *O'Callaghan*, 542 So. 2d at 1324; *Hall*, 541 So. 2d at 1125.

63. FLA. STAT. § 921.141(5) (1987).

64. *Walton v. State*, 547 So. 2d 622 (Fla. 1989) (testimony regarding the condition of victim's son presented to establish nonstatutory aggravating factor was harmless error; lack of remorse is a nonstatutory aggravating factor but may be presented to rebut evidence of nonstatutory mitigating factor of defendant being remorseful).

65. *Cherry v. State*, 544 So. 2d 184 (Fla. 1989) (during burglary and for pecuniary gain are one factor, along with heinous, atrocious, and cruel, and prior conviction of a violent felony and these aggravating factors, in absence of mitigating factors, were sufficient for imposition of death penalty); *Walton*, 547 So. 2d at 622 (during robbery and for pecuniary gain [as one factor]; heinous, atrocious, or cruel; cold, calculated and premeditated; and avoidance of lawful arrest sufficient for imposition of death penalty where no mitigating factors established); *Carter v. State*, 14 Fla. L. Weekly 525 (Fla. 1989) (under sentence of imprisonment, convicted of prior violent felonies, and during robbery sufficient where only one nonstatutory mitigating factor of deprived childhood established); *Mendyk v. State*, 545 So. 2d 846 (Fla.), *cert. denied*, 110 S. Ct. 520 (1989) (during a kidnapping and sexual battery; wicked, evil, atrocious, and cruel; and cold, calculated, and premeditated sufficient where only mitigating factor was age present); *Rutherford v. State*, 545 So. 2d 853 (Fla. 1989) (heinous, atrocious, and cruel; cold, calculated, and premeditated; and during robbery and for pecuniary gain sufficient where only mitigating factor of no significant history of criminal activity established); *Rivera v. State*, 545 So. 2d 864 (Fla. 1989) (previous conviction of violent felony; knowingly created great risk of death to many persons; during flight after robbery or burglary; avoidance of lawful arrest; heinous, atrocious and, cruel not upheld; and cold, calculated, and premeditated not upheld—sufficient valid aggravating fac-

of two circumstances based on a single aspect of the case) of any of these factors is not permitted.⁶⁶

The Florida Supreme Court continues to review death sentences in accordance with the standard established in *State v. Dixon*, wherein the court stated that death penalty cases will be viewed in light of other death penalty cases so as to insure that death as a penalty will be reserved for only the most aggravated and least mitigated of murders.⁶⁷

Of the cases surveyed under this subsection, the Florida Supreme Court held the imposition of the death penalty inappropriate in seven cases. The supreme court found that some or all of the aggravating factors were not properly established in the record.⁶⁸ When the supreme court so eliminates one or more aggravating circumstance, it

tors); *Hamblen v. Dugger*, 546 So. 2d 1039 (Fla. 1989) (factor of cold, calculated, or premeditated eliminated but remaining two aggravating factors sufficient to justify death penalty).

66. *Bello v. State*, 547 So. 2d 914 (Fla. 1989) (committed to avoid lawful arrest and to disrupt or hinder law enforcement used as two aggravating factors was improper doubling); *Cherry*, 544 So. 2d at 184 (improper doubling where murder for pecuniary gain and murder during burglary considered as two aggravating factors).

67. 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974); *Songer v. State*, 544 So. 2d 1010 (Fla. 1989) (death penalty invalid because disproportionate where only aggravating factor was "under sentence of imprisonment at time of murder" and there were three statutory mitigating factors and seven nonstatutory established); *Hudson v. State*, 538 So. 2d 829 (Fla. 1989) (death penalty not disproportionate where defendant broke into former girlfriends's house, stabbed roommate, and left her body in a drainage ditch); *Carter*, 14 Fla. L. Weekly at 525 (death penalty not disproportionate where three aggravating factors far outweigh the mitigating factors); *Smalley v. State*, 546 So. 2d 720 (Fla. 1989) (death penalty disproportionate where one aggravating factor and extensive mitigating circumstances).

68. *Banda v. State*, 536 So. 2d 221 (Fla. 1988) (single aggravating factor of cold, calculated, and premeditated without pretense of moral or legal justification not proven beyond a reasonable doubt); *Schafer v. State*, 537 So. 2d 988 (Fla. 1989) (three of five aggravating factors improperly found: conviction of prior violent felony—the contemporaneous robbery; committed to avoid arrest; and cold, calculated, and premeditated factors not established in the record); *Cook v. State*, 542 So. 2d 964 (Fla. 1989) (two of four aggravating factors improperly found: heinous, atrocious, and cruel; and committed to avoid arrest not established in the record); *Songer*, 544 So. 2d at 1010 (one aggravating factor far outweighed by several mitigating circumstances); *Smalley*, 546 So. 2d at 720 (one aggravating factor of heinous, atrocious, or cruel outweighed by mitigating circumstances); *Bello*, 547 So. 2d at 914 (two of four aggravating factors held improper, and additional mitigating factors should have been considered); *Alvin v. State*, 545 So. 2d 1112 (Fla. 1989) (one of two aggravating circumstances invalid—knowingly creating a risk of death to many persons not present where only four people in the area).

may affirm the death penalty if it is convinced that the elimination of the aggravating factors would not have resulted in a life sentence.⁶⁹ If the supreme court is not so convinced, it may remand the case for a new sentencing hearing or for imposition of a life sentence. The supreme court remanded four of the above cases for a new sentencing hearing and three for imposition of a life sentence.⁷⁰

69. *Hamblen*, 546 So. 2d at 1039.

70. *Bello*, 547 So. 2d at 914; *Smalley*, 546 So. 2d at 720; *Alvin*, 545 So. 2d at 1112 (remanded for a new sentencing hearing); *Cook*, 542 So. 2d at 964; *Schafer*, 537 So. 2d at 988; *Banda*, 536 So. 2d at 221 (remanded for imposition of life sentence).