Death Penalty

Craig S. Barnard*
Abstract

Capital sentencing law is an ever-changing specialized field governed by its own statutory process that in turn is shaped by strict, but evolving, constitutional requirements.

KEYWORDS: sentence, death, premeditated
for pro bono recognition, for which he was preeminently qualified, always met with his disapproval, and in respect of his feelings, such efforts were always dropped. Were he to know of our remarks here, he would be abashed.

We honor Craig Barnard because he honored us with his presence in our lives, his contributions to our profession, and his inspiration of our work. May he rest in peace, and may his memory sustain us in our days to come.

-Friends of Craig Barnard—

Death Penalty

Craig S. Barnard*

I. INTRODUCTION ......................................................... 908
II. AGGRAVATING CIRCUMSTANCES .............................. 909
   A. Under Sentence of Imprisonment ..................... 909
   B. Previous Conviction for a Capital or Violent Felony .......... 912
   C. Great Risk of Death to Many Persons ............ 916
   D. Committed During Commission of Felony ........ 917
   E. To Avoid a Lawful Arrest or to Escape ........ 922
   F. Pecuniary Gain ........................................... 924
   G. Hinder Governmental Function or Enforcement of Law ...... 926
   H. Especially Heinous, Atrocious, or Cruel .............. 927
   I. Cold, Calculated, Prewmeditated Without Pretense of Justification 936
   J. Victim Was Law Enforcement Officer Performing Official Duties ..... 944
   K. Victim as a Public Official, Performing Official Duties ...... 946
   L. Any Other Aggravating Circumstances ............ 947

III. CONSTITUTIONAL ISSUES ................................. 948
   A. Youth — Too Young to Die? ......................... 948
   B. Mental Retardation — Too Disabled to Die? .... 951
   C. Diminished Juror Responsibility — Federal v. State Courts ... 953

* Craig S. Barnard served as the Chief Assistant Public Defender in the Office of the Public Defender, Palm Beach County, Florida, where he had practiced since receiving J.D. with honors in 1974 from the University of Florida. His practice was concentrated on capital cases at the appellate and post-conviction levels in state and federal courts, and the Supreme Court of the United States. He was co-chair of the Death Penalty Litigation Section of the National Legal Aid and Defender Association and was the recipient of its prestigious Defender Service Award for his work in advancing representation in capital cases. He also served on the Death Penalty Steering Committee of the Florida Public Defender, Assn., Inc.
can affect future cases and future constitutionality. Next, the major constitutional issues dealt with during the survey period are reviewed, followed by a discussion of significant events affecting appellate review, and other notable issues. It will be seen from this article that capital law is very difficult to apply consistently on a case-by-case basis, an inevitable aspect of this area of law that explains the apparent shifts and even reversals in positions that will be seen during this survey period.

II. Aggravating Circumstances

A. Under Sentence of Imprisonment

The imprisonment aggravating circumstance is a "status" factor; that is, one not necessarily related to the capital offense, but rather arising only from the capital defendant's status as a "prisoner." Very early it was held not to be limited to its literal meaning, but also applies to persons on parole. That application continued during the survey period. In the three decisions applying the factor, the capital defendants were all on parole and the imprisonment factor was sustained. This factor is therefore subject to objective application.

The controversy that arises involves the method and scope of the proof offered by the State to support the factor. The court took an ominous step in Jackson v. State, where it held that in proving parole status, the prosecution may also present evidence of the nature of the prior offense underlying the parole. It took that step without precedent and without much stated analysis. In Jackson the defendant had been on parole.

3. Hildwin v. State, 531 So. 2d 124, 126 (Fla. 1988); Jackson v. State, 530 So. 2d 269, 272 (Fla. 1988); Burch v. State, 522 So. 2d 810, 814 (Fla. 1988). In a fourth case, the trial court had applied the aggravating factor where the defendant was on probation, but the question of the propriety of that application was not reached because the sentence was reversed on other grounds. Priggin v. State, 531 So. 2d 951, 953 n.1 (Fla. 1988). In Peak v. State, 395 So. 2d 492, 499 (Fla. 1981) the court held that the factor does not apply to a defendant on probation, unless the defendant committed the capital felony while in jail as a condition of probation.
4. 530 So. 2d 269 (Fla. 1988).
5. Id. at 272.

I. Introduction

Capital sentencing law is an ever-changing, specialized field governed by its own statutory process that in turn is shaped by strict, but evolving, constitutional requirements. The purpose of capital law is to rationally select the few first degree murderers who must be put to death by the state from the much greater number of such persons who will receive lesser penalties. The intent is to accomplish that selection accurately, on rational bases, and with evenhandedness, so as to avoid the arbitrariness that plagues death sentencing before it was stricken in 1972. The degree to which that goal of consistency is met, will determine the constitutional validity of the sentencing procedure in general and in particular parts.

This article surveys the law in capital cases as it was announced during the period of December 1, 1987 through September 30, 1988. The focus is on the 81 opinions in capital cases issued by the Florida Supreme Court during the survey period, but decisions by the federal courts and the Supreme Court of the United States also had (or will have) a significant impact on Florida's practice and are discussed both as they apply to specific subjects and separately. While prior precedent is explained where necessary to show context or significance, it is assumed that the reader has at least a passing awareness of capital sentencing law. "Aggravating circumstances" are the primary tools of the selection process of capital law, and thus each Florida aggravating factor that is discussed because even subtle changes in interpretation...
I. Introduction

Capital sentencing law is an ever-changing, specialized field governed by its own statutory process that in turn is shaped by strict, but evolving, constitutional requirements. The purpose of capital law is to rationally select the few first degree murderers who must be put to death by the state from the much greater number of such persons who will receive lesser penalties. The intent is to accomplish that selection accurately, on rational bases, and with evenhandedness, so as to avoid the arbitrariness that plagued death sentencing before it was stricken in 1972. The degree to which that goal of consistency is met, will determine the constitutional validity of the sentencing procedure in general and in particular parts.

This article surveys the law in capital cases as it was announced during the period of December 1, 1987 through September 30, 1988. The focus is on the 81 opinions in capital cases issued by the Florida Supreme Court during the survey period, but decisions by the federal courts and the Supreme Court of the United States also had (or will have) a significant impact on Florida’s practice and are discussed both as they apply to specific subjects and separately. While prior precedent is explained where necessary to show context or significance, it is assumed that the reader has at least a passing awareness of capital sentencing law. “Aggravating circumstances” are the primary tools of the selection process of capital law, and thus each Florida aggravating factor is separately discussed because even subtle changes in interpretation can affect future cases and future constitutionality. Next, the major constitutional issues dealt with during the survey period are reviewed, followed by a discussion of significant events affecting appellate review, and other notable issues. It will be seen from this article that capital law is very difficult to apply consistently on a case-by-case basis, an inevitable aspect of this area of law that explains the apparent shifts and even reversals in positions that will be seen during this survey period.

II. Aggravating Circumstances

A. Under Sentence of Imprisonment

The imprisonment aggravating circumstance is a “status” factor; that is, one not necessarily related to the capital offense, but rather arising only from the capital defendant’s status as a “prisoner.” Very early it was held not to be limited to its literal meaning, but also applies to persons on parole. That application continued during the survey period. In the three decisions applying the factor, the capital defendants were all on parole and the imprisonment factor was sustained. This factor is therefore subject to objective application.

The controversy that arises involves the method and scope of the proof offered by the State to support the factor. The court took an ominous step in Jackson v. State, when it held that in proving parole status, the prosecution may also present evidence of the nature of the prior offense underlying the parole. It took that step without precedent and without much stated analysis. In Jackson the defendant had been on parole.

2. See, e.g., Aldridge v. State, 351 So. 2d 942 (Fla. 1977). See also Darden v. State, 329 So. 2d 287 (Fla. 1976) (Furlough); King v. State, 390 So. 2d 315 (Fla. 1980) (work release).
3. Hildwin v. State, 531 So. 2d 124, 126 (Fla. 1988); Jackson v. State, 530 So. 2d 269, 272 (Fla. 1988); Burch v. State, 322 So. 2d 810, 814 (Fla. 1988). In a fourth case, the trial court had applied the aggravating factor where the defendant was on probation, but the question of the propriety of that application was not reached because probation, but the question of the propriety of that application was not reached because the sentence was reversed on other grounds. Prudin v. State, 531 So. 2d 951, 953 n.1 (Fla. 1988). In Pore v. State, 395 So. 2d 492, 499 (Fla. 1981) the court held that the factor does not apply to a defendant on probation, unless the defendant committed the capital felony while in jail as a condition of probation.
4. 530 So. 2d 269 (Fla. 1988).
parole after a conviction for escape. A motion in limine to prevent admission of evidence of the prior escape conviction was filed by the defendant, and he further offered to stipulate to his parole status. The motion was denied, and the prosecutor was permitted to prevent evidence of the escape conviction as part of its proof of the imprisonment aggravating circumstance. On appeal the defendant challenged the admissibility of that evidence as being an unauthorized aggravating factor and alternatively that the prejudicial effect outweighed the probative value. The Florida Supreme Court rejected this argument, holding that "[evidence of the particular offense for which appellant was on parole may be admitted to establish the aggravating factor permitted by section 921.141(5)(a), Florida Statutes (1985)."

To understand the significance of this facially simple holding, some review of history is necessary. One of the unique features of the Florida capital sentencing scheme is that only evidence concerning statutory aggravating circumstances may be presented by the prosecution and considered by the jury and judge. It is a principle that was established at the outset of the application of the statute and one that has been strictly enforced by the Florida Supreme Court. Therefore in proving the aggravating factor set out in Florida Statutes, section 921.141(5)(b) involving a prior conviction for a violent felony, it is improper and generally reversible error to introduce evidence of crimes not involving violence or for which there has been no conviction. However, once a prior violent conviction is properly proven, the prosecution may present the factual circumstances surrounding the prior case. Accordingly, in Jackson the prior escape conviction was otherwise inadmissible as being nonstatutory aggravating circumstance. By permitting the introduction under the imprisonment factor, the Florida Supreme Court broke from precedent and broadened the type of evidence that is permitted in capital sentencing trials. The only support cited by the Jackson decision is a case dealing with the "prior violent felony" aggravating factor. The court thus transported precedent from another factor into the imprisonment aggravating factor. In another similar context the court has said that "[t]he state may not do indirectly that which we have held they may not do directly." Such reasoning would appear to be especially applicable to the issue presented in Jackson. As mentioned, the imprisonment aggravating circumstance is a "status" factor, with the relevant inquiry being whether the defendant was under some relevant legal constraint. If the defendant was on parole, the aggravating circumstance is applicable. In this inquiry it does not matter what offense was underlying the parole because it is the status of parole that gives rise to the aggravating factor. If the prior offense qualifies as the type of offense the legislature deemed appropriate for consideration, it will be considered under the separate aggravating factor defining a "prior violent felony." It is this
parole after a conviction for escape. A motion in limine to prevent admission of evidence of the prior escape conviction was filed by the defendant, and he further offered to stipulate to his parole status. The motion was denied, and the prosecutor was permitted to present evidence of the escape conviction as part of its proof of the imprisonment aggravating circumstance. On appeal the defendant challenged the admissibility of that evidence as being an unauthorized aggravating factor and alternatively that the prejudicial effect outweighed the probative value. The Florida Supreme Court rejected this argument, holding that “[e]vidence of the particular offense for which appellant was on parole may be admitted to establish the aggravating factor permitted by section 921.141(5)(a), Florida Statutes (1985).”

To understand the significance of this facially simple holding, some review of history is necessary. One of the unique features of the Florida capital sentencing scheme is that only evidence concerning statutory aggravating circumstances may be presented by the prosecution and considered by the jury and judge. It is a principle that was established at the outset of the application of the statute and one that has been strictly enforced by the Florida Supreme Court. Therefore in proving the aggravating factor set out in Florida Statutes, section 921.141(5)(b) involving a prior conviction for a violent felony, it is improper and generally reversible error to introduce evidence of crimes not involving violence or for which there has been no conviction. However, once a prior violent conviction is properly proven, the prosecution may present the factual circumstances surrounding the prior case.

Accordingly, in Jackson the prior escape conviction was otherwise inadmissible as being nonstatutory aggravating circumstance. By permitting the introduction under the imprisonment factor, the Florida Supreme Court broke from precedent and broadened the type of evidence that is permitted in capital sentencing trials. The only support cited by the Jackson decision is a case dealing with the “prior violent felony” aggravating factor. The court thus transported precedent from another factor into the imprisonment aggravating factor. In another similar context the court has said that “[t]he state may not do indirectly that which we have held they may not do directly.”

Such reasoning would appear to be especially applicable to the issue presented in Jackson. As mentioned, the imprisonment aggravating circumstance is a “status” factor, with the relevant inquiry being whether the defendant was under some relevant legal constraint. If the defendant was on parole, the aggravating circumstance is applicable. In this inquiry it does not matter what offense was underlying the parole because it is the status of parole that gives rise to the aggravating factor. If the prior offense qualifies as the type of offense the legislature deemed appropriate for consideration, it will be considered under the separate aggravating factor defining a “prior violent felony.” It is this

12. The Jackson court provided a “cf.” citation to Mann v. State, 453 So. 2d 784 (Fla. 1984). Jackson, 530 So. 2d at 273. The Mann decision held it was proper to present the underlying facts to a prior burglary in order to show that it involved violence so as to qualify under Fla. Stat. § 921.141(5)(b) (1987). Mann, 453 So. 2d at 786.

13. Dragovich v. State, 492 So. 2d 350, 355 (Fla. 1986). In Dragovich the state had been permitted to present evidence of the defendant’s reputation as an arsonist for the purpose of rebutting the mitigating factor of lack of prior criminal history. The court held the admission to be improper because the result was the same as if it had been offered as an aggravating circumstance. The court thus prohibited the evidence regardless of “[w]hatever doctrinal distinctions may be devised” by the state to justify the admission of the evidence. Id. This reasoning seemed to apply with equal force to the admission of the evidence in Jackson, but it was not mentioned.

14. Cf. Mkenas v. Dugger, 519 So. 2d 601, 602 (Fla. 1988) (in reviewing a question of harmless error the court noted that “[a]ll of the aggravating circumstances were related to the murder itself except one which referred to the fact that Mkenas was on parole when he committed the crime”).
prior violent felony circumstance that the court has held is intended to provide the "character analysis" of the defendant, for unlike the other aggravating circumstances it permits an inquiry into details of the defendant's background (rather than focusing on the facts of the capital offense). Accordingly, the court's holding in Jackson seems to be not only unsupported by prior precedent, but also in conflict with previously established principles.

B. Previous Conviction for a Capital or Violent Felony

The aggravating factor concerning the capital defendant's criminal record is one that is frequently relied upon by trial courts. Together with the imprisonment aggravating circumstance, it focuses on the defendant, apart from the facts of the capital cases upon which the sentence is being imposed. The scope of evidence that may be presented in connection with this aggravating factor has previously been discussed and includes not only the fact of the conviction, but also the details of the prior offense.

While this factor seems to be objective and thus subject to easy application, problems do arise because the factor has been literally interpreted at times. The key elements that must be proven to establish this aggravating factors are: previous conviction and the threat or use of violence against the person. Of course in most situations the circumstance is applied with its common ordinary meaning, such as a prior conviction for murder or armed robbery, and in these situations it is

most factor, 921.151 (5) (g). The merger principle applies where the factors speak to essentially the same underlying concept. The court has held, however, that it does not apply to the imprisonment and the prior violent felony aggravating factors. Waterhouse v. State, 429 So. 2d 301 (Fla. 1983); Johnson v. State, 442 So. 2d 185 (Fla. 1983).

16. Ellridge v. State, 346 So. 2d 998, 1001 (Fla. 1976) (evidence concerning the details of the prior offense, as opposed to only the fact of conviction, are admissible because the purpose is "to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case").

17. "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Fla. Stat. § 921.141(5)(b) (1987).

18. The factor had been relied upon by the trial courts in twenty-three of the thirty-eight cases considered on direct appeal during the survey period.

19. See supra notes 10 & 11 and accompanying text.

20. E.g., Torres-Arboleda v. State, 524 So. 2d 403 (Fla. 1988) (prior California

prior violent felony circumstance that the court has held is intended to provide the "character analysis" of the defendant, for unlike the other aggravating circumstances it permits an inquiry into details of the defendant's background (rather than focusing on the facts of the capital offense). Accordingly, the court's holding in Jackson seems to be not only unsupported by prior precedent, but also in conflict with previously established principles.

B. Previous Conviction for a Capital or Violent Felony

The aggravating factor concerning the capital defendant's criminal record is one that is frequently relied upon by trial courts. Together with the imprisonment aggravating circumstance, it focuses on the defendant, apart from the facts of the capital cases upon which the sentence is being imposed. The scope of evidence that may be presented in connection with this aggravating factor has previously been discussed and includes not only the fact of the conviction, but also the details of the prior offense.

While this factor seems to be objective and thus subject to easy application, problems do arise because the factor has been literally interpreted at times. The key elements that must be proven to establish this aggravating factors are: previous conviction and the threat or use of violence against the person. Of course in most situations the circumstance is applied with its common ordinary meaning, such as a prior conviction for murder or armed robbery, and in these situations it is

seldom challenged on appeal.

Questions continue to arise, however, over the timing of the "previous" convictions. The Florida Supreme Court has applied a literal meaning to "previously convicted" and thus permitted this aggravating factor to be established by any conviction for a violent felony that occurred prior to sentencing in the capital case. This interpretation means that even contemporaneous convictions arising from the same criminal episode and tried at the same trial may be used to support this aggravating factor because the convictions literally were entered "previous" to the subsequent capital sentencing proceeding. Accordingly, a defendant without a prior record of violent crimes had been held nevertheless to qualify for the previous conviction aggravating factor, if he or she was charged and convicted of a capital murder and related violent felonies against a single victim and arising from a single criminal episode.

The Florida Supreme Court recently clarified its view regarding the use of contemporaneous convictions as previous convictions and precluded such use where there was a single victim, Wasko v. State. The court applied the Wasko holding in three cases during the survey period, further explaining its reasoning and rereading from contrary

22. See, e.g., Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988), cert. denied, 109 S. Ct. 185 (1984) ("Neither party disputes the fact that appellant previously was convicted of violent felonies").

23. See, e.g., Lucas v. State, 376 So. 2d 1149, 1152 (Fla. 1979) ("It is true that the two felony convictions were entered contemporaneously with the conviction of murder in the first degree, but both were entered 'previous' to sentencing and were therefore properly considered by the trial judge as an aggravating circumstance"); King v. State, 350 So. 2d 315, 320-21 (Fla. 1980) ("The legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance").

24. See, e.g., Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984) (factor supported by the contemporaneous convictions for robbery and sexual battery) noting that "we cannot say that the separate acts of violence on one victim are less revealing of the violent propensities of the perpetrator than contemporaneous acts of violence on separate victims"). Of course, the legal issues involve the meaning of the aggravating factor not what the appellate court believes to be revealing. The court, as will be seen, later changed its views and returned to the question of statutory interpretation.

25. 505 So. 2d 1314, 1317-18 (Fla. 1987) (striking the factor where trial court based its finding of the § 921.141(5)(b) aggravating factor on the contemporaneous conviction for attempted sexual battery, and not the one conviction for attempted sexual battery on the same victim). While the court did not challenge the validity of the holding since the holding was not discussed in the prior footnote.
held a conviction is final for purposes of this aggravating factor even if it is pending on direct appeal. The court in those earlier decisions did not face the question of what would happen if the conviction relied upon was later vacated. It faced that question in Long v. State, where the court had vacated a separate murder conviction. It held that the subsequent vacation of a conviction relied upon in imposing the death sentence “eliminates the proper use of the conviction as an aggravating factor.” The Florida Supreme Court had previously reached the same holding in another case, but the Long decision is significant because the court found it to be reversible error “although there were other criminal convictions of violent crimes presented in the penalty phase” to support this aggravating factor. It did so because the vacated conviction “was the only prior murder conviction available for use in the sentencing proceeding.” The significance of that reasoning is that the court recognized that the aggravating factor may be invalidated if part, but not all, of its bases was improper.

The Supreme Court of the United States also spoke to this question. In Johnson v. Mississippi, the defendant had been sentenced to death in 1982 based in part on a 1963 New York felony conviction. The Mississippi Supreme Court affirmed the conviction and death sentence. After the Mississippi direct appeal had been concluded, Johnson

26. 522 So. 2d 817 (Fla. 1988).
27. Id. at 820.
28. Id. (reciting from Hardwick v. State, 461 So. 2d 79 (Fla. 1984)).
31. Id. at 568.
32. E.g., Provence v. State, 337 So. 2d 783, 786 (Fla. 1976).
34. 528 So. 2d 353 (Fla. 1988).
35. 386 So. 2d 499 (Fla. 1980).
37. Peek, 395 So. 2d at 499 (expressly noting that the court did not have to face the question of a later-vacated conviction in the case before it).
38. 529 So. 2d 286 (Fla. 1988).
39. Id. at 293.
41. Long, 529 So. 2d at 293.
42. Id. (emphasis in original).
43. Prior decisions have treated improper bases of this aggravating factor as either harmless or surplusage, where there were other convictions to support the factors. See, e.g., Johnson v. State, 465 So. 2d 499 (Fla. 1985) (possible error in considering burglary not determinative where also supported by robbery conviction); Jones v. State, 440 So. 2d 270 (Fla. 1983) (improper references to prior charges and juvenile record held to be surplusage where factor otherwise supported by conviction for battery on a law enforcement officer); Mason v. State, 438 So. 2d 374 (Fla. 1983) (even though some of the convictions relied upon were nonviolent, sufficient violent felony convictions existed to support this factor).
45. The sentencing court relied upon the conviction itself, not the underlying conduct giving rise to the offense and no evidence concerning the offenses that had been presented other than a document showing the conviction. Id. at 1986.
In *Perry v. State* the defendant had demanded gold from the victim prior to the murder and thus was convicted of capital murder and armed robbery. The sentencing judge based her finding of this aggravating factor on the contemporaneous armed robbery conviction. Citing to its *Wasko* decision, the court held "it improper to aggravate for a prior conviction of a violent felony when the underlying felony is part of the single criminal episode against the single victim of the murder." The court expressly receded from its contrary holdings. The same reasoning was applied in striking the aggravating factor in another case where it had been based on a contemporaneous conviction for burglary. The case of *Correll v. State* illustrates the application of this factor based on contemporaneous convictions. The defendant had been convicted of four murders arising from a single episode. However, because they obviously involved different victims, for the purpose of sentencing for each offense, the aggravating factor of prior violent felonies was supported in each instance: "As to each crime, Correll had already been convicted of three capital felonies even though all four murders were committed in one episode." Another question in applying this factor is determining whether there is a "conviction." "Mere arrests or accusations" do not qualify and may not be considered, but it has been held that entry of a guilty plea qualifies under this factor even if adjudication has not yet been entered. In *Garron v. State* the court faced the situation where the defendant had entered a plea of nolo contendere to aggravated assault and received no adjudication of guilt. The court found that since a nolo contendere plea, unlike a guilty plea, does not amount to either a confession or a conviction, it cannot support the prior violent felony aggravating factor.

A related question concerns the finality of a conviction that is pending on appeal at the time of the capital sentencing. The court has

---

26. 522 So. 2d 817 (Fla. 1988).
27. Id. at 820.
28. Id. (reciting from Hardwick v. State, 461 So. 2d 79 (Fla. 1984)).
31. Id. at 568.
32. E.g., Provence v. State, 337 So. 2d 783, 786 (Fla. 1976).
34. 528 So. 2d 353 (Fla. 1988).
35. Id. at 360.
36. Id. at 371.
37. Id. at 372.
38. Id. at 373.
39. Id. at 374.
40. Id. at 375.
41. Id. at 376.
42. Id. at 377.
43. Prior decisions had treated improper bases of this aggravating factor as either harmless or surpluses, where there were other convictions to support the factors. See, e.g., Johnson v. State, 465 So. 2d 499 (Fla. 1985) (possible error in considering burglary not determinative where also supported by robbery conviction); Jones v. State, 440 So. 2d 570 (Fla. 1983) (improper references to prior charges and juvenile record held to be surpluses where factor otherwise supported by conviction for battery on a law enforcement officer); Mason v. State, 438 So. 2d 374 (Fla. 1983) (even though some of the convictions relied upon were nonviolent, sufficient violent felony convictions existed to support this factor).
successfully persuaded the New York Court of Appeals to vacate the 1963 conviction.\textsuperscript{46} Johnson's efforts in the Mississippi courts to vacate his death sentence was unsuccessful.\textsuperscript{47} On certiorari, the Supreme Court rejected the reasoning of the Mississippi court and held that reliance upon the New York conviction violated the eighth amendment mandate that death sentences "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'"\textsuperscript{48} The Court emphasized that the error was more than the "mere invalidation of an aggravating circumstance" because "[h]ere the jury was allowed to consider evidence that has been revealed to be materially inaccurate."\textsuperscript{49}

C. Great Risk of Death to Many Persons\textsuperscript{50}

The Florida Supreme Court over the years has narrowed the application of this aggravating factor by strictly construing the statute's provisions of "many" persons and "great risk."\textsuperscript{51} While the court does not seem to have separately interpreted "knowingly," it has tried to provide reliance on speculation to establish this factor.

46. Id. at 1984. The New York courts found that he had been unconstitutionally denied the right to appeal and thus granted a new appeal but vacated the conviction because all of the records in the case had been destroyed. Id. at 1985 & n.3.
47. The Mississippi court found alternatively that issue had been waived because it was not raised on direct appeal; that its capital procedures would be capricious if a post-sentencing decision by another state could invalidate a Mississippi death sentence; that the New York proceedings may not have been truly adversarial; and that since Johnson had served his sentence in New York it had sufficient finality to be considered as an aggravating circumstance in Mississippi. Id. at 1985.
48. Id. at 1986 (quoting Zant v. Stephens, 462 U.S. 862 (1983)).
49. Id. at 1989 (footnote omitted).
51. In Kampff v. State, 371 So. 2d 1007 (Fla. 1979) where two bystanders were present in the retail store when the defendant shot his ex-wife, the court struck the reliance on this aggravating factor because "[b]y using the word 'many' the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance." The court further held that "[a] great risk means not a mere possibility but a likelihood or high probability." Id. at 1009. The court in a later decision further stated that the factor could not be applied "for what might have occurred," but must rest on "what in fact occurred." White v. State, 403 So. 2d 331, 337 (Fla. 1981) (original emphasis), and thus cannot be based on "speculation." Francis v. State, 407 So. 2d 885, 891 (Fla. 1981). The White and Francis cases involved the killing of six persons.
successfully persuaded the New York Court of Appeals to vacate the 1963 conviction. Johnson’s efforts in the Mississippi courts to vacate his death sentence was unsuccessful. On certiorari, the Supreme Court rejected the reasoning of the Mississippi court and held that reliance upon the New York conviction violated the eighth amendment mandate that death sentences “cannot be predicated on mere ‘caprice’ or on ‘factors that are constitutionally impermissible or totally irrelevant to the sentencing process.’” The Court emphasized that the error was more than the “mere invalidation of an aggravating circumstance” because “[h]ere the jury was allowed to consider evidence that has been revealed to be materially inaccurate.”

C. Great Risk of Death to Many Persons

The Florida Supreme Court over the years has narrowed the application of this aggravating factor by strictly construing the statute’s provisions of “many” persons and “great risk.” While the court does not seem to have separately interpreted “knowingly,” it has tried to preclude reliance on speculation to establish this factor.

46. Id. at 1984. The New York courts found that he had been unconstitutionally denied the right to appeal and thus granted a new appeal but vacated the conviction because all of the records in the case had been destroyed. Id. at 1985 & n.3.
47. The Mississippi court found alternatively that issue had been waived because it was not raised on direct appeal; that its capital procedures would be capricious if a post-sentencing decision by another state could invalidate a Mississippi death sentence; that the New York proceedings may not have been truly adversarial; and that since Johnson had served his sentence in New York it had sufficient finally to be considered an aggravating circumstance in Mississippi. Id. at 1985.
48. Id. at 1986 (quoting Zant v. Stephens, 462 U.S. 862 (1983)).
49. Id. at 1989 (footnote omitted).
51. In Kampf v. State, 371 So. 2d 1007, 1009-10 (Fla. 1979) where two bystanders were present in the retail store when the defendant shot his ex-wife, the court struck the reliance on this aggravating factor because “[b]y using the word ‘many’ the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance.” The court further held that “[g]reat risk means not a mere possibility but a likelihood or high probability.” Id. at 1009. The court in a later decision further stated that the factor could not be applied “for what might have occurred,” but must rest on “what in fact occurred.” White v. State, 401 So. 2d 331, 337 (Fla. 1981) (original emphasis), and thus cannot be based on speculation.” Francois v. State, 407 So. 2d 885, 891 (Fla. 1983). The White and Francois cases involved the killing of six persons.

1989

There have been occasional deviations by the court from its strict interpretation. One of those interpretation/reinterpretation instances is shown by Scull v. State.68 The offenses involved a double homicide caused by beating. After the deaths, the victims’ house was set afire. Based upon the arson, the sentencing judge found that Scull had caused a great risk of death to many people. The Florida Supreme Court found insufficient evidence to support this factor.69 The court began by acknowledging that in King v. State,69 it had upheld this factor for an arson. However, the court also acknowledged that when King returned after resentencing,69 the court had “revised” its positions and invalidated the aggravating factor.69 In Scull as it had done in the King resentencing opinion, the court found that the case “contains no facts that point to any person, inside or outside the house, who was at risk of death.”69

Accordingly, great risk to many persons, means persons other than the murder victim(s) and cannot be heard on speculation.68

D. Committed During Commission of Felony

This aggravating factor in essence is the traditional felony murder rule, and thus in most instances it applies whenever the prosecution has

52. 533 So. 2d 1137 (Fla. 1988).
53. Id. at 1141.
54. 390 So. 2d 315 (Fla. 1980).
55. In King the defendant argued that the only evidence was that one person was in the house at the time of the fire, but the court said he should have reasonably foreseen that the fire would pose a great risk to neighbors, firefighters and police. Id. at 320.
57. Scull, 533 So. 2d at 1141.
58. Id.
59. The only other decision during the survey period where this factor had been found was Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988). The propriety of the finding was not reviewed because the court reduced the sentence of death on other grounds. Id. at 811, 812. In a prior appeal of the same case, however, the court had affirmed the finding where the defendant held three hostages in a bank office and shot at persons other than the victim. Fitzpatrick v. State, 437 So. 2d 1072, 1077 (Fla. 1983).
60. “The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.” FLA. STAT. § 921.141(5)(d) (1987).
proven a felony-murder in its case-in-chief. It is that parallel application that requires proof beyond a reasonable doubt of the underlying felony, and also that has raised a constitutional question regarding Florida's application of that factor. Its importance as an aggravating circumstance cannot be doubted, it was found by trial courts in twenty-one of the thirty-eight direct appeals reviewed during the survey period.

Two opinions demonstrate its application. The opinion in Turner v. State, rejects a challenge that the felony murder aggravating factor could not be found based on a burglary that was not separately charged in the case-in-chief. The court held that the section defining this factor "does not require that a defendant be charged or convicted of the enumerated felonies, it requires only that this aggravating circumstance be proven beyond a reasonable doubt." The court further reviewed the evidence, finding it sufficient to prove that Turner had committed a burglary.

The same principles were applied in Hardwick v. State, but the result was different. The trial court had found the capital felony was committed during a kidnapping, but the Florida Supreme Court found the evidence of abduction to be "at most equivocal" and thus insufficient to support this aggravating factor. The court accordingly reaffirmed the need to prove the commission of the underlying felony "beyond a reasonable doubt."

---

61. See State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 94 (1974) (under this provision, commission of a capital felony as part of a specified felony "constitutes not only a capital felony...but also an aggravated capital felony"). Although this aggravating factor is applied under traditional felony murder principles, the statutory language differs from the present codification of the substantive offense of felony murder. As codified, the substantive offense includes certain drug trafficking, escape, and aggravated child abuse as underlying felonies, offenses not among those listed in the aggravating factor. Compare Fla. Stat. § 782.041(1)(d)(2) (1987), with Fla. Stat. § 921.141(5) (d) (1987). The offense also does not include the broad "flight from" language of the aggravating factor. Dixon, 283 So. 2d at 9.

62. 530 So. 2d 45 (Fla. 1988).
63. Id. at 50.
64. Id. at 50-51.
65. Id. at 50.
66. 521 So. 2d 1071 (Fla. 1988).
67. Id. at 1075-76. The court noted that the state had not charged Hardwick with kidnapping. As to the evidence of abduction, the court said that the testimony as to how the victim came to be in Hardwick's company was "at most equivocal," and the medical examiner's testimony that the victim's hands were tied, a fact that could have shown kidnapping, was uncertain. Id. at 1075.
68. Id. at 1076.
proven a felony-murder in its case-in-chief. It is that parallel application that requires proof beyond a reasonable doubt of the underlying felony, and also that has raised a constitutional question regarding Florida’s application of that factor. Its importance as an aggravating circumstance cannot be doubted, it was found by trial courts in twenty-one of the thirty-eight direct appeals reviewed during the survey period.

Two opinions demonstrate its application. The opinion in Turner v. State, rejections a challenge that the felony murder aggravating factor could not be found based on a burglary that was not separately charged in the case-in-chief. The court held that the section defining this factor “does not require that a defendant be charged or convicted of the enumerated felonies, it requires only that this aggravating circumstance be proven beyond a reasonable doubt.” The court further reviewed the evidence, finding it sufficient to prove that Turner had committed a burglary.

The same principles were applied in Hardwick v. State, but the result was different. The trial court had found the capital felony was committed during a kidnapping, but the Florida Supreme Court found the evidence of abduction to be “at most equivocal” and thus insufficient to support this aggravating factor. The court accordingly reaffirmed the need to prove the commission of the underlying felony “beyond a reasonable doubt.”

61. See State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974) (under this provision, commission of a capital felony as part of a specified felony “constitutes not only a capital felony . . . . but also an aggravated capital felony”). Although this aggravating factor is applied under traditional felony murder principles, the statutory language differs from the present codification of the substantive offense of felony murder. As codified, the substantive offense includes certain drug trafficking, escape, and aggravated child abuse as underlying felonies, offenses not among those listed in the aggravating factor. Compare Fla. Stat. § 782.04(1)(a)(2) (1987), with Fla. Stat. § 921.141(5) (d) (1987). The offense also does not include the broad “flight from” language of the aggravating factor. Dixon, 283 So. 2d at 9.

62. 530 So. 2d 45 (Fla. 1988).
63. Id. at 50.
64. Id. at 50-51.
65. Id. at 50.
66. Id. at 50.
67. Id. at 1075-76. The court noted that the state had not charged Hardwick with kidnapping. As to the evidence of abduction, the court said that the testimony as to how the victim came to be in Hardwick’s company was “at most equivocal,” and the medical examiner’s testimony that the victim’s hands were tied, a fact that could have shown kidnapping, was uncertain. Id. at 1075.
68. Id. at 1076.

One other decision deserves mention because its language does not appear to be necessarily in complete accord with Hardwick. The defendant challenged the sufficiency of the evidence to support a finding of this factor based on an attempted robbery in Lloyd v. State. The Florida Supreme Court reviewed the sentencing judge’s findings, but conspicuously did not say it was proven beyond a reasonable doubt. Rather, the court said that “there was sufficient evidence to support an attempted robbery instruction.” Sufficiency of the evidence to support an instruction and proof beyond a reasonable doubt may be doctrinally different, but that question will be left for another day because Lloyd’s sentence was reduced to life imprisonment for other reasons. The court found that felony murder was insufficient, as the lone valid aggravating factor, to support the death sentence. The court thus applied its longheld view that undistinguished felony murders do not call for a death penalty.

There is a remaining constitutional question regarding Florida’s application of this felony murder aggravating circumstance. In simple terms the question is whether an essential element for conviction of the capital offense may also be used as an aggravating factor. The Florida Supreme Court has repeatedly approved this practice and did so again during the survey period. The Supreme Court of the United States also spoke to the question in Lowenfield v. Phelps, but by its reasoning left the constitutional question open for capital procedures such as those followed in Florida.

The constitutional question stems from the eighth amendment requirement that in imposing the death sentence the procedures must

69. 524 So. 2d 396 (Fla. 1988).
70. Id. at 402.
71. Id. at 403. The court found the death sentence to be “proportionately incorrect.” Id. (citing Rembert v. State, 445 So. 2d 337 (Fla. 1984)).
72. See, e.g., McCaskill v. State, 344 So. 2d 1276, 1280 (Fla. 1977) (“Juries, under our new death penalty statute, have been reluctant to recommend the imposition of the death penalty in all but the most aggravated cases despite general knowledge of the death penalty in all but the most aggravated cases despite general knowledge of the death penalty in all but the most major cases”). Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984) (reversing for life sentence where the only valid aggravating factor was felony murder, and noting that “[t]he oral argument the state conceded that in similar circumstances many people receive a less severe sentence”).
73. Swafford v. State, 533 So. 2d 270, 274 (Fla. 1988) (“We have held that the engaged-in-felony aggravating circumstance can be found even where the conviction rests on the felony-murder rule”) (citing Mills v. State, 476 So. 2d 172, 177 (Fla. 1985)).
provide a “meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” Since the vast majority of persons charged with murder do not receive a death sentence, the process of selecting the persons who will be given the ultimate penalty must be even-handed, rational, and consistent. That selection process is undertaken in one of two ways. One method, and that followed in Florida, is the use of aggravating circumstances. The second method, not followed in Florida, is by narrowing the definition of the substantive capital offense.

A capital sentencing scheme that fails to channel that selection process may result in “arbitrary and capricious” application of the death penalty.77 Thus, the Court holds that “[t]o avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”78

Does the reliance upon felony murder for both the conviction and as an aggravating circumstance comply with the “genuinely narrow” requirement? In Lowenfield the Court found no constitutional flaw in finding the aggravating factor of creating a “risk of death . . . to more than one person” where the conviction rested upon the “intent to kill . . . more than one person.”79 These two provisions had been interpreted in “parallel fashion” by the state courts.80 Thus, the question was presented whether the use of the aggravating circumstance genuinely narrowed the class of persons eligible for death? The Court recognized that in most states the narrowing function is accomplished by the requirement that at least one aggravating circumstance be proven before death may be imposed. As one example, the Court cited to the Florida procedure.

However, the Court found that the Louisiana procedure under review in Lowenfield was different than the procedure in Florida and other states. The Louisiana procedure narrowed the class of death eligible persons at the guilt phase by using narrow statutory definitions of capital offenses.81 “[S]o the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.”82

The question remains, however, whether in a capital sentencing scheme that “broadly define[s] capital offenses” and depends upon aggravating circumstances to meet the narrowing requirement,83 the duplication of an element of the crime as an aggravating circumstance would meet eighth amendment muster. Florida is one of those states providing a broad definition of the capital offense of first degree murder. Florida permits first degree murder to be proven by either of two theories: by premeditated intent or by felony murder. The theory need not be specified in the indictment; the state need not elect upon which theory it would proceed; the jury does not need to agree unanimously on a theory; and the jury issues only a general verdict, not specifying its theory.84

Without statutory definition to narrow the capital offense, the aggravating circumstances serve the purpose of narrowing the class of death eligible persons. In a prosecution involving felony murder (and all murder prosecutions could be such a case since it need not be specified), upon a finding of guilt at least one aggravating circumstance is applicable before even reaching the penalty phase. Every person convicted of a murder in connection with a felony would also have the felony murder aggravating circumstance. The class has not been narrowed by the aggravating circumstances—especially considering that death is presumed to be the sentence if one aggravating factor exists.85 There is thus no rational way to select the few who will be sentenced to die from the many who will not. As one federal appellate court has said: “We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function.”86

The constitutional question, although decided by the Florida Su-

77. Zant, 462 U.S. at 877 (emphasis supplied).
78. Lowenfield, 108 S. Ct. at 554.
79. Id.
80. Id. (citing Profiti v. Florida, 428 U.S. 242, 247-50 (1976)).
provide a “meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” Since the vast majority of persons charged with murder do not receive a death sentence, the process of selecting the persons who will be given the ultimate penalty must be even-handed, rational, and consistent. That selection process is undertaken in one of two ways. One method, and that followed in Florida, is the use of aggravating circumstances. The second method, not followed in Florida, is by narrowing the definition of the substantive capital offense.

A capital sentencing scheme that fails to channel that selection process may result in “arbitrary and capricious” application of the death penalty. The Court holds that “[t]o avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”

Does the reliance upon felony murder for both the conviction and as an aggravating circumstance comply with the “genuinely narrow” requirement? In Lowenfield the Court found no constitutional flaw in finding the aggravating factor of creating a “risk of death ... to more than one person” where the conviction rested upon the “intent to kill ... more than one person.” These two provisions had been interpreted in “parallel fashion” by the state courts. Thus, the question was presented whether the use of the aggravating circumstance genuinely narrowed the class of persons eligible for death? The Court recognized that in most states the narrowing function is accomplished by the requirement that at least one aggravating circumstance be proven before death may be imposed. As one example, the Court cited to the Florida procedure.

However, the Court found that the Louisiana procedure under review in Lowenfield was different than the procedure in Florida and other states. The Louisiana procedure narrowed the class of death eligible persons at the guilt phase by using narrow statutory definitions of capital offenses. “[S]o the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm.”

The question remains, however, whether in a capital sentencing scheme that “broadly define[s] capital offenses” and depends upon aggravating circumstances to meet the narrowing requirement, the duplication of an element of the crime as an aggravating circumstance would meet eighth amendment muster. Florida is one of those states providing a broad definition of the capital offense of first degree murder. Florida permits first degree murder to be proven by either of two theories: by premeditated intent or by felony murder. The theory need not be specified in the indictment; the state need not elect upon which theory it would proceed; the jury does not need to agree unanimously on a theory; and the jury issues only a general verdict, not specifying its theory.

Without statutory definition to narrow the capital offense, the aggravating circumstances serve the purpose of narrowing the class of death eligible persons. In a prosecution involving felony murder (and all murder prosecutions could be such a case since it need not be specified), upon a finding of guilt at least one aggravating circumstance is applicable before even reaching the penalty phase. Every person convicted of a murder in connection with a felony would also have the felony murder aggravating circumstance. The class has not been narrowed by the aggravating circumstances — especially considering that death is presumed to be the sentence if one aggravating factor exists. There is thus no rational way to select the few who will be sentenced to die from the many who will not. As one federal appellate court has said: “We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function.”

The constitutional question, although decided by the Florida Su-
preme Court, remains viable after Lownfield. The existence of this constitutional question does not of course address the issue of the effect of the error, if any, in reliance upon the felony murder aggravating circumstance. In Swafford v. State, the court held that the defendant's challenge to the aggravating factor was "mistaken because his first-degree murder conviction is based on premeditation rather than the felony murder rule." The opinion does not state the basis for the court's finding that the verdict rested on premeditation rather than felony murder, and under Florida's procedure it is seldom known which theory the jury relied upon for its guilty verdict. Regardless, the Florida Supreme Court holds, as it did in Swafford, that there is no constitutional error in duplicating an element of the crime as an aggravating circumstance.

E. To Avoid a Lawful Arrest or to Escape

There is no difficulty in applying this aggravating factor to cases where a law enforcement officer was the victim, although in such situations this factor merges with other law enforcement aggravating factors. The issues in applying this aggravating factor arise primarily in the attempt to apply it where the homicide victim is not a law enforcement officer. Those questions arose frequently during the survey period. This aggravating factor also applies to murders committed to eliminate witnesses or otherwise avoid detection. That application is limited, however. An example of the restrictive application is Perry v.

87. 533 So. 2d 270, 277-78 (Fla. 1988).
88. "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." Fla. Stat. § 921.141(5)(a) (1987).
90. Id. (avoid arrest, Fla. Stat. § 5(f)(1) (1987), and hindering the enforcement of laws, § 5(g)(1), were "treated as one circumstance"); accord Kennedy v. State, 455 So. 2d 351 (Fla. 1984). Presumably the same "doubling" reasoning would apply to Fla. Stat. § 5(f)(1) (1987), addressing cases where the victim is a law enforcement officer, although as yet there are no decisions applying that aggravating factor.
91. The touchstone cases defining this application of the aggravating circumstances are Menendez v. State, 368 So. 2d 1272, 1282 (Fla. 1978) and Riley v. State, 366 So. 2d 19 (Fla. 1979). These are the decisions that originally established that where the crime does not involve a police officer, the state must prove by "very strong" evidence that the "dominant or only motive" for the killing was to avoid arrest. These

1989] 923

Death Penalty

State, where the factor was stricken. The victim had been killed in her home and the defendant, a former neighbor, confessed that he had killed her in a robbery attempt. The trial judge found that the motive for the killing was to eliminate the only witness to the crime. The Florida Supreme Court found, however, that "there was no direct evidence of motive" and some evidence that the defendant "panicked" or "blacked out" during the murder. The court found insufficient evidence to support the application of this aggravating factor. In doing so it applied settled precedent that when the victim is not a law enforcement officer there must be "strong proof of the defendant's motive," and it must be "clearly shown that the dominant or only motive for the murder was the elimination of the witnesses." The court further noted that the "mere fact that the victim knew and could have identified his assailant" is insufficient to prove this aggravating factor. In contrast the circumstance was upheld where there was no reason to kill the elderly victim to accomplish the robbery, the victim knew the defendant, and the defendant told a cellmate that he shot the victim after he spoke the defendant's name. In another case the defendant told a television reporter that "they ain't got no witnesses anytime I seen a witness, I took him out, or at least shot him" and thus the factor was approved. The court also held that it is not necessary that an arrest be imminent and that a motive to eliminate potential witnesses to "an antecedent crime" can establish this aggravating factor. The court acknowledged that while some of its decisions had found motive based on the defendant's statements, such direct evidence is not required. The factor can be based upon the circumstantial evidence

92. 522 So. 2d 817 (Fla. 1988).
93. Id. at 819.
94. Id. at 820.
95. Id. (emphasis supplied).
96. Id. The court applied these principles to strike the factor in three other cases during the update period. Scull v. State, 531 So. 2d 1137, 1141-42 (Fla. 1988) (finding no aggravating factor); Scherff v. State, 531 So. 2d 1137, 1141-42 (Fla. 1988) (finding no aggravating factor); Scherff v. State, 531 So. 2d 1137, 1141-42 (Fla. 1988) (finding no aggravating factor).
97. 531 So. 2d 1137, 1141-42 (Fla. 1988) (stricken, although stepdaughter victim was on the telephone with the operator asking for the police at the time she was shot); Livingston v. State, 13 Fla. L. Weekly 187 (Fla. 1988) (murder during committing a forcible sexual battery robbery where clerk was shot and killed, and defendant shot at another person saying he was "going to get the one in the back [of the store]").
98. Remeta v. State, 527 So. 2d 182, 188 (Fla. 1988).
99. 527 So. 2d 182, 188 (Fla. 1988).
100. 527 So. 2d 182, 188 (Fla. 1988).
101. 533 So. 2d 270, 276 (Fla. 1988).
preme Court, remains viable after Lowerfield. The existence of this constitutional question does not of course address the issue of the effect of the error, if any, in reliance upon the felony murder aggravating circumstance. In Swafford v. State, the court held that the defendant's challenge to the aggravating factor was "mistaken because his first-degree murder conviction is based on premeditated murder rather than the felony murder rule." The opinion does not state the basis for the court's finding that the verdict rested on premeditated murder rather than felony murder, and under Florida's procedure it is seldom known which theory the jury relied upon for its guilty verdict. Regardless, the Florida Supreme Court holds, as it did in Swafford, that there is no constitutional error in duplicating an element of the crime as an aggravating circumstance.

E. To Avoid a Lawful Arrest or to Escape

There is no difficulty in applying this aggravating factor to cases where a law enforcement officer was the victim, although in such situations this factor merges with other law enforcement aggravating factors. The issues in applying this aggravating factor arise primarily in the attempt to apply it where the homicide victim is not a law enforcement officer. Those questions arose frequently during the survey period.

This aggravating factor also applies to murders committed to eliminate witnesses or otherwise avoid detection. That application is limited, however. An example of the restrictive application is Perry v.

State, where the factor was stricken. The victim had been killed in her home and the defendant, a former neighbor, confessed that he had killed her in a robbery attempt. The trial judge found that the motive for the killing was to eliminate the only witness to the crime. The Florida Supreme Court found, however, that "there was no direct evidence of motive" and some evidence that the defendant "panicked" or "blackened" during the murder. The court thus found insufficient evidence to support the application of this aggravating factor. In doing so it applied settled precedent that when the victim is not a law enforcement officer there must be "strong proof of the defendant's motive," and it must be "clearly shown that the dominant or only motive for the murder was the elimination of the witnesses." The court further noted that the "mere fact that the victim knew and could have identified his assailant" is insufficient to prove this aggravating factor. In contrast the circumstance was upheld where there was no reason to kill the elderly victim to accomplish the robbery, the victim knew the defendant, and the defendant told a cellmate that he shot the victim after he spoke the defendant's name. In another case the defendant told a television reporter that "they ain't got no witnesses anytime I see a witness, I take him out, or at least hurt him" and thus the factor was approved. The court also held that it is not necessary that an arrest be imminent and that a motive to eliminate potential witnesses to "an antecedent crime" can establish this aggravating factor. The court acknowledged that while some of its decisions had found motive based on the defendant's statements, such direct evidence is not required. The factor can be based upon the circumstantial evidence.

87. 533 So. 2d 270, 277-78 (Fla. 1988).
88. "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." FLA. STAT. § 921.141(3)(e) (1987).
90. Id. (avoid arrest, FLA. STAT § 5(c) (1987), and hindering the enforcement of laws, § 5(f)), "were "treated as one circumstance.", accord Kennedy v. State, 435 So. 2d 351 (Fla. 1984). Presumably the same "doubling" reasoning would apply to FLA. STAT. § 5(c)) (1987), addressing cases where the victim is a law enforcement officer, although as yet there are no decisions applying that aggravating factor.
91. The touchstone cases defining this application of the aggravating circumstances are Menendez v. State, 368 So. 2d 1272, 1282 (Fla. 1978) and Riley v. State, 366 So. 2d 19 (Fla. 1979). These are the decisions that originally established that where the crime does not involve a police officer, the state must prove, beyond a "very strong" evidence that the "dominant or only motive" for the killing was to avoid arrest. These principles were applied during the survey period and will be discussed in text.

92. 522 So. 2d 817 (Fla. 1988).
93. Id. at 819.
94. Id. at 820.
95. Id. (emphasis supplied).
96. Id. The court applied these principles to strike the factor in three other cases during the update period. Scall v. State, 533 So. 2d 1137, 1141-42 (Fla. 1988) (finding it to be "mere speculation" that the dominant motive was to eliminate a witness; there was little evidence to support any of several theories why the murders took place); little evidence to support any of several theories why the murders took place; Leake v. State, 528 So. 2d 353, 360 (Fla. 1988) (stricken, although stepdaughter Garron v. State, 528 So. 2d 353, 360 (Fla. 1988) (stricken, although stepdaughter Leake v. State, 528 So. 2d 353, 360 (Fla. 1988) (stricken, although stepdaughter Livingston v. State, 13 Fla. L. Weekly 187 (Fla. 1988) (murder during convenience store robbery where clerk was shot and killed, and defendant shot at another person saying he was "going to get the one in the back [of the store]").
100. Remeta v. State, 522 So. 2d 825, 827, 829 (Fla. 1988).
without direct evidence.\textsuperscript{100}

F. Pecuniary Gain\textsuperscript{101}

This aggravating circumstance is applied with its obvious meaning that the murder itself was committed for financial gain. As a general rule this factor merges with the felony murder aggravating factor\textsuperscript{18} unless the underlying felony does not involve a financial motive or where there are multiple underlying felonies, some of which do not involve financial motive.\textsuperscript{102} It also applies in other obvious situations, including contract murders and murder for insurance proceeds.\textsuperscript{103} Significant limiting language was used in striking this factor in \textit{Hardwick v. State}.\textsuperscript{104} The court held that the only situations where the pecuniary gain aggravating factor is permitted are "where the murder is an integral step in obtaining some sought-after specific gain." Hardwick purportedly had killed someone for stealing drugs from him. The court found that any financial advantage Hardwick could have expected "at most was indirect and uncertain," and thus not shown beyond a reasonable doubt.\textsuperscript{105}

Where the motive for the killing is unknown, it is improper to in-

\textsuperscript{100} Id. The court is speaking primarily about cases where the murder seems to have no explanation except eliminating a witness. However, these present close cases that depend upon subjective evaluations. The same reasoning could have been applied in \textit{Perry v. State}, 522 So. 2d 817 (Fla. 1988), discussed in text, where the defendant apparently entered his former neighbor's house, robbed the victim and killed her. It could have been the logical inference, under the Swafford reasoning, that Perry intended to eliminate a witness who knew him.

\textsuperscript{101} "The capital felony was committed for pecuniary gain." Fla. Stat. \textsection 921.141(5)(f) (1987).

\textsuperscript{102} See \textit{Proveno v. State}, 337 So. 2d 783, 786 (Fla. 1976) (holding that the felony murder and pecuniary gain aggravating circumstances "refer to the same aspect of the defendant's crime" and thus "constitute") only one factor" (original emphasis).

\textsuperscript{103} E.g., \textit{Bryan v. State}, 533 So. 2d 744, 748 (Fla. 1988) (robbery and kidnapping).

\textsuperscript{104} E.g., \textit{Caillier v. State}, 523 So. 2d 158, 160 (Fla. 1988); \textit{Buenaventura v. State}, 527 So. 2d 194, 199 (Fla. 1988) (in both cases a husband was killed with a gun for insurance benefits).

\textsuperscript{105} 521 So. 2d 1071 (Fla. 1988).

\textsuperscript{106} Id. at 1076. The court cited to its decision in \textit{Simmons v. State}, 419 So. 2d 316, 318 (Fla. 1982) where it held that pecuniary motive for a murder "cannot be supplied by inference from circumstances unless the evidence is inconsistent with any 107 \textit{Hardwick}, 521 So. 2d at 1076.

\textsuperscript{108} 333 So. 2d 1137 (Fla. 1988).

\textsuperscript{109} Id. at 1142.

\textsuperscript{110} 529 So. 2d 1088 (Fla. 1988).

\textsuperscript{111} Id. at 1090.

\textsuperscript{112} Id. at 1094. The reasoning to reach the court's conclusion is somewhat complex because it involves a misstatement to the jury that for the wife to be convicted of first degree murder, the state had to prove premeditated intent in the minds of both the husband and the wife, and Spivey's agent. Since the jury acquitted the wife of first degree murder, the court concluded the jury must have rejected premeditation for both the wife and Spivey. Id.

\textsuperscript{113} Id. at 1095.
without direct evidence.  

F. Pecuniary Gain

This aggravating circumstance is applied with its obvious meaning: that the murder itself was committed for financial gain. As a general rule this factor merges with the felony murder aggravating factor unless the underlying felony does not involve a financial motive or where there are multiple underlying felonies, some of which do not involve financial motive. It also applies in other obvious situations, including contract murders and murder for insurance proceeds. Significant limiting language was used in striking this factor in Hardwick v. State. The court held that the only situations where the pecuniary gain aggravating factor is permitted are "where the murder is an integral step in obtaining some sought-after specific gain." Hardwick purportedly had killed someone for stealing drugs from him. The court found that any financial advantage Hardwick could have expected "at most was indirect and uncertain," and thus not shown beyond a reasonable doubt. Where the motive for the killing is unknown, it is improper to infer a pecuniary motive. This principle is shown by Scull v. State, where the victims were found beaten to death in the home of one of the victims, and the defendant had been driving one of the victim's cars later the same evening. The court held that although Scull took the car after the murder, "it is possible that the car was taken to facilitate escape rather than as a means of improving his financial worth," and thus it was not shown beyond a reasonable doubt that "the primary motive for this killing was pecuniary gain."  

A unique situations was presented in Spivey v. State. Spivey allegedly committed a contract murder of his estranged wife. The plan was to disguise the murder as a murder occurring during a robbery. The plan thus included a fake felony murder and when the killing was accomplished, Spivey and his helpers took items of value from the victim's house. Spivey reportedly later received money in payment for the murder. At trial both the wife who had hired Spivey and Spivey were convicted of conspiracy to commit first degree murder, but only Spivey was convicted of the actual first degree murder. From these "dissonant verdicts" the court concluded that the jury rejected the contract (premeditation) murder theory and instead found Spivey guilty of only felony murder. The court further held that the jury must have believed Spivey's disclaimer of intent to kill; thus there was a reasonable basis for the jury to reject the contract murder theory rejecting pecuniary gain as a motive for the murder. The message from Spivey is that even though the defendant committed an apparent robbery-murder and took valuables, it was not the motive for the murder. Since the motive for the taking was to disguise the nature of the crime, the murder was not done to improve the defendant's financial worth. In short, the fact that the defendant realize financial gain from the murder does not on its own necessarily support the aggravating factor unless it is also shown that gain was the motive.

100. Id. The court is speaking primarily about cases where the murder seems to have no explanation except eliminating a witness. However, these present close cases that depend upon subjective evaluations. The same reasoning could have been applied in Perry v. State, 522 So. 2d 817 (Fla. 1988), discussed in text, where the defendant apparently entered his former neighbor's house, robbed the victim and killed her. It could have been the logical inference, under the Swafford reasoning, that Perry intended to eliminate a witness who knew him.  
102. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976) (holding that the felony murder and pecuniary gain aggravating circumstances "refer to the same aspect of the defendant's crime" and thus "constitute[ ] only one factor" (original emphasis)).  
103. E.g., Bryan v. State, 533 So. 2d 744, 748 (Fla. 1988) (robbery and kidnapping).  
104. E.g., Caillier v. State, 523 So. 2d 158, 160 (Fla. 1988); Buenaventura v. State, 527 So. 2d 194, 199 (Fla. 1988) (in both cases a husband was killed in part for insurance benefits).  
105. 521 So. 2d 1071 (Fla. 1988).  
106. Id. at 1076. The court cited its decision in Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982) where it held that pecuniary motive for a murder "cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance."  
107. Hardwick, 521 So. 2d at 1076.
for the murder.

G. Hinder Governmental Function or Enforcement of Law

This aggravating circumstance is seldom separately applied because it generally merges with the “avoid arrest” aggravating factor, since it refers to the same aspect of the defendant's conduct. In practice, the factor is equivalent to the avoid arrest factor; therefore the Florida Supreme Court has not had the opportunity to separately define it. It is suggested that the original intent of this factor was to reach situations involving political killings, terrorist acts or other such actions against government or government officials. It has been applied to situations other than those involving the avoidance of arrest, such as the killing of a grand jury witness, but most times it is applied in situations where it would seem it is being interpreted identically to the avoid arrest factor.

The two decisions on this factor during the survey period demonstrate this parallel application. In Brown v. State, the defendant shot

114. "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) (1987).
115. See supra subsection (c) and text accompanying note 88.
116. The aggravating circumstances in the Florida Statute were taken directly from the ALI MODEL PENAL CODE § 210.6 (Proposed Official Draft, 1962). However, the "hinder governmental functions" aggravating factor is not contained in the Model Penal Code listing. The genesis of Fla. Stat. § 921.141(5)(g) (1987) is unclear. Apparently it first appeared as a Senate amendment to HB 1-A, JOURNAL OF THE FLORIDA HOUSE OF REPRESENTATIVES, at 42-43 (Nov. 30, 1972); JOURNAL OF THE FLORIDA SENATE, at 24 (Nov. 30, 1972). It remained in the bill through conference committee and was passed by both houses on December 1, 1972, JOURNAL OF THE SENATE, December 1, 1972, at 40. The aggravating circumstance as eventually passed, since it was not in the Model Penal Code, apparently came from the bill recommended by the Senate Council on Criminal Justice. That bill, calling for a mandatory death sentence, included as a capital felony a killing by a person engaged in the perpetration or attempt to perpetrate the "assassination of a state or federal elected officer, a candidate for any such office, or a federal judge." REPORT OF SENATE COUNCIL ON CRIMINAL JUSTICE, Nov. 20, 1972.
117. Antoine v. State, 382 So. 2d 1205 (Fla. 1980).
118. For example, it has been applied in situations where the victim was not a law enforcement officer with the reasoning for its application being the same as with the avoid arrest aggravating factor: witness elimination. See, e.g., White v. State, 401 So. 2d 719 (Fla. 1982) (eliminate a witness/victim of an aggravated battery).
119. 326 So. 2d 903 (Fla. 1988).
120. Id. at 905.
121. Id. at 905 n.4 (citing Fla. Stat. § 921.141(5)(g) (1987)).
122. 525 So. 2d 833 (Fla. 1988).
123. Id. at 840.
124. Where the victim is a police officer, such as in the two cases discussed in text, it also appears that this factor would merge with the factor set out in Fla. Stat. § 921.141 (5)(j) (1987) — victim was a law enforcement officer. Since that aggravating factor is relatively new, there have been no decisions applying it.
125. Fla. Stat. § 921.141(5)(k) (Supp. 1988). This new aggravating factor requires the victim to be in the performance of official duties and the motive for the murder be related to those duties before the factor applies. As so defined it appears to be the same as hindering or disrupting a governmental function. See infra text accompanying note 114.
for the murder.

G. Hinder Governmental Function or Enforcement of Law

This aggravating circumstance is seldom separately applied because it generally merges with the "avoid arrest" aggravating factor since it refers to the same aspect of the defendant's conduct. In practice the factor is equivalent to the avoid arrest factor; therefore the Florida Supreme Court has not had the opportunity to separately define it. It is suggested that the original intent of this factor was to reach situations involving political killings, terrorist acts or other such actions against government or government officials. It has been applied to situations other than those involving the avoidance of arrest, such as the killing of a grand jury witness, but most times it is applied in situations where it would seem it is being interpreted identically to the avoid arrest factor.

The two decisions on this factor during the survey period demonstrate this parallel application. In Brown v. State, the defendant shot a police officer who had stopped him after the defendant had robbed a convenience store. The sentencing judge found as an aggravating factor that it was "murder to avoid arrest or hinder law enforcement." Although the judge used language from both statutory aggravating factors, the Florida Supreme Court provided a statutory citation to the hinder law enforcement factor. A similar situation was involved in Grossman v. State, where a police officer was killed after stopping the defendant. The sentencing court found both the avoid arrest and hinder law enforcement aggravating factors, but the Florida Supreme Court specifically pointed out that the two factors "were treated as one [aggravating] circumstance by the trial judge." In most instances this aggravating factor addresses the same conduct as that described by the avoid arrest aggravating factor and hence the two factors merge. It could be simply that the court has not yet been faced with a situation calling for its separate application, but even in those situations this hinder-governmental functions factor would likely merge with the newest aggravating factor involving murders where the victim is "an elected or appointed public official."

H. Especially Heinous, Atrocious, or Cruel

As one commentator has opined, this aggravating circumstance has "generated more controversy than any other aggravating circumstance." Twenty-four states have similar aggravating factors permitting imposition of the death penalty "based upon a finding that the
murder was, in some ill-defined way, worse than other murders. It is a difficult factor to apply because it attempts to describe an emotional or at least intangible aspect of a particular homicide that, as a result, is subject to variation dependent upon the sensibilities of the individual decisionmaker. It is left to the courts to try to put some objectivity and consistency into its application, lest it be a catch-all aggravating factor. Florida too has had its problems in applying this factor in a meaningfully consistent manner. For most cases where the factor has been upheld, one could probably find a case with similar facts where it was not applied. In almost eighty percent of the direct appeals in Florida, the sentencing judge had found this aggravating factor, and thus there are bound to be conflicts between decisions attempting to apply such an "ill-defined" standard. It is beyond the scope of this article to analyze either the myriad of situations to which the factor has been applied or the attempt at times to narrow its application. The difficulties that have been recognized in the application of this factor must be borne in mind, however, because the primary development during the survey period regarding this factor is a decision finding unconstitutional vagueness in a statute very similar to the Florida statute.

In Maynard v. Cartwright,181 the Court was called upon to review the application of the Oklahoma aggravating circumstance of "especially heinous, atrocious, or cruel." The obvious significance to Florida is that the factors are identically worded in each state's statute. The holding of the Court is that, as applied, "especially heinous, atrocious, or cruel" violates the eighth amendment. The aggravating circumstance "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v.

128. Id. at 943.
129. In twenty-two of the thirty direct appeal opinions issued during the survey period, the heinous aggravating factor had been found by the sentencing judge. Articles have been written criticizing Florida's application of this factor. See Mallo, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller, 13 SYRACUSE L. REV. 523 (1984); DIX, Appellate Review of the Decision to Impose Death, 68 GEOR. L.J. 97, 126-28 (1979). The Mallo article catalogues the different offense-types where the factor had been applied. See also supra Rosen, note 127, at 944 n.9 (listing of several cases reversing this aggravating factor).
131. 283 So. 2d 1 (Fla. 1973).
132. Id. at 1858. (citation omitted) The Court emphasized that an analysis of aggravating circumstances challenged as vague must be undertaken under the eighth amendment rather than the due process clause. The distinction is that the due process analysis focuses on "notice" so that a particular set of facts must be known to the defendant in order to comport with due process standards where reasonable persons would know their conduct is at risk. The eighth amendment analysis does not focus on the facts of the particular case. Thus, regardless of "however shocking" the facts of a murder may be, they will not save the statute "without some narrowing principle to apply to those facts." Id. at 1859.
133. Id. at 1858.
134. Id. at 1859.
135. 283 So. 2d 1 (Fla. 1973).
136. Id. at 9.
137. Id.
murder was, in some ill-defined way, worse than other murders. It is a difficult factor to apply because it attempts to describe an emotional or at least intangible aspect of a particular homicide that, as a result, is subject to variation dependent upon the sensibilities of the individual decisionmaker. It is left to the courts to try to put some objectivity and consistency into its application, lest it be a catch-all aggravating factor. Florida too has had its problems in applying this factor in a meaningfully consistent manner. For most cases where the factor has been upheld, one could probably find a case with similar facts where it was not applied. In almost eighty percent of the direct appeals in Florida, the sentencing judge had found this aggravating factor, and thus there are bound to be conflicts between decisions attempting to apply such an "ill-defined" standard. It is beyond the scope of this article to analyze either the myriad of situations to which the factor has been applied or the attempt at times to narrow its application. The difficulties that have been recognized in the application of this factor must be borne in mind, however, because the primary development during the survey period regarding this factor is a decision finding unconstitutional vagueness in a statute very similar to the Florida statute.

In Maynard v. Cartwright, the Court was called upon to review the application of the Oklahoma aggravating circumstance of "especially heinous, atrocious, or cruel." The obvious significance to Florida is that the factors are identically worded in each state's statute. The holding of the Court is that, as applied, "especially heinous, atrocious, or cruel" violates the eighth amendment. The aggravating circumstance "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v.

128. Id. at 943.
129. In twenty-two of the thirty direct appeal opinions issued during the survey period, the heinous aggravating factor had been found by the sentencing judge.
130. Articles have been written criticizing Florida's application of this factor. See Mallo, 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); Dix, Appellate Review of the Decision to Impose Death, 68 GIO. LJ 97, 126-28 (1979). The Mello article catalogues the different offense-types where the factor had been applied. See also supra Rosen, note 127, at 944 n.9 (listing of several dozen law review articles addressing this aggravating factor).

Georgia." The Court reiterated that it has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement" so as to minimize the risk "of wholly arbitrary and capricious action." The Court stated the obvious flaw in the statutory language: "To say that something is 'especially heinous' merely suggests that individual jurors should determine that the murder is more than just 'heinous,' whatever that means." As the Court noted, "as ordinary person could honestly believe that every unjustified intentional taking of a human life is 'especially heinous.'" To survive constitutional challenge there must a limiting construction of the heinous, atrocious or cruel aggravating circumstance and that limiting construction must be effectively conveyed to the jurors.

Whether Florida has limited its construction of the "heinous, atrocious, or cruel" aggravating factor, as mentioned, is beyond the purpose of this article. However, the effect of the Maynard decision in individual cases is a question for review. The Florida Supreme Court first attempted to define the terms of this aggravating factor in State v. Dixon, where the court found 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." The interpretation of heinous was "extremely wicked or shockingly evil," atrocious means "outrageously wicked and vile;" and cruel means "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." Even assuming these subjective definitions are sufficiently limiting to meet the constitutional test, the remaining question is whether they are applied in practice.

The current standard jury instructions contain none of these limit-
ing definitions.\textsuperscript{138} Instead the jury is told only to determine whether the crime "was especially wicked, evil, atrocious or cruel."\textsuperscript{139} This instruction to the juries in Florida seemingly conflicts with the holding in Maynard and thus may have violated the eighth amendment since their adoption, by failing to adequately guide and channel the jury's discretion. It is a difficult aggravating circumstance to apply, and it is even more difficult without a narrowing construction.

There has been efforts to provide a limiting construction at the appellate level and decisions during the survey period demonstrate several of those limiting principles. Perhaps the most consistently applied limiting principle is that an "instantaneous or near instantaneous death by gunfire ordinarily [is not] a heinous killing."\textsuperscript{140} Likewise, death by "a single blow to the head" was held insufficient to support this aggravating factor.\textsuperscript{141} Beyond those fairly objective situations, application of heinous, atrocious, or cruel becomes more subjective.

The aggravating circumstance is intended to select murders that are somehow worse than other first degree murders. It is a difficult task that may be beyond definition, but it is suggested that one of the factors set out in Dixon, if consistently applied, could be sufficient to meet the limiting construction required by Maynard v. Cartwright. The Florida Supreme Court proposed in Dixon that this factor would apply where the crime was "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others."\textsuperscript{142} The conscienceless or pitiless crime which is unnecessarily tortuous to the victim."\textsuperscript{143} These terms attempt to describe intentional ("designed
to") torture of the victim. The intent requirement goes to the mental state of the defendant, perhaps the most relevant factor in winnowing out the few who deserve society's ultimate penalty. The "intent to torture" may thus meet constitutional tests.\textsuperscript{144}

On occasion the Florida Supreme Court has emphasized the "designed to inflict" aspect of its definition of heinous, atrocious, or cruel. The factor was rejected in Brown v. State,\textsuperscript{145} where the defendant shot a police officer during a struggle while the officer was attempting to arrest him for armed robbery. The officer was shot once in the arm and twice in the head. In disapproving the finding of heinous, atrocious, or cruel, the court repeated its Dixon definition, reviewed decisions where it had rejected the factor,\textsuperscript{146} and found that "the evidence disproved that it was committed so as to cause the victim unnecessary and prolonged suffering."\textsuperscript{147} The emphasized language seems to indicate that the court is focusing upon the conscious intent of the defendant in committing the crime. Even this standard can be difficult to apply because of the fine distinctions that must be made. In Grossman v. State,\textsuperscript{148} the defendant fought the officer who was threatening to arrest him for violating his probation and eventually gained the upper hand in the struggle, wrestled away the officer's weapon, and shot her once in the head, resulting in her instantaneous death.\textsuperscript{149} The case thus has very similar facts to those found insufficient in Brown. The result was different, however. The court upheld the aggravating factor because the fight had included a "brutal beating" and because the officer must have known "she was fighting for her life."\textsuperscript{146} These same observations could most likely have been made in Brown. Similarly, the finding in Brown that the evidence disproved that the murder was committed "so as to cause the victim unnecessary suffering, seems equally applicable to the Grossman facts. The Brown decision, announced three months after Grossman, could be viewed as a change in interpretation of the aggra-


\textsuperscript{139} Id. This instruction was adopted in 1981. The prior standard jury instruction contained the definitions from Dixon. Florida Standard Jury Instructions in Criminal Cases, 78 (1975). See Pope v. State, 441 So. 2d 1073, 1077-78 (Fla. 1983) (noting change in jury instructions).

\textsuperscript{140} Brown v. State, 526 So. 2d 903, 907 (Fla. 1988) (reversing finding of a heinous killing where police officer had been killed by two shots to the head and one to arm); see also Amoroso v. State, 531 So. 2d 1256, 1260 (Fla. 1988) (shote male companion of former girlfriend, three times at close range with victim attempting to flee); Garron v. State, 528 So. 2d 353, 360 (Fla. 1988) (single shot killing stepdaughter from "steady firing positions . . . in no way establishes . . . an atrocity"); Lloyd v. State, 524 So. 2d 396, 402-03 (Fla. 1988) (two guns shots at close range killing victim in her house during robbery).

\textsuperscript{141} Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988) (state conceded the evidence did not support this aggravating factor as to one of the two victims).

\textsuperscript{142} State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

\textsuperscript{143} This is the narrow construction applied by the Oklahoma courts in the wake of Maynard v. Cartwright, 108 S. Ct. 1853. See id. at 1859-60 (factor limited to "torture or serious physical abuse").

\textsuperscript{144} 526 So. 2d 903 (Fla. 1988).

\textsuperscript{145} Id. at 906-07. The court also noted that: "The mere fact that the victim is a police officer is, as a matter of law, insufficient to establish this aggravating circumstance." Id.

\textsuperscript{146} Id. at 907 (emphasis supplied).

\textsuperscript{147} 525 So. 2d 833 (Fla. 1988).

\textsuperscript{148} Id. at 835.

\textsuperscript{149} Id. at 840-41.
The Florida Supreme Court proposed in Dixon that this factor would apply where the crime was “designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others” — the conscienceless or pitiless crime which is unnecessarily torturous to the victim.”

Three terms attempt to describe intentional (“designed to”) torture of the victim. The intent requirement goes to the mental state of the defendant, perhaps the most relevant factor in winnowing out the few who deserve society’s ultimate penalty. The “intent to torture” may thus meet constitutional tests.

On occasion the Florida Supreme Court has emphasized the “designed to inflict” aspect of its definition of heinous, atrocious, or cruel. The factor was rejected in Brown v. State, where the defendant shot a police officer during a struggle while the officer was attempting to arrest him for armed robbery. The officer was shot once in the arm and twice in the head. In disapproving the finding of heinous, atrocious, or cruel, the court repeated its Dixon definition, reviewed decisions where it had rejected the factor, and found that “the evidence disproved that it was committed so as to cause the victim unnecessary and prolonged suffering.” The emphasized language seems to indicate that the court is focusing upon the conscious intent of the defendant in committing the crime. Even this standard can be difficult to apply because of the fine distinctions that must be made. In Grossman v. State, the defendant fought the officer who was threatening to arrest him for violating his probation and eventually gained the upper hand in the struggle, wrestled away the officer’s weapon, and shot her once in the head, resulting in her instantaneous death. The case thus has very similar facts to those found insufficient in Brown. The result was different, however. The court upheld the aggravating factor because the fact had included a “brutal beating” and because the officer must have known “she was fighting for her life.” These same observations could most likely have been made in Brown. Similarly, the finding in Brown that the evidence disproved that the murder was committed “so as to cause” the victim unnecessary suffering, seems equally applicable to the Grossman facts. The Brown decision, announced three months after Grossman, could be viewed as a change in interpretation of the aggravating factor.

140. Brown v. State, 526 So. 2d 903, 907 (Fla. 1988) (reversing finding of a heinous killing where police officer had been killed by two shots to the head and one in the arm); see also Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988) (shot male companion of former girfriend, three times at close range with victim attempting to pull gun); Garrison v. State, 528 So. 2d 353, 360 (Fla. 1987) (single shot killing stepdaughter: shooting from “steady firing position . . . in no way establishes . . . as atrocity”); Lloyd v. State, 524 So. 2d 396, 402-403 (Fla. 1988) (two gunshots at close range killing victim in her house during robbery).
141. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988) (state conceded the evidence did not support this aggravating factor as to one of the two victims).
vating factor, but the court did not announce it as such, or more likely it can be seen as illustrative of the difficulty in applying such a subjective factor in a consistent manner.

In *Harvey v. State*, the two victims were shot during a robbery at their home. One victim died instantly. The second victim did not die instantly from the first gunshot, and the defendant, upon discovering that fact later, fired a second shot at close range. The court upheld the aggravating factor as to both victims, emphasizing that in applying "the aggravating circumstance of heinous, atrocious, and cruel... the mind set or mental anguish of the victims is an important factor." The court found that the victims "became aware of their impending deaths when Harvey and... [the co-perpetrator] discussed the necessity of disposing of witnesses" and "[i]n desperation... tried to run away." This test does not focus on the defendant's intent to cause suffering but rather on the mental suffering of the victim with regard to whether the crime was "designed to" cause such suffering. The distinctions are fine under this test also. For example, in *Amoros v. State*, the defendant entered the home of his former girlfriend, found her male companion, chased him and in the words of the trial judge "the victim made a futile attempt to save his life by running to the rear of the apartment, only to find himself trapped at the back door." The victim "was shot three times at close range, the shots having been fired within a short time of each other." The aggravating circumstance was disapproved on appeal. The distinction cited by the court was that "the shots were fired very soon after Amoros discovered the victim." Accordingly, in the effort to determine which murder was worse in these cases, the decision came down to the number of minutes before the shooting began, since both cases involved victims who were aware of their impending deaths and who were shot while in "futile" or "desperate" efforts to flee. It may be true that the murder in *Grossman* was worse than the murder in *Amoros*, but stated differences between them do not reveal a clear line for future application of heinous, atrocious, or cruel.

150. 529 So. 2d 1083 (Fla. 1988).
151. Id. at 1087.
152. Id.
153. 531 So. 2d 1256 (Fla. 1988).
154. Id. at 1260.
155. Id.

1989]

**Death Penalty**

Nevertheless, mental anguish, including knowledge of impending death without regard to the defendant's intent, continues to be the most often proved justification for approving heinous, atrocious, or cruel as an aggravating factor. A comparison of two cases illustrates the difficult distinctions that must be made. In *Lamb v. State*, the defendant struck the victim's head with a hammer, but death was not instantaneous, and thus six blows were struck. Heinous, atrocious, or cruel was approved. In *Scull v. State*, the victim was struck once in the head with a baseball bat, and the house was set afire and the victim's body was "charred." Heinous, atrocious, or cruel was rejected because the victim "died from a single blow to the head."

Using the test of the victim's mental state, not dependent on the defendant's "design" or intent, causes of death over than shooting generally are found to be heinous, atrocious or cruel. These cases, during the survey period, include stabbing, strangulation, poisoning, and beating. Included also are cases involving shooting, but after a period of confinement or with many gunshots. The mental state of

157. 532 So. 2d 1051 (Fla. 1988).
158. Id. at 1053.
159. 533 So. 2d 1137 (Fla. 1988).
160. Id. at 1142.
161. Jackson v. State, 530 So. 2d 269 (Fla. 1988) (stabbed repeatedly, after having been bound, beaten and choke); Turner v. State, 530 So. 2d 45, 51 (Fla. 1988) (pursued and cornered the victim in a telephone booth, then stabbed to death); Mitchell v. State, 527 So. 2d 179, 180, 182 (Fla. 1988) (stabbed 110 times in a "rage"); Carroll v. State, 523 So. 2d 562 (Fla. 1988) (four victims who had been repeatedly stabbed); Perry v. State, 522 So. 2d 817, 821 (Fla. 1988) (stabbed, choked and beaten); Holsworth v. State, 522 So. 2d 348, 349, 354 (Fla. 1988) (multiple stab wounds); Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988) (stabbed and shot, medical examiner testified victim was conscious for as long as five minutes after being stabbed).
162. Hibbing v. State, 531 So. 2d 124, 128 (Fla. 1988) ("We have often found that strangulation murders meet this test," and rejected the argument that the judge had engaged in speculation in finding this aggravating factor).
163. Buenaventura v. State, 527 So. 2d 194, 199 (Fla. 1988) ("Systematically poisoning one’s husband over a time until it causes his death and witnessing the effects of the poison is an unusual manner and method of committing a homicide" and the death was "not instantaneous").
164. Lamb v. State, 532 So. 2d 1051, 1053 (Fla. 1988) (six blows to head with hammer, not instantaneous death).
165. Bryan v. State, 533 So. 2d 744, 749 (Fla. 1988) (victim bound and driven to an isolated area, pushed into creek, shot with single shotgun blast); Jackson v. State, 522 So. 2d 802, 804 (Fla. 1988) (victim shot once but did not die immediately and was
vating factor, but the court did not announce it as such, or more likely it can bee seen as illustrative of the difficulty in applying such a subjec-
tive factor in a consistent manner.

In Harvey v. State the two victims were shot during a robbery at their home. One victim died instantly. The second victim did not die instantly from the first gunshot, and the defendant, upon discovering that fact later, fired a second shot at close range. The court upheld this
aggravating factor as to both victims, emphasizing that in applying
"the aggravating circumstance of heinous, atrocious and cruel . . . the
mind set or mental anguish of the victims is an important factor." The
court found that the victims "became aware of their impending
deaths when Harvey and . . . [the co-perpetrator] discussed the neces-
sity of disposing of witnesses" and "[thereafter he] tried to run
away." This test does not focus on the defendant's intent to cause
suffering but rather on the mental suffering of the victim without re-
gard to whether the crime was "designed to" cause such suffering. The
distinctions are fine under this test also. For example, in Amoros v.
State, the defendant entered the home of his former girlfriend, found
her male companion, chased him and in the words of the trial judge
"the victim made a futile attempt to save his life by running to the rear
of the apartment, only to find himself trapped at the back door." The
victim "was shot three times at close range, the shots having been fired
within a short time of each other." The aggravating circumstance
was disapproved on appeal. The distinction cited by the court was that
"the shots were fired very soon after Amoros discovered the victim." Accordingly, in the effort to determine which murder was worse in
these cases, the decision came down to the number of minutes before
the shooting began, since both cases involved victims who were aware of
their impending deaths and who were shot while in "futile" or "des-
perate" efforts to flee. It may be true that the murder in Grossman was
worse than the murder in Amoros, but stated differences between them
do not reveal a clear line for future application of heinous, atrocious, or
cruel.

150. 529 So. 2d 1083 (Fla. 1988).
151. Id. at 1087.
152. Id.
153. 531 So. 2d 1256 (Fla. 1988).
154. Id. at 1260.
155. Id.
156. Id. at 1261.

Nevertheless, mental anguish, including knowledge of impending
death without regard to the defendant's intent, continues to be the most
often-proved justification for approving heinous, atrocious, or cruel as
an aggravating factor. A comparison of two cases illustrates the diffi-
cult distinctions that must be made. In Lamb v. State, the defendant
struck the victim's head with a hammer, but death was not instantane-
ous, and thus six blows were struck. Heinous, atrocious, or cruel was
approved. In Scull v. State, the victim was struck once in the head
with a baseball bat, and the house was set afire and the victim's body
was "charred." Heinous, atrocious, or cruel was rejected because the
victim "died from a single blow to the head."

Using the test of the victim's mental state, not dependent on the
defendant's "design" or intent, causes of death over than shooting gen-
erally are found to be heinous, atrocious or cruel. These cases, during
the survey period, include stabbing,\(^{191}\) strangulation,\(^{192}\) poisoning,\(^{193}\)
and beating.\(^{194}\) Included also are cases involving shooting, but after a
period of confinement\(^{195}\) or with many gunshot.\(^{196}\) The mental state of

\(^{157}\) 532 So. 2d 1051 (Fla. 1988).
\(^{158}\) Id. at 1053.
\(^{159}\) 533 So. 2d 1137 (Fla. 1988).
\(^{160}\) Id. at 1142.
\(^{161}\) Jackson v. State, 530 So. 2d 269 (Fla. 1988) (stabbed repeatedly, after hav-
ing been bound, beaten and choked); Turner v. State, 530 So. 2d 45, 51 (Fla. 1988)
(pursed and cornered the victim in a telephone booth, then stabbed to death); Mitchell
v. State, 527 So. 2d 179, 180, 182 (Fla. 1988) (stabbed 110 times in a "rage"); Correll v. State, 523 So. 2d 562 (Fla. 1988) (four victims who had been repeatedly
stabbed); Perry v. State, 522 So. 2d 817, 821 (Fla. 1988) (stabbed, choked and
stabbed); Holsworth v. State, 522 So. 2d 348, 349, 354 (Fla. 1988) (multiple stab
beaten); Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988) (stabbed and shot,
wounds); medical examiner testified victim was conscious for as long as five minutes after being
stabbed.

\(^{162}\) Hildwin v. State, 531 So. 2d 124, 128 (Fla. 1988) ("We have often found
that strangulation murders meet this test," and rejected the argument that the judge
had engaged in speculation in finding an aggravating factor).

\(^{163}\) Buenoano v. State, 527 So. 2d 194, 199 (Fla. 1988) ("Systematically
poisoning one's husband over a time until it causes his death and witnessing the effects
of the poison is an unusual manner and method of committing a homicide and the
death was "not instantaneous").

\(^{164}\) Lamb v. State, 532 So. 2d 1051, 1053 (Fla. 1988) (six blows to head with
hammer, not instantaneous death).

\(^{165}\) Bryan v. State, 533 So. 2d 744, 749 (Fla. 1988) (victim bound and driven
to an isolated area, pushed into creek, shot with single shotgun blast); Jackson v. State,
527 So. 2d 807, 804 (Fla. 1988) (victim shot once but did not die immediately and was

Published by NSUWorks, 1999
the victim is determined "in accordance with common sense inference from the circumstances." As applied in Florida, the heinous, atrocious, or cruel aggravating factor is used primarily to determine which murders are worse than others, not which murderers are worse. In 1983 the Florida court made explicit this offense-only application of the heinous factor. In Pope v. State, the court held that this factor would henceforth focus "on the manner in which the crime was accomplished — on the act itself — rather than on the perpetrator of the act." The court noted that its prior definition had "also tended to focus attention on the mind set of the murderer — his consciousness or pitilessness." The court said this new focus limited the crime was brought about by the new jury instructions it had adopted in which "[a] new interpretation of the statutory terms are offered, nor is the defendant's mindset ever at issue." The court thus used its authority to promulgate standards of jury instructions to reinterpret the statutory heinous provision from how it had previously applied that statute, with no intervening expression of new legislative intent, nor any stated change in legal principles except the court's own change of view. Under this "new" interpretation, a murderer who seeks out an innocent victim with the full intent of torturing that victim but whose victim dies quickly in the process would receive more lenient consideration than a murderer who has no such intent, uses the same means of causing death, but whose victim lives minutes longer before succumbing. Disregarding the defendant's intent of design would seem to be an error away from the need to focus on the defendant's 'personal responsibility and moral guilt,'" for with-

transported to a remote location where he was dumped into a river). Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988) ("In numerous cases the Court had held that this aggravating factor could be applied by evidence of actions of the offender preceding the actual killing, including forcible abduction, transportation away from possible sources of assistance and detection, and sexual abuse").

166. Swafford, 533 So. 2d at 277 ("the killing itself occurred in such a way as to show a wanton atrocity. Swafford fired nine bullets into the victim's body, most of them directed at the torso and extremities").

168. 441 So. 2d 1073 (Fla. 1983). The particular issue before the court was whether the defendant's lack of remorse should be considered in applying the heinous aggravating factor.

169. Id. at 1077.

170. Id.

the victim is determined "in accordance with common sense inference from the circumstances."164

As applied in Florida, the heinous, atrocious, or cruel aggravating factor is used primarily to determine which murders are worse than others, not which murderers are worse. In 1983 the Florida court made explicit this offense-only application of the heinous factor. In Pope v. State,166 the court held that this factor would henceforth focus "on the manner in which the crime was accomplished — on the act itself — rather than on the perpetrator of the act."167 The court noted that its prior definition had "also tended to focus attention on the mind set of the murderer — his conscientiousness or pitilessness."168 The court said this new focus limited to the crime was brought about by the new jury instructions it had adopted in which "[n]o further definition of the [statutory] terms are offered, nor is the defendant's mindset at issue."169 The court thus used its authority to promulgate standard jury instructions to reinterpret the statutory heinous provision from how it had previously applied that statute, with no intervening expression of new legislative intent, nor any stated change in legal principles except the court's own change of view. Under this "new" interpretation, a mean murderer who seeks out an innocent victim with the full intent of torturing that victim but whose victim dies quickly in the process would receive more le lien consideration than a murderer who has no such intent, uses the same means of causing death, but whose victim lives minutes longer before succumbing. Disregarding the defendant's intent of design would seem to be a move away from the need to focus on the defendant's 'personal responsibility and moral guilt,'170 for with-

transported to a remote location where he was dumped into a river); Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988) ("In numerous cases the Court had held that this aggravating factor could be supported by evidence of actions of the offender preceding the actual killing, including forcible abduction, transportation away from possible sources of assistance and detection, and sexual abuse.")

166. Swafford, 533 So. 2d at 277 ("the killing itself occurred in such a way as to show a wanton atrocity. Swafford fired nine bullets into the victim's body, most of them directed at the torso and extremities").

167. Id. at 277.
168. 441 So. 2d 1073 (Fla. 1983). The particular issue before the court was whether the defendant's lack of remorse should be considered in applying the heinous aggravating factor.
169. Id. at 1077.
170. Id.
171. Id. at 1078.

out that intent the factor's application may be a matter of random chance.

One could question whether this is a rational means of selecting which persons must die or whether it is in accord with legislative intent.171 Regardless, this effort to put a fine point on what is a subjective judgment is at best difficult and at times dependent on blurry distinctions. Why is breaking into someone's house and beating the occupant to death with a single blow to the head with a baseball bat172 not as "bad" as breaking into a home and beating the occupant to death with a hammer but where several blows were necessary to cause death,173 This is not to say there is no difference between these crimes, but rather to illustrate the difficulty in applying heinous, atrocious, or cruel to particular sets of facts.

Although the court says it no longer considers the defendant's intent, the court does not always completely eschew the defendant's mind set in its analysis. As mentioned above in Brown v. State174 the court rejected the factor because the evidence failed to show that the defendant committed the murder "so as to cause unnecessary suffering; and in Buenaventura v. State175 the court focused in part of the defendant's

ida, 458 U.S. 782, 801 (1982)).

173. There are two penological justifications offered to support the death penalty: deterrence and retribution. See, e.g., Gregg v. Georgia, 428 U.S. 153, 183 (1976).
 Neither of those goals seemingly are served by a system that exshews the mental culpability of the defendant, in favor of the chance "mind set" of the victim. Cf. Booth v. Mary land, 107 S. Ct. 2529, 2534 (1987) (imposing death sentence on the basis of the effect of the murder on other persons "may be wholly unrelated to the blame-worthiness of a particular defendant" because the defendant generally would be "unaware" of those factors, and basing the decision on the victim's status does provide a principled way to distinguish cases where the death sentence must be imposed from the many cases in which it is not). If the goal is to deter particularly wanton torturous murders, imposing death on those who had no such intent will not further that goal; likewise "moral outrage" that defines retribution falls mute when directed at one who does not possess that heightened mental or moral culpability.

175. Lamb v. State, 532 So. 2d 1051 (Fla. 1988).
176. 526 So. 2d 903, 907 (Fla. 1988).
177. 527 So. 2d 194, 199 (Fla. 1988). In one other case the court seemingly readopted both of the aspects of heinous, atrocious, or cruel, including the "designed to" language abandoned in Pope v. State, 441 So. 2d 1073 (Fla. 1983). In Lloyd v. State, 524 So. 2d 396 (Fla. 1988) the court defined heinous, atrocious, or cruel using the definitions from State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), in the conjunctive.
178. Lloyd, 524 So. 2d at 403 ("extremely wicked or shockingly evil, or 'designed to'
having "witness[ed] the effects of the poison" "over a period of time," thus implying the defendant's callousness to be a part of the heinous finding.

In short this aggravating factor is a most troublesome factor to consistently apply. The Florida Supreme Court has been given the task of bringing order to an ill-defined factor. It has made efforts to limit its application, but for every rule there can be found an exception. The court's efforts at finding order will now be tested against the eighth amendment principles set down by Maynard v. Cartwright.

I. Cold, Calculated, Premeditated Without Pretense of Justification

To understand this aggravating factor it is necessary to know why it was added to the statute in 1979.\(^{179}\) It was the Florida Legislature's response to two decisions that it felt had excluded "execution-style" murders from consideration as being especially heinous, atrocious, or cruel. The Florida Supreme Court had disapproved the heinous aggravating factor in Riley v. State\(^{180}\) and Menendez v. State,\(^{181}\) finding that the circumstances of those cases did not establish the factor beyond a reasonable doubt. "Execution-style" is not a precise term but Riley and Menendez provide examples of what the Legislature sought to address. Both cases involved robberies. In Riley three victims were bound, made to lie on the floor and were shot in the head, and in Menendez the victim was shot, under the prosecution theory, while his arms were in a "submissive position."\(^{182}\) The capital sentencing statute was amended specifically "to include execution type killings as one of the enumerated aggravating circumstances."\(^{183}\)

After its enactment, the Florida Supreme Court set out to reach consistent application of a factor, that, much like heinous, atrocious, or cruel, carries with it ill-defined, subjective terms. In its first decision on the factor, the Florida court actually held that this new aggravating factor "inure[s] to the benefit of a defendant" because it added nothing new in aggravation but rather limited the circumstances in which premeditation could be considered in aggravation.\(^{184}\) As discussed, however, the Legislature believed it was adding aggravation since it sought to address two specific situations where aggravation had been rejected.\(^{185}\) Without diligent supervision by the Florida Supreme Court, the cold, calculated premeditated factor threatens to be a "catchall" aggravating factor that will surpass even heinous, atrocious, or cruel\(^{186}\) and carry the same constitutional questions.\(^{187}\)

Nevertheless, after enactment of cold, calculated and premeditated, the court quickly held that it was applicable only where there

---

\(^{178}\) "The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification."

\(^{179}\) 1979 Fla. Laws § 79-353, § 177.

\(^{180}\) Senate Staff Analysis and Economic Impact Statement, SB 523 (May 9, 1979, revised).

\(^{181}\) 366 So. 2d 19 (Fla. 1979).

\(^{182}\) 368 So. 2d 1278 (Fla. 1979).

\(^{183}\) Riley, 368 So. 2d at 20. One of the three victims survived; he was the son of one of the victims who was killed. The sentencing judge based the heinous, atrocious, or cruel finding on the fact that the son was forced to witness his father's murder. Id. at 21. The court's holding was that the factor's focus is on what is "done to the victim" and thus does not include the effect on others. Here the victim dies instantaneously, so the murder was not heinous, atrocious, or cruel. Id.

\(^{184}\) Menendez, 368 So. 2d at 1281-82. The court noted that the evidence was "subject to other reasonable interpretation" regarding the position of the victim's arms.

\(^{185}\) Staff Analysis, supra note 180, at 4.

\(^{186}\) Combs v. State, 403 So. 2d 418, 421 (Fla. 1981). The court was rejecting an ex post facto challenge to application of the circumstances to an offense pre-dating the effective date of the new aggravating factor. Accord Stano v. Dugger, 524 So. 2d 1018 (Fla. 1988). The ex post facto question, though resolved by the Florida court, remains to be resolved by the federal court. See Stano v. State, No. 88-225-CIV-ORL-19 (M.D. Fla. 1988) (finding ex post facto violation in applying the factor to an offense predating the aggravating factor).

\(^{187}\) One creative litigant sought to address the "beneficial" nature of the aggravating factor. Reasoning that if it inures to his benefit, he could waive that benefit. The court rejected that reasoning, saying the point of Combs was that all premeditated murders do not qualify under this factor. Johnson v. State, 438 So. 2d 774, 779 (Fla. 1983). The factor thus is not truly beneficial to the defendant.

\(^{188}\) For example, the factor was found by trial judges in twenty-four of thirty-eight cases reviewed on direct appeal during the update period. Of the twenty cases where its validity was reached on appeal, the court struck the factor in ten cases. An error rate of sixty percent seemingly indicates difficulty on the part of sentencing judges in understanding the meaning of this factor.

\(^{189}\) See supra notes 126-30 and accompanying text (discussing vagueness of heinous, atrocious, or cruel). See generally Kennedy, Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L. Rev. 47 (1987) (contending that as applied the cold, calculated, and premeditaded aggravating circumstance is unconstitutional because it fails to narrow the class of persons eligible for the death penalty and produces inconsistent results).
having “witness[ed] the effects of the poison” “over a period of time,” thus implying the defendant’s callousness to be a part of the hinsen finding.

In short this aggravating factor is a most troublesome factor to consistently apply. The Florida Supreme Court has been given the task of bringing order to an ill-defined factor. It has made efforts to limit its application, but for every rule there can be found an exception. The court’s efforts at finding order will now be tested against the eight amendment principles set down by Maynard v. Cartwright.

I. Cold, Calculated, Premeditated Without Pretense of Justification

To understand this aggravating factor it is necessary to know why it was added to the statute in 1979. It was the Florida Legislature’s response to two decisions that it felt had excluded “execution style” murders from consideration as being especially heinous, atrocious, or cruel. The Florida Supreme Court had disapproved the heinous aggravating factor in Riley v. State and Menendez v. State, finding that the circumstances of those cases did not establish the factor beyond a reasonable doubt. “Execution-style” is not a precise term but Riley and Menendez provide examples of what the Legislature sought to address. Both cases involved robberies. In Riley three victims were bound, made to lie on the floor and were shot in the head, and in Menendez the victim was shot, under the prosecution theory, while his arms were in a “submissive position.” The capital sentencing statute was amended specifically “to include execution type killings as one of the enumerated aggravating circumstances.”

After its enactment, the Florida Supreme Court set out to reach consistent application of a factor, that, much like heinous, atrocious, or cruel, carries with it ill-defined, subjective terms. In its first decision on the factor, the Florida court actually held that this new aggravating factor “inure[s] to the benefit of a defendant” because it added nothing new in aggravation but rather limited the circumstances in which premeditation could be considered in aggravation. As discussed, however, the Legislature believed it was adding aggravation since it sought to address two specific situations where aggravation had been rejected. Without diligent supervision by the Florida Supreme Court, the cold, calculated premeditated factor threatens to be a “catchall” aggravating factor that will surpass even heinous, atrocious, or cruel and carry the same constitutional questions.

Nevertheless, after enactment of cold, calculated and premeditated, the court quickly held that it was applicable only where there

179. 1979 Fla. Laws 79-353, § 177.
180. SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, SB 521 (May 9, 1979, revised).
181. 366 So. 2d 19 (Fla. 1979).
182. 368 So. 2d 1278 (Fla. 1979).
183. Riley, 366 So. 2d at 20. One of the three victims survived; he was the son of one of the victims who was killed. The sentencing judge based the heinous, atrocious, or cruel finding on the fact that the son was forced to witness his father’s murder. Id. at 21. The court’s holding was that the factor’s focus is on what is “done to the victim” and thus does not include the effect on others. Here the victim dies instantaneously, so the murder was not heinous, atrocious, or cruel. Id.
184. Menendez, 368 So. 2d at 1281-82. The court noted that the evidence was

“subject to other reasonable interpretation” regarding the position of the victim’s arms.

185. Staff Analysis, supra note 180, at 4.
186. Combs v. State, 403 So. 2d 418, 421 (Fla. 1981). The court was rejecting an ex post facto challenge to application of the circumstances to an offense pre-dating the effective date of the new aggravating factor, accord Stano v. Dugger, 524 So. 2d 1018 (Fla. 1988). The ex post facto question, though resolved by the Florida court, remains to be resolved by the federal court. See Stano v. State, No. 88-425-CIV-ORL-19 (M.D. Fla. 1988) (finding ex post facto violation in applying the factor to an offense predating the aggravating factor).
187. One creative litigant sought to address the “beneficial” nature of the aggravating factor. Reasoning that if it inures to his benefit, he could waive that benefit, the court rejected that reasoning, saying the point of Combs was that all premeditated murders do not qualify under this factor. Johnson v. State, 438 So. 2d 774, 779 (Fla. 1983). The factor thus is not truly beneficial to the defendant.
188. For example, the factor was found by trial judges in twenty-four of thirty-eight cases reviewed on direct appeal during the update period. Of the twenty cases where its validity was reached on appeal, the court struck the factor in ten cases. As an error rate of fifty percent seemingly indicates difficulty on the part of sentencing judges in understanding the meaning of this factor

189. See supra notes 126-30 and accompanying text (discussing vagueness of heinous, atrocious, or cruel). See generally Kennedy, Florida’s "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 STETSON L. REV. 47 (1987) (contending that as applied the cold, calculated, and premeditated aggravating circumstance is unconstitutional because it fails to narrow the class of persons eligible for the death penalty and produces inconsistent results).
was a heightened degree of premeditation, beyond that necessary to establish guilt for first degree murder. The task of applying the principle on a case-by-case basis yielded varying results. In McCray v. State, the court held the factor "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." That definition explains why the factor was found proper in Card v. State, where the defendant transported the robbery victim, a store clerk, to a secluded area eight miles away and then cut out her throat. It does not explain why in Preston v. State, where the robbery victim, a store clerk, was taken by the defendant to a remote location and was stripped, mutilated to "near decapitation," and stabbed to death, the factor was held to have been improperly found.

The difficulty in reaching a consistent application of the cold, calculated aggravating factor is well-illustrated by the decisions during the survey period. The court sought to apply the narrowing principles it had established in Rogers v. State. That decision has become the touchstone decision in the Florida court's efforts at narrowing the application of this factor.

The Rogers court sought to give the statutory language its "plain and ordinary meaning" and thus held to establish this aggravating factor the prosecution must prove that the defendant "had a careful plan or prearranged design to kill." The facts of Rogers demonstrate how limiting the construction can be when closely followed by the court. Rogers and his coconspirator rented a car, bought semiautomatic weapons, "cased" a grocery store for a robbery, entered the store armed and wearing masks and gloves, attempted a robbery and on

190. See, e.g., Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1982) ("The level of premeditation needed to convict ... does not necessarily rise to the level of premedita-
tion in subsection (5) (i)"); Washington v. State, 432 So. 2d 44, 48 (Fla. 1983) ("This aggravating circumstance inures to the benefit of the defendant insofar as it requires proof beyond that necessary to prove premeditation").
191. 416 So. 2d 804 (Fla. 1982).
192. Id. at 807.
193. 453 So. 2d 17 (Fla. 1984).
194. Id. at 23. The court said the defendant had "ample time during this series of events to reflect on his actions." Id. at 23-24.
195. 444 So. 2d 939 (Fla. 1984), post conviction proceeding, 528 So. 2d 896, habeas corpus, 531 So. 2d 154, stay granted, 109 S. Ct. 28 (1988).
196. Id. at 941, 946-47.
198. Id. at 533.
199. See, e.g., Davis v. State, 461 So. 2d 67 (Fla. 1984) (defendant entered home, armed with pistol and with rope to tie victim); Eusty v. State, 458 So. 2d 755 (Fla. 1984) (procured gun in advance); Squires v. State, 450 So. 2d 208 (Fla. 1984) (victim wounded by shotgun, then shot four times at close range); Jennings v. State, 453 So. 2d 736 (Fla. 1984) (located victim ahead of time, then returned and raped and shot victim in a canal where she drowned).
201. Rogers, 511 So. 2d at 533.
202. Rogers, 446 So. 2d at 1057.
203. Rogers, 446 So. 2d at 1057.
204. On habeas corpus review of Hering's case, the court again emphasized that Rogers had adopted the dissent's view in Hering and "excessively overruled" the application of the factor. Id. at 446, 469 U.S. (1984).
was a heightened degree of premeditation, beyond that necessary to establish guilt for first degree murder. The task of applying the principle on a case-by-case basis yielded varying results. In McCray v. State, the court held the factor "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." That definition explains why the factor was found proper in Card v. State, where the defendant transported the robbery victim, a store clerk, to a secluded area eight miles away and then cut her throat. It does explain why in Preston v. State, where the robbery victim, a store clerk, was taken by the defendant to a remote location and was stripped, mutilated to "near decapitation," and stabbed to death, the factor was held to have been improperly found.

The difficulty in reaching a consistent application of the cold, calculated aggravating factor is well illustrated by the decisions during the survey period. The court sought to apply the narrowing principles it had established in Rogers v. State. That decision has become the touchstone decision in the Florida court's efforts at narrowing the application of this factor.

The Rogers court sought to give the statutory language its "plain and ordinary meaning" and thus held to establish this aggravating factor the prosecution must prove that the defendant "had a careful plan or prearranged design to kill." The facts of Rogers demonstrate how limiting the construction can be when closely followed by the court.

Rogers and his co-perpetrator rented a car, bought semiautomatic weapons, "cased" a grocery store for a robbery, entered the store armed and wearing masks and gloves, attempted a robbery and on leaving shot a man three times (the last two shots being fired while the victim was face down on the pavement). These circumstances — especially obtaining weapons beforehand, casing the store, and multiple shots — are the type relied upon in prior cases to uphold the finding of cold, calculated, and premeditated.

The Rogers court recognized some of the prior inconsistency in its decisions applying the factor and thus receded from its holding in Herrin v. State, to the extent that it dealt with the necessary calculation to establish this factor. Herrin robbed a convenience store. During the robbery he shot the clerk in response to a threatening gesture and shot a second time after the clerk had fallen to the floor. The court held that the second shot made the killing cold, calculated and premeditated. It was this holding that was withdrawn in Rogers.

During the survey period, Rogers was cited frequently in striking the application of cold, calculated and premeditated as an aggravating factor. An appropriate example is found in Amoros v. State. The defendant had threatened to kill his former girlfriend. On the next evening, the girlfriend went to the police station to report the threat, leaving her current boyfriend behind locked in her apartment. While he was gone, Amoros broke in, discovered the boyfriend and shot him three times. The Florida Supreme Court cited Rogers as having "receded from a broader use of the circumstance... particularly where there was no evidence of any prearrangement..." The only evidence of a plan was the prior night's threat to kill the former girlfriend, but there was no evidence that Amoros knew the victim or that he was living there. The court rejected the "supposition that Amoros' threat to

190. See, e.g., Jent v. State, 408 So. 2d 1024, 1033 (Fla. 1982) ("The level of premeditation needed to convict... does not necessarily rise to the level of premeditation in subsection (5) (i)"); Washington v. State, 432 So. 2d 44, 48 (Fla. 1983) ("This aggravating circumstance inures to the benefit of the defendant insomuch as it requires proof beyond that necessary to prove premeditation").
191. 416 So. 2d 804 (Fla. 1982).
192. Id. at 807.
193. 453 So. 2d 17 (Fla. 1984).
194. Id. at 23. The court said the defendant had "ample time during this series of events to reflect on his actions." Id. at 23-24.
195. 444 So. 2d 939 (Fla. 1984), post conviction proceeding, 528 So. 2d 896, habeas corpus, 531 So. 2d 154, stay granted, 109 S. Ct. 28 (1988).
196. Id. at 941, 946-47.
198. Id. at 533.
199. Id. at 529.
200. See, e.g., Davis v. State, 461 So. 2d 67 (Fla. 1984) (defendant entered two homes, armed with pistol and with rope to tie victim); Eutry v. State, 558 So. 2d 755 (Fla. 1989) ("[m]urderer then intentionally killed victim as his hostage"; Not guilty in advance); Squires v. State, 450 So. 2d 208 (Fla. 1984) ("[i]nadequate control, mere presence"; Not guilty in advance); Jennings v. State, 455 So. 2d 736 (Fla. 1984) (defendant caused victim with rope ahead of time, then returned and raped and killed the victim in a canal where she drowned).
202. Rogers, 511 So. 2d at 533.
203. Herrin, 446 So. 2d at 1057.
204. On habeas corpus review of Herrin's case, the court again emphasized that Rogers had adopted the dissent's view in Herrin and "expressly overruled" the application of the factor. Herrin v. Dugger, 528 So. 2d 1176, 1178 (Fla. 1988).
205. 531 So. 2d 1256 (Fla. 1988).
206. Id. at 1256-57, 1261.
the girlfriend can be transferred to the victim” and held that the trial court had erred in finding that the murder was committed in a cold, calculated, and premeditated manner.208

In another case the defendant entered a retail store armed with a .38 caliber automatic pistol and ordered the clerk to give him money and then to disrobe in a dressing room. He said his pistol discharged accidentally one time in the dressing room but had not struck the victim. The victim offered to accompany him to the rear of the store to obtain more money, but while doing that he saw her push a button he believed to be an alarm. The defendant was angered and ordered her back to the dressing room where he shot her once in the back of the head. Here too, the court cited to Rogers and struck the finding of cold, calculated, and premeditated.209 The court distinguished situations where the robbery victims have been transported to other locations and killed later. Since the evidence did not indicate the defendant intended to kill the victim when he decided to rob the store, his conduct was “more akin to a spontaneous act taken without reflection.”210 The court was “unable to say that it meets the standard of heightened premeditation and calculation.”211

The circumstances of 110 stab wounds to the robbery victim was found in Mitchell v. State212 to be contradictory to the “careful plan or prearranged design” required by Rogers. Instead, the court found the facts to indicate “rage” and “rage is inconsistent with the premeditated intent to kill someone.”213 The application of the Rogers test can also be seen in Jackson v. State,214 where Rogers was cited to invalidate the finding of cold, calculated, and premeditated.215 The victim came to the defendant’s house every month to collect an installment payment. On this occasion the defendant robbed him at knifepoint, then bound, gagged, choked, and slapped him to death. The court found insufficient evidence of “prior calculation and planning.”216 The Rogers test was used also in Garron v. State,217 to overrule this aggravating factor in a domestic case where after an argument Garron got a gun, hid it under a towel, and then shot his wife and stepdaughter to death. The shooting, the court said was a “spontaneous reaction,” commenting that the case involves a “passionate, intra-family quarrel, not an organized crime or underworld killing.”218

The lack of a prearranged design was the basis for disapproving this factor in Llloyd v. State.219 Lloyd arrived at the victim’s house armed with a .38 caliber pistol. He demanded money and ordered the victim and her daughter into the bathroom. The victim was shot twice, with the fatal shot being fired with the gun in contact with the head. There was a “suspicion that this was a contract killing,” but the fact was not proven beyond a reasonable doubt, and absent that proof there was no showing of the calculated plan required by Rogers.220 The factor was also invalidated in case where the robbery victim in her own home had been “brutally beaten . . . choked and repeatedly stabbed” as the defendant “tried and tried again to kill” the victim.221

The other aspect of this aggravating factor — “without any pretense of moral or legal justification” — caused reversal of cold, calculated, and premeditated in Banda v. State.222 The prosecution evidence, including a statement by the defendant, showed that the victim had threatened to beat the defendant to death over the failure to pay a $10 debt.223 The Florida Supreme Court found a pretense or “colorable claim” that the murder was “motivated out of self defense, albeit in a form clearly insufficient to reduce the degree of the crime.”224 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.225 The prosecution failed to prove this “element” of the aggravating factor beyond a reasonable doubt.226

208. Id.
210. Id.
211. Id.
213. Id. at 182.
214. 530 So. 2d 269 (Fla. 1988).
215. Id. at 273.
216. Id.
217. 228 So. 2d 353 (Fla. 1988).
218. Id. at 361.
219. 524 So. 2d 396 (Fla. 1988).
220. Id. at 403.
221. Perry v. State, 522 So. 2d 817, 821 (Fla. 1988). The court found no “brightened premeditation.” Id. at 820. See also Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988) (victims beaten with a baseball bat, but no “competent and substantial evidence” to show they were “contract or execution-style”).
222. 536 So. 2d 221 (Fla. 1988).
223. Id. at 222.
224. Id. at 225.
225. Id.
226. Id. The court noted it has previously found a “pretense” from the defend-
the girlfriend can be transferred to the victim" and held that the trial court had erred in finding that the murder was committed in a cold, calculated and premeditated manner.208

In another case the defendant entered a retail store armed with a .38 caliber automatic pistol and ordered the clerk to give him money and then to disrobe in a dressing room. He said his pistol discharged accidentally one time in the dressing room but had not struck the victim. The victim offered to accompany him to the rear of the store to obtain more money, but while doing that he saw her push a button he believed to be an alarm. The defendant was angered and ordered her back to the dressing room where he shot her once in the back of the head. Here too, the court cited to Rogers and struck the finding of cold, calculated, and premeditated.200 The court distinguished situations where the robbery victims have been transported to other locations and killed later. Since the evidence did not indicate the defendant intended to kill the victim when he decided to rob the store, his conduct "was more akin to a spontaneous act taken without reflection."202 The court was "unable to say that it meets the standard of heightened premeditation and calculation."203

The circumstances of 110 stab wounds to the robbery victim was found in Mitchell v. State220 to be contradictory to the "careful plan or prearranged design" required by Rogers. Instead, the court found the facts to indicate "rage" and a "rage is inconsistent with the premeditated intent to kill someone."204 The application of the Rogers test can also be seen in Jackson v. State,205 where Rogers was cited to invalidate the finding of cold, calculated, and premeditated.206 The victim came to the defendant's house every month to collect an installment payment. On this occasion the defendant robbed him at knifepoint, then bound, gagged, choked, and stabbed him to death. The court found insufficient evidence of "prior calculation and planning."207 The Rogers test was used also in Garrison v. State,208 to overrule this aggravating factor in a domestic case where after an argument Garrison got a gun, hid it under a towel, and then shot his wife and stepdaughter to death. The shooting, the court said was a "spontaneous reaction," commenting that the case involves a "passionate, intra-family quarrel, not an organized crime or underworld killing."209

The lack of a prearranged design was the basis for disapproving this factor in Lloyd v. State.210 Lloyd arrived at the victim's house armed with a .38 caliber pistol. He demanded money and ordered the victim and her daughter into the bathroom. The victim was shot twice, with the fatal shot being fired with the gun in contact with the head. There was a "suspicion that this was contract killing," but the fact was not proven beyond a reasonable doubt, and absent that proof there was no showing of the calculated plan required by Rogers.211 The factor was also invalidated in a case where the robbery victim in her own home had been "brutally beaten ... choked and repeatedly stabbed" as the defendant "tried and tried again to kill" the victim.212

The other aspect of this aggravating factor—"without any pretense of moral or legal justification"—caused reversal of cold, calculated, and premeditated in Banda v. State.213 The prosecution evidence, including a statement by the defendant, showed that the victim had threatened to beat the defendant to death over the failure to pay a $10 debt.214 The Florida Supreme Court found a pretense or "colorable claim" that the murder was "motivated out of self-defense, albeit in a form clearly insufficient to reduce the degree of the crime."215 A "pretense of justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nonetheless rebuts the otherwise cold and calculating nature of the homicide.216 The prosecution failed to prove this "element" of the aggravating factor beyond a reasonable doubt.217

208. Id.
210. Id.
211. Id.
212. 527 So. 2d 179 (Fla. 1988).
213. Id. at 182.
214. 530 So. 2d 269 (Fla. 1988).
215. Id. at 273.
216. Id.
217. 528 So. 2d 167 (Fla. 1988).
218. Id. at 361.
219. 524 So. 2d 396 (Fla. 1988).
220. Id. at 403.
221. 522 So. 2d 1137, 1142 (Fla. 1988). The court found no "brightened premeditation." Id. at 820. See also Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988) (victims beaten with a baseball bat, but no "competent and substantial evidence to show they were "contract or execution-style").
222. 536 So. 2d 221 (Fla. 1988).
223. Id. at 222.
224. Id. at 225.
225. Id. at 225.
226. Id. The court noted it had previously found a "pretense" from the defendant—
While these decisions seemingly show that the application of the cold, calculated, and premeditated factor has been narrowed, especially as compared to the pre-Rogers decisions, there are still apparent inconsistencies or at least blurry lines. One troubling matter is that Herring v. State,⁴²⁵ which was expressly disapproved by Rogers,⁴²⁶ has continued to receive favorable citation. In Harmon v. State,⁴²⁴ where the aggravating factor was invalidated, the court cited Herring for the proposition that the factor applies to "execution murders, contract murders, or witness elimination murders."⁴²² This quoted phrase adds "witness elimination murders" to the phrase used in the Rogers and other post-Rogers opinions referred to above.⁴²³ The Harmon opinion likewise renews the "substantial period of reflection and thought" language of the pre-Rogers decision of Preston v. State.⁴²⁶ While the Harmon opinion may be a simple difference in language by different justices,⁴²⁴ it is of concern because it also could be an effort to return to broader principles for future cases. This is a difficult factor to apply and it may be impossible to do so consistently, unless the Florida Supreme Court is clear and consistent in its rulings.

The Harmon opinion is not the only case to resurrect Herring. Cold, calculated, and premeditated was upheld as an aggravating factor in Swafford v. State⁴²⁶ where the defendant shot the victim nine times. The court cited Herring for the proposition that reloading the

weapon provides further time for reflection and so meets the "heightened premeditation" requirement. Herring had shot his victim twice during a robbery and the court had said that the time between the shots showed heightened premeditation, but Rogers had specifically disapproved that reasoning.⁴²⁶ Swafford seems to readopt it. Moreover, Swafford goes further in approving "advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course" as factors supporting this aggravating circumstance.⁴²⁶ This language is bothersome because each of these factors could have been seen in the post-Rogers decisions discussed above. For example, in Amoros, Hamblen, Lloyd, and Perry, the defendants armed themselves before setting out to rob, and none of the cases contained evidence of coincidence. The same can be said for the other factors identified in Swafford. The question is why the court is not, at least factually, following its Rogers teaching?

Despite the broad language of Swafford, other cases where the court upheld this aggravating circumstance seem to go beyond the factors listed in Swafford. In Hardwick v. State,⁴²⁷ the defendant had threatened to kill the victim if he did not return drugs he had stolen and later shot and stabbed the victim. The court cited Rogers and found a "prearranged design" from the defendant having announced his intentions in advance of the killing.⁴²⁸ A drug argument was also the motive in Jackson v. State,⁴²⁹ where the defendant shot two fellow drug users. The second killing was found to be cold, calculated, and premeditated because of the time to reflect (about a half day) between the murders.⁴³⁴ Other examples which go beyond the Swafford factors are where the defendant planned to rob and "planned to leave no witnesses,"⁴³⁴ where the defendant and his co-perpetrator discussed the need to kill the victims during the burglary of their home,⁴³⁴ where the

225. See supra note 201 and accompanying text.
226. Swafford, 533 So. 2d at 277.
227. 521 So. 2d 1071 (Fla. 1988).
228. Id. at 1076.
229. 522 So. 2d 802 (Fla. 1988).
230. Id. at 810.
231. See Kennedy, supra note 145, at 79-82 (demonstrating the application of this factor to witness-elimination murders, and arguing that such murders do not necessarily include "heightened premeditation" and thus do not qualify for application of the cold, calculated aggravating factor).
232. 444 So. 2d 939 (Fla. 1984). Preston is discussed supra in the text accompanying note 145.
233. puppy authored the Harmon opinion and Justice Barkett authored Rogers.
234. 533 So. 2d 270 (Fla. 1988).
While these decisions seemingly show that the application of the
cold, calculated, and premeditated factor has been narrowed, especially
as compared to the pre-Rogers decisions, there are still apparent in-
sistencies or at least blurry lines. One troubling matter is that Herring
v. State,\(^{227}\) which was expressly disapproved by Rogers,\(^{228}\) has con-
tinued to receive favorable citation. In Harmon v. State,\(^{229}\) where the
aggravating factor was invalidated, the court cited Herring for the pro-
position that the factor applies to “execution murders, contract
murders, or witness elimination murders.”\(^{230}\) This quoted phrase adds
“witness elimination murders” to the phrase used in the Rogers and
other post-Rogers opinions referred to above.\(^{231}\) The Harmon opinion
likewise renews the “substantial period of reflection and thought” lan-
guage of the pre-Rogers decision of Preston v. State.\(^{232}\) While the Har-
mon opinion may be a simple difference in language by different jus-
tices,\(^{233}\) it is of concern because it also could be an effort to return to
broaden principles for future cases. This is a difficult factor to apply
and it may be impossible to do so consistently, unless the Florida Su-
preme Court is clear and consistent in its rulings.

The Harmon opinion is not the only case to resurrect Herring.
Cold, calculated, and premeditated was upheld as an aggravating fac-
tor in Swafford v. State\(^{234}\) where the defendant shot the victim nine
times. The court cited Herring for the proposition that reloading the

ant’s consistent statements that he had killed the victim only after he jumped at him, in
Cannady v. State, 427 So. 2d 723, 730-31 (Fla. 1983); but that where the evidence was
inconsistent with the defendant’s statement that he killed the victim over a $15 debt if
had refused to find a pretense in Williamson v. State, 511 So. 2d 289, 293 (Fla. 1987),
cert. denied, 108 S. Ct. 1098 (1988). Banda, 536 So. 2d at 225. See also supra Ken-
nedy, note 189, at 101-04 (arguing that the Florida court had virtually ignored the
pretense of justification clause, by failing to apply it where such pretense apparently
existed).

\(^{227}\) 446 So. 2d 1049 (Fla. 1984), cert. denied, 469 U.S. 989(1984).
\(^{228}\) See supra text accompanying notes 197-204.
\(^{229}\) 527 So. 2d 182 (Fla. 1988).
\(^{230}\) Id. at 188.
\(^{231}\) See Kennedy, supra note 145, at 79-82 (demonstrating the application of
this factor to witness-elimination murders, and arguing that such murders do not neces-
sarily included “heightened premeditation” and thus do not qualify for application of
the cold, calculated aggravating factor).
\(^{232}\) 444 So. 2d 939 (Fla. 1984). Preston is discussed supra in the text accompa-
nying note 145.
\(^{233}\) Justice Ehrlich authored the Harmon opinion and Justice Barkett authored
Rogers.
\(^{234}\) 533 So. 2d 270 (Fla. 1988).
defendant gradually poisoned her husband to death, where the defendant killed his ex-wife and her female roommate after prior plans to kill them both, where the defendant committed a burglary but then concealed himself in the house to await the victim’s return, and where the robbery victim was abducted and taken to a remote location where he was shot.

The conclusion to be drawn from the body of decisions issued during the survey period is that the court made significant efforts towards reaching the limiting construction required by the eighth amendment. The question will be whether that limiting construction is conveyed to the juries and judges who must apply it at the trial level. The principles enforced in Maynard v. Cartwright with respect to “heinous, atrocious, or cruel” apply equally to this aggravating factor because of its broad language. Jury instructions providing the narrowing language of Rogers will be necessary to properly guide and channel the juries and clear adherence to the principles will be required by the Florida Supreme Court for the factor to survive constitutional muster.

J. Victim Was Law Enforcement Officer Performing Official Duties

This factor became effective on October 1, 1987 and as of this writing has not yet been applied or discussed by the Florida Supreme Court. There are principles from prior decisions, however, that may help guide the application of this aggravating circumstance.

The factor, from its language, was seemingly intended to make the killing of a law enforcement officer more aggravated than the killing of a civilian, and thus more likely to receive a death sentence. The question will be whether it adds anything to the current statute. Two statutory aggravating factors had already been consistently applied where a police officer was the victim of a homicide. The “avoid or prevent arrest” factor had been uniformly applied where a police officer was a victim where an arrest was being undertaken or where an arrest was likely. Likewise, the aggravating factor that the homicide was committed “to disrupt or hinder the . . . enforcement of laws” has been held to apply to law enforcement officers performing official duties. Since these two factors overlap in the evil they address, they are sometimes used interchangeably, seldomly applied separately by the trial courts and if separately applied are held to merge into one aggravating factor on appeal.

Merger would seem to be applicable in most situations so that this factor will merge with the two other law enforcement factors to describe one aggravating aspect of the offense. To separately apply this law enforcement officer aggravating factor, the situation would have to be one not involving an actual or potential arrest and one not involving disruption or hindrance of the enforcement of law, but yet still involve a law enforcement officer in the performance of his or her duties. Such situations will be rare. There is one difference between the aggravating circumstances. The two original “law enforcement” aggravating factors contain language indicating that the described conduct must be intentional. The avoid arrest factor provides that the capital felony was “committed for the purpose of” avoiding arrest or escaping, and the disrupt or hinder law enforcement circumstance provides that the capital offense must be “committed to” hinder or disrupt enforcement of law. The new law enforcement aggravating factor speaks only to the victim’s status and not to the defendant’s intentions. Presumably this circumstance could thus be applied, even if the defendant did not know the victim was a law enforcement officer in the performance of lawful duties. How broadly this factor is to be applied will await decision by the Florida Supreme Court.

244. Turner v. State, 530 So. 2d 45, 51 (Fla. 1988). In Turner, the defendant killed his ex-wife soon after entering her apartment and then chased the roommate outside and cornered her in a telephone booth. The court held that the contentions of an “uncontrolled frenzy” was belied by the fact that he hid when a police car drove by. Id.
245. Lamb v. State, 532 So. 2d 1051, 1053 (Fla. 1988).
248. The current standard jury instructions contain only the statutory language, without further definition or explanation. THE FLORIDA BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, PENALTY PROCEEDINGS — CRIMINAL CASES (1981).
defendant gradually poisoned her husband to death,\textsuperscript{44}\textsuperscript{44} where the defendant killed his ex-wife and her female roommate after prior threats to kill them both,\textsuperscript{44}\textsuperscript{44} where the defendant committed a burglary but then concealed himself in the house to await the victim's return,\textsuperscript{44}\textsuperscript{44} and where the robbery victim was abducted and taken to a remote location where he was shot.\textsuperscript{44}\textsuperscript{44}

The conclusion to be drawn from the body of decisions issued during the survey period is that the court made significant efforts towards reaching the limiting construction required by the eighth amendment. The question will be whether that limiting construction is conveyed to the juries and judges who must apply it at the trial level. The principles enforced in \textit{Maynard v. Cartwright}\textsuperscript{44}\textsuperscript{44} with respect to “heinous, atrocious, or cruel” apply equally to this aggravating factor because of its broad language. Jury instructions providing the narrowing language of \textit{Rogers} will be necessary to properly guide and channel the juries\textsuperscript{44}\textsuperscript{44} and clear adherence to the principles will be required by the Florida Supreme Court for the factor to survive constitutional muster.

\textbf{J. Victim Was Law Enforcement Officer Performing Official Duties}\textsuperscript{44}\textsuperscript{44}

This factor became effective on October 1, 1987\textsuperscript{44}\textsuperscript{44} and as of this writing has not yet been applied or discussed by the Florida Supreme Court. There are principles from prior decisions, however, that may help guide the application of this aggravating circumstance.

The factor, from its language, was seemingly intended to make the killing of a law enforcement officer more aggravated than the killing of a civilian, and thus more likely to receive a death sentence. The question will be whether it adds anything to the current statute. Two statutory aggravating factors had already been consistently applied where a police officer was the victim of a homicide. The “avoid or prevent arrest” factor\textsuperscript{44}\textsuperscript{44} had been uniformly applied where a police officer was a victim where an arrest was being undertaken or where an arrest was likely.\textsuperscript{44}\textsuperscript{44} Likewise, the aggravating factor that the homicide was committed “to disrupt or hinder the . . . enforcement of laws”\textsuperscript{44}\textsuperscript{44} has been held to apply to law enforcement officers performing official duties.\textsuperscript{44}\textsuperscript{44} Since these two factors overlap in the evil they address, they are sometimes used interchangeably, seldomly applied separately by the trial courts and if separately applied are held to merge into one aggravating factor on appeal.\textsuperscript{44}\textsuperscript{44}

Merger would seem to be applicable in most situations so that this factor will merge with the two other law enforcement factors to describe one aggravating aspect of the offense. To separately apply this law enforcement officer aggravating factor, the situation would have to be one not involving an actual or potential arrest and one not involving disruption or hindrance of the enforcement of law, but yet still involve a law enforcement officer in the performance of his or her duties. Such situations will be rare. There is no difference between the aggravating circumstances. The two original “law enforcement” aggravating factors contain language indicating that the described conduct must be intentional. The avoid arrest factor provides that the capital felony was “committed for the purpose of” avoiding arrest or escaping\textsuperscript{44}\textsuperscript{44} and the disrupt or hinder law enforcement circumstance provides that the capital offense must be “committed to” hinder or disrupt enforcement of law.\textsuperscript{44}\textsuperscript{44} The new law enforcement aggravating factor speaks only to the victim's status and not to the defendant's intentions. Presumably this circumstance could thus be applied, even if the defendant did not know the victim was a law enforcement officer in the performance of lawful duties. How broadly this factor is to be applied will await decision by the Florida Supreme Court.

\textsuperscript{44}Bueno \textit{v. State}, 527 So. 2d 194, 199 (Fla. 1988).

\textsuperscript{44}Turner \textit{v. State}, 530 So. 2d 45, 51 (Fla. 1988). In \textit{Turner}, the defendant killed his ex-wife soon after entering her apartment and then chased the roommate outside and cornered her in a telephone booth. The court said that the contention of an “uncontrolled frenzy” was belied by the fact that he hid when a police car drove by. Id.

\textsuperscript{44}Lamb \textit{v. State}, 532 So. 2d 1051, 1053 (Fla. 1988).

\textsuperscript{44}Yates \textit{v. State}, 533 So. 2d 744, 746-749 (Fla. 1988).

\textsuperscript{44}108 S. Ct. 1853 (1988). See also supra text accompanying notes 131-33.

\textsuperscript{44}The current standard jury instructions contain only the statutory language, without further definition or explanation. \textit{Florida Bar, Florida Standard Jury Instructions in Criminal Cases, Penalty Proceedings — Capital Cases} (1991).

\textsuperscript{44}"The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties." \textit{Fla. Stat.} § 921.141(5)(e) (1987).

\textsuperscript{44}1987 Fla. Laws, 87-368.
K. Victim as a Public Official, Performing Official Duties

This new aggravating factor was enacted during the survey period, effective October 1, 1988. There presently are no reported decisions applying or construing this aggravating factor. However, general principles governing aggravating factors in prior decisions may guide the application of this factor.

The apparent focus of this aggravating circumstance is upon protection of public business and seeks that protection by making an offense committed against public leaders more aggravated than the same offense committed against lesser public servants or the public at large. It is likely that in most instances this factor would merge with this aggravating circumstance proscribing a capital offense "committed to disrupt or hinder the lawful exercise of any governmental function" since it describes the "same aspect of the defendant's crime." This merger seems to be required because the new factor requires that the protected official be engaged in the performance of official duties, which compares to "any governmental function." It also requires that a motive for the offense be related to the official capacity of the victim, which compares to the intent to "disrupt or hinder the lawful exercise" of the governmental function. The two factors appear to be parallel, with the only difference being the specification of the victim's status in the new factor.

Questions of statutory interpretation and of constitutionality will need to be resolved. With regard to statutory interpretation, the courts will have to decide who falls within the "elected or appointed public official" categories. While elected officials have common meaning, there are a wide variety of appointed officials involved in all levels of government.

258. "The victim of the capital felony was an elected or 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)(a) (Supp. 1988).
260. In the original enactment of Florida's capital sentencing statute the legislature had debated a provision for an aggravating factor for a person engaged in the perpetration of an attempt to perpetrate the "assassination of a state or federal officer, a candidate for any such office, or a federal judge," but dropped it apparently in favor of the broader disrupt or hinder any governmental function aggravating factor codified in Fla. Stat. § 921.141(5)(a) (1987). See supra note 116.
262. Provenzo v. State, 337 So. 2d 783, 786 (Fla. 1976) (original emphasis omitted).

III. Constitutional Issues

It is not an overstatement to observe that most issues arising during a capital sentencing proceeding implicate the eight amendment's cruel and unusual punishment clause. The United States Supreme Court decision in Maynard v. Cartwright is an apt example, for as

264. Cf. Soverino v. State, 336 So. 2d 269, 271-72 (Fla. 1987) (statute proscribing history on a law enforcement officer "engaged in the lawful performance of his duties" does not create an "elite class of uncoachable" because "when an officer is not performing his official duties, he is no longer protecting the public welfare and, consequently, the statute yields him no greater protection than that accorded to member of general public").
266. Id. at 2533 (quoting Emmond v. Florida, 458 U.S. 782, 801 (1982).
267. Id. at 2534.
K. Victim as a Public Official, Performing Official Duties

This new aggravating factor was enacted during the survey period, effective October 1, 1988. There presently are no reported decisions applying or construing this aggravating factor. However, general principles governing aggravating factors in prior decisions may guide the application of this factor.

The apparent focus of this aggravating circumstance is upon protection of public business and seeks that protection by making an offense committed against public leaders more aggravated than the same offense committed against lesser public servants or the public at large. It is likely that in most instances this factor would merge with the aggravating circumstance proscribing a capital offense "committed to disrupt or hinder the lawful exercise of any governmental function" since it describes the "same aspect of the defendant's crime." This merger seems to be required because the new factor requires that the protected official be engaged in the performance of official duties, which compares to "any governmental function." It also requires that a motive for the offense be related to the official capacity of the victim, which compares to the intent to "disrupt or hinder the lawful exercise" of the governmental function. The two factors appear to be parallel, with the only difference being the specification of the victim's status in the new factor.

Questions of statutory interpretation and of constitutionality will need to be resolved. With regard to statutory interpretation, the courts will have to decide who falls within the "elected or appointed public official" categories. While elected officials have common meaning, there are a wide variety of appointed officials involved in all levels of government that may not be subject to common understanding—thus the lines become difficult to draw. Similarly, "engaged in the performance of his official duties" will need to be interpreted. With a literal interpretation, the official would need to have been actively performing his or her work for this aggravating factor to be applied—off-duty or out-of-season officials would not fall within this factor.

The constitution requires that aggravating factors provide a meaningful basis for distinguishing the few who must die from the many who are sent to lesser punishments. They also must have "some bearing on the defendant's 'personal responsibility and moral guilt.'" Under these principles, it could be questioned whether it is rational to base the selection of who should die upon the status within the government of the victim of the capital offense. Such a selection "may be wholly unrelated to the blameworthiness of a particular defendant," and thus "irrelevant to the sentencing process."

These questions will have to be answered as the juries and judges of Florida attempt to apply this new aggravating factor. As the discussion of the prior aggravating factors has shown, the history is that factors are frequently given broad interpretations when initially applied, and then later attempts are made to define narrowing principles. If history is true, the constitutional issues will need to be addressed.

III. Constitutional Issues

It is not an overstatement to observe that most issues arising during a capital sentencing proceeding implicate the eighth amendment's cruel and unusual punishment clause. The United States Supreme Court decision in Maynard v. Cartwright is an apt example, for as

258. "The victim of the capital felony was an elected or 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)(c) (Supp. 1988).


260. In the original enactment of Florida's capital sentencing statute the legislature had debated a provision for an aggravating factor for a person engaged in the perpetration of or the attempt to perpetrate the "assassination of a state or federal elected official, a candidate for any such office, or a federal judge." But dropped it apparently in favor of the broader disrupt or hinder any governmental function aggravating factor codified in Fla. Stat. § 921.141(5)(g) (1987). See supra note 116.


262. Provence v. State, 337 So. 2d 758, 786 (Fla. 1976) (original emphasis omitted). See also supra note 15.


264. Cf. Soverino v. State, 356 So. 2d 268, 271-72 (Fla. 1978) (statute prescribing battery on a law enforcement officer engaged in the lawful performance of his duties "does not create an 'elite class of untouchables' because when an officer is not performing his official duties, he is no longer protecting the public welfare and, consequently, the statute yields him no greater protection than that accorded to member of the general public.


266. Id. at 2533 (quoting Emmund v. Florida, 458 U.S. 782, 801 (1982).


previously discussed, it applied the eighth amendment to the state's use of an aggravating circumstance — eschewing broader due process tests. There were, however, several specific constitutional questions addressed during the survey period by the Florida Supreme Court and by federal courts in a manner that may affect Florida's capital sentencing scheme. It is this class of issues that is addressed in this section.

A. Youth — Too Young to Die?

Is there an age below which the application of the death penalty on an individual becomes cruel and unusual punishment per se? The Supreme Court tried to answer that question in Thompson v. Oklahoma involving an offender who was fifteen years old at the time of the crime. While the result was clear for Mr. Thompson (his sentence was deemed cruel and unusual) the holding and precedent of Thompson is not so clear because it was decided by a plurality opinion with Justice O'Connor concurring in the judgment only. The plurality, using traditional eighth amendment analysis, reviewed national practice in the treatment of juveniles and whether execution of juveniles would meet the goals of capital punishment and concluded

270. See supra note 133 and accompanying text.
271. Id. at 108 S.Ct. 2687 (1988).
272. Id. at 2700.
273. The Court explained the test: “We first review relevant legislative enactments, then refer to jury determinations, and finally explain why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty. Id. at 2691-92 (footnotes omitted).
274. Id. at 2692-98. The plurality reviewed legal distinctions between juveniles and adults in a variety of areas including voting, marriage, purchase of alcohol or cigarettes, contracts, driving, etc. and also the separate provisions for juvenile offenders. Id. at 2692-96. The plurality also looked specifically to the evidence of the frequency of imposition of capital punishment on juveniles in the United States and found its infrequency as showing it to be “now generally abhorrent to the conscience of the community.” Id. at 2697.
275. Id. at 2698-2700. The plurality found general agreement that “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.” Id. at 2698 (footnote omitted). The two goals of capital punishment are “retribution and deterrence.” 108 S. Ct. at 2699 (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)). Retribution, the plurality found was inapplicable “[gives the lesser culpability of the juvenile offender, and society's fiduciary obligations to its children.” Id. at 2699. It found deterrence to be “equally unacceptable” because so few persons under sixteen commit willful homicide the deterrent value of the death penalty will not be diminished for the vast majority of potential offenders, and because it is unlikely that a teenager would stop to make the “cost-benefit” analysis required for punishment to deter and, even so, very few juveniles are sentenced to death, Id. at 2700.
276. Id. at 2700. The plurality declined the opportunity to set the minimum age at eighteen years since that question was not before the court. Id.
277. Id. at 2706-2708 (O'Connor, J., concurring).
278. “The conclusion I have reached in this unusual case is itself unusual.” Id. at 2721.
279. Id. (O'Connor, J., concurring).
280. Id.
284. See id. §§ 39.02-39.237 (Delinquency cases); id. § 39.01(7) (“Child” means...
previously discussed, it applies the eighth amendment to the state's use of an aggravating circumstance — eschewing broader due process tests. There were, however, several specific constitutional questions addressed during the survey period by the Florida Supreme Court and by federal courts in a manner that may affect Florida's capital sentencing scheme. It is this class of issues that is addressed in this section.

A. Youth — Too Young to Die?

Is there an age below which the application of the death penalty on an individual becomes cruel and unusual punishment *per se*? The Supreme Court tried to answer that question in *Thompson v. Oklahoma* involving an offender who was fifteen years old at the time of the crime. While the result was clear for Mr. Thompson (his sentence was deemed cruel and unusual), the holding and precedent of Thompson is not so clear because it was decided by a plurality opinion with Justice O'Connor concurring in the judgment only. The plurality, using traditional eighth amendment analysis, reviewed national practice in the treatment of juveniles and whether execution of juveniles would meet the goals of capital punishment and concluded that "the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense." Justice O'Connor concurred in the judgment and reviewed the same evidence of national practice. Justice O'Connor, however, found the evidence to be inconclusive and reached the "unusual" conclusion that since Oklahoma's statute carries no minimum age, it could not be relied upon as having "the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty." Thus, Justice O'Connor's view is that the death penalty may not be imposed on someone "below the age of 16 at the time of their offense... under the authority of a capital punishment statute that specifies no minimum age.

The Court has accepted jurisdiction to review the constitutionality of the imposition of the death penalty on a sixteen year old and a seventeen year old. There should be a clarification of Thompson announced during the October 1988 Term. Nevertheless, even under the narrowed holding from Justice O'Connor's concurring opinion in Thompson, Florida cannot execute a person who was under sixteen years of age at the time of the offense because it has set no minimum age either by its capital sentencing statute or its juvenile delinquency statutes.

The death penalty will not be diminished for the vast majority of potential offenders, and it is unlikely that a teenager would stop to make the "cost-benefit" analysis required for punishment to deter and, even so, very few juveniles are sentenced to die. Id. at 2700.
The Florida Supreme Court has not yet expressly affirmed a death sentence for someone sixteen or under, but its reversals have not been based on the constitutional question addressed in Thompson.40 The court declined to reach the question of whether the death penalty was constitutionally imposed on one who was seventeen years old at the time of the crime.41 Thus, during the survey period the Florida courts did not decide the constitutional issue now pending in the Supreme Court.

Age is, of course, a mitigating factor and may be considered by the judge and jury in determining the appropriate sentence. There is no age set by statute or case law as being mitigating, for the true value of age in determining the appropriate sentence is not the mere chronological fact, but rather in combination with other aspects of the defendant's life, such as emotional or mental maturity, family background, criminal history, etc.42 Youth, especially when combined with mental problems, is a factor of great weight in determining the proper sentence.43 However, the fact that age may be considered as a mitigating factor under Florida law, does not settle the underlying eight amendment question of whether the evolving standards of decency accord the execution of a juvenile.

B. Mental Retardation — Too Disabled to Die?

If there is a chronological age below which imposition of the death penalty would be cruel and unusual, then what of someone who functions at the same level of emotional and cognitive maturity due to mental retardation? Three justices of the Florida Supreme Court believe that imposition of the death sentence on a retarded person would be cruel and unusual.44 Public opinion is in accord with that view.70% oppose the death penalty for mentally retarded persons as compared with an overall approval of capital punishment by 89% in Florida.45 The Supreme Court of the United States has granted certiorari to consider that question in its October Term, 1988.46

The Florida Supreme Court majority did not reach the constitutional question in the two cases where it was raised during the survey period. In Doyle v. State47 and in Woods v. State,48 decided three weeks later, the court's majority opinions found the issue to have been procedurally barred because it had not been raised on direct appeal.49 The issue thus could not be reviewed in post-conviction proceedings. As

285. See e.g., Vasi v. State, 374 So. 2d 465 (Fla. 1979) (fifteen year old; death sentence reversed because court could not reach consensus to affirm); Morgan v. State, 392 So. 2d 1315 (Fla. 1981) (sixteen year old; unconstitutional bifurcated sanity trial; new trial ordered); Morgan v. State, 433 So. 2d 394 (Fla. 1984) (same case after retrial; new trial ordered for precluding sanity defense); Morgan v. State, 537 So. 2d 973 (Fla. 1989) (same case, reversed again for new trial for precluding expert witness on sanity); Simpson v. State, 418 So. 2d 984 (Fla. 1982) (sixteen year old; new trial order for prosecution committing emotional age was low to testify).

286. Livingston v. State, 13 F. L. Weekly 147 (Fla. 1988). The court reversed the death sentence on other grounds — that the case did not warrant the death penalty — and thus did not reach the constitutional question. Id. at 188.

287. Although not within the time period of this survey, within three weeks after that period ended, the court rejected the constitutional challenge for a seventeen year old defendant. LeCroy v. State, 533 So. 2d 750, 756-58 (Fla. 1988).


289. In State v. Dixon, 283 So. 2d 110 (Fla. 1973) the court explained that this mitigating factor "allows the judge and jury to consider the effect of the inexperience of the defendant on one hand, or, in conjunction with subsection (a) (lack of criminal history), the length of time that the defendant has obeyed the laws in determining whether or not one explanation of total criminality warrants the extinction of life." Similarly, in Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) the Court recognized that the "unhappy facts," but it is "a time and condition of life when a person may be most susceptible to influence and to psychological damage."
The Florida Supreme Court has not yet expressly affirmed a death sentence for someone sixteen or under, but its reversals have not been based on the constitutional question addressed in Thompson. The court declined to reach the question of whether the death penalty was constitutionally imposed on one who was seventeen years old at the time of the crime. Thus, during the survey period the Florida courts did not decide the constitutional issue now pending in the Supreme Court.

Age is, of course, a statutory mitigating factor and may be considered by the jury and judge in determining the appropriate sentence. There is no age set by statute or case law as being mitigating, for the true value of age in determining the appropriate sentence is not the mere chronological fact, but rather in combination with other aspects of the defendant's life, such as emotional or mental maturity, family background, criminal history, etc. Youth, especially when combined with mental problems, is a factor of great weight in determining the

---

... any married or unmarried person who is charged with a violation of law occurring prior to the time that person reached the age of 18 years..." Id. § 39.02(1). ("A child of any age charged with a violation of Florida law punishable by death is shall be tried and handled in every respect as if he were an adult" after an indictment is returned by the grand jury).

285. See, e.g., Vail v. State, 374 So. 2d 465 (Fla. 1979) (fifteen year old; death sentence reversed because court could not reach consensus to affirm); Morgan v. State, 392 So. 2d 1315 (Fla. 1981) (sixteen year old; unconstitutional bifurcated sanity trial, new trial ordered); Morgan v. State, 453 So. 2d 394 (Fla. 1984) (same case after retrial; new trial ordered for precluding sanity defense); Morgan v. State, 537 So. 2d 973 (Fla. 1989) (same case, reversed again for new trial for precluding expert witness on sanity); Simpson v. State, 418 So. 2d 964 (Fla. 1982) (sixteen year old; new trial order for prosecution comment on defendant's failure to testify).

286. Livingston v. State, 13 Fla. L. Weekly 187 (Fla. 1988). The court reversed the death sentence on other grounds — that the case did not warrant the death penalty — and thus did not reach the constitutional question. Id. at 188.

287. Although not within the time period of this survey, within three weeks after that period ended, the court rejected the constitutional challenge for a seventeen year old defendant. LeCroy v. State, 533 So. 2d 750, 756-58 (Fla. 1988).


289. In State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) the court explained that this mitigating factor "allows the judge and jury to consider the effect of the inexperience of the defendant on the one hand, or, in conjunction with subsection (a) [lack of criminal history], the length of time that the defendant has obeyed the laws in determining whether or not one expiration of total criminal warrants the extirpation of life. Similarly, in Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) the Court recognized that "youth is more than a chronological fact," but is "a time and condition of life when a person may be most susceptible to influence and to psychological damage."

---

1989] Death Penalty 951

B. Mental Retardation — Too Disabled to Die?

If there is a chronological age below which imposition of the death penalty would be cruel and unusual, then what of someone who functions at the same level of emotional and cognitive maturity due to mental retardation? Three justices of the Florida Supreme Court believe that imposition of the death sentence on a retarded person would be cruel and unusual.

Public opinion is in accord with that view — 79% oppose the death penalty for mentally retarded persons as compared with an overall approval of capital punishment by 89% in Florida. The Supreme Court of the United States has granted certiorari to consider that question in its October Term, 1988.

The Florida Supreme Court majority did not reach the constitutional question in the two cases where it was raised during the survey period. In Doyle v. State and in Woods v. State, decided three weeks later, the court's majority opinions found the issue to have been procedurally barred because it had not been raised on direct appeal. The issue thus could not be reviewed in post-conviction proceedings. As

---

200. See, e.g., Brown v. State, 526 So. 2d 903, 908 (Fla. 1988) ("borderline defective eighteen-year-old functioning emotionally as a disturbed child"); Scull v. State, 533 So. 2d 1137, 1143 (Fla. 1988) (age of twenty-four found mitigating by trial court held not to be error, "factors which were observable by the judge during the trial and sentencing proceeding support his finding that Scull's emotional age was low enough to sustain this mitigating circumstance"); Perry v. State, 522 So. 2d 817, 821 (Fla. 1988) (in its life verdict the jury "may have considered the evidence of Perry's relatively young age of twenty-one").

201. See Woods v. State, 531 So. 2d 79, 83 (Fla. 1988) (Shaw, J., joined by Barkin and Kogan, JJ, dissenting, Barrett, J., joined by Kogan, J., dissenting). The dissenting justices would find it unconstitutional under article I, section 17, Florida Constitution, even apart from any ruling on the Constitution of the United States.


204. A summary of the issues presented is set out at 57 U.S.L.W. 3014.

205. 526 So. 2d 909 (Fla. 1988).

206. 531 So. 2d 79 (Fla. 1988).

207. 526 So. 2d at 911; Woods, 531 So. 2d at 82.
did the separate opinions in those cases, one can question whether the execution of a mentally retarded person can ever be the subject of a waiver. Not only is it oxymoronically to say a mentally disabled person could rationally "waive" the issue of his disability, but also the issue is not one of a mere trial error. It is an issue of the fundamental justice of the death sentence, for it involves proportionality under the eighth amendment that would declare the death sentence unenforceable in the same way it was declared disproportionate for rape, robbery, or felony murder with no intent to kill. The Florida Supreme Court would not, it can be safely assumed, declare it proper to execute a child or a defendant convicted of robbery simply because they had not presented the question on direct appeal.

Regardless of the ultimate decision on the constitutional question, it is evident that mental retardation plays a significant role in mitigating. Where proven, it has caused the Florida Supreme Court to declare the death penalty disproportionate in an individual case, even though it has not declared it disproportionate per se, when applied to a retarded person. The decision in "Fitpatrick v. State" is illustrative. Fitzpatrick's death sentence had been affirmed on direct appeal, but subsequently the court granted habeas corpus relief, ordering a new sentencing trial. Death was again imposed, but on appeal the court found the death sentence to be "inappropriate." Fitzpatrick had held hostages in a business office as part of a plan to rob a bank, and during the hostage-holding, he fatally shot a deputy sheriff. The jury voted for death, and the judge imposed the death sentence, finding five aggravating factors. The court did not rule on the validity of the judge's findings, and, instead, to maintain "[a] high degree of certainty in procedural fairness as well as substantive proportionality," the court examined the "appropriateness" of the death sentence. In finding the sentence to be disproportionate, the court placed primary reliance upon Fitzpatrick's impaired mental capacity, including evidence that his "emotional age was between nine and twelve years old." The court concluded that his "actions were those of a seriously emotionally disturbed man-child." Thus, "in comparison to other cases . . . [the death penalty] is unwarranted." The essential question in determining whether to impose the death sentence is moral responsibility of the defendant. Mental retardation increasingly is being recognized in the law as bearing upon the assessment of personal culpability — and its differences from mental illness are beginning to be understood and accepted by the courts. The "man-child" observation by the Florida Supreme Court reflects that increased understanding. During the survey period, that growth began and promises to continue apace in the near future.

C. Diminished Juror Responsibility — Federal v. State Courts

The federal courts are presently in conflict with the Florida Supreme Court on the constitutionality of an aspect of Florida capital

"Fitpatrick", 527 So. 2d at 812. 46
did the separate opinions in those cases,297 one can question whether the execution of a mentally retarded person can ever be the subject of a waiver. Not only is it oxymoronic to say a mentally disabled person could rationally "waive" the issue of his disability, but also the issue is not one of a mere trial error. It is an issue of the fundamental justice of the death sentence, for it involves proportionality under the eighth amendment that would declare the death sentence unenforceable in the same way it was declared disproportionate for rape,298 robbery,299 or felony murder with no intent to kill.300 The Florida Supreme Court would not, it can be safely assumed, declare it proper to execute a child or a defendant convicted of robbery simply because they had not presented the question on direct appeal.301

Regardless of the ultimate decision on the constitutional question, it is evident that mental retardation plays a significant role in mitigating. Where proven, it has caused the Florida Supreme Court to declare the death penalty disproportionate in an individual case, even though it has not declared it disproportionate per se, when applied to a retarded person. The decision in Fitzpatrick v. State302 is illustrative. Fitzpatrick's death sentence had been affirmed on direct appeal,303 but subsequently the court granted habeas corpus relief, ordering a new sentencing trial. Death was again imposed, but on appeal the court found the death sentence to be "inappropriate."304 Fitzpatrick had held hostages in a business office as part of a plan to rob a bank, and during the hostage-holding, he fatally shot a deputy sheriff. The jury voted for death, and the judge imposed the death sentence, finding five aggravating factors.305 The court did not rule on the validity of the judge's findings, and, instead, to maintain "[a] high degree of certainty in procedural fairness as well as substantive proportionality," the court examined the "appropriateness" of the death sentence.306 In finding the sentence to be disproportionate, the court placed primary reliance upon Fitzpatrick's impaired mental capacity, including evidence that his "emotional age was between nine and twelve years old."307 The court concluded that his "actions were those of a seriously emotionally disturbed man-child."308 Thus, "in comparison to other cases . . . [the death penalty] is unwarranted."309

The essential question in determining whether to impose the death sentence is moral responsibility of the defendant.310 Mental retardation increasingly being recognized in the law as bearing upon the assessment of personal culpability — and its differences from mental illness are beginning to be understood and accepted by the courts.311 The "men-child" observation by the Florida Supreme Court reflects that increased understanding. During the survey period, that growth began and promises to continue apace in the near future.

C. Diminished Juror Responsibility — Federal v. State Courts

The federal courts are presently in conflict with the Florida Supreme Court on the constitutionality of an aspect of Florida capital

297. See Doyle, 526 So. 2d at 912 (Kogan, J., concurring; Barkett, J., dissenting; Woods, 531 So. 2d at 83 (Shaw, J., joined by Barkett and Kogan, J., dissenting; Barkett, J., joined by Kogan, J., dissenting).


301. Florida's post-conviction relief rule provides that a sentence "imposed in violation of the Constitution or Laws of the United States, or of the State of Florida" may be challenged at any time. Fla. R. CRIM. P. 3.850.

302. 527 So. 2d 809 (Fla. 1988).


304. Fitzpatrick, 527 So. 2d at 812.

305. Id. at 811 (the judge found that he had previously been convicted of a violent felony; that he had created a great risk of death to many persons; that the murder occurred during a kidnapping; that it was done to avoid arrest; and that it was done for pecuniary gain).

306. Id. (emphasis supplied).

307. Id. at 812.

308. Id.

309. See also Brown v. State, 526 So. 2d 903, 908 (Fla. 1988) (finding error in the judge's imposition of death over a jury's life verdict, the court held that the jury may have relied upon Brown's mental retardation: "Although chronologically eighteen [years old], he had the emotional maturity of a preschool child"). But see Ramona v. State, 522 So. 2d 825, 828 (Fla. 1988) (death sentence imposed and affirmed despite the finding that "Ramona had a mental age of approximately thirteenth").


311. See generally Ellis & Luckasson, Mentally Retarded Criminal Defendants, 5 Geo. Wash. L. Rev. 414 (1985) (surveying the history and current status of the penalties of imprisonment by the courts and the definition and effects of mental
sentencing practice. The Supreme Court of the United States has, how-
ever, granted certiorari to review the conflict and settle the application of its decision in *Caldwell v. Mississippi.*312

The issue is whether, in the cases under review, through counsel’s argument and jury instructions, the jurors’ sense of responsibility for a verdict to impose the death sentence has been diminished so as to under-
neath the reliability of that death verdict and thus the reliability of the death sentence itself. The question arose after *Caldwell* was an-
nounced. In *Caldwell* the “prosecution sought to minimize the jury’s sense of the importance of its role” by arguing that there is automatic appellate review of its decision and that therefore the jury’s decision was not the final decision.313 The Court found eighth amendment error: “[w]e conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”314

The basis for the Court’s holding was the unique need for reliabil-
ity in capital sentencing. The need for the sentencers to “view their task as the serious one of determining whether a specific human being should die at the hands of the state” lies at the core of the Court’s death penalty jurisprudence:

Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an “awesome responsibility” has allowed this Court to view sentencer discretion as consistent with — and indeed indispensable to — the Eighth Amendment’s “need for reliability in the determination that death is the appropriate punishment in a specific case.”315

To meet constitutional demands a capital sentencing procedure must provide guided discretion to the sentencer so as to apply the punishment evenhandedly and reliably. To make that guided discretion work properly, the sentencers must understand and feel the awesome respon-
sibility they bear in deciding whether to take a human life. If responsi-
bility is lifted, there is a “risk that the death penalty will be imposed in

313. Id. at 325-26.
314. Id. at 328-29.
315. Id. at 330 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion)).
317. Id.
318. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).
319. 408 U.S. 238 (1972). A contemporaneous history of the passage of the Florida capital statute is contained in Ehrhardt & Levenson, *Florida’s Legislative Response to Furman: An Exercise in Futility, 64 J. Crim. L. & Criminology 10* (1973). The authors describe the compromise: “The statute finally approved is a hybrid: in return for the House’s approval of a judge and jury sentencing procedure, the Senate aban-
doned its insistence that the jury have a determinative role in sentencing capital cases.” Id. at 16. The Florida court also believed that “allowing the jury’s recommen-
sentencing practice. The Supreme Court of the United States has, how-
ever, granted certiorari to review the conflict and settle the application of its decision in *Caldwell v. Mississippi*.  

The issue is whether in the cases under review, through counsel’s argument and jury instructions, the jurors’ sense of responsibility for a verdict to impose the death sentence has been diminished so as to under-cut the reliability of that death verdict and thus the reliability of the death sentence itself. The question arose after *Caldwell* was announced. In *Caldwell* the “prosecution sought to minimize the jury’s sense of the importance of its role” by arguing that there is automatic appellate review of its decision and that therefore the jury’s decision was not the final decision.  

The Court found eight amendment error: “[W]e conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”  

The basis for the Court’s holding was the unique need for reliability in capital sentencing. The need for the sentencers to “view their task as the serious one of determining whether a specific human being should die at the hands of the state” lies at the core of the Court’s death penalty jurisprudence:  

Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an “awesome responsibility” has allowed this Court to view sentencer discretion as consistent with — and indeed indispensable to — the Eighth Amendment’s “need for reliability in the determination that death is the appropriate punishment in a specific case.”  

To meet constitutional demands a capital sentencing procedure must provide guided discretion to the sentencer so as to apply the punishment evenly and reliably. To make that guided discretion work properly, the sentencers must understand and feel the awesome responsibility they bear in deciding whether to take a human life. If responsibility is lifted, there is a “risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.” When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the eight and fourteenth amendments.  

The *Caldwell* decision, though relatively uncomplicated on the facts before the Court, set in motion legal challenges to the Florida capital sentencing procedure that either threaten one of its underlying premises, or, according to the Florida court, have no relevance to Florida’s procedure. The Florida procedure has been described as “trifurcated” to emphasize the roles of the jury, judge, and the appellate court. The jury renders an advisory sentencing verdict, the judge independently determines the appropriate sentence, and then the Florida Supreme Court reviews that sentence for procedural regularity and to see that it meets legal standards. The nature of the jury’s “advisory” role in sentencing has been the subject of questions since the inception of the statute. The bifurcation of the jury’s and judge’s roles came about through a legislative compromise, and the jury was kept from being the final sentencer despite it having been the sentencer for a hundred years, because it was thought that jury sentencing was precluded by *Furman v. Georgia*.  

Despite the jury’s nonbinding advisory role, the Florida Supreme Court assigned the jury’s sentencing verdict an important, usually determinative, role in the sentencing determination. The court held that where a jury votes for a life sentence, the sentencing judge must give deference or “great weight” to that verdict, and thus cannot impose a death sentence unless “the facts suggesting a sentence of death . . . [are] so clear and convincing that virtually no reasonable person could differ.” This standard also has been viewed as governing the sentenc-
ing judge’s discretion after the jury returns a death verdict; after a death verdict “the trial judge's actual [sentencing] discretion is relatively narrow.”

Florida thus assigns great weight to its jury sentencing verdict, but jurors' continues to be told that their verdict is “merely advisory” to a recommendation to the judge who is the final sentence. The question under Caldwell is whether those instructions to the jury unconstitutionality lift from the jurors the responsibility for the ultimate sentence. The en banc United States Court of Appeals for the Eleventh Circuit was faced with that question in Mann v. Dugger and found eighth amendment error on the facts before it. The court first reviewed the weight given by Florida law to the jury's sentencing verdict and then proceeded to the facts in Mann's case. The jury had repeatedly told by the prosecutor that its sentencing verdict was “simply a recommendation,” that the sentence is “not the jury's responsibility,” that the decision to impose the death penalty is “not on you shoulders.” The jury was instructed, in accord with the standard jury instructions, that the final decision as to what punishment shall be imposed is the responsibility of the judge but that the jury should not “act hastily without due regard to the gravity of these proceedings realizing a human life is at stake.”

The court found a "danger ... that the jurors, because they were unaware of the body of law that requires the trial judge to give weight

322. The Florida Bar, Florida Standard Jury Instructions in Criminal Cases, Penalty Proceedings — Capital Cases (1981) (“Final decision as to what punishment shall be imposed rests solely with the judge of this court; however, the jury renders to the court an advisory sentence as to what punishment should be imposed upon the defendant”).
323. 844 F.2d 1446 (11th Cir. 1988) (en banc). The original panel decision in Mann had also found eighth amendment error. Mann v. Dugger, 817 F.2d 1471, reh'g en banc granted, 828 F.2d 1449 (11th Cir. 1987).
324. Mann, 844 F.2d at 1450-54. The court was responding to the Attorney General's argument that the final sentencing responsibility rests on the judge and that Caldwell error cannot occur in Florida. Id. at 1450. The court found a significant role for the jury, not only under the great weight standard, but because the Florida case law "reflects ... an insightful normative judgment that a jury recommendation of death has an inherently powerful impact on the trial judge." Id. at 1454.
325. Id. at 1455.
326. Id. at 1456. The judge had refused the defense request to instruct the jury on the "great weight" that would be given to its sentencing verdict. Id.

327. Id. at 1457.
328. Id.
329. Id. at 1458.
330. 844 F.2d 1464 (11th Cir. 1988) (en banc).
331. Id. at 1475 (citing Pope v. Wainwright, 496 So. 2d 798, 805 (Fla. 1986)).
332. Id.
333. 804 F.2d 1526 (1986), opinion modified on reh'g, 816 F.2d 1493 (11th Cir. 1987).
335. The sentencing judge in Adams, among other comments, told the jurors that the sentence “is not on your shoulders... So that this conscience part of us as to whether or not you're going to put the man to death or not, is not your decision to make...: [I]t has to be on my conscience. It cannot be on yours.” Adams, 804 F.2d at 1526.
ing judge's discretion after the jury returns a death verdict; after a
death verdict "the trial judge's actual [sentencing] discretion is rela-
tively narrow."583

Florida thus assigns great weight to its jury sentencing verdict, but
jurors' continue to be told that their verdict is "merely advisory," a
recommendation to the judge who is the final sentences.583 The ques-
tion under Caldwell is whether those instructions to the jury unconsti-
tutionality lift from the jurors the responsibility for the ultimate sen-
tence. The en banc United States Court of Appeals for the Eleventh
Circuit was faced with that question in Mann v. Dugger584 and found
eight amendment error on the facts before it. The court first reviewed
the weight given by Florida law to the jury's sentencing verdict584 and
then proceeded to the facts in Mann's case. The jury had been repea-
tedly told by the prosecutor that its sentencing verdict was "simply a
recommendation," that the sentence is "not the jury's responsibility,"
and that the decision to impose the death penalty "is not on your shoul-
der."

The jury was instructed, in accord with the standard jury in-
structions, that "the final decision as to what punishment shall be im-
posed is the responsibility of the judge" but that the jury should not
"act hastily or without due regard to the gravity of these proceedings
. . . realizing a human life is at stake."585

The court found a "danger . . . that the jurors, because they were
unaware of the body of law that requires the trial judge to give weight
to the jury recommendation, were misinformed as to the importance
of their judgment call."586 The term "advisory," it was observed, would
suggest to a layman that the judge would not "in any way be bound by
the recommendation."587 Thus, because the "overall effect" at these
proceedings was "to diminish the jury's sense of responsibility with re-
gard to its sentencing role," the death sentence "is invalid under the
eighth amendment."588

At the same time that the Court of Appeals for the Eleventh Cir-
uit issued its en banc opinion in Mann, it issued its en banc opinion in
Harich v. Dugger,589 where it rejected a finding of Caldwell-type error.
The comments and instructions in Harich were found not to rise to the
level of those in Mann, but rather "accurately explain[ed] the respec-
tive functions of the judge and jury."590 The court said that judge and
prosecution had not "implied that the jury's recommendation was su-
perfluous" and thus "did not create the intolerable danger that the ad-
visory jury's recommendation was unreliable."591

In the meantime the case that had originally recognized the Cal-
dowell defect and that had caused the Florida Supreme Court much con-
cern, Adams v. Dugger,592 had been granted review by the Supreme
Court.593 The Adams case presented two aspects of the issue. On the
merits of the Caldwell claim the facts are much the same as, if not
more explicit than, those in Mann.594 The controversy in Adams and
the aspect with the potential for affecting a broad number of Florida
cases, is its holding on rehearing that Caldwell was a change in the law
sufficient to overcome procedural bars to review. The change in law
brought about by Caldwell was found to avoid the "abuse of the writ"
bar to successive petitions for writ of habeas corpus, and the procedural bar from Adams's failure to object to the error in state court. The potential effects of that change-of-law ruling, as seen by the Florida Supreme Court, is that all pre-Caldwell Florida death sentences would be called into question. The Florida court thus reacted quickly and strongly.

Since the original Adams's opinion was announced, the Florida Supreme Court has rejected Caldwell claims on both procedural bar grounds and the merits of the issue. During the survey period, the court issued its major response to Mann and Adams. The depth of the Florida Supreme Court's concern for the potential effect of those decisions can be seen by contrasting its interpretation of Caldwell's applicability to Florida's procedure before and after Adams and Mann. Prior to the announcement of the Adams's opinion the court viewed Caldwell as fully applicable to Florida. In Garcia v. State the defendant argued that the judge had given too much deference to the jury, as shown by his instruction to the jury that its verdict would not be overruled unless there was no reasonable basis for it. The court said that "[i]t is error to stress the necessity of the jury's seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi, . . . and Tedder v. State.

In contrast to Garcia's observations, the Adams decision and

337. Adams, 816 F.2d at 1496-1501. The "successive petition" and "procedural default" bars are separate concepts, each of which can be complex in its application in individual cases. For purposes of the discussion in the text, these procedural bars are discussed together since the effect of a change of law is similar in both instances. The reader should, however, be cognizant of the differences in the two doctrines that have entirely different sources. The citations to Adams provide separate treatment of the issues if further information is desired.
338. In most cases the court found both a procedural bar and alternatively rejected the merits of the claim. E.g., Cave v. State, 529 So. 2d 293, 296 (Fla. 1988); Preston v. State, 528 So. 2d 806, 809 (Fla. 1988); Mitchell v. State, 527 So. 2d 179, 181 (Fla. 1988); Bertolotti v. State, 554 So. 2d 303, 387 n.2 (Fla. 1988); Jackson v. State, 552 So. 2d 302, 309 (Fla. 1988); Ford v. State, 522 So. 2d 345, 346 (Fla. 1988). Recently the court has mentioned only the procedural bar. Clark v. State, 533 So. 2d 1144, 1145 (Fla. 1988); Woods v. State, 531 So. 2d 79, 83 (Fla. 1988).
340. Id. at 367 (emphasis supplied; citations omitted).

the panel opinion in Mann, the court held in Combs v. State that the "Florida procedure is clearly distinguishable from the Mississippi procedure [reviewed in Caldwell]. The Florida procedure does not empower the jury with the final sentencing decision, rather the trial judge imposes the sentence." The court said that in establishing the standard for the judge to overrule a jury's life verdict it "had no intention of changing the clear statutory directive that the jury's role is advisory." The court did not disguise the reason for its strong answer to Adams and Mann. It was "deeply disturbed" by the potential effect of those decisions, for if they were followed "[w]e would necessarily have to find that our standard jury instructions, as they have existed since 1976, violate the dictates of Caldwell." The court was attempting to influence the en banc decisions then-pending in Mann and Harich.

The court's fear that the strict application of Mann "would result in a resentencing proceeding for virtually every individual sentenced to death in this state since 1976," was probably overstated. The Court of Appeals for the Eleventh Circuit did not broadly apply Adams and Mann, limiting them to their facts. Those cases involved express instructions to the jurors that the responsibility was not on their "conscience" or "shoulders." In contrast, Harich did not involve such specific comments, and so no Caldwell error was found. The issue is to be determined by the Supreme Court in Adams either on the charge-of-law procedural issues or on the substantive merits. Nevertheless, the Florida court's reaction to the issue illustrates an important consideration in analyzing issues in capital cases. The court was so concerned with what it perceived as the potential effect of the federal court rulings that it actually went from saying that it would violate Caldwell to fail to instruct the jury on the great weight given to its verdict, to saying that Caldwell did not apply to the Florida process since the jury is merely advisory. It made that change within the space of nine months. Its concern apparently caused it to ignore its firm stand that

341. 525 So. 2d 853 (Fla. 1988).
342. Id. at 856.
343. Id. at 857 (citing Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)).
344. Id. at 857.
345. The court repeatedly telegraphed that intent by referring to the tendency of these decisions. Id. at 857 ("Fortunately Mann has been set aside pending rehearing en banc"); id. at 857 ("we realize . . . Harich and Mann have now been vacated . . . and set for a rehearing en banc.").
346. Id. at 858.
347. One decision demonstrates this split view of the jury's importance in a
bar to successive petitions for writ of habeas corpus, and the procedural bar from Adam's failure to object to the error in state court. The potential effects of that change-of-law ruling, as seen by the Florida Supreme Court, is that all pre-Caldwell Florida death sentences would be called into question. The Florida court thus reacted quickly and strongly.

Since the original Adam's opinion was announced, the Florida Supreme Court has rejected Caldwell claims on both procedural bar grounds and the merits of the issue. During the survey period, the court issued its major response to Mann and Adam. The depth of the Florida Supreme Court's concern for the potential effect of those decisions can be seen by contrasting its interpretation of Caldwell's applicability to Florida's procedure before and after Adam and Mann. Prior to the announcement of the Adam's opinion the court viewed Caldwell as fully applicable to Florida. In Garcia v. State the defendant argued that the judge had given too much deference to the jury, as shown by his instruction to the jury that its verdict would not be overruled unless there was no reasonable basis for it. The court said that "[t]here is no error; this is the law" and then continued: "It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi... and Teddy v. State." In contrast to Garcia's observations, after the Adam's decision and

the panel opinion in Mann, the court held in Combs v. State that the Florida procedure is clearly distinguishable from the Mississippi procedure reviewed in Caldwell. The Florida procedure does not empower the jury with the final sentencing decision; rather the trial judge imposes the sentence. The court said that in establishing the standard for the judge to overrule a jury's life verdict it "had no intention of changing the clear statutory directive that the jury's role is advisory." The court did not disguise the reason for its strong answer to Mann and Mann. It was "deeply disturbed" by the potential effect of those decisions, for if the were followed "[w]e would necessarily have to find that our standard jury instructions, as they have existed since 1976, violate the dictates of Caldwell." The court was attempting to influence the en banc decisions then-pending in Mann and Harich.

The court's fear that the strict application of the Florida procedure would result in a resentencing proceeding for virtually every individual sentenced to death in this state since 1976, was probably overstated. The Court of Appeals for the Eleventh Circuit did not broadly apply Adam's decisions to Mann, limiting them to their facts. Those cases involved express instructions to the jurors that the responsibility was not on their "conscience" or "shoulders." In contrast, Harich did not involve such specific comments, and so no Caldwell error was found. The issue is to be determined by the Supreme Court in Adam's either on the charge-of-law procedural issues or on the substantive merits. Nevertheless, the Florida court's reaction to the issue illustrates an important consideration in analyzing issues in capital cases. The court was so concerned with what it perceived as the potential effect of the federal court rulings that it actually went from saying that it would violate Caldwell to fail to instruct the jury on the great weight given to its verdict, to saying that Caldwell did not apply to the Florida process since the jury is merely advisory. It made that change within the space of nine months. Its concern apparently caused it to ignore its firm stand that

336. Adam's, 816 F.2d at 1494-96. Adam's first petition for writ of habeas corpus had been denied. Adam's v. Waunwright, 764 F.2d 1356 (11th Cir. 1985).

337. Adam's, 816 F.2d at 1496-1501. The "successive petition" and "procedural default" bars are separate concepts, each of which can be complex in their application in individual cases. For purposes of the discussion in the text, these procedural bars are discussed together since the effect of a change of law is similar in both instances. The reader should, however, be cognizant of the differences in the two doctrines that have entirely different sources. The citations to Adam's provide separate treatment of the issues if further information is desired.

338. In most cases the court found both a procedural bar and alternatively rejected the merits of the claim. E.g., Cave v. State, 529 So. 2d 293, 296 (Fla. 1988); Preston v. State, 528 So. 2d 806, 809 (Fla. 1988); Mitchell v. State, 527 So. 2d 179. (Fla. 1988); Bordenhetl v. State, 534 So. 2d 386, 387 n.2 (Fla. 1988); Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988); Ford v. State, 522 So. 2d 345, 346 (Fla. 1988). Recently the court has mentioned only the procedural bar. Clark v. State, 513 So. 2d 1144, 1145 (Fla. 1988); Woods v. State, 531 So. 2d 79, 83 (Fla. 1988).


340. Id. at 367 (emphasis supplied; citations omitted).
it would not "counteract the designation of the jury's role." The long term effect of this controversy may be more fundamental than simply the Caldwell issue. It caused two members of the court to urge that the Tedder rule, governing the standard for overriding a jury's life
verdict since 1975, must be abandoned. Although the majority has not accepted that view, the long term effects of this remarkable exchange between the state and federal courts will have to wait future analysis.

D. Mitigation — Can Its Exclusion be Harmless or Waived?

In 1978 the Court issued its opinion in Lockett v. Ohio, establishing definitively that the eighth amendment requires that "the sentence . . . not be precluded from considering that 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." That now well settled principle was applied in

unique way by applying both views in the same case. In Grossman v. State, 525 So. 2d 833 (Fla. 1988) the court rejected the Caldwell claim. It reasoned as it has in other cases that "[t]he judge is in sentencing authority and the jury's role is merely advisory. Thus, Caldwell, which addressed the designation of the jury acting as a sentence is clearly distinguishable." Id. at 839 (original emphasis). However, when called upon to decide whether a different constitutional error was harmless, the court relied in large measure upon the effect of the jury's death verdict, finding that because of that verdict "the trial judge's actual [sentencing] discretion here was relatively narrow." Id. at 846. "A jury recommendation of death, reflecting the conscience of the community, is entitled to great weight." Id. The court thus appears to be ruling in two opposite ways in the same case, depending upon the result to be achieved. It may indicate also the Florida court's strict reading of Caldwell to limit it to sentencing schemes where the jury's verdict is absolutely final, and thus inapplicable to a scheme where the jury does not have that role, regardless of how much weight the jury's verdict is given. That reading of Caldwell would be inconsistent with observations made in Baldwin v. Alabama, 472 U.S. 372 (1985). The Baldwin Court noted an error in the jury proceedings could invalidate the death sentence even where the judge is the sentence "if the judge actually were required to consider the jury's sentence" . . . and if the judge were obligated to accord some deference to it." Id. at 382 (citing Poffitt v. Florida, 428 U.S. 242 (1976)).

348. Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983).
351. Id. at 604 (plurality opinion).

1989]

Death Penalty

two ways during the survey period. First, the Florida Supreme Court continued the process of reexamining prior sentences in the wake of Hitchcock v. Dugger, where it was held that a procedure followed in a number of early Florida cases improperly restricted the consideration of mitigating factors to only those listed in the statute. Second, the Florida court had to confront the question of whether a defendant, for personal reasons, may waive mitigation, and ask for the death sentence to be imposed.

1. Hitchcock — The More or Less Harmless Defect

A unanimous Court ruled in Hitchcock that "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances" and thus the death sentence was imposed in violation of Lockett and its progeny. The significance of the Hitchcock ruling was that the procedure deemed unconstitutional was also the procedure followed in most early Florida cases, for it was based upon the then-effective statute and the case law and jury instructions based on that statute. Accordingly, a relatively large number of early cases contained the Hitchcock error in either the jury instructions, the judge's sentencing determination, or both. Until Hitchcock the Florida Supreme Court had consistently upheld its procedure against the constitutional challenge, and as after

353. Id. at 1824 (citing Lockett; Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982)).
354. The statute in effect until 1979 referred to the mitigating circumstances "as enumerated in subsection (6)" in defining the process by which the jury and judge were to determine the appropriate sentence. Fla. Stat. §§ 921.141(2)-(3) (1977). It thus directed consideration of only the statutory mitigating factors. The language was removed from the statute in the next legislative session followed the Lockett decision, effective July 5, 1979. 1979 Fla. Laws 79-353. See also Hitchcock v. State, 107 S. Ct. at 1823 noting the change in the statute, and that "other Florida judges conducting sentencing proceedings during roughly the same period believed that Florida law precluded consideration of non-statutory mitigating circumstances.
it would not “countenance the denigration of the jury's role.” The long term effect of this controversy may be more fundamental than simply the Caldwell issue. It caused two members of the court to urge that the Tedder rule, governing the standard for overriding a jury's life verdict since 1975, must be abandoned. Although the majority has not accepted that view, the long term effects of this remarkable exchange between the state and federal courts will have to await future analysis.

D. Mitigation — Can Its Exclusion be Harmless or Waived?

In 1978 the Court issued its opinion in Lockett v. Ohio, establishing definitively that the eighth amendment requires that “the sentencer . . . not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” That now well settled principle was applied in a unique way: by applying both views in the same case. In Grossman v. State, 525 So.2d 833 (Fla. 1988) the court rejected the Caldwell claim. It reasoned as it has in other cases that “[t]he judge is the sentencing authority and the jury's role is merely advisory. Thus, Caldwell, which addressed the denigration of the jury as acting as a sentencer is clearly distinguishable.” Id. at 839 (original emphasis). However, when called upon to decide whether a different constitutional error was harmless, the court relied in large measure upon the effect of the jury's death verdict, finding that because of that verdict “the trial judge's actual sentencing discretion here was relatively narrow.” Id. at 846. “A jury recommendation of death, reflecting the conscience of the community, is entitled to great weight.” Id. The court thus appears to be ruling in two opposite ways in the same case, depending upon the result to be achieved. It may indicate also the Florida court's strict reading of Caldwell to limit it to sentencing schemes where the jury's verdict is absolutely final, and thus inapplicable to a scheme where the jury does not have that role, regardless of how much weight the jury's verdict is given. That reading of Caldwell would be inconsistent with observations made in Baldwin v. Alabama, 472 U.S. 372 (1985). The Baldwin Court noted an error in the jury proceedings could invalidate the death sentence even where the judge is the sentencing “if the judge actually were required to consider the jury's sentence. . . . and if the judge were obligated to accord some deference to it.” Id. at 382 (citing Proffitt v. Florida, 428 U.S. 242 (1976)).

348. Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983).
351. Id. at 604 (plurality opinion).

1989]

Barnard: Death Penalty

Death Penalty

99 ways during the survey period. First, the Florida Supreme Court continued the process of reexamining prior sentences in the wake of Hitchcock v. Dugger where it was held that a procedure followed in a number of early Florida cases improperly restricted the consideration of mitigating factors to only those listed in the statute. Second, the Florida court had to confront the question of whether a defendant, for personal reasons, may waive mitigation, and ask for the death sentence to be imposed.

1. Hitchcock — The More or Less Harmless Defect

A unanimous Court ruled in Hitchcock that “the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances” and thus the death sentence was imposed in violation of Lockett and its progeny. The significance of the Hitchcock ruling is that the procedure deemed unconstitutional was also the procedure followed in most early Florida cases, for it was based upon the then-effective statute and the case law and jury instructions based on that statute. Accordingly, a relatively large number of early cases contained the Hitchcock error in either the jury instructions, the judge's sentencing determination, or both. Until Hitchcock the Florida Supreme Court had consistently upheld its procedure against the constitutional challenge, and thus after

353. Id. at 1824 (citing Lockett; Skipper v. South Carolina, 476 U.S. 1 (1986); Edings v. Oklahoma, 455 U.S. 104 (1982)).
354. The statute in effect until 1979 referred to the mitigating circumstances “as stated in subsection (6)” in defining the process by which the jury and judge were to determine the appropriate sentence. Fla. Stat. §§ 921.141(2)-(3) (1977). It thus directed consideration of only the statutory mitigating factors. The language was reworded from the statute in the next legislative session followed the Lockett decision, effective July 5, 1979, 1979 Fla. Laws 79-135. See also Hitchcock, 107 S. Ct. at 1823 (noting the change in the statute, and that “other Florida judges conducting sentencing proceedings during roughly the same period believed that Florida law precluded consideration of non-statutory mitigating circumstances”).
Hitchcock, it was required to reexamine those earlier decisions.\[^{86}\]

In its Hitchcock decisions during the survey period the court rejected finding error in the current standard jury instructions;\[^{87}\] consistently found error in earlier cases;\[^{88}\] but was more likely to find the error to be harmless than it was immediately after Hitchcock;\[^{89}\] extended the time period affected by the unconstitutional procedure;\[^{90}\] and granted relief in the case that arguably had given rise to much of the confusion leading to the constitutional error in the first place.\[^{91}\]

Different aspects of the Hitchcock error were reviewed during the survey period. In Foster, for example, the jury instructions were the same as those condemned in Hitchcock, and the trial judge restricted his own consideration of mitigating factors to the statutory listing. The court relied upon the judge's restriction: "The fact that the judge, the ultimate sentencing authority, did not consider nonstatutory mitigating evidence settles the issue because there was some nonstatutory mitigating evidence that the court could have considered.\[^{92}\] However, in

\[^{356}\] In the eight months between the announcement of the Hitchcock decision and the start of the survey period under review here, the court granted relief, ordering resentencing in five cases. Riley v. Wainwright, 517 So. 2d 656 (Fla. 1988); Morgan v. State, 515 So. 2d 975 (Fla. 1987); Thompson v. State, 515 So. 2d 173 (Fla. 1987); Downs v. Duggar, 514 So. 2d 1069 (Fla. 1987); McClave v. State, 510 So. 2d 874 (Fla. 1987). It denied relief in only two cases where error was found. Dempis v. Duggar, 513 So. 2d 659 (Fla. 1987).

\[^{357}\] Preston v. State, 528 So. 2d 896, 899 (Fla. 1988) ("The jury was properly instructed concerning nonstatutory mitigating evidence"); Johnson v. Duggar, 520 So. 2d 563, 566 (Fla. 1988) ("It is undisputed that the judge instructed the jury properly under Hitchcock"); Johnson v. Duggar, 523 So. 2d 161, 162 (Fla. 1988) (judgment was altered to Lockett prior to sentencing); cf. Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988) ("Florida standard jury instruction complies with . . . Lockett").

\[^{358}\] Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988); Mikenas v. Duggar, 519 So. 2d 601, 602 (Fla. 1988); Foster v. State, 518 So. 2d 901, 902 (Fla. 1988); cert. denied 108 S.Ct. 2914(1988).

\[^{359}\] Clark v. State, 533 So. 2d 1144, 1146 (Fla. 1988); Jackson v. State, 529 So. 2d 1081, 1082 (Fla. 1988); Smith v. Duggar, 529 So. 2d 679, 681-82 (Fla. 1988); Hall v. Duggar, 531 So. 2d 76, 77 (Fla. 1988); White v. State, 523 So. 2d 140 (Fla. 1988); Tafuro v. Duggar, 520 So. 2d 287, 289 (Fla. 1988); Ford v. State, 522 So. 2d 345, 346-47 (Fla. 1988); Booker v. Duggar, 520 So. 2d 246, 249 (Fla. 1988).

\[^{360}\] Zeigler v. Duggar, 524 So. 2d 419 (Fla. 1988); Combs v. State, 525 So. 2d 853 (Fla. 1988).

\[^{361}\] Cooper v. Duggar, 526 So. 2d 900 (Fla. 1988).

\[^{362}\] Foster, 518 So. 2d 902. The state had not argued harmless error in Foster's

\[^{363}\] The court reasoned that it could not "say beyond a reasonable doubt that the jury knew that nonstatutory mitigating evidence could be considered, it would not have recommended life imprisonment." Id.

\[^{364}\] Id. at 344. The court did not "pass judgment" on whether the error was harmless, since the state declined to argue that point. Id. at 344 n.4.

\[^{365}\] 359 So. 2d 601 (Fla. 1988).

\[^{366}\] Id. at 602.

\[^{367}\] Id. The court reasoned that it could not "say beyond a reasonable doubt that the jury knew that nonstatutory mitigating evidence could be considered, it would not have recommended life imprisonment." Id.

\[^{368}\] 522 So. 2d 341 (Fla. 1988).

\[^{369}\] Id. at 344. The court did not "pass judgment" on whether the error was harmless, since the state declined to argue that point. Id. at 344 n.4.

\[^{370}\] 526 So. 2d 900 (Fla. 1988).

\[^{371}\] Cooper v. State, 336 So. 2d 1133 (Fla. 1976).

\[^{372}\] Cooper v. State, 437 So. 2d 1070 (Fla. 1983).

Hitchcock it was required to reexamine those earlier decisions. In its Hitchcock decisions during the survey period the court rejected finding error in the current standard jury instructions; consistently found error in earlier cases, but was more likely to find the error to be harmless than it was immediately after Hitchcock. The time period affected by the unconstitutional procedure, and granted relief in the case that arguably had given rise to much of the confusion leading to the constitutional error in the first place.

Different aspects of the Hitchcock error were reviewed during the survey period. In Foster, for example, the jury instructions were the same as those condemned in Hitchcock, and the trial judge restricted his own consideration of mitigating factors to the statutory listing. The court relied upon the judge's restriction: "The fact that the judge, the ultimate sentencing authority, did not consider nonstatutory mitigating evidence settles the issue because there was some nonstatutory mitigating evidence that the court could have considered." However, in

356. In the eight months between the announcement of the Hitchcock decision and the start of the survey period under review here, the court granted relief, ordering resentencing in five cases. Riley v. Wainwright, 517 So. 2d 656 (Fla. 1988); Thompson v. State, 515 So. 2d 173 (Fla. 1988); Downs v. Dagger, 514 So. 2d 1069 (Fla. 1987); McCrate v. State, 510 So. 2d 874 (Fla. 1987). It denied relief in only two cases where error was found. Dempsey v. Dagger, 513 So. 2d 659 (Fla. 1987).

357. Preston v. State, 528 So. 2d 896, 899 (Fla. 1988) ("The jury was properly instructed concerning nonstatutory mitigating evidence"); Johnson v. Dugger, 520 So. 2d 565, 566 (Fla. 1988) ("It is undisputed that the judge instructed the jury properly under Hitchcock"); Johnson v. Dugger, 523 So. 2d 161, 162 (Fla. 1988) (judge was alerted to Lockett prior to sentencing); cf. Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988) ("Florida standard jury instruction complies with . . . Lockett").


359. Clark v. State, 533 So. 2d 1144, 1146 (Fla. 1988); Jackson v. State, 529 So. 2d 1081, 1082 (Fla. 1988); Smith v. Dugger, 529 So. 2d 679, 681-82 (Fla. 1988); Hall v. Dugger, 531 So. 2d 76, 77 (Fla. 1988); White v. State, 523 So. 2d 140 (Fla. 1988); Tafero v. Dugger, 520 So. 2d 287, 289 (Fla. 1988); Ford v. State, 522 So. 2d 345, 346-47 (Fla. 1988); Booker v. Dugger, 520 So. 2d 246, 249 (Fla. 1988).

360. Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988); Combs v. State, 525 So. 2d 853 (Fla. 1988).

361. Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988).

362. Foster, 518 So. 2d 902. The state had not argued harmless error in Foster's case, but instead contended that the claim was procedurally barred. As the court noted, it had held that the Hitchcock decision changed Florida law so as not to be subject to procedural default. Id. at 902 n.3 (citing Riley v. Wainwright, 517 So. 2d 656 (Fla. 1988)).

Mikenas v. State was restriction jury instruction alone that required relief. Mikenas had been sentenced originally prior to Lockett and thus his jury was instructed in the same manner as condemned in Hitchcock. He was resentenced before a new judge (without a jury) who was aware of the requirements of Lockett. Thus, the judge's sentencing was not erroneous. Relief was granted because the original jury was limited in considering mitigation. The court declined to find harmless error because "[a]ll of the aggravating circumstances were directly related to the murder itself" and not related to Mikenas's character except for the fact that he was on parole, and the jury verdict had been reached by only a seven to five margin. The court rejected the state's argument in Waterhouse v. State that mitigation was not limited because the defense attorney presented evidence of nonstatutory mitigating factors: "It is not what the lawyer thought could be presented that is important. Rather, what is important is what the jury was permitted to consider in making its recommendation to the court." One case is unique not because of its holding, but because of its history. The court granted relief in Cooper v. Dugger, but only after turning away Mr. Cooper's claim on direct appeal and post-conviction. The original opinion on direct appeal could be said to underlie the constitutional error finally identified eleven years later in Hitchcock. It is in that opinion where the Florida Supreme Court prohibited the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute. It was not until 1978, after Lockett, that the Florida court recognized the need for full consideration of mitigating factors.
ing factors. Even after Lockett, Mr. Cooper was denied relief on his claim that he was unconstitutionally restricted in the presentation of mitigating factors. It was only after Hitchcock that he was granted relief and a new sentencing hearing ordered.

The breadth of Hitchcock's effect on Florida law is shown by its application to two cases where relief was granted when the trials had occurred after Lockett and after the Florida Supreme Court's decision in Songer "clarifying" or harmonizing its Lockett decision with Lockett. The question is not the constitutional error but rather the reviewability of the error. In cases occurring prior to Lockett it could be said that the lack of clarity in constitutional principles, as evidenced by Cooper, would excuse a lawyer's failure to object in the trial court to limiting jury instructions or exclusion of evidence. However, for cases tried after Lockett and Songer, there would be no excuse for the failure to object, and thus the procedural default rule would bar subsequent review of the error. The Florida Supreme Court rejected that default bar. In Combs v. State, relief was granted even though he had been tried almost two years after the Lockett opinion was issued and after the Florida statute was amended to accommodate Lockett. In granting relief the court reaffirmed that "Hitchcock represents a sufficient change in the law to defeat the argument that Combs should be denied relief on the basis of a procedural default." The court in essence was recognizing that even after Lockett and Songer, Florida law did not fully recognized the principles explained in Hitchcock. The rejection of the court's prior law also explains why relief was granted in Zeigler v. Dugger, in a trial held after Lockett and Songer and also where the issue had been twice rejected by the Florida Court on the basis of

373. In his post-conviction action the court found that Lockett did not change Florida law and thus found a procedural default for the failure to raise the precise issue regarding nonstatutory mitigating circumstances on direct appeal. Cooper, 437 So. 2d at 1072.
374. 525 So. 2d 853 (Fla. 1988).
375. Combs was convicted in April, 1980. Id. at 854. Lockett was announced in July 1978. The Florida statute was amended effective July 5, 1979, Fla. Laws 79-353, to remove the statutory terms reflecting limits on considering mitigation.
376. Combs, 525 So. 2d at 855.
377. In Riley v. Wainwright, 517 So. 2d 656, 659-60 (Fla. 1988), the court explained the law change and acknowledged that even if Riley had presented the issue on direct appeal, relief would now have to be granted because Hitchcock plainly rejected even the post-Lockett/Songer analysis of the issue by the Florida Supreme Court.
ing factors. Even after Lockett, Mr. Cooper was denied relief on his claim that he was unconstitutionally restricted in the presentation of mitigating factors. It was only after Hitchcock that he was granted relief and a new sentencing hearing ordered.

The breadth of Hitchcock’s effect on Florida law is shown by its application to two cases where relief was granted when the trials had occurred after Lockett and after the Florida Supreme Court’s decision in Songer “clarifying” or harmonizing its Cooper decision with Lockett. The question is not the constitutional error but rather the reviewability of the error. In cases occurring prior to Lockett it could be said that the lack of clarity in constitutional principles, as evidenced by Cooper, would excuse a lawyer’s failure to object in the trial court to limiting jury instructions or exclusion of evidence. However, for cases tried after Lockett and Songer, there would be no excuse for the failure to object, and thus the procedural default rule would bar subsequent review of the error. The Florida Supreme Court rejected that default bar. In Combs v. State, relief was granted even though he had been tried almost two years after the Lockett opinion was issued and after the Florida statute was amended to accommodate Lockett. In granting relief the court reaffirmed that “Hitchcock represents a sufficient change in the law to defeat the argument that Combs should be denied relief on the basis of a procedural default.” The court in essence was recognizing that even after Lockett Songer, Florida law did not fully recognize the principles explained in Hitchcock. The rejection of the court’s prior law also explains why relief was granted in Zeigler v. Dugger in a trial held after Lockett and Songer and also where the issue had been twice rejected by the Florida court on the basis of procedural default. Hitchcock seemingly precludes any finding of a procedural bar so that whenever the error occurs, it will be reviewed.

There is one further effect of Hitchcock. It caused the court to apply harmless error reasoning to jury sentencing proceedings — something it had not previously done until faced with a large number of cases with constitutional error. An example of the court’s prior reasoning can be seen in Floyd v. State. The sentencing judge, finding no evidence of mitigating circumstances, did not instruct the jury on any mitigating factors. The Florida Supreme Court approved the judge’s findings of aggravating factors and no mitigating factors, but nonetheless reversed for the failure to instruct on mitigating factors: “Under our capital sentencing statute, a defendant has the right to an advisory opinion from a jury.” The instructions “may have precluded” the jury from considering “relevant factors” and thus “Floyd was denied his right to an advisory opinion.” The court was not concerned with harmless error, but rather only with the right to a fair jury sentencing determination.

When the court was faced with Hitchcock error, it readily began to apply harmless error reasoning. In Ford v. State for example, the court held that even though constitutional error occurred, it was harmless because there were five aggravating factors and in mitigation there was “only” evidence that Ford had supported his family, suffered from dyslexia which caused depression that changed his lifestyle, and that he could be rehabilitated. The dissent points out that the majority overlooked mitigation and had not reviewed the entire record. Re-

373. In his post-conviction action the court found that Lockett did not change Florida law and thus found a procedural default for the failure to raise the precise issue regarding nonstatutory mitigating circumstances on direct appeal. Cooper, 437 So. 2d at 1972.
374. 525 So. 2d 853 (Fla. 1988).
375. Combs was convicted in April, 1980. Id. at 854. Lockett was announced in July 1978. The Florida statute was amended effective July 5, 1979, Fla. Laws 79-135, to remove the statutory terms reflecting limits on considering mitigation.
376. Combs, 525 So. 2d at 855.
377. In Riley v. Wainwright, 517 So. 2d 656, 659-60 (Fla. 1988), the court explained the law change and acknowledged that even if Riley had presented the issue on direct appeal, relief would now have to be granted because Hitchcock plainly rejected over the post-Lockett/Songer analysis of the issue by the Florida Supreme Court.
378. 524 So. 2d 419 (Fla. 1988).
The court did not place limits on this “right.” Its holding “does not mean that courts of this state can administer the death penalty by default,” but upheld the practice in Hamblen because “[t]he judge did not merely rubber-stamp the state’s position.”

The question is not only a moral question but one of policy. Should executions be used as a means by which individuals commit suicide? Although the Florida court saw the question as being one of controlling personal destiny and took comfort because the judge independently determined the sentence, society also has interests at stake. Society has an interest in accurate sentencing decisions and a penalty that is not capriciously applied. Although the court can say there is no “death penalty by default,” if there is no information presented regarding the defendant’s background or character, the sentencing decision in reality is being reached by default. The Florida Supreme Court majority noted this problem, but satisfied itself that if the defendant did not want to cooperate, such mitigating evidence would not be divulged.

There are, of course, other sources of character evidence aside from the defendant.

There is simply no method to accurately impose and administer the death penalty absent accurate and complete information. Hamblen’s appellate counsel and the dissenting justices urged that independent “public counsel” be appointed in these situations so as to preserve both the right to self-representation and the need for reliable and accurate sentencing information.

E. Racial Bias — A Special Danger

Issues of racial bias are not unique to capital cases, but it has been recognized that because of the unique discretionary nature of the decision to impose death as punishment, and its irrevocability, there must be reversed because the judge refused a request to inquire into the defendant’s competency. Prigden v. State, 531 So. 2d 951 (Fla. 1988).

397. Cf. Gardner v. Florida, 430 U.S. 347, 357-8 (1977) (“From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”). 398. Hamblen, 527 So. 2d at 804.

399. Id. at 809 (Barkett, J., joined by Ehrlich, J., dissenting).
Barnard: Death Penalty

The court did not place limits on this "right." Its holding "does not mean that courts of this state can administer the death penalty by default," but upheld the practice in Hamblen because "[t]he judge did not merely rubber-stamp the state's position." 396

The question is not only a moral question but one of policy. Should executions be used as a means by which individuals commit suicide? Although the Florida court saw the question as being one of controlling personal destiny and took comfort because the judge independently determined the sentence, society also has interests at stake. Society has an interest in accurate sentencing decisions and a penalty that is not capriciously applied. 398 Although the court can say there is no "death penalty by default," if there is no information presented regarding the defendant's background or character, the sentencing decision in reality is being reached by default. The Florida Supreme Court majority noted this problem, but satisfied itself that if the defendant did not want to cooperate, such mitigating evidence would not be divulged. 399 There are, of course, other sources of character evidence aside from the defendant. There is simply no method to accurately impose and administer the death penalty absent accurate and complete information. Hamblen's appellate counsel and the dissenting justices urged that independent "public counsel" be appointed in these situations so as to preserve both the right to self-representation and the need for reliable and accurate sentencing information. 400

E. Racial Bias — A Special Danger

Issues of racial bias are not unique to capital cases, but it has been recognized that because of the unique discretionary nature of the decision to impose death as punishment, and its irreversibility, there must

...
be heightened scrutiny to avoid its influence.\textsuperscript{409}

The Florida Supreme Court adopted that scrutiny and vacated for resentencing in Robinson v. State,\textsuperscript{410} finding that the prosecutor had injected evidence into the penalty trial that was "calculated to arouse racial bias."\textsuperscript{411} Robinson, a black man, was being tried by an all-white jury for the murder of a white woman. During cross-examination of Robinson's medical expert, the prosecutor asked a series of questions about Robinson's racial prejudice and about the race of prior victims with whom he had sexual encounters.\textsuperscript{412} The court saw the prosecutor's questioning as "a deliberate attempt to insinuate that appellant had a habit of preying on white women and thus constituted an impermissible appeal to bias and prejudice."\textsuperscript{413}

The court found the risk that racial prejudice may have influenced the sentencing decision was unacceptable, especially in the absence of a cautionary instruction. The court "emphasize[d] that the risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital sentencing proceeding."\textsuperscript{414} The capital sentencing decision is unique because it is discretionary and not simply a factfinding function. As the court recognized, this discretion provides "a greater opportunity for latent racial bias to affect [the jury's] judgment."\textsuperscript{415}

F. Victim-Impact Statements — Diverting the Decision

Florida law provides that in a homicide case the "next of kin of the victim" may prevent a statement (in person or in writing) to the sentencing judge. That statement may include "the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings . . . resulting from the crime."\textsuperscript{416} The question is whether the application of that provision to capital sentencing proceedings meets the constitutional demand for sentencing discretion to be narrowly guided so as to avoid arbitrariness.

The Supreme Court of the United States had faced this question in Booth v. Maryland.\textsuperscript{417} It held that because such victim impact evidence was unrelated to the question of whether a particular defendant should be put to death, its admission would violate the Eighth Amendment by creating the "unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."\textsuperscript{418}

The Florida Supreme Court applied Booth to the Florida victim-impact provisions in Grossman v. State\textsuperscript{419} and declared them "invalid insofar as they permit the introduction of victim impact evidence as an aggravating factor in death sentencing."\textsuperscript{420} The court further considered the effect of the erroneous admission of victim impact evidence in Florida cases and in doing so reviewed the analysis it would undertake in cases where it had been admitted. Such error is subject to procedural default if not properly objected to in the lower court.\textsuperscript{421} The court further held that Booth error is "subject to harmless error analysis on a case-by-case basis."\textsuperscript{422} Of significance to the court in finding the error harmless in Grossman, was that only the judge, not the jury, heard the victim impact evidence. Since the jury recommenced the death sentence and the judge is required to give great weight to that verdict, "the trial judge's actual discretion here was relatively narrow."\textsuperscript{423} The sentencing judge had found four aggravating factors and nothing in mitigation. The court was thus "persuaded beyond a reasonable doubt

\textsuperscript{409} See Turner v. Murray, 476 U.S. 28, 35 (1986) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected"). The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.

\textsuperscript{410} Id. at 2533. The Court reasoned that such evidence was "wholly unrelated to the blameworthiness of a particular defendant," id. at 2534, and could "inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant," id. at 2536.

\textsuperscript{411} Id. at 2529 (Fla. 1988).

\textsuperscript{412} See id. at 2536.

\textsuperscript{413} Id. at 842. The court based its ruling in part also on the preclusion of nonstatutory aggravating factors under Florida law. Id. at 846.

\textsuperscript{414} Id. at 846. The court also apparently was concerned that if Booth error was deemed to be per se reversible error "all death penalties in Florida are potentially subject to automatic reversal" because most presentence investigation (PSI) reports include victim impact information. Id. at 842 n.6. The court did not make any distinction between a PSI and a victim impact statement — both appear to be the same for purposes of analysis.

\textsuperscript{415} See supra note 412.
be heightened scrutiny to avoid its influence. The Florida Supreme Court adopted that scrutiny and vacated for resentencing in Robinson v. State, finding that the prosecutor had injected evidence into the penalty trial that was "calculated to arouse racial bias." Robinson, a black man, was being tried by an all-white jury for the murder of a white woman. During cross-examination of Robinson's medical expert, the prosecutor asked a series of questions about Robinson's racial prejudice and about the race of prior victims with whom he had sexual encounters. The court saw the prosecutor's questioning as a "deliberate attempt to insinuate that appellant had a habit of preying on white women and thus constituted an impermissible appeal to bias and prejudice." The court found the risk that racial prejudice may have influenced the sentencing decision was unacceptable, especially in the absence of a cautionary instruction. The court "emphasize[d] that the risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital sentencing proceeding." The capital sentencing decision is unique because it is discretionary and not simply a factfinding function. As the court recognized, such discretion provides a "greater opportunity for latent racial bias to affect [the jury's] judgment." 

F. Victim-Impact Statements — Diverting the Decision

Florida law provides that in a homicide case the "next of kin of the victim" may prevent a statement (in person or in writing) to the sentencing judge. That statement may include "the facts of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings... resulting from the crime." The question is whether the application of that provision to capital sentencing proceedings meets the constitutional demand for sentencing discretion to be narrowly guided so as to avoid arbitrariness. The Supreme Court of the United States had faced this question in Booth v. Maryland. It held that because such victim impact evidence was unrelated to the question of whether a particular defendant should be put to death, its admission would violate the eighth amendment by creating "the unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." The Florida Supreme Court applied Booth to the Florida victim impact provisions in Grossman v. State and declared them "invalid insofar as they permit the introduction of victim impact evidence as an aggravating factor in death sentencing." The court further considered the effect of the erroneous admission of victim impact evidence in Florida cases and in doing so reviewed the analysis it would undertake in cases where it had been admitted. Such error is subject to procedural default if not properly objected to in the lower court. The court further held that Booth error is subject to harmless error analysis on a case-by-case basis. Of significance to the court in finding the error harmless in Grossman, was that only the judge, not the jury, heard the victim impact evidence. Since the jury recommended the death sentence and the judge is required to give great weight to that verdict, "the trial judge's actual discretion here was relatively narrow." The sentencing judge had found four aggravating factors and nothing in mitigation. The court was thus "persuaded beyond a reasonable doubt..."
that the death penalty would have been imposed absent the impermissible evidence.418

The Booth holding likely will be applied beyond specific victim impact statements to other forms of victim impact evidence such as general character evidence419 and presentence investigation reports.420 Also, under the reasoning of the court in Grossman, if victim impact evidence is introduced before the jury, not just the judge, a finding of reversible error would be more likely.

IV. Appellate Review

A. Jury Override — Tedder Lives

Where a jury votes that a life sentence be imposed, an override of that verdict by imposition of a death sentence will be sustained only if it meets the standards of Tedder v. State.421 The so-called Tedder rule is easy to state, but the terms used in applying it vary in individual cases. The rule is that a jury override will be sustained only if “the facts suggesting a sentence of death . . . are so clear and convincing that virtually no reasonable person could differ.”422 This rule is strictly applied by the Florida Supreme Court. During the survey period, despite the first serious suggestion that the Tedder standard be abandoned,423 of the ten decisions reviewing jury override cases only one affirmed the death sentence,424 one was reversed for a new trial,425 and the remaining eight decisions reduced the sentences to life

415. Id.
416. The Supreme Court has granted certiorari to further review the Booth holding. South Carolina v. Gathers, 109 S. Ct. 218 (1988) (Order granting certiorari). The Gathers case involves evidence and argument that the victim was religious and a voter.
417. In State v. State, 520 So. 2d 278 (Fla. 1988), the court answered a claim that the defense lawyer was ineffective for allowing a PSI to be used that contained victim impact evidence. The court said Booth was distinguishable, id. at 281 n.4, and also that counsel had successfully limited the use of the PSI to only mitigating factors, id. at 281.
418. 322 So. 2d 908 (Fla. 1975).
419. Id. at 910.
420. See supra note 349 and accompanying text, discussing the opinions by two justices that the Tedder rule was no longer constitutional.
421. Torren-Arboledo v. State, 524 So. 2d 403 (Fla. 1988).
423. Spivey v. State, 529 So. 2d 1088 (Fla. 1988); Harmon v. State, 527 So. 2d 182 (Fla. 1988); Brown v. State, 526 So. 2d 903 (Fla. 1988); Callier v. State, 523 So. 2d 155 (Fla. 1988); Perry v. State, 522 So. 2d 817 (Fla. 1988); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Burch v. State, 522 So. 2d 810 (Fla. 1988); Maxson v. State, 516 So. 2d 206 (Fla. 1987).
424. Torren-Arboledo, 524 So. 2d at 413.
425. Id.
426. 527 So. 2d 182 (Fla. 1988).
427. Id. at 189.
428. Id.
429. Spivey v. State, 529 So. 2d 1088, 1095 (Fla. 1988) (“jury could have con-
that the death penalty would have been imposed absent the impermissible evidence."

The Booth holding likely will be applied beyond specific victim impact statements to other forms of victim impact evidence such as general character evidence and presence investigation reports. Also, under the reasoning of the court in Grossman, if victim impact evidence is introduced before the jury, not just the judge, a finding of reversible error would be more likely.

IV. Appellate Review

A. Jury Override — Tedder Lives

Where a jury votes that a life sentence be imposed, an override of that verdict by imposition of a death sentence will be sustained only if it meets the standards of Tedder v. State. The so-called Tedder rule is easy to state, but the terms used in applying it vary in individual cases. The rule is that a jury override will be sustained only if "the facts suggesting a sentence of death . . . are so clear and convincing that virtually no reasonable person could differ." This rule is strictly applied by the Florida Supreme Court. During the survey period, despite the first serious suggestion that the Tedder standard be abandoned, of the ten decisions reviewing jury override cases only one affirmed the death sentence, one was reversed for a new trial, and the remaining eight decisions reduced the sentences to life.

415. Id.
416. The Supreme Court has granted certiorari to further review the Booth holding. South Carolina v. Gathers, 109 S. Ct. 218 (1988) (Order granting certiorari). The Gathers case involves evidence and argument that the victim was religious and a voter. A summary of the issues is set out at 57 U.S.L.W. 3248-49.
417. In Stano v. State, 520 So. 2d 278 ( Fla. 1988), the court answered a claim that the defense lawyer was ineffective for allowing a PSI to be used that contained victim impact evidence. The court said Booth was distinguishable, id. at 281 n.4, and also that counsel had successfully limited the use of the PSI to only mitigating factors, id. at 281.
418. 322 So. 2d 908 (Fla. 1975).
419. Id. at 910.
420. See supra note 349 and accompanying text, discussing the opinions by two justices that the Tedder rule was no longer constitutional.
421. Torrez-Argumedo v. State, 524 So. 2d 403 (Fla. 1988).
422. Merritt v. State, 523 So. 2d 373 (Fla. 1988).

imprisonment.

In the decision upholding the death sentence imposed after the jury's life verdict, the court reaffirmed that "when there are valid mitigating factors discernible from the record which reasonable people could conclude outweigh aggravating factors . . . an override will not be upheld." It nevertheless upheld the override because the expert evidence in mitigation that the defendant was "very intelligent and an excellent candidate for rehabilitation" was not believed by the court to be of "such weight that reasonable people could conclude that they outweigh the aggravating factors proven." The appellate court thus weighed the mitigating factors differently than the jury and apparently held that the jury was not composed of reasonable people — it did not specify whether the jury had been somehow misled or failed to consider relevant evidence.

In reviewing the override cases as a whole, however, a pattern does emerge. It seems that general character evidence about the defendant is not seen by the court as providing a "reasonable basis" for a jury's life verdict. In the case discussed above, the mitigation was general evidence of the defendant's high intelligence — as described by the court, it did not relate to circumstances of the crime nor to the defendant's background. The court said the same thing in Harmon v. State, where although it did reduce the sentence to life, it commented that the general evidence of good character (good father and son, model prisoner, religious, intelligent) would not be, standing alone, a reasonable basis for the jury's verdict. What was found significant in Harmon was the degree of participation and disparate sentencing treatment of the codefendant.

Other cases also relied on codefendant disparity to support the jury's verdict and thus reduce the death sentence to life imprisonment. Among other factors relied upon to reduce overriding to life,
the court found substantial use of drugs and alcohol on the day of the murder, 436 mental or emotional disability, 437 and background of abuse and poverty 438 to provide reasonable bases for jury life verdicts. The common theme in these factors is that they reduce the defendant's moral culpability for the offense (or seek equity in treatment with others who were also culpable). It is the type of evidence "that lessens the defendant's culpability of the crime" because it bears "strongly on the degree to which the defendant was morally responsible for her crime." 439 Evidence concerning the degree of the defendant's participation in the crime, or his age and emotional history, thus bear directly on the fundamental justice of imposing capital punishment. 440

The Florida court may believe, based upon its comments in Harmon and its actions in Torres-Arboledo, that general evidence of good character cannot provide a reasonable basis for a life verdict because, as a matter of law, it does not reduce moral culpability. However, it cannot say that good character evidence is not legitimate mitigation. Mitigation involves factors that "might serve as a basis for a sentence less than death." 441 Evidence of good character can bear upon the determination of whether a death sentence is required, for it can serve to show the potential for peaceably living in prison if sentenced to life, to show the crime as being an isolated out-of-character act, and even to

cluded [codefendants] were the principle actors . . . and that it would be a miscarriage of justice to impose death on Spivey whose role was less critical" while codefendants received lesser sentences); Callella v. State, 523 So. 2d 158, 160 (Fla. 1988) ("dispensable treatment of an equally culpable accomplice can serve as a basis for a jury's recommendation for life"); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988) (persons whose argument with victim precipitated the homicide were never charged).

430. Holsworth v. State, 522 So. 2d 348, 355 (Fla. 1988) ("May have been high on PCP and alcohol"); Masterman v. State, 516 So. 2d 256, 258 (Fla. 1988) ("consumed substantial amounts of drugs and alcohol on the day of the murder").


432. Brown, 526 So. 2d at 908 (improperly armed, abusive parents, lack of education, "particularly significant . . . where the defendant . . . was a borderline defective eighteen-year-old functioning emotionally as a disturbed child"); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988) ("family history of physical and drug abuse"); Holsworth v. State, 522 So. 2d 348 (Fla. 1988) ("physical abuse appellant suffered as a child").


434. Id. at 13-14 (Powell, J., concurring).

435. Id. at 13-14 (Powell, J., concurring).

436. Brown, 526 So. 2d at 908.


440. Holsworth, 522 So. 2d at 354.

441. The wide swings taken by the court over the years regarding jury override cases were appropriately demonstrated by Justice Shaw's concurring opinion urging the need to abandon Tedder in Grossman v. State, 525 So. 2d 833 (Fla. 1988). "During 1986-1987, we affirmed on direct appeal three trial judge overrides in eleven of fifteen cases, sixty-nine percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent." Id. at 851 (Show, J., concurring).

Plainly, the operation of Tedder in an even-handed way will require conscientious adherence to its standards. An overview of jury override practice in Florida is provided elsewhere in its standards. An overview of jury override practice in Florida is provided elsewhere in its standards. An overview of jury override practice in Florida is provided elsewhere in its standards. An overview of jury override practice in Florida is provided elsewhere in its standards. An overview of jury override practice in Florida is provided elsewhere in its standards.
the court found substantial use of drugs and alcohol on the day of the murder, mental or emotional disability, and background of abuse and poverty to provide reasonable bases for jury life verdicts. The common theme in these factors is that they reduce the defendant's moral culpability for the offense (or seek equity in treatment with others who were also culpable). It is the type of evidence "that lessens the defendant's culpability of the crime" because it bears "strongly on the degree to which the defendant was morally responsible for her crime." Evidence concerning the degree of the defendant's participation in the crime, or his age and emotional history, thus bear directly on the fundamental justice of imposing capital punishment.

The Florida court may believe, based upon its comments in Harmon and its actions in Torres-Arboledo, that general evidence of good character cannot provide a reasonable basis for a life verdict because, as a matter of law, it does not reduce moral culpability. However, it cannot say that good character evidence is not legitimate mitigation. Mitigation involves factors that "might serve 'as a basis for a sentence less than death.'" Evidence of good character can bear upon the determination of whether a death sentence is required, for it can serve to show the potential for peacefully living in prison if sentenced to life, to show the crime as being an isolated out-of-character act, and even to

counteract the need for retribution. Plainly then, mitigating evidence must not be deemed "unreasonable" simply because it falls within the category of evidence and good character.

There are times when the court referred to such character evidence as a part of the reasonable basis for the jury's life verdict. The court recognized that "potential for rehabilitation constitutes a valid mitigating factor" and that the defendant was "kind, good to his family and helpful around the home," and "employment history and positive character traits as showing potential for rehabilitation and productivity within the prison system," as supporting jury life verdicts. The difficulty comes in trying to draw the line between a case like Torres-Arboledo where the evidence of the defendant's intelligence and potential for rehabilitation was deemed unreasonable and the cases where similar evidence was seen as supporting the reasonableness of the jury's life vote.

The application of the Tedder rule comes down to a subjective judgment by the Florida Supreme Court. The court rejected the argument that "the presence of any mitigating factor on which the jury might have relied bars an override of the jury's recommendation." At the same time it noted that "it takes more than a difference of opinion for a judge to override that [life] recommendation." Somewhere between no mitigation and some mitigation lies the point at which the jury's verdict is found to be unreasonable. To draw that line, the Florida Supreme Court must weigh the mitigating and aggravating factors on a case-by-case basis. Such a process, whether or not it adheres to what is said in Tedder, could result in inconsistent or even arbitrary result.
B. Proportionality — Comparing Cases More Often

During the survey period the Florida Supreme Court found six death sentences to be disproportionate—almost equal to the number it had reversed on such grounds in the prior fifteen years. This increase can only indicate a change in policy by that court, unless it is assumed by mere coincidence a large number of disproportionate sentences reached the court during the nine month survey period. A policy change by the members of the court is the more likely reason for the increased willingness to hold a death sentence to be improper even where the jury has recommended a death sentence. It could be a reaction to Caldwell, i.e., placing less reliance upon the jury, it could indicate increased awareness of mitigation after Hitchcock, or it could simply represent a philosophical change.

Regardless of the reasons for the change, the reasons for determining proportionality are clear. In Fitzpatrick v. State, the court vacated the death sentence, even though in a prior appeal it had affirmed the death sentence. The court explained that the death penalty is only intended to be imposed "for the most aggravated, the most indefensible of crimes." The court emphasized that it is the uniqueness of death as punishment, in its irrevocability and renunciation of all that is embodied in our concept of humanity. Thus, the court must maintain "substantive proportionality . . . to insure that the death penalty is administered evenhandedly." Even though the court left intact the finding of five aggravating factors, it found Fitzpatrick's death sentence to be disproportionate. "Fitzpatrick's actions were those of seriously emotionally disturbed man-child, not those of a cold-blooded, heartless killer." The court explained that in making this ruling, the court was not reweighing the aggravating and mitigating circumstances. Rather, the court's comparison with other death penalty cases led it to conclude that the punishment was not warranted in this case.

The comparison to other cases also led to the finding of disproportionality in Lloyd v. State, and Livingston v. State. In Lloyd the existence of one aggravating circumstance, killing during an attempted robbery, when balanced against the one mitigating factor, no significant criminal history, was held to be insufficient to justify death in comparison to prior decisions. Similarly, in Livingston the balance of two aggravating factors against two mitigating factors was not sufficient. Although the court hastened to explain in Fitzpatrick that it would not reweigh aggravating and mitigating factors, it did so in Livingston: "The record discloses several mitigating factors which effectively outweigh the remaining valid aggravating circumstances." The court concluded that the mitigating factors it found "counterbalance" the effects of the aggravating factors and thus the case "does not warrant the death penalty." In two other decisions the court struck all of the aggravating factors and concluded that death would be disproportionate.

Accordingly, during the survey period the court increasingly analyzed proportionality of death sentences in comparison with other cases, rather than deferring to the trial court and jury. The court has not stated its reasons for such increased proportionality analysis, and they can only be the subject of informed speculation. The opinion Profitt v. State appears to have been a turning point in the court's thinking because until that time findings of disproportionate sentences had been limited almost exclusively to so-called domestic cases. Profitt's case was not domestic, but instead involved the burglary of a home and

442. Twenty-seven cases were reviewed where the jury had recommended the death sentence and the judge imposed it. Six of these sentences were found to be disproportionate — a rate of more than twenty percent.

443. Prior to this time only seven death sentences had been reversed to life imprisonment in homicide cases where the jury had voted for death. Profitt v. State, 510 So. 2d 896 (Fla. 1987); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Caruthers v. State, 464 So. 2d 496 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Blair v. State, 406 So. 2d 1103 (Fla. 1981); Kampf v. State, 370 So. 2d 1007 (Fla. 1979).

444. See supra text accompanying note 312.

445. See supra section III(B).

446. 527 So. 2d 809 (Fla. 1988).

447. Id. at 811 (quoting State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973)).

448. Id.
B. Proportionality — Comparing Cases More Often

During the survey period the Florida Supreme Court found six death sentences to be disproportionate\(^ {442} \) — almost equal to the number it had reversed on such grounds in the prior fifteen years.\(^ {443} \) This increase can only indicate a change in policy by that court, unless it is assumed by mere coincidence a large number of disproportionate sentences reached the court during the nine month survey period. A policy change by the members of the court is the more likely reason for the increased willingness to hold a death sentence to be improper even where the jury had recommended a death sentence. It could be a reaction to Caldwell,\(^ {444} \) i.e., placing less reliance upon the jury, it could indicate increased awareness of mistreatment after Hitchcock,\(^ {445} \) or it could simply represent a philosophical change.

Regardless of the reasons for the change, the reasons for determining proportionality are clear. In Fitzpatrick v. State,\(^ {446} \) the court vacated the death sentence, even though in a prior appeal it had affirmed the death sentence. The court explained that the death penalty is only intended to be imposed "for the most aggravated, the most indefensible of crimes."\(^ {447} \) The court emphasized that it is the uniqueness of death as punishment, in its irrevocability and renunciation of all that is embodied in our concept of humanity. Thus, the court must maintain "substantive proportionality . . . to insure that the death penalty is administered evenhandedly."\(^ {448} \) Even though the court left intact the finding of five aggravating factors, it found Fitzpatrick's death sentence to be disproportionate: "Fitzpatrick's actions were those of seriously emotionally disturbed man-child, not those of a cold-blooded, heartless

---

\(^ {442} \) Twenty-seven cases were reviewed where the jury had recommended the death sentence and the judge imposed it. Six of these sentences were found to be disproportionate — a rate of more than twenty percent.

\(^ {443} \) Prior to this time only seven death sentences had been reversed to life imprisonment in homicide cases where the jury had voted for death. Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Caruthers v. State, 464 So. 2d 496 (Fla. 1985); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Bland v. State, 406 So. 2d 1106 (Fla. 1981); Kampff v. State, 370 So. 2d 1007 (Fla. 1979).

\(^ {444} \) See supra text accompanying note 312.

\(^ {445} \) See supra section III(B).

\(^ {446} \) 527 So. 2d 809 (Fla. 1988).

\(^ {447} \) Id. at 811 (quoting State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973)).

\(^ {448} \) Id.
stabbing death of the occupant. The court said that even though it had initially upheld the sentence on direct appeal and the Supreme Court had affirmed it, there had been changes in the law since that time. The court found the case to be nonaggravated beyond the burglary and with much mitigation. It therefore found the death sentence to be disproportionate, noting that if it were upheld in this case it would mean every murder during a burglary would justify a death sentence. 448

During this time period, the court also began to be concerned with the implications of Caldwell v. Mississippi 449 on Florida sentencing practice. The court's members began debating the weight that should be given to jury sentencing verdicts, with at least two of the justices expressing the view that jury votes should be less determinative of the outcome of appellate review. 449 One justice complained that the jury had become the de facto sentence, 449 and the majority denied that de facto role. 449 It was plainly a time when the proper role for the jury was addressed with varying opinions. This willingness to rule independently of the jury, giving it less deference, could signal a subtle shift in the court's attitudes in reviewing death sentence. It also may reflect the passage of time and maturing of the review process. Nevertheless, the court's shift during the survey period appears to have been sudden in relation to past history but with no corresponding sudden event stated as having caused that shift. It represents a significant development, the effort of which can only be known as it develops in future decisions.

V. Other Issues

Prosecutorial Argument — "When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." 444 Such arguments are a violation of "the prosecutor's duty to seek justice and not merely 'win a death recommendation.'" 444 Arguments appealing to sympathy ("I would hope . . . that the jurors will listen to the screams and to her desires for punishment"

445. Id. at 898.
447. See supra note 349 and accompanying text.
450. See supra note 338 and accompanying text.
451. Id. at 899.
452. Id. at 899. The court quoted from its decision in Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) to the effect that prosecutorial misconduct must be "egregious" to warrant vacating a sentence, because the jury's recommendation is "advisory only." This willingness to diminish the jury's importance is contrary to its precedent emphasizing that importance and refusing to find harmless error for errors before the jury. See supra note 338 and accompanying text. It also seems in conflict with reasoning in another case where the court rather than diminishing the jury's importance, instead relied on the importance of the jury's death verdict to find an error to be harmless. Grossman v. State, 525 So. 2d 833, 846 (Fla. 1988) ("A jury recommendation of death . . . is entitled to great weight" and in view of that verdict the trial judge's sentencing discretion was "relatively narrow").
453. 528 So. 2d 361 (Fla. 1988).
454. Id. at 363-64 (plurality opinion). The court was applying the two part test enunciated in Strickland v. Washington, 466 U.S. 668 (1984) that requires evaluation
stabbing death of the occupant. The court said that even though it had initially upheld the sentence on direct appeal and the Supreme Court had affirmed it, there had been changes in the law since that time. The court found the case to be nonaggravated beyond the burglary and with much mitigation. It therefore found the death sentence to be disproportionate, noting that if it were upheld in this case it would mean every murder during a burglary would justify a death sentence.\footnote{458}

During this time period, the court also began to be concerned with the implications of \textit{Caldwell v. Mississippi}\footnote{459} on Florida sentencing practice. The court's members began debating the weight that should be given to jury sentencing verdicts, with at least two of the justices expressing the view that jury votes should be less determinative of the outcome of appellate review.\footnote{460} One justice complained that the jury had become the \textit{de facto} sentence,\footnote{461} and the majority denied that \textit{de facto} role.\footnote{462} It was plainly a time when the proper role for the jury was addressed with varying opinions. This willingness to rule independently of the jury, giving it less deference, could signal a subtle shift in the court's attitudes in reviewing death sentence. It also may reflect the passage of time and maturing of the review process. Nevertheless, the court's shift during the survey period appears to have been sudden in relation to past history but with no corresponding sudden event stated as having caused that shift. It represents a significant development, the effort of which can only be known as it develops in future decisions.

\section*{V. Other Issues}

\textbf{Prosecutorial Argument} — “When comments in closing argument are intended to and do inject elements of emotion and fear into the jury’s deliberations, a prosecutor has ventured far outside the scope of proper argument.”\footnote{463} Such arguments are a violation of “the prosecutor’s duty to seek justice and not merely ‘win’ a death recommendation.”\footnote{464} Arguments appealing to sympathy (“I would hope . . . that the jurors will listen to the screams and to her desires for punishment

\begin{footnotesize}
\begin{enumerate}
\item Id. at 988.  
\item 472 U.S. 320 (1985).  
\item See supra note 349 and accompanying text.  
\item Holowich v. State, 522 So. 2d 348, 355 (Fla. 1988) (Ehrlich, J., dissenting).  
\item Grossman v. State, 525 So. 2d 833, 839-40 (Fla. 1988).  
\item Garner v. State, 528 So. 2d 353, 359 (Fla. 1988).  
\item Id.  
\item Id. at 808.  
\item Id. at 809.  
\item The court quoted from its decision in Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) to the effect that prosecutors’
\item misbehavior must be “gross” to warrant vacating a sentence, because the jury’s recommendation is “advisory only.” This willingness to diminish the jury’s importance is contrary to its precedent emphasizing that importance and refusing to find harmless error for errors before the jury. See supra note 338 and accompanying text. It also seems in conflict with reasoning in another case where the court rather than diminishing the jury’s importance, instead relied on the importance of the jury’s death verdict to find an error to be harmless. Grossman v. State, 525 So. 2d 833, 846 (Fla. 1988) (“A jury recommendation of death . . . is entitled to great weight” and in view of that verdict the trial judge’s sentencing discretion was “relatively narrow”).  
\item 528 So. 2d 361 (Fla. 1988).  
\item Id. at 363-64 (plurality opinion). The court was applying the two part test
\end{enumerate}
\end{footnotesize}
lied that had the character evidence been presented, the state could have presented evidence in rebuttal and thus the balance of aggravating would have been unchanged. In a separate opinion Justice Ehrlich emphasized that a "reasoned judgment" on what evidence to present cannot be made and options exercised unless and until a complete investigation into the defendant's background and past ha[s] been made." He also would include a necessary investigation into an "explanation of the defendant's mind to ascertain if there be present any evidence that would call into play a statutory mitigating factor, or any non-statutory mitigating circumstances." Justice Shaw concurred, finding inadequate assistance of counsel, even though it did not require relief due to insufficient prejudice." He said it was obvious from the facts of the case that the two attorneys representing Harris each though the other was preparing for the penalty phase, and consequently, neither was prepared when the penalty phase arrived.

The dissenting opinions found Harris to present a "glaring example of prejudicial ineffectiveness" where Harris received "virtually no defense at all in the penalty phase." The dissent suggested it was improper for the appellate court to attempt to weigh the mitigation in determining prejudiced: "Regardless of how any particular individual might weigh this testimony, it clearly is the type of mitigating evidence that might persuade a jury that death is not the appropriate penalty." Evaluation of ineffectiveness of counsel claims depend upon judgments made on a case-by-case basis, but what Harris teaches is that competent investigation for the penalty trial is a fundamental duty of counsel.

New Court Rule: Sentencing Findings — In 1986 the Florida

of performance and an assessment of the prejudice stemming from the alleged deficient performance. The court in Harris looked only to the prejudice part of that test. Id. at 364.

470. Id. at 364 (plurality opinion).
471. Id. at 364 (Ehrlich, J., concurring).
472. Id. at 364-65 (Ehrlich, J., concurring).
473. Id. at 365 (Shaw, J., concurring).
474. Id.
475. Id. at 365 (Barkett, J., dissenting).
476. Id. at 366 (Barkett, J., dissenting).
477. In State v. Michael, 530 So. 2d 929 (Fla. 1988), the court affirmed the grant of post-conviction relief based upon counsel's failure to investigate the defendant's mental condition as it applied to possible mitigating circumstances.

478. Van Royal v. State, 497 So. 2d 625 (Fla. 1985). The court based its ruling on the provision that if the court imposes a death sentence "it shall set forth in writing its findings upon which the sentence of death is based." FLA. STAT. § 921.141 (3) (1981).
479. E.g., Patterson v. State, 513 So. 2d 1257 (Fla. 1987).
480. 525 So. 2d 833, 841 (Fla. 1988).
481. Id.
482. Id. The opinion became final on May 25, 1988 on the denial of rehearing. The court did not specify whether the new rule would be formally added to the rules of court, but if it were, it would probably be an amendment to Rule 3.780, FLA. R. CRIM. P.
483. Id.
lieved that had the character evidence been presented, the state could have presented evidence in rebuttal and thus the balance of aggravating would have been unchanged. In a separate opinion Justice Ehrlich emphasized that a "reasoned judgment" on what evidence to present "cannot be made and options exercised unless and until a complete investigation into the defendant's background and past has been made." He also would include a necessary investigation into an "exploration of [the] defendant's mind to ascertain if there be present any evidence that would call into play a statutory mitigating factor, or any non-statutory mitigating circumstances." Justice Shaw concurred, finding inadequate assistance of counsel, even though it did not "require relief due to insufficient prejudice." He said it was obvious from the facts of the case that the two attorneys representing Harris each though the other was preparing for the penalty phase, and "consequently, neither was prepared when the penalty phase arrived."" The dissenting opinions found Harris to present a "glaring example of prejudicial ineffectiveness" where Harris received "virtually no defense at all in the penalty phase." The dissent suggested it was improper for the appellate court to attempt to weigh the mitigating is determining prejudice: "Regardless of how any particular individual might weigh this testimony, it clearly is the type of mitigating evidence that might persuade a jury that death is not the appropriate penalty." Evaluation of ineffective assistance of counsel claims depend upon judgments made on a case-by-case basis, but what Harris teaches is that competent investigation for the penalty trial is a fundamental duty of counsel.

New Court Rule: Sentencing Findings — In 1986 the Florida court issued an opinion holding that a death sentence must be vacated if the sentencing judge does not timely file written findings of fact in support of that sentence. Since that opinion, a number of cases have been presented where the judges had not filed written findings contemporaneously with the oral pronouncement of the sentence — and the court dealt with those cases by holding it to be adequate if the written findings were filed before the record on appeal was certified to the Supreme Court. The court was again presented with that issue in Grossman v. State and upheld the procedure because the findings, although filed three months after the sentence was imposed, were filed before certification of the record. Since the practice has seemingly continued with relative frequency, the court believed it to be "desirable to establish a procedural rule": "all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement." The court used its rule-making authority to establish that rule, effective thirty days after its opinion became final. It is unclear from the opinion whether future failure to comply with the new rule will require vacation of sentences. There is an implication that the court is contemplating that prospect, for it recognized that cases have reached or will reach it in the near future that have not had the benefit of its decisions on the issue.

VI. Conclusion

This article began by noting that the purpose of capital sentencing is to select the few who must die from the many who will not. Even during this short survey period, criteria for that selection process changed, expanding and narrowing case-by-case; life and death distinctions were made on the basis of lines that were sometimes blurry and uncertain and uncertain and uncertain.
many times mobile. We, as a society, have asked our courts to put rationality into what is a subjective process involving some of the most highly-charged cases and issues of our time. We should not be surprised if that rationality is not always achieved.

Survey of Recent Florida Labor and Employment Law

John E. Sanchez

In the last year or so, state and federal courts have decided a variety of cases in the areas of labor and employment under Florida law. The constraints of this article necessarily preclude the discussion of labor and employment cases decided in Florida but interpreting federal law. This article surveys some of the significant rulings by the Florida appellate courts (although a U.S. Supreme Court decision interpreting Florida law and a new AIDS law are also included), focusing on (1) workers' compensation, (2) unemployment compensation, (3) employment discrimination, (4) restrictive covenants, (5) negligent hiring, supervision and retention, and (6) defamation and tortious interference with a contractual relationship. The focus is on individual employment rights rather than the relationship of labor unions and employers which is largely governed by federal law.

WORKERS' COMPENSATION

Workers' compensation is usually the exclusive relief available to an employee for a personal injury or death by accident arising out of and in the course of employment. One issue analyzed by a Florida court during the survey period dealt with whether an injury is "accidental" if it results from the intentional tort of a co-employee? In Byrd v. Richardson-Greenshields Securities, Inc., a Florida court ruled that the exclusivity of workers' compensation is not precluded by an intentional tort committed by an employee.

In Byrd, certain female employees alleged sexual harassment by the branch manager. The plaintiffs further alleged that the employer

1. Assistant Professor of Law, Nova University Center for the Study of Law.
   L.L.M., Georgetown Law Center, 1984; J.D., University of California, Berkeley (Boalt Hall), 1977; B.A., Pomona College, 1974. The author wishes to thank Barry Fudim for his research assistance in the preparation of this article.

2. 527 So. 2d 899 (Fla. 2d Dist. Cl. App. 1988).