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Florida Capital Cases: July 1, 1994 - July 30, 1995

Gary Caldwell*

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TABLE OF CONTENTS

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I. DISCOVERY

A. *Rules of Discovery*

After many years of silence on the issue, the Supreme Court of Florida has in recent years begun to develop a body of law respecting penalty phase discovery. In May of 1995, the court proposed the following rule:[1]

> RULE 3.202 EXPERT TESTIMONY OF MENTAL MITIGATION DURING PENALTY PHASE OF CAPITAL TRIAL: NOTICE AND EXAMINATION BY STATE EXPERT
>
> (a) **Notice of Intent to Present Expert Testimony of Mental Mitigation.** When in any capital case it shall be the intention of the defendant to present, during the penalty phase of the trial, expert testimony of a mental health professional, who has tested, evaluated, or examined the defendant, in order to establish statutory or nonstatutory mental mitigating circumstances, the defendant shall give written notice of intent to present such testimony.
>
> (b) **Time for Filing Notice; Contents.** The defendant shall give notice of intent to present expert testimony of mental mitigation no later than 45 days before the guilt phase of the capital trial. The notice shall contain a statement of particulars listing the statutory and nonstatutory mental mitigating circumstances the defendant expects to establish through expert testimony and the names and addresses of the mental

1. The impetus for the rule arose from Burns v. State, 609 So. 2d 600, 606 n.8 (Fla. 1992), in which the court asked the Criminal Rules Committee to develop a procedure for the state's mental evaluation of a defendant for capital sentencing purposes.

> health experts by whom the defendant expects to establish mental mitigation, insofar as is possible.
>
> (c) **Appointment of State Expert; Time of Examination.** After the filing of such notice and on the motion of the state indicating its desire to seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state. Attorneys for the state and defendant may be present at the examination. The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony.
>
> (d) **Defendant's Refusal to Cooperate.** If the defendant refuses to be examined by or fully cooperate with the state's mental health expert, the court may, in its discretion:
>
> (1) order the defense to allow the state's expert to review all mental health reports, tests, and evaluations by the defendant's mental health expert; or
>
> (2) prohibit defense mental health experts from testifying concerning mental health tests, evaluations, or examinations of the defendant.[2]

In issuing this proposed rule,[3] the court rejected a proposal by the Criminal Rules Committee to clarify that rule 3.220, which ostensibly governs all discovery in criminal cases, applies to death penalty proceedings.[4] Do provisions of rule 3.220 concerning depositions, reports of experts, and the like nevertheless apply to capital sentencing? The court did not say, except

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2. Amendments to Florida Rule of Criminal Procedure 3.220-Discovery (3.202-Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial), 654 So. 2d 915, 916-17 (Fla. 1995) [hereinafter *Amendments*].

3. The court directed the Criminal Procedure Rules Committee and other interested parties to file comments by July 1, 1995. It also directed the Committee to consider

> the need for 1) a rule requiring the defendant and the State to file a statement of the issues to be tried in the penalty phase of a capital trial and 2) a pretrial procedure, similar to summary judgment, that would allow the trial court to determine whether the death penalty is an option based on the aggravating and mitigating factors alleged to exist in a capital case.

Amendments, 654 So. 2d at 916. As to the first matter, the court has ruled in the past that the state has no duty to disclose the aggravating circumstances it seeks to employ. *E.g.*, Menendez v. State, 368 So. 2d 1278, 1282 n.21 (Fla. 1979). As to the second, the court has ruled that it would violate the separation of powers doctrine of the state constitution for a trial court to determine, before a trial, whether the state could seek the death penalty in the event of a conviction. State v. Bloom, 497 So. 2d 2 (Fla. 1986).

4. Among other things, the Committee had proposed to amend rule 3.220 (a) to "make the discovery rules applicable to the penalty phase of a capital trial." *Amendments*, 654 So. 2d at 915.

to write in a footnote: "The proposed rule will not relieve the parties of the continuing duty to disclose witnesses under Florida Rule of Criminal Procedure 3.220(j)."[5]

Respecting discovery in postconviction proceedings, the court addressed the question of whether a judge may be subjected to discovery depositions in *State v. Lewis*.[6] The court held that where a rule 3.850 motion for postconviction relief alleges improper actions by the trial judge, there may be limited discovery depositions of the judge where "absolutely necessary."[7] The court added that a judge has the power to limit his own deposition in stating: "The judge may refuse to answer any question which the judge deems intrusive."[8] In *Asay v. Florida Parole Commission*,[9] the court held that *Brady v. Maryland*,[10] does not apply to clemency proceedings so that clemency records need not be disclosed to death row inmates.[11]

B. *Grand Jury*

Discovery of grand jury testimony has also been a matter of controversy over the years. In *Keen v. State*,[12] the court seemed to have resolved the matter, ruling that the trial court erred by refusing to grant at least in camera review of grand jury testimony of a witness who had initially said the death of Michael Keen's wife was an accident, but later said that he and Mr. Keen had murdered her. Relying on *Dennis v. United States*,[13] and *Miller v. Wainwright*,[14] the court wrote that, upon a showing of particular-

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5. *Id.* at 916 n.1. The Committee's proposal would have amended rule 3.220 to provide for separate witness lists for the guilt and penalty phases. *Id.*

6. 656 So. 2d 1248 (Fla. 1994).

7. *Id.* at 1250.

8. *Id.*

9. 649 So. 2d 859 (Fla. 1994), *cert. denied*, 116 S. Ct. 591 (1995).

10. 373 U.S. 83 (1963). Under *Brady*, the prosecution must disclose exculpatory evidence to the defense. *Id.* at 86.

11. In a related matter, the court amended Florida Bar Rule 4-1.6 (Confidentiality of Information) by adding section (5)(e), which states: "**Limitation of Amount of Disclosure.** When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule." The Florida Bar re: Amendments to Rules Regulating the Florida Bar, 644 So. 2d 282, 311 (Fla. 1994). Presumably, this new rule was to govern disclosure of attorney-client communications in litigation of ineffective assistance of counsel claims in capital cases.

12. 639 So. 2d 597 (Fla. 1994).

13. 384 U.S. 855 (1966).

14. 798 F.2d 426 (11th Cir. 1986), *cert. denied and judgment vacated by*, 480 U.S. 901 (1987). The court also cited to Jent v. State, 408 So. 2d 1024 (Fla. 1986), *cert. denied*, 457

ized need for access to grand jury testimony,[15] the trial court must turn such testimony over to the defense.[16]

During the survey period, the court rejected a claim under *Keen* in *Armstrong v. State*,[17] ruling that the trial court did not err in denying in camera review of grand jury testimony where the defense failed to show its materiality and failed to advise the court as to its possible usefulness.

II. THE PENALTY TRIAL

A. *The Jury Sentencing Trial*

In *State v. Hernandez*,[18] the court resolved a nagging question regarding the procedure for waiving the right to a jury sentencing proceeding. In *State v. Ferguson*,[19] the district court had held that under rule 3.260 of the *Florida Rules of Criminal Procedure*, the defendant could not waive the sentencing jury without the state's consent.[20] *Hernandez* overruled *Ferguson*, and held that the trial court has discretion to proceed to sentencing without a jury upon a knowing and intelligent waiver by the defendant.[21] It noted, however, that under *Sireci v. State*,[22] the "trial judge may require a jury recommendation notwithstanding the defendant's waiver."[23]

B. *Evidence and Argument*

1. Hearsay

Section 921.141(1) of the *Florida Statutes* provides the following regarding evidence at death penalty sentencing proceedings:

U.S. 1111 (1982), without noting that *Miller* effectively overruled *Jent*. For the history of this issue, see Gary Caldwell, *Recent Florida Capital Decisions*, 16 NOVA L. REV. 1357, 1362-64 (1992).

15. Under *Miller*, the defense shows a particularized need by demonstrating inconsistencies between the deposition and trial testimony of a material witness. *Miller*, 798 F.2d at 429.

16. *Keen*, 639 So. 2d at 600 & n.4.

17. 642 So. 2d 730 (Fla. 1994), *cert. denied*, 115 S. Ct. 1799 (1995).

18. 645 So. 2d 432 (Fla. 1994).

19. 556 So. 2d 462 (Fla. 2d Dist. Ct. App.), *review denied*, 564 So. 2d 1085 (Fla. 1990).

20. *Id.* at 464.

21. *Hernandez*, 645 So. 2d at 435.

22. 587 So. 2d 450 (Fla. 1991), *cert. denied*, 503 U.S. 946 (1992).

23. *Hernandez*, 645 So. 2d at 435.

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.[24]

Somewhat surprisingly, the supreme court's decisions have interpreted the statute to authorize the state's use of hearsay and to prevent the defense's use of it.

As to the state's use of hearsay, the main case is *Rhodes v. State*,[25] in which the State presented the capital sentencing jury with evidence about an offense committed by the defendant in Nevada. A police captain played a taped interview of the Nevada victim, and gave hearsay testimony about the statement. The supreme court ruled that the Confrontation Clause barred the State's use of the taped statement,[26] but then ruled that the State could use the captain's hearsay testimony regarding the victim's statement, concluding

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24. FLA. STAT. § 921.141(1) (1995).

25. 547 So. 2d 1201 (Fla. 1989).

26. *Id.* at 1204.

> While hearsay evidence may be admissible in penalty phase proceedings, such evidence is admissible only if the defendant is accorded a fair opportunity to rebut any hearsay statements. The statements made by the Nevada victim came from a tape recording, not from a witness present in the courtroom. In *Engle v. State*, we stated:
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> > The [S]ixth [A]mendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the [Due Process Clause] of the [F]ourteenth [A]mendment to the United States Constitution. The primary interest secured by, and the major reason underlying the [C]onfrontation [C]lause, is the right of cross-examination. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process.
>
> Obviously, Rhodes did not have the opportunity to confront and cross-examine this witness. By allowing the jury to hear the taped statement of the Nevada victim describing how the defendant tried to cut her throat with a knife and the emotional trauma suffered because of it, the trial court effectively denied Rhodes this fundamental right of confronting and cross-examining a witness against him. Under these circumstances if Rhodes wished to deny or explain this testimony, he was left with no choice but to take the witness stand himself.

Id. (citations omitted).

that because the defendant could cross-examine the captain, his hearsay testimony was admissible.[27]

At to the defense's use of hearsay, the court wrote in *Hitchcock v. State*:[28]

> Hitchcock argues that, although the state's introducing hearsay in a penalty proceeding is limited to that hearsay which a defendant is given the opportunity to rebut, a defendant's ability to introduce hearsay is unlimited. While the rules of evidence have been relaxed somewhat for penalty proceedings, they have not been rescinded. We find no merit to Hitchcock's claim that the state must abide by the rules but that defendants need not do so. Additionally, even if admissible, the hearsay statements would have been merely cumulative to other testimony about Hitchcock's past.[29]

During the survey period, the court expressed some antipathy for defense hearsay evidence in *Griffin v. State*[30] and *Wuornos v. State*.[31] In *Griffin*, relying on *Hitchcock*, the court approved the trial court's refusal to let the defense present evidence of the defendant's remorse and character.[32] In *Wuornos*, without totally disapproving the defense's use of hearsay, the court ruled that the trial court did not err in failing to find in mitigation facts presented via hearsay: "The vast bulk of the case for mitigation was hearsay. While hearsay can be admissible in the penalty phase, we cannot conceive that there is any absolute duty for the trial court to accept it in mitigation where, as here, the State's rebuttal established strong indicia of unreliability."[33]

In *Henry v. State*,[34] the court found no error in the State's presentation of hearsay in the form of a transcript of the testimony of a witness at the trial leading to Henry's conviction of a prior violent felony.

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27. *Id.*
28. 578 So. 2d 685 (Fla. 1990), *judgment vacated*, 505 U.S. 1215 (1992).
29. *Id.* at 690 (footnote omitted).
30. 639 So. 2d 966 (Fla. 1994), *cert. denied*, 115 S. Ct. 1317 (1995).
31. 644 So. 2d 1012 (Fla. 1994), *cert. denied*, 115 S. Ct. 1708 (1995).
32. *Griffin*, 639 So. 2d at 970.
33. *Wuornos*, 644 So. 2d at 1020.
34. 649 So. 2d 1366 (Fla. 1994), *cert. denied*, 115 S. Ct. 2591 (1995).

2. Treatment of Mitigation

In three cases, the court seemed to express three different views about opinion evidence presented in mitigation. In *Walls v. State*,[35] Justice Kogan wrote for the court:[36]

> Eighth, Walls contends that the trial court improperly rejected expert opinion testimony that he was suffering extreme emotional disturbance and that his capacity to conform his conduct to the law's requirements was substantially impaired. In Florida as in many states, a distinction exists between factual evidence or testimony, and opinion testimony. As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable, or contradictory. This rule applies equally to the penalty phase of a capital trial.
>
> Opinion testimony, on the other hand, is not subject to the same rule. Certain kinds of opinion testimony clearly are admissible—and especially qualified expert opinion testimony—but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve. We cannot conclude that the evidence here was anything more than debatable. Accordingly, this Court may not revisit the judge and jury's determination on appeal.[37]

In a footnote to the opinion the court stated:

> Reasonable persons could conclude that the facts of the murder are inconsistent with the presence of the two mental mitigators. Moreover, all the experts hedged their statements, gave equivocal responses, or responded to questions that themselves were equivocal. The psychiatrist said he could not testify as to Walls' state of mind at the time of the murder. One psychologist responded yes to a question that essentially only asked whether Walls was suffering *any* impairment at the time of the murder. The facts may be consistent with some degree of emotional impairment, which the trial court surely recognized in finding emotional

35. 641 So. 2d 381 (Fla. 1994), *cert. denied*, 115 S. Ct. 943 (1995).

36. Chief Justice Grimes, and Justices Overton, Shaw, and Harding concurred in the court's opinion. *Id.* at 391. Justice McDonald wrote a special concurrence joined by Justice Overton. *Id.*

37. *Id.* at 390-91 (citations omitted) (footnote omitted).

> handicap and brain dysfunction as nonstatutory mitigators. Nevertheless, the expert testimony does not address the true problem here: the relative weight of mitigating versus aggravating circumstances. On the whole, the facts are consistent with the conclusion that any impairment Walls suffered was nonstatutory in nature and, in any event, was of far slighter weight than the aggravating factors found to exist.[38]

Thus, *Walls* indicates that the sentencer is free to disregard unrebutted expert evidence offered in mitigation. In *Spencer v. State*,[39] however, the court took an opposite view:

> We also find merit in Spencer's claim that the trial court improperly rejected the statutory mitigating circumstances. During the penalty phase, the two experts testified that Spencer suffered from chronic alcohol and substance abuse, a paranoid personality disorder, and biochemical intoxication. Based upon their testing, interviews, and evaluations, both experts concluded that Spencer was under the influence of extreme mental or emotional disturbance at the time the murder was committed and that his capacity to conform his conduct to the requirements of law was impaired. The sentencing order finds that neither of these mitigating factors is present.
>
> Whenever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved if the record contains competent substantial evidence to support the trial court's rejection of the mitigating circumstance. In this case, the evidence of these mitigating circumstances that was submitted by Spencer was uncontroverted. The trial judge rejected the experts' opinions as speculative and conclusory. However, the experts based their opinions on a battery of psychological and personality tests administered to Spencer, clinical interviews with Spencer, examination of evidence in this case, and a review of Spencer's life history, school records, and military records. Thus, the trial court erred in not finding and weighing these statutory mental mitigating circumstances.[40]

38. *Id.* at 391 n.8.
39. 645 So. 2d 377 (Fla. 1994).
40. *Id.* at 384-85 (citations omitted).

The voting pattern in *Spencer* is worth noting. Justices Shaw, Harding, and McDonald joined the *per curiam* opinion for the court,[41] and Justice Kogan concurred in part and dissented in part, writing:

> In light of the strong case for mental mitigation here and the lack of cold calculated premeditation, I would reduce the penalty to life imprisonment without possibility of parole for twenty-five years. A remand here would be a useless act because the death penalty cannot be imposed based on the facts. I note that this case is directly on point with *Santos v. State*, in which we remanded based on similar facts only to reverse the trial court's imposition of the death penalty in the appeal after remand. Moreover, based on our second *Santos* opinion, I believe death clearly cannot be proportional in this instance. I therefore dissent as to the remand, but otherwise concur with the majority.[42]

Justice Kogan made no mention of the apparent contradiction between these views and his opinion for the court in *Walls*.

In *Jones v. State*,[43] the court approved the trial judge's refusal to find in mitigation apparently uncontroverted evidence that the defendant's alcoholic mother had abandoned him as a child:

> As a separate nonstatutory mitigating circumstance the trial judge considered the fact that Jones was "an abandoned child who was raised by relatives." The court rejected this "childhood scenario" as a mitigating factor, reasoning that Jones' mother delivered him into an "infinitely superior environment" where he was cared for by "decent, law abiding and God fearing" relatives who "cared for him as if he was one of their own" and where he did well in school and was a good child.
>
> Jones challenges the trial judge's failure to find his abandonment by an alcoholic mother in mitigation and maintains that a new sentencing proceeding is required because the mental health experts who testified did not bring to the court's attention the fact that Jones likely suffers from fetal alcohol syndrome. First, on this record, the court did not abuse its discretion by refusing to find in mitigation that Jones was abandoned by an alcoholic mother.[44]

41. *Id.* at 385.
42. *Id.* at 386 (citations omitted).
43. 652 So. 2d 346 (Fla.), *cert. denied*, 116 S. Ct. 202 (1995).
44. *Id.* at 351 (citations omitted).

3. "Victim Impact" Evidence

In *Windom v. State*,[45] the court addressed a number of issues pertaining to the State's use of "victim impact" evidence:

> Windom attacks the admissibility of testimony by a police officer during the sentencing phase of the trial. The police officer was assigned by her police department to teach an anti-drug program in an elementary school in the community in which the defendant and the three victims of the murders lived, and where the murders occurred. Two of the sons of one of the victims were students in the program. The police officer testified concerning her observation about one of these sons following the murder. Her testimony involved a discussion concerning an essay which the child wrote. She quoted the essay from memory: "Some terrible things happened in my family this year because of drugs. If it hadn't been for DARE, I would have killed myself." The police officer also described the effect of the shootings on the other children in the elementary school. She testified that a lot of the children were afraid.
>
> Defendant asserts, first, that this evidence was in essence nonstatutory aggravation, relying upon *Grossman v. State*. Defendant does concede that subsequent to *Payne v. Tennessee* this Court has held victim impact testimony to be admissible as long as it comes within the parameters of the *Payne* decision. Both the Florida Constitution in Article I, Section 16, and the Florida Legislature in section 921.141(7), Florida Statutes (1993), instruct that in our state, victim impact evidence is to be heard in considering capital felony sentences. We do not believe that the procedure for addressing victim impact evidence, as set forth in the statute, impermissibly affects the weighing of the aggravators and mitigators which we approved in *State v. Dixon*, or otherwise interferes with the constitutional rights of the defendant. Therefore, we reject the argument which classifies victim impact evidence as a nonstatutory aggravator in an attempt to exclude it during the sentencing phase of a capital case.
>
> Rather, we believe that section 921.141(7) indicates clearly that victim impact evidence is admitted only after there is present in the record evidence of one or more aggravating circumstances. The evidence is not admitted as an aggravator but, instead, as set forth in section 921.141(7), allows the jury to consider "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." Victim impact evidence must be limited to that which is relevant as specified in section 921.141(7). The

45. 656 So. 2d 432 (Fla.), *cert. denied*, 116 S. Ct. 571 (1995).

> testimony in which the police officer testified about the effect on children in the community other than the victim's two sons was erroneously admitted because it was not limited to the victim's uniqueness and the loss to the community's members by the victim's death.
>
> However, defendant did not object to this testimony specifically, and thus his objection on appeal is procedurally barred . . . .
>
> Defendant's second attack on the victim impact evidence concerns the application of 921.141(7) to defendant's crime. He claims that such application was a violation of the ex post facto clauses of the United States and Florida Constitutions since the murders were on February 7, 1992, and subsection seven of section 921.141 did not go into effect until July 1, 1992. We do not agree. To the contrary, we approve the Fourth District Court of Appeal's decision on this point in *State v. Maxwell*, in which the district court found our decision in *Glendening v. State* to be instructive. Section 921.141(7) only relates to the admission of evidence and is thus procedural. Therefore, application of section 921.141(7) in the present case does not violate the prohibition against ex post facto laws.[46]

4. Final Argument

In *Wike v. State*,[47] the court found per se reversible error in the trial court's failure to allow the defense to make its final argument to the sentencing jury under rule 3.780 of the *Florida Rules of Criminal Procedure.*

III. AGGRAVATING CIRCUMSTANCES

A. *Sentence of Imprisonment*[48]

Although the application of this circumstance is usually straightforward, *Thompson v. State*,[49] involved a rare misapplication. At the time that the defendant murdered a sandwich shop employee, he was ostensibly serving community control sentences for various thefts and forgeries. Accordingly, the trial court employed the "sentence of imprisonment" circumstance in

46. *Id.* at 438-39 (citations omitted).

47. 648 So. 2d 683, 687 (Fla. 1994).

48. An aggravating circumstance exists where "[t]he capital felony was committed by a person under sentence of imprisonment or placed on community control." FLA. STAT. § 921.141(5)(a).

49. 647 So. 2d 824 (Fla. 1994).

sentencing him to death for the murder. After imposition of the death sentence, the court presiding over the community control cases ruled that the community control sentences had been illegally imposed. Accordingly, the defendant argued on appeal that it was error to use the "sentence of imprisonment" circumstance against him. The supreme court agreed:

> "We have expressly held that a conviction used as an aggravating circumstance, which is valid at the time of the sentence but later reversed and vacated by an appellate court, results in an error in the penalty phase proceeding. The reversal eliminates the proper use of the conviction as an aggravating factor." We conclude that the same reasoning applies to an aggravating circumstance based on an illegal sentence. We strike this aggravating circumstance.[50]

B. *Previous Violent Felony Conviction*[51]

Again, there is usually little trouble with the application of this circumstance.[52] There were no significant developments regarding this circumstance during the survey period.

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50. *Id.* at 827 (citations omitted).

51. An aggravating circumstance exists where "[t]he 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).

52. A defendant has been "previously convicted" even if the violent felony is contemporaneous with the murder. *See* Lucas v. State, 376 So. 2d 1149 (Fla. 1979) (attempted murders of two victims could constitute prior violent felonies in sentencing defendant for murder of third victim). On the other hand, contemporaneous violent felonies committed on the murder victim do not satisfy the circumstance. *See* Holton v. State, 573 So. 2d 284 (Fla.), *cert. denied*, 500 U.S. 960 (1991). The court has written directly contrary opinions as to whether the circumstance applies only to felonies which contain a violent element or whether the court can look to the facts to determine whether the previous felony involved violence. *Compare* Elam v. State, 636 So. 2d 1312, 1314 (Fla. 1994) (holding it error to use conviction for solicitation to commit murder to establish the circumstance since violence is not an inherent element of this offense) *with* Sweet v. State, 624 So. 2d 1138 (Fla. 1993) (approving the trial court's use of conviction for possession of firearm by convicted felon, notwithstanding that violence is not an inherent element of that offense; sentencer not bound by the elements of the offense, and can look to facts underlying prior offense), *cert. denied*, 114 S. Ct. 1206 (1994).

C. *Great Risk*[53]

In *Coney v. State*,[54] the court disapproved use of this circumstance in an arson-murder at a jail, in which "Jimmie Coney set his putative jailhouse lover ablaze."[55] Striking the circumstance, the court wrote: "the fire was relatively small, was contained within a single cell, was set in an area under constant surveillance, and was easily extinguished with several puffs from a fire extinguisher."[56]

D. *Felony Murder*[57]

There were no significant developments respecting this circumstance.

E. *The Law Enforcement Circumstances: Avoiding Arrest, Hindering Law Enforcement, and Murder of Law Enforcement Officers*[58]

Where the defendant has murdered a police officer, the application of these aggravating circumstances is nearly automatic, although they usually merge into one.[59]

Problems arise, however, when the victim is not a law enforcement officer. *Robertson v. State*[60] sets out the standards applying to such cases:

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53. An aggravating circumstance also exists where "[t]he defendant knowingly created a great risk of death to many persons." FLA. STAT. § 921.141(5)(c).

54. 653 So. 2d 1009 (Fla.), *cert. denied*, 116 S. Ct. 315 (1995).

55. *Id.* at 1010.

56. *Id.* at 1015.

57. "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, aggravated child abuse, 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).

58. In addition, an aggravating circumstance exists when "[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody," *id.* § 921.141(5)(e); "[t]he capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws," *id.* § 921.141(5)(g); "[t]he victim of the capital felony was a law enforcement officer engaged in the performance of his official duties," *id.* § 921.141(5)(j).

59. *E.g.*, Pietri v. State, 644 So. 2d 1347 (Fla. 1994), *cert. denied*, 115 S. Ct. 2588 (1995); Armstrong v. State, 642 So. 2d 730 (Fla. 1994), *cert. denied*, 115 S. Ct. 1799 (1995).

60. 611 So. 2d 1228 (Fla. 1993) (striking circumstance where defendant murdered a woman who had witnessed her companion's murder).

> The State must prove beyond a reasonable doubt that an aggravating circumstance exists. Moreover, even the trial court may not draw "logical inferences" to support a finding of a particular aggravating circumstance when the State has not met its burden. In order to support a finding that a defendant committed a murder to avoid arrest, the State must show beyond a reasonable doubt that the defendant's dominant or only motive for the murder of the victim, who is not a law enforcement officer, is the elimination of a witness. "Proof of the requisite intent to avoid arrest and detection must be very strong" to support this aggravating circumstance when the victim is not a law enforcement officer.[61]

Thus, in the past, the court has struck the circumstance where defendants committing burglaries have murdered victims who knew and could identify them.[62] On the other hand, it has applied the circumstance where the defendant has moved a victim to a remote location.[63]

The court followed the first line of cases in disapproving the circumstance in *Thompson v. State*.[64] The evidence there was that the defendant robbed and shot the attendant of a Subway sandwich shop. The court struck the circumstance because "we do not know what happened" at the time of the shooting.[65]

It followed the second line in approving the circumstance in other cases. In *Thompson v. State*,[66] a retarded former grave digger, thinking that the cemetery owed him money, forced the bookkeeper to write him a check, then took the bookkeeper and his assistant to a wooded area and murdered them. Finding that the record supported the circumstance, the court wrote: "Once Thompson had obtained the $1,500 check from Swack and Walker, there was little reason to kill them other than to eliminate the

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61. *Id.* at 1232 (citations omitted).

62. *E.g.*, Davis v. State, 604 So. 2d 794 (Fla. 1992) (burglar killed elderly woman who knew and could identify him; supreme court held that the fact that witness elimination may have been a motive in the murder was insufficient to support circumstance); Geralds v. State, 601 So. 2d 1157, 1164 (Fla. 1992) (striking circumstance and speculating that where burglar tied victim up and then killed her, perhaps defendant killed her while she was trying to escape).

63. *E.g.*, Hall v. State, 614 So. 2d 473, 477 (Fla.) (holding circumstance applied where defendants abducted and raped woman, killing her to cover up their crime), *cert. denied*, 114 S. Ct. 109 (1993).

64. 647 So. 2d 824 (Fla. 1994).

65. *Id.* at 827. See the discussion of the court's striking of the coldness circumstance below. *See infra* part III.H.

66. 648 So. 2d 692 (Fla. 1994), *cert. denied*, 115 S. Ct. 2283 (1995).

sole witnesses to his actions."[67] The court apparently did not consider the defendant's slim intellectual resources in reaching this determination.

The court affirmed the circumstance without discussion in *Suggs v. State* where Ernest Suggs took a barmaid to a remote area and stabbed her,[68] and in *Fennie v. State* where Alfred L. Fennie flagged down a woman motorist, forced her into the trunk of her car, eventually shooting her after driving around telling others he was going to kill her.[69]

F. *Pecuniary Gain*[70]

This circumstance usually applies in robbery and burglary cases where it merges with the felony murder circumstance.[71] Problems may arise when the state's theory is that the defendant has committed a murder to obtain insurance proceeds. In *Chaky v. State*,[72] pointing to the fact that Kenneth Chaky had increased life insurance coverage of his wife less than seven months before he murdered her, the trial court concluded that he had committed the murder for pecuniary gain.[73] The supreme court disagreed:

> In his third issue, Chaky contends that the evidence is insufficient to support, beyond a reasonable doubt, the aggravating circumstance of "committed the murder for pecuniary gain." This aggravating circumstance applies "only where the murder is an integral step in obtaining some sought-after specific gain." Moreover, proof of this aggravating circumstance cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. The only evidence presented to support this aggravating circumstance was that Chaky, as a matter of course through his employment with the University of Florida, maintained two life insurance policies on his wife, totalling

67. *Id.* at 695. The court employed somewhat similar reasoning in Hannon v. State, 638 So. 2d 39 (Fla. 1994), *cert. denied*, 115 S. Ct. 1118 (1995). There, the defendant and two friends murdered a man who had mistreated the sister of one of the friends. The defendant then chased the first victim's roommate upstairs and murdered him. The court upheld the avoid arrest circumstance because the roommate's murder was "ancillary" to the purpose of killing the first man. *Id.* at 44.

68. 644 So. 2d 64, 70 (Fla. 1994), *cert. denied*, 115 S. Ct. 1794 (1995).

69. 648 So. 2d 95, 98 (Fla. 1994), *cert. denied*, 115 S. Ct. 1120 (1995).

70. An aggravating circumstance exists if "[t]he capital felony was committed for pecuniary gain." FLA. STAT. § 921.141(5)(f).

71. *E.g.*, Robertson v. State, 611 So. 2d 1228 (Fla. 1993).

72. 651 So. 2d 1169 (Fla. 1995).

73. *Id.* at 1171.

> $185,000, and that he had increased this life insurance on a regular basis since his initial employment date with the university in 1985. Additional testimony indicated that fifty-percent of all employees with the university maintained similar policies and that the amount of insurance Chaky maintained on his wife was only half of the amount of life insurance he maintained on himself. Further, the last increase in his life insurance was initiated more than six months before he killed his wife. Although Chaky did tell Thompson and Feinberg that he would pay them for their assistance, Thompson assumed that he was to be paid from automobile insurance money obtained for burning Chaky's car and Feinberg was never told where the funds for payment would come from and was not told that he would be paid until after the murder occurred. Although one could surmise under these circumstances that Chaky killed his wife to obtain the insurance proceeds, we must conclude that the evidence in this record is insufficient to support that hypothesis beyond a reasonable doubt. Consequently, we find that the trial judge erroneously concluded that Chaky committed the murder for pecuniary gain.[74]

G. *Heinousness*[75]

During the survey period, the court did little to firm up this often shapeless circumstance.[76] In 1995, after many years of litigation, the court adopted the following jury instruction defining the circumstance:

> 8. The crime for which the defendant is to be sentenced was especially ~~wicked~~, ~~evil~~, *heinous*, atrocious, or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime

74. *Id.* at 1172-73 (citations omitted).

75. An aggravating circumstance exists if "[t]he capital felony was especially heinous, atrocious, or cruel." FLA. STAT. § 921.141(5)(h).

76. For the background of this circumstance, see Craig S. Barnard, *Death Penalty (1988 Survey of Florida Law)*, 13 NOVA L. REV. 908 (1989); Eric Cumfer, *Instructing a Capital Sentencing Jury on Florida's Especially Heinous, Atrocious, or Cruel Aggravating Circumstance*, 14 FLA. B. CRIM. L. SEC. NEWSL., Oct. 1991, at 18; Michael Mello, *Florida's "Heinous, Atrocious, or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523 (1984); Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases-The Standardless Standard*, 64 N.C. L. REV. 941 (1986).

> was conscienceless or pitiless and was unnecessarily torturous to the victim.[77]

This instruction is an amalgam of definitions of "heinous," "atrocious," and "cruel" found unconstitutional in *Shell v. Mississippi*,[78] and a narrowing construction ("accompanied by additional acts . . . unnecessarily torturous to the victim") found constitutional in *Proffitt v. Florida*.[79]

Notwithstanding this attempt at regularizing the circumstance's application, the court still seems to reach contrary results in similar cases. In *Green v. State*,[80] the court disapproved the circumstance where, robbing Charles Flynn and Kim Hallock at gun point in the woods, Crosley Green tied Flynn's hands behind his back, and kidnapped the pair.[81] Attempting to escape, Flynn shot at Green[82] who shot him back as Hallock escaped. The court wrote: "The additional acts accompanying Flynn's death—Flynn knew Green had a gun, his hands were tied behind his back, and he was driven a short distance to the orange grove—do not turn this shooting death into the "'especially' heinous" type of crime for which this aggravator is reserved.[83]

The court took a different tack in *Wuornos v. State*[84] writing:

> Next, Wuornos contends that this murder was not heinous, atrocious, or cruel beyond a reasonable doubt. Wuornos' initial confession to law officers detailed a sequence in which she first struggled with Mallory for no reason other than his refusal to remove his clothes. After winning the struggle, she pointed the gun at him and announced that she "knew" he was going to rape her. Despite Mallory's protestation that he had no intent to rape her, she shot him anyway. Mallory still was conscious and able to walk from the car. In spite of seeing this, Wuornos then ran around to where Mallory was standing, and shot him several more times.
>
> We believe the protracted nature of this killing together with the mental suffering it necessarily would entail created a question for the finder of fact to resolve, especially in light of the similar crimes

77. In Re Standard Jury Instructions Criminal Cases - No. 90-1, 579 So. 2d 75, 75 (Fla. 1990).
78. 498 U.S. 1 (1990).
79. 428 U.S. 242 (1976).
80. 641 So. 2d 391 (Fla. 1994), *cert. denied*, 115 S. Ct. 1120 (1995).
81. *Id.* at 395-96.
82. Apparently Flynn's hands were still tied behind his back. *Id.* at 393.
83. *Id.* at 396; *see* Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).
84. 644 So. 2d 1000 (Fla. 1994), *cert. denied*, 115 S. Ct. 1705 (1995).

evidence. That question has been resolved against Wuornos, and the resolution is sufficiently supported by the record.[85]

Similarly, the court wrote in the case of Charlie Thompson:

> We also find that there was sufficient evidence to support the trial court's finding that each murder was heinous, atrocious, or cruel. Swack was stabbed numerous times before he was shot. Also, both victims undoubtedly suffered great fear and terror for some time prior to their murders. In the sentencing order, the trial judge stated:
>
> > After obtaining a check to which he was not entitled, the Defendant forced the victims to go in one of the victim's cars to a park and then walk to a secluded wooded area. The Defendant was armed with a knife and a gun. The victims were forced to disrobe. The female victim was then allowed to redress. While clothed only in his underwear and shoes and socks, the male victim struggled with the Defendant and was stabbed nine times in various parts of his body. While the victim was still alive, the Defendant shot him in the head. The female victim was lying face down on the ground with her head on her arm. The autopsy revealed a bite mark to her arm that was inflicted while she was alive and aware of her impending death which came from a gunshot to her head. It is unclear which victim was killed first, but it is clear that both were aware for some period of time that the Defendant intended to kill them.
>
> We have previously found that these type of facts support a finding of the heinous, atrocious, or cruel aggravating factor.[86]

Wyatt v. State[87] is consistent with *Thompson*. Robbing a pizza restaurant, Thomas Wyatt raped an employee, and then shot her and two co-

85. *Id.* at 1011 (citation omitted). The court also upheld use of the circumstance for another murder committed by Aileen Wuornos in a separate case where the victim "suffered bruises and abrasions and was shot while in the act of twisting or writhing in a vain effort to avoid his attacker." Wuornos v. State, 644 So. 2d 1012, 1019 (Fla. 1994), *cert. denied*, 115 S. Ct. 1708 (1995).

86. Thompson v. State, 648 So. 2d 692, 695-96 (Fla.), *cert. denied*, 115 S. Ct. 2283 (1995) (citations omitted).

87. 641 So. 2d 1336 (Fla. 1994), *cert. denied*, 115 S. Ct. 1983 (1995).

workers (one of them her husband). The court upheld the circumstance because the victims "were acutely aware of their impending deaths."[88]

The court also upheld the circumstance in *Whitton v. State*,[89] where the defendant beat and stabbed a drunken friend stealing his money. The court rejected an argument that since the decedent had a blood alcohol level of .34, it was unlikely that he experienced the degree of pain or suffering associated with the heinousness circumstance.[90]

State v. Breedlove[91] involved an unusual interpretation of the circumstance. The trial court had granted a motion to vacate McArthur Breedlove's death sentence for a 1979 murder[92] because the sentencing jury had received an unconstitutional jury instruction on the heinousness circumstance.[93] The supreme court reversed, writing that the use of the unconstitutional instruction was harmless.[94] Without purporting to employ the narrowing construction contained in the 1991 jury instruction, the court employed an amorphous standard that the murder was "far different from the norm of capital felonies[:]"

> However, we believe that the failure to give the requested instruction on heinous, atrocious, or cruel was harmless error. The evidence presented at the trial clearly established that Breedlove committed the murder in a heinous, atrocious, or cruel manner. The fatal stabbing was administered with such force that it broke the victim's collar bone and drove the knife all the way through to the shoulder blade. The puncture of the victim's lung was associated with great pain and the victim literally drowned in his own blood. The victim had defensive stab wounds on his hands and did not die immediately. Moreover, the attack occurred while the victim lay asleep

88. *Id.* at 1341. In another case, Wyatt took a woman from a bar across the state and then shot her and stole her car. Wyatt v. State, 641 So. 2d 355 (Fla. 1994), *cert. denied*, 115 S. Ct. 1372 (1995). The trial court instructed the jury on the heinousness circumstance, but did not find it in the sentencing order. The supreme court ruled that it did not need to decide whether the evidence supported the circumstance "because the jury was properly instructed and the trial judge did not find the existence of this aggravating circumstance." *Id.* at 360.

89. 649 So. 2d 861 (Fla. 1994), *cert. denied*, 116 S. Ct. 106 (1995).

90. *Id.* at 866-67.

91. 655 So. 2d 74 (Fla.), *cert. denied*, 116 S. Ct. 678 (1995).

92. The supreme court had affirmed the conviction and death sentence in Breedlove v. State, 413 So. 2d 1 (Fla.), *cert. denied*, 459 U.S. 882 (1982).

93. *See* Espinosa v. Florida, 505 U.S. 1245 (1992) (holding that heinousness jury instruction violated eighth amendment requirement of narrow definition of aggravating circumstances), *cert. denied*, 114 S. Ct. 2184 (1994).

94. *Breedlove*, 655 So. 2d at 76.

> in his bed as contrasted to a murder committed in a public place. In fact, in discussing this aggravator in Breedlove's direct appeal, we stated that this killing was "far different from the norm of capital felonies" and set apart from other murders. Under the facts presented, this aggravator clearly existed and would have been found even if the requested instruction had been given. Further, there were two other valid aggravating circumstances, including the previous conviction of a violent felony. While Breedlove presented some testimony concerning possible psychological problems, two state experts expressly stated that they found no evidence of organic brain damage or psychosis and one of them said Breedlove was malingering. Any error in the instruction was harmless beyond a reasonable doubt and did not affect Breedlove's sentence.[95]

Apparently in response to a dissent by Justice Anstead (joined by Justices Shaw and Kogan) based on *James v. State*,[96] the court wrote: "Breedlove's

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95. *Id.* at 76-77 (citations omitted).

96. 615 So. 2d 668 (Fla. 1993). *James* has an interesting history. In 1981, Davidson and Larry Clark robbed a sign shop owned by Felix and Dorothy Satey. Clark shot Mr. Satey twice, and the men then went into an adjoining residence where one of them shot

> the seventy-four-year-old Mrs. Satey who was confined by a physical disability to a castored typist's chair. Mr. Satey pleaded that his wife not be harmed, then heard a gunshot followed by his wife's moaning. When found, Mrs. Satey had a gunshot wound over the right eye, from which she subsequently died.

Clark v. State, 443 So. 2d 973, 975 (Fla. 1983), *cert. denied*, 467 U.S. 1210 (1984). On Clark's appeal, the court struck the heinousness circumstance, writing:

> Directing a pistol shot to the head of the victim does not establish a homicide as especially heinous, atrocious, or cruel. Although Mr. Satey testified that he heard his wife moan after being shot, there was no evidence of whether she was conscious after being shot, not [sic] did the medical examiner indicate how long Mrs. Satey survived or what degree of pain, if any, she suffered. Although the helpless anticipation of impending death may serve as the basis for this aggravating factor, there is no evidence to prove that Mrs. Satey knew for more than an instant before she was shot what was about to happen to her. Similarly, as pitiable as were Mr. Satey's vain efforts to dissuade his attackers from harming his wife, it is the effect upon the victim herself that must be considered in determining the existence of this aggravating factor.

Id. at 977 (citations omitted). Relying on *Clark*, the court then struck the circumstance in James's appeal. *See* James v. State, 453 So. 2d 786 (Fla.), *cert. denied*, 469 U.S. 1098 (1984). In both cases, however, the court found harmless the trial court's use of the heinousness circumstance.

In 1993, the court accepted James' argument that the unconstitutional instruction on the circumstance required resentencing:

> In closing argument the state attorney argued forcefully that the murder was heinous, atrocious, or cruel. On appeal, on the other hand, we held that the

reliance on *James v. State*, is misplaced because in that case it was determined that the facts did not support a finding of heinous, atrocious, or cruel."[97]

H. *Coldness*[98]

As in the past,[99] the coldness circumstance was the most frequently misapplied during the survey period.[100]

> facts did not support finding that aggravator. Striking that aggravator left four valid ones to be weighed against no mitigators, and we believe that the trial court's consideration of the invalid aggravator was harmless error. We cannot say beyond a reasonable doubt, however, that the invalid instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given. Therefore, we reverse the trial court's order as to the last issue regarding the constitutionality of the instruction on the heinous, atrocious, or cruel aggravator. The trial court is directed to empanel a new jury, to hold a new sentencing proceeding, and to resentence James.

James, 615 So. 2d at 669 (citation omitted).

97. *Breedlove*, 655 So. 2d at 77 n.4.

98. An aggravating circumstance exists where "[t]he capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." FLA. STAT. § 921.141(5)(i). For the early history of this circumstance, see Jonathan Kennedy, *Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases*, 17 STETSON L. REV. 47 (1987).

99. *See* Gary Caldwell, *Capital Crimes (1993 Survey of Florida Law)*, 18 NOVA L. REV. 117, 128 (1993).

100. The court approved use of the circumstance in twelve direct appeals. *See* Hunter v. State, 660 So. 2d 244 (Fla. 1995), *cert. denied*, 116 S. Ct. 946 (1996); Gamble v. State, 659 So. 2d 242 (Fla. 1995), *cert. denied*, 116 S. Ct. 933 (1996); Windom v. State, 656 So. 2d 432 (Fla.), *cert denied*, 116 S. Ct. 571 (1995); Lockhart v. State, 655 So. 2d 69 (Fla.), *cert. denied*, 116 S. Ct. 250 (1995); Foster v. State, 654 So. 2d 112 (Fla.), *cert. denied*, 116 S. Ct. 314 (1995); Thompson v. State, 648 So. 2d 692 (Fla. 1994); Fennie v. State, 648 So. 2d 95 (Fla. 1994), *cert. denied*, 115 S. Ct. 1120 (1995); Wuornos v. State, 644 So. 2d 1012 (Fla. 1994), *cert. denied*, 115 S. Ct. 1708 (1995); Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), *cert. denied*, 115 S. Ct. 1705 (1995); Suggs v. State, 644 So. 2d 64 (Fla. 1994), *cert. denied*, 115 S. Ct. 1794 (1995); Walls v. State, 641 So. 2d 381 (Fla. 1994), *cert. denied*, 115 S. Ct. 943 (1995); Griffin v. State, 639 So. 2d 966 (Fla. 1994), *cert. denied*, 115 S. Ct. 1317 (1995). The court disapproved use of the circumstance in six appeals. *See* Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Thompson v. State, 647 So. 2d 824 (Fla. 1994); Spencer v. State, 645 So. 2d 377 (Fla. 1994); Pietri v. State, 644 So. 2d 1347 (Fla. 1994), *cert. denied*, 115 S. Ct. 2588 (1995); Castro v. State, 644 So. 2d 987 (Fla. 1994); Wyatt v. State, 641 So. 2d 1336 (Fla. 1994), *cert. denied*, 115 S. Ct. 1983 (1995). In several other cases, the court reversed convictions or sentences without approving or disapproving the trial court's use of the circumstance.

In *Jackson v. State*,[101] the court summarized the requirements of the circumstance: 1) the killing was the product of cool and calm reflection rather than of emotional frenzy, panic, or a fit of rage; 2) there was a careful plan or prearranged design to commit murder before the fatal incident; 3) the defendant had a "heightened" level of premeditation over and above what is required for unaggravated first-degree murder; and 4) there must be no "pretense of moral or legal justification," meaning a colorable claim of some excuse, justification, or incomplete defense to the murder.[102]

It is easiest to apply the circumstance where the defendant has previously announced his intention to commit murder. Thus, there could be no dispute about its use in *Fennie* where the defendant, after forcing a woman into the trunk of a car, drove around telling others he was going to kill the woman.[103]

At the other extreme, as noted in *Jackson*, are cases where the defendant acts out a state of profound mental agitation which belies any claim of cold-bloodedness.[104] Thus, the court disapproved the circumstance in *Spencer v. State*,[105] where, although there was "evidence that Spencer contemplated this murder in advance, we find that the evidence offered in support of the mental mitigating circumstances also negates the cold component of the CCP aggravator."[106] As may be recalled, the trial

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101. 648 So. 2d 85 (Fla. 1994).

102. *Id.* at 89. The most acceptable "pretense of moral or legal justification" is that the defendant, while committing a violent felony, killed the victim in order to defend himself. Banda v. State, 536 So. 2d 221, 224-25 (Fla. 1988), *cert. denied*, 489 U.S. 1087 (1989). Some pretenses of justification rejected by the court are: defendant poisoned neighbor to get her family to move, Trepal v. State, 621 So. 2d 1361 (Fla. 1993), *cert. denied*, 114 S. Ct. 892 (1994); defendant was retarded, Hall v. State, 614 So. 2d 473 (Fla.), *cert. denied*, 114 S. Ct. 109 (1993); defendant murdered daughter as way of getting back at wife, Klokoc v. State, 589 So. 2d 219 (Fla. 1991); considering himself protector of the black community, defendant murdered Iranian shopkeeper's brother, Gunsby v. State, 574 So. 2d 1085 (Fla.) (indicating through dicta that attempting to rid neighborhood of drug dealers might be reasonable pretense), *cert. denied*, 502 U.S. 843 (1991).

103. *See also* Griffin v. State, 639 So. 2d 966 (1994), *cert. denied*, 115 S. Ct. 1317 (1995) (before shootout with police, defendant said he was not going back to jail).

104. *Jackson*, 648 So. 2d at 89.

105. 645 So. 2d 377 (Fla. 1994).

106. *Id.* at 384. In fact, there was substantial evidence of premeditation—Spencer repeatedly said that he was going to kill his wife in the weeks leading up to the murder. *Id.* at 379; *see also* Besaraba v. State, 656 So. 2d 441 (Fla. 1995). A half hour after being evicted from a bus, Joseph Besaraba confronted the driver at a bus terminal, shooting him and a passenger dead and then shooting a man while stealing a getaway car. The court struck the circumstance because "the random nature of Besaraba's acts during the crimes belies a careful plan" and the trial court found "strong mental health mitigating circumstances

court had rejected unrebutted expert opinion testimony respecting statutory mental mitigating circumstances.[107]

In between, there are many cases in which the exact events of the fatal episode and the defendant's state of mind are in dispute. In some cases, the court defers to the trial court's resolution of uncertainties in the evidence, but in others it applies a rule that the state must conclusively rebut hypotheses contrary to the circumstance's application.

The court took the first approach in one of Aileen Wuornos' cases.[108] In a thorough discussion of each of the four elements of the circumstance, the court noted that the defense evidence, if believed, would rebut each element.[109] Nevertheless, the court approved the finding of the circumstance, writing that the jury and trial judge could accept the State's theory of the case and reject the defendant's "testimony as self-serving, unbelievable in light of Wuornos' constantly changing confessions, contrary to the facts that could be inferred from the similar crimes evidence, or contrary to other facts adduced at trial."[110]

The court took the opposite approach in the case of Derek Todd Thompson.[111] The trial court had determined that Thompson's murder of a store clerk during a robbery was cold, calculated, and premeditated.[112] The supreme court reversed, noting that while a witness saw Thompson enter the shop and talk with the clerk, she was looking away when she heard the gun fire:

> No one saw the actual shooting . . . . A number of scenarios inconsistent with heightened premeditation are possible: The victim may have struggled with Thompson; the victim may have tried to duck and hide from Thompson; or the victim may have tried to escape. The record simply does not show what happened in the brief time span when the witness looked away.[113]

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that weigh against the formulating of a careful plan to kill" the bus driver. *Id.* at 445. "Although the record may reflect a suspicion that [a careful plan to kill] existed," the court determined that "it is plausible that Besaraba acted impulsively." *Id.* at 446. *But see* Thompson v. State, 648 So.2d 692 (Fla. 1994) (upholding circumstance notwithstanding that trial court found in mitigation that retarded defendant had chronic mental illness and acted under "moderate" disturbance at time of murder), *cert. denied*, 115 S. Ct. 2283 (1995).

107. *Spencer*, 645 So. 2d at 380.

108. Wuornos v. State, 644 So. 2d 1000 (Fla.), *cert. denied*, 115 S. Ct. 1705 (1995).

109. *Id.* at 1008.

110. *Id.*

111. Thompson v. State, 647 So. 2d 824 (Fla. 1994).

112. *Id.* at 826.

113. *Id.*

As already noted, the court took a similar approach in *Besaraba* ("it is plausible that Besaraba acted impulsively").[114]

Sometimes there does not seem to be any principled reason for the court's ruling on the circumstance. One would be hard pressed to explain why one of the two following horrible sets of facts is more "cold-blooded" than the other:

> The evidence shows that the victims were subjected to at least twenty minutes of abuse prior to their deaths. Wyatt pistol-whipped William Edwards when the safe did not contain enough money for his satisfaction. Wyatt also undressed Frances Edwards completely and raped her a short distance from where the other two employees were being held. Wyatt then killed his victims in front of each other. William Edwards begged for his life and stated that he and Frances, his wife, had a two-year-old daughter at home. Wyatt shot him in the chest. Upon seeing her husband shot, Frances Edwards began to cry and Wyatt then shot her in the head while she was in a kneeling position. Having witnessed the shooting of his co-workers, Michael Bornoosh started to pray. Wyatt put his gun to Bornoosh's ear and before he pulled the trigger told him to listen real close to hear the bullet coming. When Wyatt realized William Edwards was still alive he went back and shot him in the head.[115]

> Walls indicated that he deliberately woke up the two victims by knocking over a fan after entering the house to commit a burglary. Then he forced Alger to lie on the floor and made Peterson tie him up so that his hands were "behind the back, ankles shackled." He next forced Peterson to lie on the floor so he could tie her up in the same manner.
>
> Walls stated that Alger later got loose from his bindings and attacked Walls. During the fight, Walls tackled Alger, forced him to the floor, and "caught [Alger] across the throat with the knife." Alger continued struggling with Walls and succeeded in biting him on the leg. At this point, Walls apparently dropped his knife. Walls then pulled out his gun and shot Alger several times in the head.
>
> Walls returned to Peterson. He found her "laying in there crying and everything, asked—asked me some questions." Walls said he could not understand what she was saying, so he removed her gag. She asked if Alger was all right. Walls said:

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114. *Besaraba*, 656 So. 2d at 446.

115. Wyatt v. State, 641 So. 2d 1336, 1340-41 (1994), *cert. denied*, 115 S. Ct. 1983 (1995).

> I told her no. I told her what was going on, and I said, "I came in here, and I didn't want to hurt none of y'all. I didn't want to hurt you, but he attacked my ass, and things just happened."

Walls then untied Peterson, and "started wrestling around with her." During this second struggle, he ripped off Peterson's clothing. Walls' confession stated:

> [Peterson] was like curled up crying like. I don't know, I guess I was paranoid and everything. I didn't want no, uh, no witnesses.
>
> . . . .
>
> I—all I know is just—all I know I just went out, and I just pulled the trigger a couple of times right there behind her head.
>
> . . . .
>
> I mean close range, I mean shit, it's got powder burns (unintelligible) and everything.

Walls stated that after the first shot, Peterson was "doing all kinds of screaming." He then forced her face into a pillow and shot her a second time in the head.[116]

The court struck the circumstance in *Wyatt*[117] but approved it in *Walls*.[118]

IV. MITIGATION

A. *Right to Present Mitigation*

In *Guzman v. State*,[119] the court went out of its way to emphasize in dicta the right of the defense to present evidence of mitigation: "trial judges should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life."[120]

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116. Walls v. State, 641 So. 2d at 381, 384-85 (1994), *cert. denied*, 115 S. Ct. 943 (1995).

117. *Wyatt*, 641 So. 2d at 1341.

118. *Walls*, 641 So. 2d at 389.

119. 644 So. 2d 996 (Fla. 1994).

120. *Id.* at 1000.

B. *Disparate Treatment of Others*

The court ruled in several cases on arguments that a co-defendant's life sentence constitutes a mitigating circumstance. In *Barrett v. State*,[121] a quadruple homicide case, the court held that the jury could have rationally based its life verdicts on the life sentences received by one of John C. Barrett's co-defendants.[122] The court also wrote that:

> [t]he jury could have reasonably concluded that Barrett was not the person who actually committed the murders, and that Burnside had committed the murders with the help of someone other than Barrett. Conflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment.[123]

In *Heath v. State*,[124] on the other hand, the supreme court affirmed the trial court's conclusion that the co-defendant's life sentence did not outweigh the aggravating circumstances[125] since, according to the co-defendant's testimony, the defendant was the dominating force in the murder.[126]

In *Gamble v. State*,[127] the court was presented with a procedural twist on this issue. Guy R. Gamble and Michael Love carefully planned and carried out the murder of their landlord. After a jury convicted Gamble and recommended that he be sentenced to death, Love entered a guilty plea and was sentenced to life imprisonment. Rejecting Gamble's argument that Love's sentence could have provided a basis for a life recommendation from the jury, the supreme court wrote:

> The trial court found two aggravating factors (cold, calculated, and premeditated and pecuniary gain), one statutory mitigating factor (age), and several non-statutory mitigating factors, most of which were given little weight. One of the non-statutory mitigating factors given "some" weight was Love's sentence of life. Gamble asserts that his jury would have also recommended a life sentence if it had been informed of Love's sentence. Gamble proffers that this factor singlehandedly

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121. 649 So. 2d 219 (Fla. 1994).
122. *Id.* at 223.
123. *Id.* (citing Cooper v. State, 581 So. 2d 49, 51 (Fla. 1991)).
124. 648 So. 2d 660 (Fla. 1994), *cert. denied*, 115 S. Ct. 2618 (1995).
125. Prior conviction of a violent felony (second-degree murder) and commission of murder during course of violent felony. *Id.* at 663.
126. *Id.* at 665-66.
127. 659 So. 2d 242 (Fla. 1995), *cert. denied*, 116 S. Ct. 933 (1996).

> requires a sentence reduction. We disagree. Love's sentence was based on a guilty plea entered after Gamble's penalty phase proceedings. Clearly the *Gamble* trial judge was not required to postpone Gamble's sentencing and await Love's plea and sentence. We refuse to speculate as to what may have occurred had the *Gamble* jury been made aware of the posture of Love's case. We find no error relative to the issue.[128]

C. *Consecutive Life Sentences*

The supreme court seems to have two rules respecting the mitigating effect of consecutive life sentences.[129] In *Nixon v. State*,[130] Joe Elton Nixon was convicted of first-degree murder and several noncapital offenses for which he could receive life sentences. The trial court refused his request for a penalty phase jury instruction on the penalties for the noncapital offenses.[131] On appeal, the supreme court rejected his argument that the refusal prevented the jury from considering in mitigation, the fact that life sentences on the other offenses would prevent his ever being released from prison.[132] "The fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime."[133]

In *Jones v. State*,[134] on the other hand, the court ruled that the trial court erred in refusing to let Randall Scott Jones argue in mitigation that, since he was convicted of two first-degree murders, consecutive life sentences would prevent him from ever being released from prison.[135] The court stated,

> [c]ounsel was entitled to argue to the jury that Jones may be removed from society for at least fifty years should he receive life sentences on each of the two murders. The potential sentence is a relevant consider-

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128. *Id.* at 245. *Compare* Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992) (co-defendant's subsequent life sentence could form basis for reduction of sentence to life imprisonment in postconviction proceedings).

129. The theory of mitigation is that consecutive sentences will ensure that the defendant will not be released into society.

130. 572 So. 2d 1336 (Fla. 1990), *cert. denied*, 502 U.S. 854 (1991).

131. *Id.* at 1344-45.

132. *Id.* at 1345.

133. *Id.*

134. 569 So. 2d 1234 (Fla. 1990).

135. *Id.* at 1239-40.

> ation of "the circumstances of the offense" which the jury may not be prevented from considering.[136]

During the survey period the court ruled, consistently with *Jones*, that a jury can reasonably base a life sentence on the fact that consecutive life sentences will assure that the defendant will never be released in prison. In the double homicide case of *Turner v. State*,[137] the court found that the trial court had failed to consider the mitigating effect of consecutive life sentences for the two murders in overriding a jury life recommendation.[138] The court specifically wrote that among the "ample mitigation" supporting the life verdict was the fact that "the alternative to the death penalty was two life sentences, which the jury knew would have required Turner to serve a minimum of fifty years in prison before he could be considered for parole."[139]

D. *Statutory Versus "Nonstatutory" Mitigation*

Under *Hitchcock v. Dugger*,[140] mitigation may not be limited to the "statutory circumstances" listed in section 921.141 of the *Florida Statutes*.[141] Nevertheless, the supreme court sometimes considers statutory circumstances somehow more important that nonstatutory circumstances. For instance, in *Foster v. State*,[142] a case in which the trial court found fourteen nonstatutory mitigating circumstances, the supreme court found the use of an unconstitutional jury instruction on the coldness circumstance harmless, and wrote:

> In view of the fact that the trial court found no statutory mitigators and three strong aggravators, we also find, beyond a reasonable doubt, that the invalid CCP instruction did not affect the jury's consideration and

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136. *Id.* at 1239-40. In Simmons v. South Carolina, 114 S. Ct. 2187 (1994), the Supreme Court held that, where the state had put in issue the future dangerousness of the defendant, the trial court violated due process in preventing the defense from informing the jury that the defendant would not be eligible for parole. *Id.* at 2193. The Court declined to decide whether a defendant's ineligibility for parole is a mitigating circumstance for purposes of the eighth amendment requirement that the sentencer consider all mitigating evidence. *Id.* at 2196-97.

137. 645 So. 2d 444 (Fla. 1994).

138. *Id.* at 448.

139. *Id.*

140. 481 U.S. 393 (1987).

141. *Id.* at 398-99.

142. 654 So. 2d 112 (Fla.), *cert. denied*, 116 S. Ct. 314 (1995).

> that its recommendation would have been the same if the requested expanded instruction had been given.[143]

E. *Waiver of Mitigation*

A growing number of cases have involved defendants who prevent presentation of mitigation or even demand to be executed. *Koon v. Dugger*[144] established the circumstances in which the trial court should allow defense counsel to waive presentation of mitigation:

> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.[145]

As may be expected, such cases may involve murders arising from tormented domestic relationships and those committed by mentally disturbed persons. Typical is *Layman v. State*.[146] The evidence showed that Gregory Scott Layman ambushed his estranged girlfriend, Sharon DePaula, shooting her twice with a sawed-off shotgun. He confessed to the crime and said he wanted to die for it. At the penalty proceeding, when the State announced that it was not seeking death, Mr. Layman objected, insisting that he be sentenced to death. After the State presented no evidence in aggravation, "Layman, representing himself, then addressed the jury and said that he wanted to die for several reasons: He had a history of committing violence against Sharon; the murder was cold, calculated and premeditated; and he still loved Sharon deeply and wanted to be with her in the afterlife."[147] The jury rendered a death verdict, which the trial court fol-

143. *Id.* at 115 (emphasis added).
144. 619 So. 2d 246 (Fla. 1993).
145. *Id.* at 250.
146. 652 So. 2d 373 (Fla. 1995).
147. *Id.* at 374.

lowed.[148] However, the supreme court reversed the sentence because of defects in the rendition of the sentencing order.[149]

The court affirmed death sentences in the following cases which involved various waivers of mitigation. *Farr v. State*,[150] discussed at length the issue of waiver of mitigation. The case was before the court after a remand for resentencing.[151] At resentencing, "Farr forbade his attorney to present a case for mitigation on remand and . . . himself took the witness stand and systematically refuted, belied, or disclaimed virtually the entire case for mitigation that existed in the earlier appeal."[152] The court determined that under these circumstances, the trial court did not err in rejecting the case for mitigation.[153]

After some discussion, the court wrote:

> It deserves emphasis, however, that the ability of a capital defendant to restrict counsel's argument is not without limit. It is true that the right to counsel embodies a right of self-determination in the face of specific criminal charges. At the trial level, this certainly means that "defendants have a right to control their own destinies" when facing the death penalty. Nevertheless, there are countervailing interests that must be honored.
>
> In *Klokoc*, for example, we addressed the problem that can arise when a death-sentenced defendant attempts to restrict the argument of appellate counsel in this Court. The Florida Constitution imposes upon the Court an absolute obligation of determining whether death is a

148. *Id.*

149. *Id.* at 375-76.

150. 656 So. 2d 448 (Fla. 1995).

151. *See Farr*, 621 So. 2d 1368 (Fla. 1993). The 1993 opinion shows: after injuring two women by gunshot during a kidnap attempt outside a bar, Victor Marcus Farr commandeered a car with a man and woman inside. The man escaped, and the defendant drove the car into a tree in an attempt to kill himself and the woman. He lived, she died. He plead guilty, waived the sentencing jury, and asked for a death sentence. The supreme court found the defendant's waiver of mitigation valid, but nevertheless ordered resentencing because the trial court had erred by failing to consider mitigation contained in psychiatric and presentence investigation (PSI) reports, writing:

> We repeatedly have stated that mitigating evidence *must* be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.

Id. at 1369 (citations omitted).

152. *Farr*, 656 So. 2d at 449.

153. *Id.* at 450.

> proportionate penalty. For that reason, appeals from death penalties are both automatic and mandatory, and cannot be rendered illusory for any reason. Thus, the *Klokoc* Court held that appellate counsel must proceed with a proper adversarial argument notwithstanding the defendant's instruction to dismiss the appeal or to acquiesce to the death penalty.
>
> We acknowledge that this is a troubling area of the law. On a case-by-case basis, we have attempted to achieve a solution that both honors the defendant's right of self-determination and the constitutional requirement that death be imposed reliably and proportionately. While there are no simple solutions, we do strongly believe that trial courts would be wise to order presentence investigations in at least those cases in which the defendant essentially is not challenging imposition of the death penalty. Nevertheless, the failure to order one cannot be considered error in light of a defendant's refusal to seriously challenge death as a penalty.[154]

In a special concurrence joined by Justices Shaw and Kogan, Justice Anstead wrote that he would "adopt a uniform rule that requires a presentence investigation and report in all capital cases. Our failure to adopt such a requirement is tantamount to inviting arbitrary decision-making at both the trial and appellate levels in a significant number of cases."[155] Justice Kogan (joined by Justice Anstead) dissented in part, writing:

> Our analysis of these cases is at best criticizable. There could be a variety of solutions, but all are problematic. One would be to recede from *Klokoc*, which would result in appeals such as Mr. Farr's becoming perfunctory affirmances. This clearly would increase the proportionality problem but would more fully honor rule 9.140(b)(3). Another would be to adopt Justice Barkett's approach in *Hamblen*, which would increase the restriction on the defendant's right of self-determination yet would more fully satisfy the proportionality doctrine. Yet the latter approach would not fully honor rule 9.140(b)(3). Part of the problem could be eliminated simply by requiring a presentence investigation in every case in which death is imposed, including those in which a defendant does not seriously challenge imposition of the death penalty. I would so order. On this point, I dissent from the majority.
>
> A time is coming when this Court must comprehensively address the problem of defendants who seek the death penalty, whose numbers

154. *Id.* (citations omitted).
155. *Id.* at 450-51.

> are growing. We have reached the stage at which our holdings are not entirely consistent with each other or with our own rules of court. Case-by-case adjudication of a larger problem certainly has its place, but not when the result is a confounding of the overall law: a point we are rapidly reaching.
>
> I personally would favor referring the entire matter to one of The Florida Bar's standing rules committees or to a committee or Court commission created especially to investigate this problem. This Court has inherent authority to promulgate rules of procedure, which could include a new procedural framework for dealing with defendants who favor their own executions. Our piecemeal approach to cases like Farr's has not adequately addressed all the problems at hand, and I believe the time is approaching for a comprehensive study and the development of one or more proposals for reform, with adequate input from all segments of the public and the Bar. I therefore would refer this issue to the Criminal Procedure Rules Committee of The Florida Bar for more intensive study and formulation of a recommendation to the Court.[156]

Like *Layman*, *Windom v. State*,[157] involved a seriously disturbed defendant. Curtis Windom shot a man on a street corner, ran to his (Windom's) girlfriend's house, shot her, and later shot the girlfriend's mother while she was driving down the street. All three died. He also shot another man in the street who survived. According to the sentencing order, the survivor "said the Defendant did not look normal—his eyes were 'bugged out like he had clicked.'"[158] Windom waived presentation of mitigation under odd circumstances:

> In this triple murder, the defendant made a knowing waiver of presenting any mitigating evidence to the advisory jury. The defendant did this in order to avoid any evidence being presented to the jury concerning the murders being related to the defendant trafficking in cocaine. The trial judge elicited a direct confirmation from the defendant that he understood that he was waiving his right to present mitigating evidence and that the reason was so that the "drug thing" would not be heard by the jury.[159]

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156. *Id.* at 452-53.
157. 656 So. 2d 432 (Fla.), *cert. denied*, 116 S. Ct. 571 (1995).
158. *Id.* at 435.
159. *Id.* at 438-39.

Lockhart v. State[160] presented an entirely different picture. Michael Lee Lockhart, "inflicted a number of wounds described as pricking, prodding, or teasing wounds" on a fourteen-year-old girl, and then bound, stabbed, strangled, and raped her.[161] After the judge denied defense counsel's motion to withdraw,[162] the defendant sought to discharge counsel, plead guilty, and refused to present mitigation.

The defendant in *Pittman v. State*,[163] according to the trial court's findings in mitigation, had a hyperactive personality, may have suffered physical and sexual abuse as a child, and was an impulsive person with memory problems and impaired social judgment.[164] A jury convicted him of three counts of first-degree murder on evidence that he repeatedly stabbed his estranged wife's parents and sister and burned their house. After the jury recommended death sentences for all three murders, the defense inexplicably failed to produce evidence (or argument apparently) to support override life sentences.[165]

V. JURY INSTRUCTIONS

In *Guzman v. State*,[166] the court wrote in dicta:

> By this opinion, we direct that trial judges fully instruct death penalty juries on all applicable jury instructions set forth in the Florida Standard Jury Instructions unless a legal justification exists to modify an instruction. If a legal need to modify an instruction exists, that need should be fully reflected in the record in accordance with Florida Rule of Criminal Procedure 3.985.[167]

The court also followed this doctrine of adherence to the standard jury instructions in *Gamble*, rejecting arguments that

160. 655 So. 2d 69 (Fla.), *cert. denied*, 116 S. Ct. 250 (1995).

161. *Id.* at 71.

162. On the motion, counsel argued "that he could not be ready when trial started because of his workload, the complexity of the case, and the travel required due to Lockhart's out-of-state convictions." *Id.* The out-of-state convictions included convictions for murder in Texas and Indiana. *Id.* at 71 n.2.

163. 646 So. 2d 167 (Fla. 1994), *cert. denied*, 115 S. Ct. 1982 (1995).

164. *Id.* at 170 n.2. There was also evidence that he had been a difficult child, with severe attention deficit disorder and hyperactivity, that his mother disciplined him severely, and that he was a paranoid schizophrenic and had organic personality disorder. *Id.* at 169.

165. *Pittman*, 646 So. 2d at 172.

166. 644 So. 2d 996 (Fla. 1994).

167. *Id.* at 1000.

> the standard jury instructions fail to: (1) inform the jury that even if an aggravating circumstance is proven beyond a reasonable doubt, they may still recommend life imprisonment; (2) adequately define mitigating circumstances; and (3) inform the jury that it could find mental impairment even if it failed to conclude that such impairment was extreme.[168]

In *Chaky v. State*,[169] there was an unusual failure by the trial court to reduce its instructions to the jury to writing and send them into the jury room for use during deliberations.[170] While determining that Chaky's lawyer had failed to preserve the matter for appeal, the court noted that the trial court had violated the requirement of rule 3.390(b) of the *Florida Rules of Criminal Procedure*, that jury instructions "in capital cases shall . . . be in writing."[171] The court also noted that rule 3.400(c) gave the trial court the discretion to send a copy of the instructions into the jury room.[172] With its decision in *Chaky*, the court then issued a comment seeking to promulgate a proposed rule amending rule 3.400(c), which would make the rule mandatory for instructions in all capital cases.[173]

VI. THE SENTENCING ORDER

A. Campbell v. State

During the survey period, the court continued to be troubled by fallout from its decision in *Campbell v. State*.[174] In *Campbell* the court wrote:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the

168. Gamble v. State, 659 So. 2d 242, 246 (Fla. 1995).
169. 651 So. 2d 1169 (Fla. 1995).
170. *Id.* at 1169.
171. *Id.* at 1172 (quoting FLA. R. CRIM. P. 3.390(b)).
172. *Id.*
173. *Id.* The court did go on to adopt this mandatory rule. *In re* Florida Rules of Criminal Procedure - Rule 3.400, 657 So. 2d 1134 (Fla. 1995).
174. 571 So. 2d 415 (Fla. 1990).

> defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.[175]

In *Ferrell v. State*,[176] the court took a strong stand on strict adherence to *Campbell*:

> We now find it necessary to further emphasize the requirements established in *Campbell*. The sentencing judge must expressly evaluate in his or her written sentencing order each statutory and non-statutory mitigating circumstance proposed by the defendant. This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge's discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the enumerated requirements deprives this Court of the opportunity for meaningful review.[177]

In *Green v. State*,[178] however, the court was less concerned about its ability to conduct a meaningful review of the death sentence: "Although the sentencing order might not comply strictly with the requirements of *Campbell*, the trial judge clearly gave careful consideration to the mitigating factors."[179] Similarly, in *Lowe v. State*,[180] the court wrote that while it "might take issue" with the trial court's rejection of unrebutted mitigation,

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175. *Id.* at 419-20 (citations omitted) (footnotes omitted).

176. 653 So. 2d 367 (Fla. 1995).

177. *Id.* at 371; *see also* Larkins v. State, 655 So. 2d 95 (Fla. 1995); Layman v. State, 652 So. 2d 373 (Fla. 1995).

178. 641 So. 2d 391 (Fla. 1994), *cert. denied*, 115 S. Ct. 1120 (1995).

179. *Id.* at 396.

180. 650 So. 2d 969 (Fla. 1994), *cert. denied*, 116 S. Ct. 230 (1995).

it nevertheless affirmed the death sentence because "the trial judge also stated that, even if these factors were of a mitigating nature, they 'would not outweigh the aggravating circumstances of committing a prior robbery and committing a murder during the commission of another attempted robbery.'"[181]

Justice Wells, in a dissent in *Crump v. State*,[182] joined by Chief Justice Grimes, registered a vigorous disapproval of *Campbell*, writing that the court's decision remanding for resentencing pursuant to *Campbell* was "just one more procedural impediment to finality."[183]

B. *Timing*

Section 921.141 of the *Florida Statutes* does not state when the trial court is to render its sentencing order, although the context makes clear that it is to do so after the penalty verdict.[184] The supreme court has developed two rules respecting the timing of the rendition of the sentencing order. In *Grossman v. State*,[185] the court ruled that the court must render the written sentencing order at the time that it pronounces the sentence.[186] In *Spencer v. State*,[187] the court decided that the court is not to render its decision until after a post penalty verdict hearing (sometimes called an "allocution hearing" or, now, a "*Spencer* hearing") at which it has heard such additional argument and evidence as the parties may present.[188] While a violation of *Grossman* requires reduction of the sentence to one of life imprisonment,[189] a violation of *Spencer* apparently requires only resentencing.

In *Perez v. State*[190] and *Layman v. State*,[191] the court followed *Grossman* and ordered that death sentences be reduced to life imprisonment.

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181. *Id.* at 976; *see also* Coney v. State, 653 So. 2d 1009 (Fla. 1995).

182. 654 So. 2d 545 (Fla. 1995).

183. *Id.* at 549. *But see* Bryant v. State, 656 So.2d 426 (Fla. 1995). Justice Wells again joined by the Chief Justice, agreed in an opinion concurring in part and dissenting in part that the sentence be reversed under *Campbell*. *Id.* at 429-30. *Bryant* was decided two weeks before *Crump*.

184. FLA. STAT. § 921.141.

185. 525 So. 2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989).

186. *Id.* at 841.

187. 615 So. 2d 688 (Fla. 1993).

188. *Id.* at 690-91. However, *Spencer* merely formalized what had already been the practice in most if not all circuits.

189. *E.g.*, Christopher v. State, 583 So. 2d 642 (Fla. 1991).

190. 648 So. 2d 715, 720 (Fla. 1995).

191. 652 So. 2d 373, 376 (Fla. 1995).

In *Layman*, Justice Wells again issued a strongly worded dissent, contending, "[s]anctions such as the one imposed by these cases have too heavy a price in the public's loss of confidence in the judicial system. I would recede from this sanction."[192]

In *Armstrong v. State*,[193] the court declined to apply *Spencer* to a sentencing which occurred before *Spencer* was decided.

VII. APPELLATE REVIEW

A. Tedder v. State

Although section 921.141 of the *Florida Statutes* lets the trial court impose a death sentence notwithstanding a life verdict,[194] the supreme court has ruled that it will affirm such an "override" sentence only where virtually no reasonable person could disagree with the death sentence.[195] In keeping with this rule, the supreme court reversed most override death sentences that came before it during the survey period.[196]

The court's method of appellate review in override cases differs substantially from its review in death verdict cases. In the latter, the court usually defers to the trial court's decisions of minimizing or disregarding mitigation.[197] But in override cases, it usually acts on the assumption that the jury has accepted all mitigation presented to it and has given it sufficient weight to outweigh the state's case for death.[198] As shown in the preceding footnote, the court will reverse override sentences even in horrendous

192. *Id.* at 377 (Wells, J., concurring in part and dissenting in part).

193. 642 So. 2d 730 (Fla. 1994), *cert. denied*, 115 S. Ct. 1799 (1995).

194. FLA. STAT. § 921.141.

195. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

196. The court reduced override sentences in five cases pursuant to *Tedder*. *See* Barrett v. State, 649 So. 2d 219 (Fla. 1994) (quadruple homicide); Caruso v. State, 645 So. 2d 389 (Fla. 1994) (double homicide); Turner v. State, 645 So. 2d 444 (Fla. 1994) (double homicide); Parker v. State, 643 So. 2d 1032 (Fla. 1994) (triple homicide); Esty v. State, 642 So. 2d 1074 (Fla. 1994), *cert. denied*, 115 S. Ct. 1380 (1995). In *Perez*, also an override case, the court reduced the sentence under *Grossman* without reaching the *Tedder* issue. *Perez*, 648 So. 2d at 720. The court has also affirmed override sentences in two cases: Washington v. State, 653 So. 2d 362 (Fla. 1994), *cert. denied*, 116 S. Ct. 387 (1995); Garcia v. State, 644 So. 2d 59 (Fla. 1994) (affirming one override death sentence and one death sentence following death recommendation), *cert. denied*, 115 S. Ct. 1799 (1995).

197. *E.g.*, Lowe v. State, 650 So. 2d 969, 976-77 (Fla. 1994); Green v. State, 641 So. 2d 391, 395-96 (Fla. 1994).

198. *E.g.*, *Barrett*, 649 So. 2d at 223.

cases involving multiple homicides.[199] Thus, the penalty verdict continues to be of paramount importance to the ultimate disposition of the case.

B. Clemons v. Mississippi *and* Espinosa v. Florida

Where the sentencer has employed an improper aggravating circumstance, the state appellate court must reverse a resulting death sentence unless it either determines that the circumstance did not contribute to the sentence, or it independently reweighs the remaining circumstances against the mitigating circumstances and finds that the death sentence is still appropriate.[200] Since Florida shares sentencing responsibility between the jury and judge, the state supreme court must look to the effect of a sentencing error on both actors.[201] *Espinosa* disapproved the Florida court's practice of considering only the effect of an error on the judge's sentencing decision.[202] Although the court has in the past repeatedly asserted that it will not reweigh sentencing circumstances,[203] it seems to have done so during the survey period.

In *Hill v. State*,[204] a federal district court partially granted the writ of habeas corpus after finding that, in affirming Clarence Edward Hill's death sentence after striking an aggravating circumstance, the state supreme court

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199. *See* cases cited *supra* note 196.

200. Stringer v. Black, 503 U.S. 222 (1992); Parker v. Dugger, 498 U.S. 308 (1991); Clemons v. Mississippi, 494 U.S. 738 (1990).

201. Espinosa v. Florida, 505 U.S. 1079 (1992).

202. *Id.* at 1082.

203. "[T]he Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances." *Parker*, 498 U.S. at 319. The state court has held that it complies with *Clemons* by the second alternative, harmless error analysis. White v. Dugger, 565 So. 2d 700, 702 (Fla. 1990); Preston v. State, 564 So. 2d 120, 123 (Fla. 1990). The court sees itself as "a reviewing court, not a fact-finding court," so that it defers to the findings of the trial court. Lucas v. State, 568 So. 2d 18, 23 (Fla. 1990).

The court's strong stance against reweighing arises from the extraordinary case of Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981), *cert. denied*, 454 U.S. 1000 (1981) which involved the "alleged impropriety" of the supreme court's practice in capital cases of reviewing secret Department of Corrections documents not available to counsel and not contained in the appellate record. *Id.* at 1328. Some 122 death row inmates joined Joseph Green Brown in protesting this practice. Without denying that it had such an ongoing practice, the court ruled that, since it is a reviewing rather than a sentencing court, it could not engage in "weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances." *Id.* at 1331. Hence, it wrote that its review of matters *dehors* the record could not affect its appellate review of the death sentence. *Id.* at 1332.

204. 643 So. 2d 1071 (Fla. 1994), *cert. denied*, 116 S. Ct. 196 (1995).

had violated *Parker v. Dugger*[205] and may have also violated *Clemons* in failing to consider uncontroverted mitigating evidence.[206] Permitting Hill to reopen his appeal for the limited purpose of addressing the issues raised in the federal court decision, the supreme court again affirmed the death sentence, writing:

> four of the five aggravating circumstances found by the trial judge remain valid. Even when we consider the statutory mitigating circumstance of Hill's age of twenty-three at the time the murder was committed and the uncontroverted evidence of non-statutory mitigating circumstances presented by Hill at sentencing regarding his background, we must conclude that the trial judge's error in finding that the murder was cold, calculated, and premeditated, was harmless beyond a reasonable doubt. In aggravation, the evidence reflects that Hill, during the course of a robbery, killed a police officer so that he and his accomplice could escape prosecution. Moreover, Hill had previously been convicted of robbery with a firearm, and, in this case, he knowingly created a great risk of death to many persons by firing a number of shots in a populated area. We again hold that death is the appropriate sentence in this case because no reasonable possibility exists that the evidence presented in mitigation, such as Hill's age, his good work history, and his helpful and nonviolent nature, is sufficient to outweigh the four valid aggravating circumstances.[207]

Similarly, in *Castro v. State*,[208] after striking the coldness circumstance, the court affirmed the death sentence writing that there remained three valid aggravating circumstances and only a "weak case for mitigation."[209]

The court also seemed to engage in reweighing in *Wuornos v. State*,[210] writing that the trial court's failure to find and weigh nonstatutory circumstances was harmless "because their weight is slight when compared with the case for aggravation."[211]

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205. *See supra* note 200.
206. *Hill*, 643 So. 2d at 1072-73.
207. *Id.* at 1074 (footnotes omitted).
208. 644 So. 2d 987 (Fla. 1994).
209. *Id.* at 991.
210. 644 So. 2d 1000 (Fla. 1994), *cert. denied*, 115 S. Ct. 1705 (1995).
211. *Id.* at 1011.

C. *Retroactivity*

The riddle of retroactivity continued to bedevil the court during the survey period. In *Smith v. State*,[212] the court seemed to settle the matter by writing that all of its decisions would apply retroactively to cases pending on direct appeal. Thereafter, however, the court refused to follow *Smith* and apply to pending cases its ruling[213] that trial courts may not instruct juries on flight as being indicative of the defendant's guilt.[214] In *Wuornos v. State*,[215] the court refused to follow its decision in *Castro v. State*,[216] in which it had held that the court must instruct the jury not to give double consideration to aggravating circumstances based on the same aspect of the offense,[217] and wrote: "We read *Smith* to mean that new points of law established by this Court shall be deemed retrospective with respect to all nonfinal cases unless this Court says otherwise."[218]

But in *Kearse v. State*,[219] the court retroactively applied *Castro*. The court wrote that the trial court committed several errors in instructing the penalty jury, including the refusal to give an anti-doubling instruction.[220] The court also retroactively applied its holding in *Jackson*, that the then-standard instruction on the coldness circumstance was unconstitutional.[221] It wrote that, in a case involving a pre-*Jackson* penalty phase, it "cannot fault" the trial court for giving the standard instruction, but then held that use of the standard instruction was harmful error.[222]

In *Foster v. State*,[223] the court retroactively applied *Jackson* to a sentencing hearing that had occurred prior to an earlier remand for entry of a new sentencing order, writing that the death sentence was not yet final.[224]

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212. 598 So. 2d 1063 (Fla. 1992).
213. Fenelon v. State, 594 So. 2d 292 (Fla. 1992).
214. *E.g.*, Taylor v. State, 630 So. 2d 1038 (Fla. 1993) (refusing to apply *Fenelon* to case pending on appeal), *cert. denied*, 115 S. Ct. 107 (1994).
215. 644 So. 2d 1000, 1007 (Fla. 1994), *cert. denied*, 115 S. Ct. 107 (1994).
216. 597 So. 2d 259 (Fla. 1992).
217. *Id.* at 261.
218. *Wuornos*, 644 So. 2d at 1007-08 n.4
219. 662 So. 2d 677 (Fla. 1995).
220. *Id.* at 685.
221. *Id.* at 686 (citing *Jackson*, 648 So. 2d at 901).
222. *Id.*
223. 654 So. 2d 112 (Fla.), *cert. denied*, 116 S. Ct. 314 (1995).
224. *Id.* at 115.

D. *The Appellate Record*

Lockhart v. State,[225] and one of Aileen Wuornos' cases[226] addressed questions regarding a court's power to look beyond the record before it. After Michael Lee Lockhart, as noted below, waived mitigation in the trial court, the judge sought to find mitigation by reading newspaper articles based on interviews of the defendant. The supreme court disapproved of this approach.[227]

In *Wuornos*, after entering a plea of *nolo contendere* to three murder charges, Wuornos presented at sentencing some limited hearsay evidence in mitigation.[228] On appeal, the supreme court rejected her request that the court take judicial notice of the case in mitigation in her other case:

> The entire reason for having a trial in a court of record is so that the appellate courts of Florida may review questions of law based on a true transcript of what occurred. While judicial notice of other proceedings certainly is permissible in some instances, it is not proper when the party in effect is asking that we use a wholly separate proceeding to establish a mitigating factor that was not asserted at any time in the proceedings below.[229]

E. *Proportionality*

Under *Songer*,[230] the court will reduce a death sentence to one of life imprisonment where there is only one aggravating circumstance to weigh against substantial mitigation.[231] During the survey period, the court followed *Songer* in reducing death sentences in the following three cases.

In the case of Derek Todd Thompson,[232] the court struck three of the four aggravating circumstances supporting a death sentence for the murder

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225. 655 So. 2d 69 (Fla.), *cert. denied*, 116 S. Ct. 250 (1995).

226. Wuornos v. State, 644 So. 2d 1012 (Fla. 1994), *cert. denied*, 115 S. Ct. 1708 (1995).

227. *Lockhart*, 655 So. 2d at 74.

228. *Wuornos*, 644 So. 2d at 1015.

229. *Id.* at 1019. The court has in the past looked outside the record in cases in which, like, *Gamble*, a co-defendant has received a life sentence after the appellant's sentencing. *Gamble*, 659 So. 2d at 245. In *Witt v. State* the court wrote that it could not "judicially ignore" the subsequent life sentence of a co-defendant. 342 So. 2d 497, 500 (Fla.), *cert. denied*, 434 U.S. 935 (1977); *see also* Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

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

231. *Id.* at 1011-12.

232. Thompson v. State, 647 So. 2d 824 (Fla. 1994).

of a restaurant employee during a robbery.[233] This left only the felony murder circumstance to weigh against the mitigating factors that the defendant was a good parent and provider, had no violent propensities before the murder, had been honorably discharged from the Navy, had been regularly employed, was raised in the church, possessed rudimentary artistic skills, and was a good prisoner.[234]

In *Chaky v. State*,[235] the court found the prior violent felony circumstance[236] insufficient to outweigh mitigating evidence respecting Kenneth Chaky's exemplary work, military,[237] family record, remorse, and potential for rehabilitation and good prison record.[238] Although the case involved a murder arising from a troubled family relationship, the court did not discuss its line of cases stating death is a disproportionate penalty for such murders.[239]

Besaraba v. State[240] applied *Songer* to a double homicide. As already noted, the court struck the coldness circumstance, leaving only the prior violent felony circumstance.[241] The court found this insufficient to outweigh mitigation that Joseph Besaraba had no significant prior criminal history, committed the murder under the influence of a great disturbance, had a history of substance abuse and physical and emotional problems, was of good character and had a record of reliable employment, conducted himself well while incarcerated, and had suffered an unstable and deprived childhood.[242]

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233. *Id.* at 827.

234. *Id.* at 826 n.2. The jury voted nine to three for a death sentence. *Id.* at 825-26.

235. 651 So. 2d 1169 (Fla. 1995).

236. The defendant had been convicted for attempted murder while serving in the military in Vietnam. *Id.* at 1171.

237. Notwithstanding the attempted murder conviction, Chaky "was restored to active duty and eventually was honorably discharged." *Id.*

238. *Id.* at 1173.

239. *See* Blakely v. State, 561 So. 2d 560 (1990), Garron v. State, 528 So. 2d 353, 361 (Fla. 1988), Ross v. State, 474 So. 2d 1170 (Fla. 1985).

240. 656 So. 2d 441 (Fla. 1995).

241. As to each murder, the other contemporaneous murder constituted a "prior" felony conviction for sentencing purposes. *Id.* at 443 n.4.

242. *Id.* at 446-47. Much of his childhood was spent in Nazi concentration camps and post-war refugee camps. *Id.* at 446.

F. *Revisiting Issues*

Foster v. State[243] presents an unusual case of the court revisiting an issue on an appeal after remand. On a previous appeal, the court rejected a constitutional challenge to the standard jury instruction on the coldness circumstance,[244] but remanded for the trial court to enter a new sentencing order[245] expressly evaluating mitigation under *Campbell v. State*[246] and *Rogers v. State*.[247] On the appeal after the remand, the court let the appellant re-litigate the jury instruction issue because the sentence was "not yet final."[248]

VIII. CONCLUSION

The supreme court's decisions broke little new ground during the survey period. Nevertheless, the adoption of rule 3.202 (as discussed in the first section of this article) governing state mental examination of capital defendants[249] promises substantial litigation in years ahead.

243. 654 So. 2d 112 (Fla. 1995).

244. Foster v. State, 614 So. 2d 455, 462 (Fla. 1992).

245. *Id.* at 465.

246. 571 So. 2d 415 (1990) (holding abusive and deprived childhood should be considered in mitigation).

247. 511 So. 2d 526 (Fla. 1987) (ruling that evidence presented by the State during the penalty phase should be limited to those matters provided by statute), *cert. denied*, 484 U.S. 1020 (1988).

248. *Foster*, 654 So.2d at 115 n.6.

249. Rehearing was still pending as of April 10, 1996.